



To: Honorable Mayor, Vice Mayor, and
Village Council

Date: December 5, 2011

From: Ron E. Williams, Village Manager

Re: Revision to Qualifying Period
for November 6th Election

AN ORDINANCE OF THE MAYOR AND COUNCIL OF THE VILLAGE OF PALMETTO BAY, FLORIDA, RELATING TO ELECTIONS; AMENDING CHAPTER 5 OF THE CODE OF ORDINANCES ESTABLISHING ELECTION PROCEDURES; PROVIDING FOR MODIFICATION OF THE QUALIFYING PERIOD; PROVIDING FOR ORDINANCES IN CONFLICT, CODIFICATION, SEVERABILITY AND AN EFFECTIVE DATE.

BACKGROUND AND ANALYSIS:

As you know, the Village will be conducting its next general election on November 6, 2012. The current qualifying period is defined by Ordinance, as follows:

Chapter 5
Elections

5.8 *Qualifying and Qualifying Period.*

- (a) Candidates for Mayor, Vice-Mayor or Council members shall qualify for election by the filing of a written notice with the Village Clerk no earlier than noon on the eighty-eighth (88th) day and no later than noon on the seventy-fourth (74th) day prior to the date of the election at which he or she is a candidate. The Village Clerk shall collect a filing fee in the amount of \$100.00 during that time.

Under the current Ordinance, the qualifying period for the next election would be August 10th through August 24, 2012. We have been contacted by the Miami-Dade County Elections Department concerning our qualifying period. Our November, 2012, Election happens to coincide with the election for the President of the United States, Federal, State, and County offices. Fourteen municipalities also share this election date. In order to prepare the ballot for our election (and the dozens of other elections being conducted), the Miami-Dade County Elections Department has requested revision of our qualifying period to set the ending date by August 17, 2012. If the modification to the Ordinance is approved,

the qualifying period would for the November, 2012, election will be August 6, 2012 through August 17, 2012 – ending at noon.

Upon review of other municipalities' Ordinances that define qualifying periods, the following language is suggested:

5.8 *Qualifying and Qualifying Period.*

- (a) Candidates for Mayor, Vice-Mayor or Council members shall qualify for election by the filing of a written notice with the Village Clerk no earlier than noon on the first Monday of August and shall continue for a period of ten consecutive days, during the hours of 8:30 a.m. to 5:00 p.m., ending at noon on the Friday of the specified period in every year a municipal election is held and in the method provided for in the Charter and under the rules of elections prescribed in the Florida Statutes.

FISCAL/BUDGETARY IMPACT: None.

RECOMMENDATION: Approval.



To: Mayor & Village Council

Date: December 5, 2011

From: Eve A. Boutsis, Village Attorney

Re: Protest Procedures

AN ORDINANCE OF THE MAYOR AND VILLAGE COUNCIL OF THE VILLAGE OF PALMETTO BAY, FLORIDA, RELATING TO PROCUREMENT; AMENDING THE VILLAGE'S PROCUREMENT CODE TO CLARIFY THE CONE OF SILENCE REQUIREMENTS AND BID PROTEST PROCEDURES; PRECLUDING A PROTESTING BIDDER FROM ADHERING TO THE BID PROTEST PROCEDURES BY CIRCUMVENTING THE BID PROTEST PROCESS; A VIOLATION OF THE CONE OF SILENCE AND BID PROTEST PROCESS WOULD AUTOMATICALLY RESULT IN A FIVE YEAR BAR OF THE PROTESTOR FROM BEING AWARDED A CONTRACT WITH THE VILLAGE; REVISING THE REQUIREMENTS OF SECTION 2-175(o) AS IT RELATES TO BID PROTEST PROCEDURES AND APPEALS TO THE VILLAGE COUNCIL; AND AMENDING SECTION 2-138 RELATING TO THE VILLAGE'S CONE OF SILENCE REQUIREMENTS; PROVIDING FOR ORDINANCES IN CONFLICT, CODIFICATION, SEVERABILITY AND AN EFFECTIVE DATE.

BACKGROUND AND ANALYSIS:

The Mayor and Village Council of the Village of Palmetto Bay, Florida are vested with a public trust to maximize the purchasing value of public funds in the procurement of goods and services, and to provide safeguards for maintaining a procurement system of quality and integrity. The Village enacted Chapter 2, Division 2, of the Village of Palmetto Bay Code of Ordinances as the procurement policy of the Village. The Village Administration desires to amend its bid protest procedures to ensure that every protestor to the procurement selection process properly adhere to the bid protest procedures. The modification to the protest procedures and cone of silence requirements is to ensure that no protestor circumvent the Village's procurement procedures and cone of silence procedures. The Village desires to clarify the procedures relating to an appeal of the decision of the Village Manager as to a properly filed bid protest with the Village Council and the process for hearing such an appeal. The Mayor and Village Council desire to amend the procurement code to further enhance the maintenance of competitive conditions in the procurement of goods and services to the maximum extent feasible, and does so by amending and clarifying the bid protest requirements and cone of silence requirements. A violation of these

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procedures would result in barring that protestor from contracting with the Village for a five year period.

Recently, the Village issued an RFQ and a recommendation issued by the Village Manager to the Village Council. Two of proposers ignored the Village's bid protest procedures and instead contacted the Village Council directly in an attempt to circumvent the award of the contract. Although the actions of the two proposers may not have violated the then existing Cone of Silence, it is clear that they did explicitly, with deliberate forethought and intent circumvent the bid protest process. These actions made it apparent to the administration, including the Village Attorney, that the Village could be faced with other such efforts to circumvent the procurement code, which could ultimately lead to litigation by the proposer that adhered to the process, or by other proposers who adhered to the Village's procurement processes. With the tightening of the cone of silence and bid protest procedures - both the Village and its proposers are ensured that proper procedures are adhered to - rather than allowing someone to lobby the commission, without registering as a lobbyist, and without allowing circumvention of the Village's enacted procedures.

The proposed revisions to the Cone of Silence and bid protest procedures are as delineated below:

A. Section 2-138(2)(b), relating to the Cone of Silence would be modified as follows:

b. ~~The cone of silence shall terminate at the time the Village Manager makes his or her written recommendation to the Village council; provided, however, that if the Village council refers the Village Manager's recommendation back to the Village Manager or staff for further review, the cone of silence shall be re-imposed until the time as the Village Manager makes a subsequent written recommendation.~~

The cone of silence, solely as to Village Administration, shall terminate at the time the Village Manager makes his or her written recommendation to the Village Council. No vendor, bidder, offeror or contractor may communicate with the Village Council prior to the award of a contract, unless specifically provided for by the bid, RFQ, or RFP. The limited release of the cone of silence as provided in this subsection is to provide any protestor to the bid to communicate in writing with the Village Manager, designee, or Village Attorney as to a bid protest, as provided under the Village's procurement code, section 2-175(o)(1). The protesting bidder, offeror or contractor may **not** communicate, orally or in writing, with the Village Council, unless specifically provided for under the bid documents, or as provided under section 2-175(o)(6), as an appeal of the Village Manager's decision as to a properly filed bid protest. A violation of this subsection by a protesting bidder, offeror or contractor will result in disqualification and a denial of the bid protest, with prejudice. The protesting bidder, offeror or contractor will be barred from responding to further bids, RFQ's, RFP's, or proposals by the Village for a five (5) year period.

The Cone of Silence shall be lifted as to administration and the elected officials upon award to the successful bidder, offeror or contractor. Should the Village Council reject the recommendation of the Village Manager, and/or refer the Village Manager's recommendation back to the Village

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Manager or staff for further review, the cone of silence shall be re-imposed until the time as the Village Manager makes a subsequent written recommendation.

(3) *Exceptions.* The provisions of this article shall not apply to oral communications at pre-bid conferences, oral presentations before selection committees, contract negotiations during any duly noticed public meeting, public presentations made to the Village council during any duly noticed public meeting in conjunction with the selection of a proposer or communications in writing at any time with any Village employee, official or member of the Village council unless specifically **provided for** ~~prohibited~~ by the applicable RFP, RFQ or bid documents. The bidder or proposer shall file a copy of any written communication with the Village clerk. The Village clerk shall make copies available to any person upon request.

B. Section 2-175(o)(1), of the Village's Bid Protest Procedures was similarly modified to reflect the modification made to the Cone of Silence provision identified above. Subsection (6) was modified as indicated below:

(6) *Decision and appeal procedures.* If the bid protest is not resolved by mutual agreement, the Village Manager, or his or her designee, shall promptly issue a decision in writing. The decision shall specifically state the reasons for the action taken and inform the protestor of his or her right to challenge the decision. Any person aggrieved by any action or decision of the Village Manager, with regard to any bid protest decision rendered under this Chapter may appeal to the Village Council. The Appeal must be filed with the Village Clerk within 10 days of the Village Manager's decision. The Council shall conduct a de novo review of the protest. The hearing will be considered quasi-judicial and the protestor is to provide all exhibits and position statements, beyond the initial appeal filing to the Village Administration 15 days prior to the scheduled hearing on the appeal. No communications may be had by the appellant with the Village Council prior to the appeal hearing. The Village Council shall adhere to its quasi-judicial proceeding requirements found at section 2-107. An aggrieved person may seek judicial review of the Village Council's action pursuant to the Florida Rules of Appellate Procedure. Judicial review must be sought within 30 days of rendition of the Village Council's decision. Any action not brought in good faith shall be subject to sanctions, including, but not limited to, damages by the Village and attorney's fees incurred by the Village in defense of the wrongful action. This subsection does not confer, and shall not waive standing requirements which are otherwise required by law.

FISCAL/BUDGETARY IMPACT: None.

RECOMMENDATION: Approval.

1
2 BE IT ENACTED BY THE MAYOR AND VILLAGE COUNCIL OF THE VILLAGE
3 OF PALMETTO BAY, FLORIDA, AS FOLLOWS:
4

5 Section 1. Chapter 2, entitled "Administration" at sections 2-138 entitled "Cone of
6 Silence" and Section 2-175(o), entitled "Procurement Process" are amended to read as follows:
7

8 * * *

8 **CHAPTER 2 ADMINISTRATION**

9 * * *

10 **Section 2-138 - Cone of silence**

11 (a) Contracts for the provision of goods and services.

12 (1) *Cone of silence* is hereby defined to mean a prohibition on:

13 a. Any communication regarding a particular RFP, RFQ, or bid between a potential vendor,
14 service provider, bidder, lobbyist, or consultant and the Village's professional staff including, but
15 not limited to, the Village Manager and his or her staff;

16 b. Any communication regarding a particular RFP, RFQ, or bid between the mayor or Village
17 council members and any member of the Village's professional staff including, but not limited to,
18 the Village Manager and his or her staff;

19 c. Any communication regarding a particular RFP, RFQ or bid between a potential vendor,
20 service provider, bidder, lobbyist, or consultant and any member of the selection committee
21 therefor;

22 d. Any communication regarding a particular RFP, RFQ or bid between the mayor, Village
23 council members and any member of the selection committee;

24 e. Any communication regarding a particular RFP, RFQ or bid between a potential vendor,
25 service provider, bidder, lobbyist, or consultant and the mayor or Village council members; and

26 f. Any communication regarding a particular RFP, RFQ or bid between any member of the
27 Village's professional staff and any member of the selection committee. The Village Manager
28 and the chairperson of the selection committee may communicate about a particular selection
29 committee recommendation, but only after the committee has submitted an award
30 recommendation to the Village Manager and provided that should any change occur in the
31 committee recommendation, the content of the communication and of the corresponding change
32 shall be described in writing and filed by the Village Manager with the Village clerk and be
33 included in any recommendation memorandum submitted by the Village Manager to the Village
34 council.

35 Notwithstanding the foregoing, the cone of silence shall not apply to:

- 1 a. Communications with the Village attorney and his or her staff;
- 2 b. Duly noticed site visits to determine the competency of bidders regarding a particular bid
3 during the time period between the opening of bids and the time the Village Manager makes his
4 or her written recommendation;
- 5 c. Any emergency procurement of goods or services;
- 6 d. Communication regarding a particular RFP, RFQ or bid between any person and the
7 contracting officer responsible for administering the procurement process for the RFP, RFQ or
8 bid, provided the communication is limited strictly to matters of process or procedure already
9 contained in the corresponding solicitation document.

10 (2) *Procedure.*

11 a. A cone of silence shall be imposed upon each RFP, RFQ and bid after the advertisement of
12 the RFP, RFQ or bid. At the time of imposition of the cone of silence, the Village Manager or his
13 or her designee shall provide for public notice of the cone of silence. The Village Manager shall
14 issue a written notice to the affected departments, file a copy of the notice with the Village clerk,
15 with a copy to the mayor and each Village council member, and shall include in any public
16 solicitation for goods and services a statement disclosing the requirements of this article.
17 Notwithstanding any other provision of this section, the imposition of a cone of silence on a
18 particular RFP, RFQ or bid shall not preclude staff from obtaining industry comment or
19 performing market research, provided all communications related thereto between a potential
20 vendor, service provider, bidder, lobbyist, or consultant and any member of the Village's
21 professional staff including, but not limited to, the Village Manager and his or her staff, are in
22 writing or are made at a duly noticed public meeting.

23 ~~b. The cone of silence shall terminate at the time the Village Manager makes his or her written~~
24 ~~recommendation to the Village council; provided, however, that if the Village council refers the~~
25 ~~Village Manager's recommendation back to the Village Manager or staff for further review, the~~
26 ~~cone of silence shall be re-imposed until the time as the Village Manager makes a subsequent~~
27 ~~written recommendation.~~

28 The cone of silence, solely as to Village Administration, shall terminate at the time the Village
29 Manager makes his or her written recommendation to the Village Council. No vendor, bidder,
30 offeror or contractor may communicate with the Village Council prior to the award of a contract,
31 unless specifically provided for by the bid, RFQ, or RFP. The limited release of the cone of
32 silence as provided in this subsection is to provide any protestor to the bid to communicate in
33 writing with the Village Manager or Village Attorney as to a bid protest, as provided under the
34 Village's procurement code, section 2-175(o)(1). The protesting bidder, offeror or contractor may
35 NOT communicate, orally or in writing, with the Village Council, unless specifically provided for
36 under the bid documents, or as provided under section 2-175(o)(6), as an appeal of the Village
37 Manager's decision as to a properly filed bid protest. A violation of this subsection by a protesting
38 bidder, offeror or contractor will result in disqualification and a denial of the bid protest, with

1 prejudice. The protesting bidder, offeror or contractor will be barred from responding to further
2 bids, RFQ's, RFP's, or proposals by the Village for a five (5) year period.

3
4 The Cone of Silence shall be lifted as to administration and the elected officials upon award to the
5 successful bidder, offeror or contractor. Should the Village Council reject the recommendation of
6 the Village Manager, and/or refer the Village Manager's recommendation back to the Village
7 Manager or staff for further review, the cone of silence shall be re-imposed until the time as the
8 Village Manager makes a subsequent written recommendation.
9

10 (3) *Exceptions.* The provisions of this article shall not apply to oral communications at pre-bid
11 conferences, oral presentations before selection committees, contract negotiations during any
12 duly noticed public meeting, public presentations made to the Village council during any duly
13 noticed public meeting in conjunction with the selection of a proposer or communications in
14 writing at any time with any Village employee, official or member of the Village council unless
15 specifically **provided for** ~~prohibited~~ by the applicable RFP, RFQ or bid documents. The bidder
16 or proposer shall file a copy of any written communication with the Village clerk. The Village
17 clerk shall make copies available to any person upon request.

18
19 (b) *Penalties.* In addition to the penalties provided in this chapter and Miami-Dade County Code
20 sections 2-11.1 (s) and (v), violation of this section by a particular bidder or proposer shall render
21 any RFP award, RFQ award or bid award to the bidder or proposer voidable. A violation of
22 section 2-155 may render the public hearing item voidable and a \$500.00 penalty to the
23 applicant. The Village council shall hold an evidentiary hearing to determine whether a violation
24 of section 2-155 has taken place, whether a penalty shall issue, and/or whether the public hearing
25 item should be voided. Any person who violates a provision of this article shall be prohibited
26 from serving on a Village competitive selection committee. In addition to any other penalty
27 provided by law, violation of any provision of this article by a Village employee shall subject the
28 employee to disciplinary action up to and including dismissal. Additionally, any person who has
29 personal knowledge of a violation of this article shall report the violation to the State Attorney
30 and, or, may file a complaint with the Miami-Dade County Commission on Ethics.

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32 * * *

33
34 2-175 *Procurement Process.*

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36 ***

37
38 (a) *Bid protests*

39
40 (1) *Right to protest.* Any actual or prospective bidder, offeror, or contractor who is aggrieved in
41 connection with the solicitation or award of a contract may protest to the Village Manager, and
42 appeal the decision of Manager to the Village Council. A protest of a solicitation of an invitation to
43 bid or request for proposals shall be submitted in writing to the Village Manager prior to the

1 opening of bids or the closing date of proposals, unless the aggrieved person did not know and
2 could not have known of the facts giving rise to such protest prior to bid opening or the closing date
3 for proposals. A protest to the Village Manager's recommendation of an award of a contract, or the
4 discovery of facts relating to a claim of irregularity in the solicitation, shall be submitted in writing to
5 the Village Manager within five (5) days of the recommendation to award of the contract and shall
6 state the particular grounds (facts and law; and shall include all documentation or evidence) on
7 which the protest is based and shall include all pertinent documents as evidence—, and shall be
8 accompanied by the filing fee and bond. The protest is considered filed when received by the
9 Village Manager. No time will be added for service by mail. The written protest may not challenge
10 the relative weight of the evaluation criteria or the formula for assigning points in making an award
11 determination. The facts, law, and evidence presented as part of the protest shall be the basis for the
12 evaluation of the protest. Anyone protesting the bid may communicate in writing to the Village
13 Manager or Village Attorney. However, the protesting bidder, offeror or contractor may NOT
14 communicate, orally or in writing, with the Village Council unless in compliance with 2-175(o)(6). A
15 violation of this provision by a protesting bidder, offeror or contractor will result in disqualification
16 and a denial of the bid protest, with prejudice. The protesting bidder, offeror or contractor will be
17 barred from responding to further bids, RFQ's, RFP's, or proposals by the Village for a five (5) year
18 period. Anyone attempting to circumvent the bid protest process by bypassing the administration
19 and the procurement procedures and proceeding directly to the Village Council shall be
20 automatically barred for a five year period from being awarded any bid, contract, or proposal.

21
22 a. *Responsiveness.* The Village Manager, after consultation with the Village Attorney, will
23 certify whether the protest submission is responsive to the bid. The parties to the protest
24 shall be bound by the determination of the Village Manager with regard to the issue of
25 responsiveness.

26 b. *Compliance with procedures.* No bid protest shall be accepted unless it complies with the
27 requirements of this Chapter. Failure to timely protest bid specifications, requirements
28 and/or terms is a waiver of the ability to protest.

29
30 (2) *Stay of procurements during protests.* In the event of a timely protest under this subsection, the
31 Village Manager shall not proceed further with the solicitation or award of the contract until all
32 administrative and judicial remedies have been exhausted, or until the Village Council makes a
33 determination on the record that the award of a contract without delay is necessary to protect
34 substantial interests of the Village.

35
36 (3) *Protest bond.* A protestor shall file a protest bond, equal to 15 percent of the bid amount, or a
37 minimum of \$5,000 which ever is greater, payable to the Village.

38
39 (4) *Authority to resolve protests.* The Village Manager, or his or her designee, shall have the authority to
40 settle and resolve a protest as described in this section. All actual bidders, including bid protestors,
41 shall be notified in writing (including written correspondence, electronic communication, facsimile,
42 or email) following the release of the Village Manager's written recommendation to the Village
43 Council.

1 (5) *Reimbursement.* The Village may require reasonable reimbursement for expenses incurred in
2 processing any protest, which expenses shall include, but not be limited to, staff time, legal fees and
3 expenses, including expert witness fees, reproduction of documents and other out-of-pocket
4 expenses payable out of the bond.
5

6 (6) *Decision and appeal procedures.* If the bid protest is not resolved by mutual agreement, the Village
7 Manager, or his or her designee, shall promptly issue a decision in writing. The decision shall
8 specifically state the reasons for the action taken and inform the protestor of his or her right to
9 challenge the decision. Any person aggrieved by any action or decision of the Village Manager, with
10 regard to any bid protest decision rendered under this Chapter may appeal to the Village Council.
11 The Appeal must be filed with the Village Clerk within 10 days of the Village Manager's decision.
12 The Council shall conduct a de novo review of the protest. The hearing will be considered quasi-
13 judicial and the protestor is to provide all exhibits and position statements, beyond the initial appeal
14 filing to the Village Administration 15 days prior to the scheduled hearing on the appeal. No
15 communications may be had by the appellant with the Village Council prior to the appeal hearing.
16 The Village Council shall adhere to its quasi-judicial proceeding requirements found at section 2-
17 107. An aggrieved person may seek judicial review of the Village Council's action pursuant to the
18 Florida Rules of Appellate Procedure. Judicial review must be sought within 30 days of rendition of
19 the Village Council's decision. Any action not brought in good faith shall be subject to sanctions,
20 including, but not limited to, damages by the Village and attorney's fees incurred by the Village in
21 defense of the wrongful action. This subsection does not confer, and shall not waive standing
22 requirements which are otherwise required by law.
23

24 (7) *Remedy.* The institution and filing of a protest under this chapter is an administrative remedy
25 that shall be employed prior to the institution and filing of any judicial action against the Village
26 concerning the subject matter of the protest.
27

28 (8) *Protests barred.* Protests not timely made under this Chapter shall be barred. Any basis or ground
29 for a protest not set forth in the letter of protest required under this Chapter shall be deemed
30 waived.
31

32 (9) *Finality.* The determination of the Village Manager and Village Attorney with regard to all
33 procedural and technical matters shall be final.
34

35 (10) *No waiver.* Nothing in this section shall waive the Village's sovereign immunity pursuant to
36 Section 768.28, Florida Statutes.
37

38 (11) *Costs.* All costs accruing from a protest shall be assumed by the protestor and are payable from
39 the bond.
40

41 (12) *Filing fee.* The written protest must also be accompanied by a filing fee in the form of a money
42 order or cashier's check payable to the Village in an amount equal to one percent (1) of the amount
43 of the bid or proposed contract, or \$500 whichever is greater.
44
45

1 (p) *Contract claims.*

2
3 (1) *Decision of the Village Manager.* All claims by a contractor against the Village relating to a contract
4 shall be submitted in writing to the Village Manager for a decision. The contractor may request a
5 conference with the Village Manager on the claim. Claims include, without limitation, disputes
6 arising under a contract, and those based upon breach of contract, mistake, misrepresentation, or
7 other cause for contract modification or revision.

8
9 (2) *Notice to the contractor of the Village Manager's decision.* The decision of the Village Manager shall be
10 promptly issued in writing, and shall be immediately mailed or otherwise furnished to the contractor
11 in writing. The decision shall state the reasons for the decision reached, and shall inform the
12 contractor of its appeal right under subsection (p)(3).

13
14 (3) *Finality of Village Manager's decision; contractor's right to appeal.* The Village Manager's decision shall
15 be final and conclusive unless, with ten (10) calendar days from the date of receipt of the decision,
16 the contractor files a written appeal with the Village Council. The contractor must exhaust these
17 administrative remedies before petitioning the circuit court for review of the Village's administrative
18 decision.

19 (4) *Failure to render timely decision.* If the Village Manager does not issue a written decision regarding
20 any contract controversy within ten days after written request for a final decision, or within such
21 longer period as may be agreed upon between the parties, then the contractor may proceed as if an
22 adverse decision had been received.

23
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25
26 Section 2. All ordinances or parts of ordinances in conflict with the provisions of this
27 ordinance are repealed.

28
29 Section 3. This ordinance shall be codified and included in the Code of Ordinances.

30
31 Section 4. If any section, clause, sentence, or phrase of this ordinance is for any reason
32 held invalid or unconstitutional by a court of competent jurisdiction, the holding shall not affect the
33 validity of the remaining portions of this ordinance.

34
35 Section 5. This ordinance shall take effect immediately upon enactment.

36
37
38 PASSED AND ENACTED this [] day of _____, 2011.

39
40
41 Attest: _____
42 Meighan Alexander Shelley Stanczyk
43 Village Clerk Mayor

44
45 APPROVED AS TO FORM:

