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MEMORANDUM

TO: Honorable Council Member Michael Boylan

CC: Jason R. Gabriel, General Counsel

FROM: Lawsikia J. Hodges, Deputy General Counsel, Government Operations 

RE: **JEA Invitation to Negotiate #129-19 for Strategic Alternatives - Notice Requirements in Section 21.04(p) of the City Charter**

DATE: December 5, 2019

I. **Background.**

On July 23, 2019, the JEA Board approved Resolution 2019-07, which authorized the Chief Administrative Officer and Managing Director (the "JEA CEO") to undertake a competitive solicitation regarding JEA's assets (the "Resolution"). On August 2, 2019, JEA issued Invitation to Negotiate #129-19 for Strategic Alternatives (the "ITN")¹.

II. **Question Asked.**

Whether the JEA Board was required under Section 21.04(p) of the City Charter to provide the Council Auditor with 30 days advance written notice of the JEA Board's action of approving the Resolution?

III. **Short Answer.**

No. The JEA Board was not required to provide the Council Auditor with 30 days advance written notice of the JEA Board's action of approving the Resolution because such approval by the JEA Board was not an "activity" pursuant to Section 21.04(p). The term "activity" as used in Section 21.04(p) refers to the specific activities listed therein (and any activities not listed of the same kind)² (i) that JEA, operating as a public utility, is permitted to

¹ The ITN was issued in accordance with the authority set forth in the Resolution, the JEA Procurement Code, the JEA Procurement Code Operational Procedures (the "Operational Procedures"), and Article 21 of the City Charter (the "City Charter").

² See statutory construction principle *eiusdem generis*.

enter into; and (ii) that transfers, sells, finances, leases or otherwise provides services or products, or by-products developed or used by JEA incident to the exercise of the powers conferred in Article 21 of the City Charter. As a public utility, the quintessential power conferred to JEA in Article 21 is the power of JEA to own, manage and operate a utilities system³ within and without the City of Jacksonville⁴; all other powers conferred to JEA in Article 21, including the powers referenced in Section 21.04(p), is in support of this foremost power. As such, the activities referenced in Section 21.04(p) must constitute “services, products, or by-products” developed or used by JEA incident to operating a utilities system. As long as an activity meets the requirements of Section 21.04(p) (i.e., constitute services, products, or by-products developed or used by JEA incident to its power to operate a utilities system), JEA must provide the Council Auditor with advance written notice prior to JEA entering into such activity.

Here, the JEA Board’s action of approving the Resolution does not constitute an “activity” under Section 21.04(p) because in and of itself such action by the board is not a “service, product or by-product” developed or used by JEA incident to the powers conferred in Article 21. By way of example, the specific activities listed in Section 21.04(p) include services, products or by-products such as energy performance contracting, power marketing services, the supply of steam or other thermal energy, and the testing and maintenance of customer-owned facilities. These activities represent ordinary activities customary to JEA’s operation as a public utility, and thus, JEA is conferred authority to enter into such activities so as long as proper advance notice is provided to the Council Auditor. Here, the board’s action of approving the Resolution was a procurement authorization and approval of the JEA CEO to explore transferring a significant portion of JEA assets (comprising more than ten percent of the utilities system) to another utility to own, manage and operate for JEA (and the City).⁵ Such action by the board was not an activity similar in nature or kind to the activities listed in Section 21.04(p);⁶ therefore, the JEA Board’s action of approving the Resolution was not subject to the Council Auditor’s notice requirement contained in Section 21.04(p).⁷

³ The term “utilities systems” includes the electric utility system, the water and sewer utility system, the natural gas utility system, and any other additional utilities systems operated by JEA. See Section 21.02 City Charter.

⁴ See Article 21.01 of the City Charter.

⁵ Given the exploratory nature, a sale or transfer of JEA assets may or may not result from the procurement process. If the JEA Board ever seeks to consummate a sale or transfer (comprising more than ten percent of the utilities system) to another utility, the JEA Board must obtain City Council approval and a subsequent voter referendum pursuant to Section 21.04(p).

⁶ See statutory construction principle *ejusdem generis*.

⁷ Although the JEA Board was not required to provide notice to the Council Auditor under Section 21.04(p), the JEA Chief Legal Officer indicated that JEA emailed a link of the July 23, 2019 JEA Board meeting materials on July 22, 2019, to the Council Auditor’s office and also delivered a hard copy of the July 23rd board meeting materials to the Council Auditor’s office on July 23, 2019.