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VIA E-Mail
Noel Pfeffer, Esq.
City Attorney
City of Delray Beach
100 NW 1st Avenue
Delray Beach, Florida 33444

RE: Legal Analysis of City's Agreement with Match Point, Inc.

Dear Mr. Pfeffer:

You have asked this Firm to provide the City of Delray Beach (the "City") with a legal analysis concerning the City's agreement with Match Point, Inc. ("MatchPoint"), dated October 12, 2005, (the "Agreement") granting a license to MatchPoint to conduct annual professional tennis events at the Delray Beach Municipal Tennis Center (the "Tennis Center"). This analysis addresses whether the Agreement violated the competitive procurement requirements set forth in Chapter 36 of the City's Code of Ordinances[1], and the City's potential remedies if such a violation exists.

SUMMARY

The City's Purchasing Ordinance governs the City's acquisition of contractual services and required the City to use a competitive process[2] for the acquisition of contractual services of "$15,000 and up," unless an Invitation to Negotiate process is utilized, the contract is for a Community Development Block Grant ("CDBG") project or the personal services contract or emergency purchase exception applied[3]. The Agreement contractually binds the City to pay MatchPoint in annual amounts that

[1] The Purchasing Ordinance refers to the applicable provisions of Chapter 36 of the City Code as they existed when the Agreement was approved by the City Commission.

[2] The Purchasing Ordinance provided for the following types of competitive procurements for the acquisition of contractual services of $15,000 and up: solicitation of bids, solicitation of quotes, the utilization of another governmental agency's contract or a cooperative purchasing group contract.

[3] *See* Sections 36.01(A) and 36.08 of the City Code (2005).

exceed $1 million, and are far in excess of the $15,000 threshold. We have been advised that there was no competitive procurement process used in connection with the October 11, 2005 City Commission approval of the Agreement. There is nothing in the public record to suggest that an Invitation to Negotiate process was utilized in connection with the Agreement. The Agreement is not for a CDBG project. There is nothing in the public record to suggest that the City deemed the Agreement to qualify for the personal services exception, nor did the exception apply, or any other exception. The Agreement was not an emergency purchase.

The Florida Supreme Court has held that competitive bidding laws should be construed in a manner that avoids their circumvention and in a manner most favorable to the public. The Florida Supreme Court has long held that contracts entered into by local governments in violation of competitive bidding laws are void and no rights can be acquired under them by the contracting party. If the validity of the Agreement comes before the court for a determination, there is a considerable chance, based on existing case law, that the court will declare that the City's Purchasing Ordinance required the Agreement to be competitively procured, and, because it was not, that the court will declare the Agreement void.

History and Background Information[4]

In 2005, the City entered into an Agreement with Match Point, dated October 12, 2005, regarding an annual professional tennis event sanctioned by the ATP Tour, Inc. ("ATP") to be held at the City's Tennis Center. The Agreement granted an exclusive and

[4] We have reviewed the following materials in connection with this analysis: (1) the Agreement; (2) Amendment Nos. 1, 2, 3, 4 and 5 to the Agreement; (3) Chapter 36 of the Code of Ordinances of the City of Delray Beach as it existed at the time of execution of the Agreement (the "Purchasing Ordinance"); (4) the City's Purchasing Manual, dated December 20, 1991, as amended (the "Purchasing Manual"); (5) the October 11, 2005 Commission Meeting Minutes concerning the Agreement Agenda Item [Agenda Item 9.E]; (6) the June 10, 2008 City Attorney memo and the Agenda Results from the June 17, 2008 City Commission Meeting concerning the City Commission's approval of Amendment No. 1; (7) the Agenda Results and Meeting Minutes from the June 16, 2009 City Commission Meeting concerning the City Commission's approval of Amendment No. 2 to the Agreement; (8) the April 13, 2011 City Attorney memo and the Agenda Results and Meeting Minutes from the April 21, 2011 City Commission Meeting concerning the City Commission's approval of Amendment No. 3; (9) the October 8, 2012 City Attorney Memo and the Meeting Minutes from the October 16, 2012 City Commission Meeting concerning the City Commission's approval of Amendment No. 4; (10) the August 29, 2013 Assistant City Manager Memo and the Agenda Results from the September 3, 2013 City Commission Meeting concerning the City Commission's approval of Amendment No. 5, and (11) the City's Agreement with IMG Worldwide, Inc., dated July 13, 2009, providing for IMG to serve as the City's exclusive marketing representative for naming rights and sponsorship sales for the World Tour and Champions Tour Events.

transferable license (the "License") to MatchPoint to use, manage and operate the Tennis Center for the staging of a nine or ten day ATP Event (the "World Tour Event") beginning in 2006. The Agreement provided that the term of the License was for "approximately twenty-five (25) years" beginning with the date of execution of the Agreement until 60 days following the conclusion of the World Tour Event in the Year 2030. The dates for the World Tour Event were to be determined by the ATP Tour provided such dates occurred during the months of November through and including April for the years 2006 through 2030.

The Agreement required the City to pay MatchPoint an annual fee for the World Tour Event of $918,750 for the first full contract year[5] (March 1, 2006 through February 28, 2007), subject to a 5% annual increase each year for 10 years through February 29, 2016, with varying annual percentage increases thereafter. The City retained the proceeds from the sale of naming rights, certain sponsorships and revenue received from parking.[6] MatchPoint was granted concession rights for the World Tour Event and was required to spend at least $150,000 annually on player appearances for the World Tour Event.

In 2008, the City and MatchPoint entered into Amendment No. 1, dated June 19, 2008, which provided that the granted License does not prohibit the City from holding a Chris Evert Charity Event in the months of November or December of each year. The original Agreement provided that the Chris Evert Charity Event could be held so long as it occurred in December.

[5] There was an initial payment of $875,000 due to MatchPoint for the period prior to March 1, 2006.

[6] The City also retained proceeds from Palm Beach County regarding the Event, excluding proceeds from the Convention Business Bureau and funds received resulting from an application made by MatchPoint directly to the Palm Beach County.

ATP Champions Tour Event (Amendment Nos. 2-5)

The parties then entered into Amendment No. 2, dated June 17, 2009, which amended the Agreement to permit MatchPoint to hold a three to five day "ATP Champions Tour" event (the "Champions Tour Event") to run concurrently with the World Tour Event at the Tennis Center. The initial term for the ATP Champions Tour was to conclude on March 31, 2014[7], with two five year, and one six year renewal periods thereafter. Amendment No. 2 also provided for MatchPoint to administer all City sponsorships sold and MatchPoint would receive a 5% fee of each sponsorship sold. The City was to pay MatchPoint $375,000 a year (subject to a 3% annual increase) for the Champions Tour Event. MatchPoint was required to spend at least $250,000 annually[8] for player appearance fees. If the Champions Tour Event was not televised, MatchPoint was required to pay the City $100,000[9] as a refund to the City for lost advertising, except if it was not televised due to a Force Majeure event or inability to obtain permitting. The City's approval of Amendment No. 2 was contingent upon the Commission receiving and approving an Agreement with IMG Worldwide, Inc. ("IMG") by July 31, 2009. Thereafter, the City entered into an Agreement with IMG, dated July 13, 2009, providing for IMG to serve as the City's exclusive marketing representative for naming rights and sponsorship sales for the World Tour and Champions Tour Events.

In 2011, the City and MatchPoint executed Amendment No. 3 to the Agreement, dated May 10, 2011, which revised the initial term of the ATP Champions Tour to conclude sixteen years later on March 31, 2030 coinciding with the end of the term of the World Tour. Amendment No. 3 also reduced the City's annual payment to MatchPoint for the Champions Tour Event by $25,000 to $350,000 (subject to a 3% annual increase thereafter), and provided the City an additional remedy in the event Matchpoint was in default of the Agreement, failed to cure, and moved the Champions

[7] The City had they right to terminate the Champions Tour Event in 2011 or 2013 if the City did not receive a minimum of $750,000 from sponsorships, naming rights, corporate and other funding (not including Delray CRA funding). MatchPoint also had the right to relocate the Champions Tour Event to another location by refunding the City all payments to Matchpoint minus all revenue received. Both of these provisions were deleted from the Agreement pursuant to Amendment No. 3.

[8] This payment amount was to increase by 3% per year pursuant to Sections 1.06(D) and 3.01(E)(1) of Amendment No. 2.

[9] This payment amount was to increase by 3% per year pursuant to Sections 1.06(D) and 3.01(E)(1) of Amendment No. 2.

Tour Event outside of the City within two years of such default.[10] Amendment No. 4, dated October 22, 2012, reduced the number of players MatchPoint was required to provide for the 2013 Champions Tour Event from eight to six. Thereafter, the parties executed Amendment No. 5, dated September 11, 2013, permitting the reduction to six players for the 2014 through 2018 Champions Tour Events and reducing the number of players required to meet established criteria from all six players down to four.

ANALYSIS

I. Requirement to Competitively Bid.

The City's acquisition of goods and services is governed by state law, the Purchasing Ordinance and the administrative procedures set forth in the City's Purchasing Manual. There is no specific state law that requires the City to competitively procure an event management services agreement[11]. Therefore, the provisions in the City's Purchasing Ordinance at the time the contractual services were acquired control the City's procurement of the event management services Agreement. Section 36.02 of the Purchasing Ordinance states:

> Whenever the City shall seek to acquire personal property, supplies, or contractual services, the following procedures ***shall*** be implemented:
> ***
> (D) *[Acquisitions of $15,000.00 and up.]* For acquisitions of fifteen thousand dollars ($15,000.00) and up, purchases shall be made by the Purchasing Supervisor after the Commission has reviewed and awarded the bid/quote. Bids/quotes shall be secured in the manner prescribed in subsection (E) of this Section.
> (E) *Conditions for Securing Formal Bids/Quotes.* The Purchasing Supervisor shall either:
> (1) Solicit competitive bids/quotes in a formal written manner from at least three (3) different sources of supply when available; or
> (2) Utilize a purchasing contract established by a local, state or federal governmental agency or cooperative purchasing group. (Emphasis supplied)

[10] MatchPoint was also required to provide for *national and international* broadcasting of the Champions Tour Event to avoid the $100,000 advertising refund to the City.

[11] However, the Florida Legislature has expressed clear intent that public procurement be fair and open to competition. *See* Section 287.001, Fla. Stat.

Section 10.05 of the City Code defines "shall" to mean that the act referred to is mandatory. Thus, the use of the word "shall" in the first sentence of City Code Section 36.02 above should be interpreted as imposing a mandatory obligation to implement a competitive procurement "whenever the City shall seek to acquire…contractual services…of $15,000 and up."

Section 36.01 of the City Code requires that the "details of all City purchasing shall be performed in accordance with the latest current revision of a standard practice instruction as issued by the City Manager." Section V of the Purchasing Manual provided in pertinent part:

> With the exceptions of emergency purchases[12], purchase orders should not be issued without sufficient competition being solicited from vendors. The reasons for this requirement are threefold:
>
> 1. It assures the City of the best of several competitive prices and products.
> 2. It promotes competition for the City's business and increases the City's sources of supply.
> 3. It negates criticism of preferential treatment for favored vendors.

Pursuant to Sections 36.02 and 36.08 (Emergency Purchases), the City Code required a competitive process for City purchases, except for emergencies, CDBG funded projects, and personal services contracts. At the time the Agreement was entered into, the City Code did not contain a best interest acquisition exemption from competitive bidding[13]. There is no information in the public record that suggests the City viewed the Agreement as an emergency purchase, or that the City complied with the requirements to effectuate an emergency purchase. The Agreement and event

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[12] The current version of the Purchasing Manual also provides an exception for sole source purchases. However, when the Agreement was approved there was no sole source exception provided for in the City Code.

[13] Some municipalities have adopted a best interest exception to their procurement ordinances, which permits a governing body to waive competitive bidding requirements (except when required by state law) upon a super-majority or unanimous vote, and a specific finding that the competition waiver is in the best interest of the city. The City's current best interest exception from competitive procurement requirements was approved by the City Commission on November 19, 2013 and requires a four-fifths affirmative vote that the City's competitive procurement methods are not in the best interest of the City for the subject contract or acquisition.

management services are not a CDBG funded project. None of the agenda documents or public meeting minutes indicates that the City viewed the Agreement as a personal services purchase. There does not appear to be any applicable case law supporting the applicability of a personal services exemption to competitive bidding for event management services. The City Code did not provide for a sole source exception from competitive bidding at the time the License and Agreement were approved. Notwithstanding that there was no sole source exception available, there appear to be multiple industry participants that provide similar event management services, including the City's contracted exclusive marketing representative for sponsorship sales for the World Tour and Champions Tour Events, IMG. Therefore, the Purchasing Ordinance exceptions did not appear to apply to the event management services provided under the Agreement.

There is no information in the public records provided to our office to suggest that any type of competitive process was used in connection with the Agreement, or that the City's competitive procurement requirements were taken into consideration when the City Commission voted to approve the Agreement. Accordingly, there was no competitive process used in connection with the Agreement, and the Agreement and underlying event management services[14] do not appear to qualify for any of the competitive bidding exemptions that existed at the time the Agreement was entered into by the parties.

The City's Purchasing Ordinance required the City's use of a competitive process for expenditures exceeding $15,000, and the Agreement required a City expenditure of approximately $1 million annually for the subject event management contractual services. Proponents of the validity and enforceability of the Agreement may argue that the nature of the event management services and the ATP Tour Events rendered the City's competitive bidding requirements inapplicable. However, the City Code, at a minimum, required the City to issue a written solicitation for competition for the

[14] The Agreement also provides an exclusive license for MatchPoint to have year round exclusive access, use and occupancy of City-owned Office Space at the event office/ticket building for the 25 year term so long as the ATP Events are held at the Tennis Center and MatchPoint has the ATP sanction for the ATP Events. For leases of City property, the City Code would have required the City "to consider any further competitive bids for the real property being leased", and issue public notice of the terms and time and place where the Commission shall consider objections to the proposed lease. However, the express language in the Agreement grants a "license" for the Office Space, and does not expressly grant a lease. Therefore, unless the court deemed the Agreement to constitute a lease of the City's real property, the City's grant of the license to the Office Space, by itself, would likely not violate the City Code for failure to provide public notice and consider any further competitive bids.

services, which far exceed the $15,000 competition requirement threshold. If the City had solicited for the services from multiple sources and there were no other interested or qualified parties, the City would likely have satisfied the competitive procurements requirements and would have had the authority to enter into the Agreement. Conversely, there is nothing in the public record indicating that the City made any attempt to solicit any competition for the subject services nor is there any finding in the agenda item, minutes or Agenda results from the meeting as to why competition was not solicited. The limited City Code exceptions from competition that were available at the time were not utilized by the City, nor were they applicable to the Agreement, particularly given that they are required to be construed narrowly in favor of competition.

The Florida Supreme Court in *City of Miami v. Kayfetz*[15] outlined the standard of review for city ordinances, stating as follows:

> In construing the validity of the ordinance in question we must: (1) assume that a valid ordinance was intended ... (2) construe the ordinance to be legal, if possible to do so, and *strive to so construe it as to give reasonable effect to its provisions*. (Emphasis supplied).

The Florida Supreme Court has also held that competitive bidding laws are enacted for the protection of the public[16], and should be construed in a manner to avoid their circumvention.[17] Statutes enacted for the public's benefit should be interpreted in a manner most favorable to the public.[18] Thus, any interpretation of the Purchasing Ordinance, and the related exemptions, should be construed in a manner most favorable to competition for the public's benefit. Further, the Agreement represents a significant commitment by the City of both millions of dollars of taxpayer money and City owned property for a 25 year period, and likely represents one of the City's largest annual dollar value contracts for services.

Accordingly, it is our opinion, based on a reasonable interpretation of Purchasing Ordinance Section 36.02 construed in a manner most favorable to the public and giving

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15 *See City of Miami v. Kayfetz*, 92 So.2d 798 (Fla.1957).

16 *See Hotel China & Glassware Co. v. Board of Public Instruction of Alachua County*, 130 So.2d 78 (Fla. 1st DCA 1961), cited in *Marriott Corporation v. Metropolitan Dade County*, 383 So.2d 662 (Fla. 3d DCA 1980).

17 *See Wester v. Belote* 103 Fla. 976, 138 So. 721 (Fla.1931); *Miami Marinas Association, Inc. v. The City of Miami* 408 So. 2d 615 (Fla. 3d DCA 1981).

18 *See Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla.1969).

reasonable effect to its provisions, that if the validity of the Agreement comes before the court for a determination, there is a considerable chance, based on existing case law, that the court will declare that the City's Purchasing Ordinance required the Agreement to be competitively procured, and, because it was not, that the court will declare the Agreement void.

II. City Contracts Entered into in Violation of Competitive Procurement Laws are Void.

The Florida Supreme Court has long held that contracts entered into by local governments in violation of competitive procurement laws are void, and no rights can be acquired under them by the contracting party.[19] The Florida Supreme Court has also held that a governmental contract made in violation of a charter requirement that the contract be awarded to the lowest responsible bidder is void.[20] Florida's Fourth District Court of Appeals, which has jurisdiction over Palm Beach County, has consistently held that a contract must comply with City ordinances in order for it to be valid.[21]

> Where competitive bidding statutes exist, public officers charged with the responsibility of letting contracts…*are without power to reserve…the right to make exceptions, releases, and modifications in the contract after it is let, which will afford opportunity for favoritism*, whether any favoritism is actually intended or practiced or not.[22]

In order to be valid, the Agreement needed to comply with the competitive procurement requirements in the City's Purchasing Ordinance. The Agreement violated Section 36.02 of the City's Purchasing Ordinance. Therefore, the City's public officials and staff did not have the power to enter into the Agreement.

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19 *See Wester* at 724; *See also Harris v. School Bd. of Duval County*, 921 So. 2d 725 (Fla. 1st DCA 2006); *Mayes Printing Co. v. Flowers*, 154 So. 2d 859 (Fla. 1st DCA 1963); *Armco Drainage & Metal Products, Inc. v. Pinellas Count*y, 137 So. 2d 234 (Fla. 2nd DCA 1962).

20 *See Robert G. Lassiter & Co. v. Taylor* 128 So. 14 (1930).

21 *See Hollywood v. Witt* 789 So. 2d 1130 (Fla. 4thDCA 2001); *Palm Beach County Health Care Dist. v. Everglades Mem'l Hosp., Inc.*, 658 So.2d 577 (Fla. 4th DCA 1995) (agreements entered into by public bodies which fail to comply with statutory requirements are void); *Town of Indian River Shores v. Coll*, 378 So.2d 53 (Fla. 4th DCA 1979)(refusing to enforce an alleged employment contract offered by the mayor of a municipality, where an ordinance required that contracts had to be authorized by the entire town council).

22 *See Wester* at 724.

Proponents of the validity and enforceability of the Agreement may argue that the City is estopped (prevented) from using the failure to comply with the City's competitive bidding requirements to deny the enforceability of a contract. For example, MatchPoint may claim the City is estopped because it relied on the City's actions in entering into the Agreement, and partial performance has already occurred. However, the Florida Supreme Court has long held that "persons contracting with a municipality must at their peril inquire into the power of a municipality, and of its officers, to make the contract contemplated."[23] The Florida Supreme Court has also held that, "estoppel cannot be applied against a governmental entity to accomplish an illegal result.[24] In *Ramsey v. City of Kissimmee*, an engineer purported to enter into a contract with the city to perform engineering services. The contract was not entered into in the manner prescribed by the city's charter and ordinances, and therefore the Court determined that the contract was unenforceable. Though the engineer presented several arguments in favor of enforcing the contract, including that the city had ratified the contract by making a partial payment, the Court concluded that the engineer could not recover under the contract.

In *Accela, Inc. v. Sarasota County*[25], software vendors filed suit challenging the county's award of a software contract to a competitor without seeking competitive bids. After the County entered into the contract, the plaintiffs filed suit seeking a declaratory judgment that the agreements were void and an injunction to prevent the county and the competitor from performing the agreements. On appeal, the Second DCA ruled that the county "acted arbitrarily when it violated the terms of the piggyback provision of its code in entering into the three agreements. The agreements must therefore be void and of no effect.[26] The Second DCA granted declaratory and injunctive relief to the plaintiffs notwithstanding the fact that the county executed a contract with the plaintiff's competitor.

In *City of Delray Beach vs. Waste Management, Inc. of Florida*[27], the Palm Beach Circuit Court declared that the City's Purchasing Ordinance required an eight year extension of the City's solid waste collection services agreement with Waste Management to be competitively procured, and because it was not, the Court declared

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23 *See Ramsey v. City of Kissimmee,* 139 Fla. 107 (Fla. 1939).
24 *See Branca v, City of Miramar* 634 So. 2d 604 (Fla. 1994).
25 *See Accela, Inc. v. Sarasota County*, 993 So. 2d 1035(Fla. 2nd DCA 2008).
26 *Id*. at 1044.
27 *See City of Delray Beach vs. Waste Management, Inc. of Florida*, Fla. 15th Judicial Circuit (March 28, 2014).

the solid waste collection services agreement, as amended, void. The Court also rejected Waste Management's argument that the City was estopped from seeking relief because the City approved it and contemplated whether it needed to be competitively procured, before approving the extension without competition.

In this case, MatchPoint does not have a viable claim for estoppel because such an estoppel claim would require the court to affirm the validity of an act that violated the Purchasing Ordinance. Further, the law impresses upon MatchPoint the knowledge of the extent of the powers of the City's officials. MatchPoint was responsible to determine the authority of a municipality, and of its officers, to enter into the contemplated contract. Thus, MatchPoint was on notice that the City did not have the power to enter into the Agreement. Applicable Florida case law suggests that there is a considerable chance that a court would declare the Agreement, as amended, void.

POTENTIAL REMEDIES

The City has two primary options for addressing the potential Purchasing Ordinance violation: (1) file a declaratory judgment action to ask a court to determine whether the Agreement is void, or (2) send a notice to MatchPoint stating that the Agreement is void (potentially resulting in a lawsuit by MatchPoint). If the City files a declaratory judgment action, MatchPoint could be permitted to continue performance of the Agreement while the City seeks a judicial determination as to the validity of the Agreement. This option minimizes the risk of damages that could be sought against the City.

In the alternative, the City can send a letter to MatchPoint declaring the Agreement to be void. MatchPoint may then file a lawsuit seeking damages resulting from the termination. The City would defend by asserting that the Agreement is void. It may be possible for the City and MatchPoint to agree to declare the Agreement void and negotiate a new agreement that is approved by the City Commission in compliance with the City's current Purchasing Ordinance.

Please let me know if you have any additional questions or concerns.

Very truly yours,

Jamie A. Cole