



# MIAMI BEACH

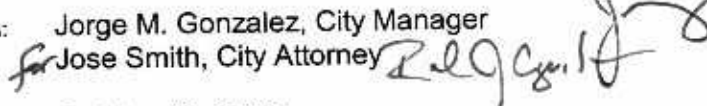
OFFICE OF THE CITY MANAGER

NO. LTC #261-2008

## LETTER TO COMMISSION

TO: Mayor Matti Herrera Bower and Members of the City Commission

FROM: Jorge M. Gonzalez, City Manager

for Jose Smith, City Attorney 

DATE: October 13, 2008

SUBJECT: Invitation to Bid No. 43-07/08 - 6<sup>th</sup> and Lenox Right of Way Improvements (the Bid)

The purpose of this LTC is to provide information with regard to a request for extension of time for submission of bids in the above noted Bid.

Three (3) e-mail requests to extend the Bid Opening Date, which is currently scheduled for Monday, October 13, 2008, at 3 PM, have been received by the City. The first request was transmitted through a City resident, who stated that he is working with some contractors to get them to bid on the project, and that these contractors need at least another seven (7) days. The second and third requests appear to be from contractors who are potentially submitting bids (also at the request of the aforesaid resident), and who appear to have been asked by the resident to request the extension directly.

Of the latter two potential bidders requesting an extension, one contractor gave no reason for the request, and the second contractor stated that the extension was needed because, as the firm had picked up the bid documents in the last two weeks, it needed more time to get information back from its sub-contractors.

The current Bid Opening Date (of 3 PM, Monday, October 13<sup>th</sup>) was selected following a City Commission directive, at its September 10, 2008 Meeting, to formally bid the project, concurrent with the Commission's consideration of a proposed Development Agreement by Berkowitz Development for the same improvements (which Development Agreement was considered by the City Commission, on First Reading, on September 10, 2008).

The City Commission requested staff to put the project out to bid for the minimum amount of time that is both practical and possible. Pursuant to City practice, a project of this type is put out to bid for no less than thirty (30) days.

At its October 7, 2008 Meeting, during the public hearing for Second Reading of the Development Agreement, Berkowitz Development again went on record stating that, if it was to perform the improvements, then the proposed Development Agreement must be approved by the end of October. At the October 7<sup>th</sup> Meeting, the City Commission, opened and continued Second Reading of the Development Agreement to a Special City Commission Meeting on October 22, 2008.

The clear sentiment of the City Commission, in its discussion while scheduling the Special City Commission Meeting, was that staff was not to delay the opening of the Bid.

In addition, during the discussion of setting the Special Meeting date for October 22<sup>nd</sup>, the Commission asked the City Manager if the proposed date would provide enough time for bids to be opened; evaluated; and a recommendation made to the City Commission.

As stated by staff at the Meeting, this date is appropriate, provided the Bid Opening Date remains on October 13, 2008. The reasons for this are both practical as well as legal:

1. Staff needs at least three (3) business days to perform its due diligence on the bidders. This due diligence includes background checks of the bidders, reference checks, verification of corporate papers, interviews of key staff, and an evaluation of the submitted bids.
2. Following the Administration's due diligence, the City Manager provides his written recommendation to the City Commission. Once the City Manager's written recommendation is issued, the City is required to allow bid protests to be submitted, up to anytime until two (2) business days following the release of said recommendation in the City Commission Agenda packet (See Section 2-371(a)(2) of the City Code [i.e. citing the City's Bid Protest Ordinance]).
3. Considering these timelines, if bids are opened on October 13<sup>th</sup>, as planned, the earliest possible date for a City Commission Meeting to consider these bids is October 22<sup>nd</sup>.
4. In addition, by policy, the City Commission has requested that Agenda Items be provided at least four (4) days in advance of the Meeting. In order to meet this date, the item must go out by Friday, October 17<sup>th</sup>, 2008.
5. If a seven (7) day extension is granted, then the new Bid opening date would be October 20, 2008. Given the due process requirements under the City's Bid Protest Ordinance, it would be administratively (and legally) impossible to open bids on October 20<sup>th</sup>; evaluate the bids; have a written recommendation from the City Manager; allow for the mandatory two (2) business day bid protest window; and still submit the bids for the Commission's consideration at the October 22<sup>nd</sup> Meeting.
6. It is understood that the purpose of the October 22<sup>nd</sup> Special Meeting is to consider Second Reading of the Development Agreement. While it could be argued, that the only information necessary to evaluate the proposed Development Agreement are the amounts of the lowest bidders (submitted in response to the Bid), the risk in this assumption is that, without proper due diligence and evaluation, it is possible that the lowest bidder (from a dollar perspective) may not turn out to be the most responsive or responsible bidder. For this reason, we recommend that the City Commission only consider bids (as a comparison to the price offered in the proposed Development Agreement) once they have been fully evaluated by staff and been through our standard process.
7. The City Administration is also reluctant to extend the Bid Opening Date where the request:
  - (i) Does not address either an error or defect in the Bid specifications, such that in order to be fair to all bidders an extension is appropriate;
  - (ii) Is not the result of either supplemental information or corrective addendum to the Bid issued by the City, that would reasonably require all potential bidders additional time to respond; and/or
  - (iii) Does not take technical exception to the Bid specifications and/or document requirements.

A fundamental consideration in the public bidding process requires that all bidders be treated fairly and equally, and that no undue or material advantage be given to one bidder over another. The concern exists in this specific situation that granting an extension of the Bid Opening Date, for the reasons requested by the two prospective bidders (and the resident seeking the extension on their behalf), which do not go towards the "merits" of the Bid, could raise a potential challenge from other bidders, on the grounds that the City could be perceived to have given preferential treatment to one bidder over another.

The City Commission has given direction to keep this project, and the related Bid Opening Date, on schedule and without delay. Due to the Commission's directive to the Administration that it wanted to have the option to consider the Development Agreement with Berkowitz, in order to continue to have that as a viable option, maintaining the current Bid Opening Date is particularly time sensitive. The reasons for the requested extensions also do not appear to be materially related to the Bid itself; but rather appear to be related to the individual circumstances of the requestors. Finally, there is no practical (or legal) process that would allow the City to open bids on October 20<sup>th</sup>, for the Commission to be able to consider them on October 22<sup>nd</sup>. As stated above, the latest responsible date to open bids and have them considered on October 22<sup>nd</sup>, is October 13<sup>th</sup>.

For these reasons, the Bid Opening Date has not been extended. Bids are required to be submitted and will be opened today at 3 PM.

Finally, the City Commission is reminded that this project continues to be subject to the City's Cone of Silence provisions. The "Cone," generally speaking, precludes oral communications regarding the Bid between the City Administration and the Mayor and City Commission and their respective staffs, as well as verbal communications between any potential bidder and the City Administration, and the Mayor and City Commission (and their respective staffs).

Since the project is still covered under the Cone of Silence, we are not able to individually discuss this issue with you until after the City Manager's recommendation has been issued, which should be later this week.

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