



MIAMIBEACH

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COMMITTEE MEMORANDUM

TO: Mayor Matti H. Bower and Members of the City Commission

FROM: Interim City Manager Kathie G. Brooks

DATE: Oct 3, 2012

This shall serve as written notice that a meeting of the Finance and Citywide Projects Committee has been scheduled for Oct 3, 2012, at 3:00 P.M. at 1755 Meridian Avenue, 3rd floor training room.

The agenda is as follows:

OLD BUSINESS

- 1. Public presentation regarding status of, and other issues pertaining to, the Lincoln Road request for proposal, and the Convention Center request for qualification. (September 12, 2012 Commission Item C4J)**

Raul Aguila – Chief Deputy City Attorney

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COMMITTEE MEMORANDUM

TO: Finance and Citywide Projects Committee

FROM: Jose Smith, City Attorney
Raul J. Aguilera, Chief Deputy City Attorney

DATE: October 3, 2012

SUBJECT: Public Presentation Regarding Status of, and Other Issues Pertaining to, the Lincoln Road RFP and the Convention Center RFQ

INTRODUCTION

In conjunction with the above referenced public presentation at the October 3, 2012 Finance and Citywide Projects Committee ("FCWP"), regarding the status of, and other issues pertaining to, pending:

1. Request for Proposals No. 14-11/12 for a Public-Private Development in Miami Beach on North Lincoln Lane, between Alton Road and Meridian Avenue, including City-owned Parking Lot #25 on 17th Street and Lenox Avenue, Parking Lot #26 on North Lincoln Lane, between Lenox Avenue and Michigan Avenue, and Parking Lot #27 on North Lincoln Lane, between Jefferson Avenue and Meridian Avenue (the "Lincoln Road RFP" or the "RFP"); and
2. Request for Qualifications No. 22-11/12 for the Development of the Miami Beach Convention Center District (the "Convention Center RFQ" or the "RFQ");

the City Attorney's Office has prepared this memorandum addressing Sunshine Law issue raised by one of the proposers to the Lincoln Road RFP, alleging that the RFP Evaluation Committee's recommendation to the City Manager should be voided, since the Committee's deliberations were not open to the public. Because a similar issue may be raised on the Convention Center RFQ, if the FCWP Committee recommend that the City "cure" the alleged violation raised in the Lincoln Road RFP, it should also recommend a cure option, as a pre-emptive measure.

BACKGROUND

The Lincoln Road RFP was issued on January 17, 2012, with an opening date for proposals on March 23, 2012. The City received four (4) proposals in response to the RFP, from the following entities: 1.) Lanestar Partners, LLC; 2.) Lincoln Road Development, LLC; 3.) Lincoln Square, LLC; and 4.) Team Nolli.

Section V of the RFP (entitled, "Evaluation/Selection Process") provides that following receipt of proposals, "An Evaluation Committee, appointed by the City Manager, shall meet to evaluate each Proposal in accordance with the requirements set forth in this RFP. If further information is desired, Proposers may be requested to make additional written submissions or oral presentations to the Evaluation Committee." (See RFP, subsection V (4) at p.18, for criteria). The Evaluation Committee convened on May 11, 2012, to hear presentations from the four (4) RFP proposers; conduct a question and answer session following each presentation; and evaluate the proposals in accordance with the RFP evaluation criteria (see RFP, subsection V (5) at p. 18); following which, the Committee made its recommendation to the City Manager of the proposer or proposers it deemed to be the best candidate(s).

The Convention Center RFQ was issued on February 7, 2012, with an opening date of April 23, 2012. The City received eight (8) proposals in response to the RFQ, from the following entities: 1.) Flagstone Property Group; 2.) Portman CMC; 3.) SoBeCa, LLC; 4.) South Beach ACE; 5.) Turnberry Village, LLC; 6.) CConnectMB; 7.) Rida Development Corporation; and 8.) Matthews Holding Southwest (NOTE: #8 subsequently withdrew its proposal). Following receipt of proposals, an Evaluation Committee appointed by the City Manager convened over the course of two days, on June 4 and 5, 2012, to hear presentations from the seven (7) remaining proposers; conduct question and answer sessions; following which, the Committee made its recommendation to the City Manager of the "shortlisted" proposers, in accordance with the Evaluation Criteria set forth in the RFQ (see RFQ, subsection II (A) (6) at p. 15.)

The Lincoln Road RFP Committee's deliberations were not open to the public (nor was the meeting noticed as a public meeting). Likewise (and consistent with what was done for the RFP), the Convention Center Evaluation Committee deliberations were also not open to the public. In both cases, however, the City tape recorded **and** videotaped the entire meeting proceedings, and the audio and video recordings were available to the public immediately following the meeting(s). Further, the videotaped meetings were posted on the City's website, so that any member of the public wishing to view them could do so, free of charge.

THE 2011 EXEMPTION TO THE SUNSHINE LAW

In 2011, the Florida Legislature passed House Bill 7223, which took effect on June 2, 2011, and amended Section 286.0113(2), Florida Statutes, to provide the following exemption to the public meeting requirement under the Sunshine Law (hereinafter referred to as the "2011 exemption"):

Any portion of a public meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution. (See F.S. 286.0113(2)(b))

Section 286.0113(2) also requires that:

A complete recording shall be made of any portion of an exempt meeting. No portion of the meeting may be held off the record. (See F.S. 286.0113(2)(c)).

Pre – 2011 Exemption

Prior to the enactment of the 2011 exemption, the Sunshine Law required that the entire City evaluation/selection committee meetings be open to the public and noticed as public meetings (which the City did, by noticing them along with other City meetings in the Weekly Meeting Notices). Evaluation/selection committee meetings are typically divided into three (3) components: 1.) introductory remarks by City staff, which provide committee members with a brief overview of the subject matter and explanation of applicable laws, including the Sunshine Law and the City's Code of Silence Ordinance; 2.) oral presentations by the individual proposers, which also include question and answer sessions; and 3.) committee deliberations and scoring/ranking of proposals in accordance with the evaluation criteria specified in the solicitation document, culminating with the committee's final vote(s) and recommendation(s) to the City Manager. The Committee's recommendation is advisory to the City Manager, who in turn makes his/her independent recommendation to the City Commission. Both the Committee's recommendation to the Manager and the Manager's recommendation to the Commission are advisory, and thus not binding on either party.

Even (pre - 2011 exemption) when the Sunshine Law required that the entirety of evaluation/selection committee meetings be open to the public, at no time has the City taken the position, nor does the Sunshine Law require, that members of the public have a right to participate and/or speak at these meetings. The Sunshine Law does not mandate that boards allow the public to speak at open meetings. See, *Wood v. Marston*, 442 So. 2d 934 [Fla. 1983], where the Florida Supreme Court held that the Sunshine Law does not give the public the right to speak at a meeting of a committee appointed by a university president to recommend candidates for a university president). Therefore, even when all portions of evaluation/selection committee meetings were open to the public, the public could only watch and listen to the proceedings.

The City's Interpretation/Application of the 2011 Exemption

Since its enactment, public bodies throughout the State have taken widely different approaches on how to interpret the 2011 exemption. Because the exemption is still new—it took effect on June 2, 2011— there is no case law interpreting it. Similarly, the legislative history provides little guidance, other than to state that the exemption was intended to remove the competitive advantage that might be gained by bidders or proposers, where the Sunshine Law gave them the right to sit through their competitor's presentation, and potentially gain information that they might use to their advantage.

Therefore, given the absence of any judicial and (very little) legislative history for the 2011 exemption and, further, given that:

- existing law does not give the public the absolute right to participate in or interfere with an evaluation/selection committee's proceedings;
- the City keeps tape recorded minutes of the entire proceedings (and, in the case of the RFP and RFQ, the proceedings were not only tape recorded, but videotaped as well); and
- the taped proceedings (and, in case of the RFP and the RFQ, the videotapes too) are public record, prior to the City Manager making his/her written recommendation (on the proposal) to the City Commission; and

- the intent of the exemption is to not give bidders/proposers an opportunity to use the Sunshine Law to gain an unfair advantage or competitive edge;

it seemed reasonable that the City interpreted the 2011 exemption to allow it the discretion to not open committee deliberations to the public (thereby, preserving the integrity of the bidding process, **without** running afoul of the Sunshine Law).

SUNSHINE LAW CURES/OPTIONS

While the City stands by its interpretation/application of the 2011 exemption, and does not concede that—by not having the Evaluation Committee deliberations for the Lincoln Road RFP (and the Convention Center RFQ) open to the public—it violated the Sunshine Law, the potential legal challenge necessitates that the issue be addressed; particularly, if the FCWP Committee wish to proceed with the RFP (and/or the RFQ) in accordance with the current proposed timelines. Therefore, an initial determination needs to be made as to whether it makes practical sense for the City to defend the proposed challenge in court or, in the alternative, whether the City should voluntarily elect to “cure” the alleged violation, by reconsidering the matter in an open public meeting.

Litigation

In the event that the proposer to the Lincoln Road RFP were to sue the City (alleging that the City violated the Sunshine Law), the complaint could be for injunctive and/or declaratory relief. For example, in the case of a complaint for injunctive relief, the plaintiff could request that the City be enjoined from making an award and/or entering into a contract pursuant to the RFP “until after such time as the ranking of the proposals could be accomplished in compliance with the Sunshine Law.” See, *Leach-Wells v. City of Bradenton*, 734 So. 2d 1168 (Fla. 2d DCA 1999). Attorney’s fees can be assessed against a party who has violated the Sunshine Law. Additionally, pending the outcome of such litigation, it would not be advisable for the City to proceed to make an award under the RFP, as any action held to have been taken in violation of the Sunshine Law is void ab initio. See, *Silver Express Company v. District Board of Lower Tribunal Trustees*, 691 So. 2d 1099 (Fla. 3rd DCA 1997), where a selection committee’s rankings resulting from a meeting held in violation of the Sunshine Law were found to be void ab initio and the agency was enjoined from entering into a contract based on such rankings.

Finally, as already stated, there is no legal precedent (and very little legislative history) interpreting the 2011 exemption, so the parties would be litigating in an area of new law. Litigation at the trial court level would probably take from 6 – 8 months, during which time the City would not be able to proceed with an award under the RFP (thereby delaying that process and the proposed project). Were the City to lose the case, one of the remedies likely to be imposed by the court would be to “cure” the violation, pursuant to one of the administrative “cure options” set forth herein. In addition, the City would be responsible for plaintiff’s attorney’s fees. If the City prevailed in the lawsuit, it would be entitled to its attorney’s fees; however, the RFP process and the project would have been delayed, and any incidental and/or consequential damages attributable to same would not be recoverable. Therefore, if the FCWP Committee’s recommendation is to continue to proceed with and expedite the current RFP (and/or the RFQ) process in a timely manner, litigation would not be an appropriate course of action. By the same token, if the FCWP Committee is now of a mind to reject all proposals received in response to the RFP (and/or the RFQ), and either start over by issuing a new competitive solicitation or not proceed with the proposed development altogether, there would be no need to litigate (and/or, for that matter cure) this matter.

Administrative "Cure" Options

As an alternative to protracted, uncertain, and perhaps costly litigation and, assuming that the FCWP Committee expresses a desire to continue with the current RFP (and/or RFQ) process, one of the following administrative options should be considered, as a means of administratively "curing" the alleged violation (and putting to rest a proposed Sunshine Law challenge). The options presented below are consistent with the general principle established by the Florida Supreme Court in *Tolar v. School Board of Liberty County*, 398 So. 2d 427 (Fla. 1981), that Sunshine Law violations may be cured if the matter discussed "out of the sunshine" is reconsidered in an open meeting. The *Tolar* decision further noted, however, that the subsequent public action (ratifying the action taken out of the sunshine) must involve more than "merely a perfunctory ratification" or "ceremonial acceptance" of the action taken out of the sunshine. (*Id.* at 429). In considering the options below, the FWCP Committee need not recommend the same option for RFP and the RFQ, but should instead select the option it deems appropriate, given the specific needs, priorities, and expectations for each of those solicitations.

Option 1. Reconvene the existing Evaluation Committee in the sunshine, keeping only the proposers' presentations (and subsequent Q & A sessions) closed to the public (i.e. the deliberations would be open to the public). Since some time has passed since the original presentations were made, in addition to having the Evaluation Committee review the original written proposals again, the FWCP Committee should also provide direction as to whether to: (i) have the original four (4) proposers "re-present" to the Committee; or (ii) have the Committee listen to the videotaped presentations from the prior Committee meeting (in which case, proposers or a representative of their team should be given the option to be present, to answer any questions from the Committee after listening to their videotaped presentation(s)).

Option 2. Reconvene a new Evaluation Committee and, as in Option 1 above, have the proposers either re-present to the Committee, or have the Committee listen to the original videotaped presentations.

Option 3. Have the Mayor and City Commission cure the action(s) of the Evaluation Committee by reconsidering the matter at a City Commission Meeting. The City Commission may elect to hear presentations from the proposers, as well as hear from members of the public wishing to speak at the meeting. In keeping with the holding in the *Tolar* case, the Commission's curative meeting(s) must not be purely ceremonial (i.e. the City Commission must do more than simply "rubberstamp" the decisions of the Evaluation Committees). Additionally, since the City Manager's recommendation (on the RFP and/or RFQ) to the City Commission is independent of the Evaluation Committee's recommendation to the Manager, the Manager could still proceed to make his/her written recommendation in accordance with the evaluation/selection process.

It should be noted that if the FCWP Committee recommends having the proposers "re-present" (either before the same or a new Evaluation Committee, or before the City Commission), the City Administration and City Attorney will be mindful that such presentations remain consistent with the respective proposers' written responses to the RFP, and any deviations therefrom will be brought to the attention of the Committee (to advise that they cannot be considered).

If the FCWP Committee recommends convening a new Committee-- for either or both the RFP and RFQ-- the City Manager's Office has compiled a list of potential members (See Exhibit A-1, for potential members for Lincoln Road RFP Committee, and Exhibit A-2 for potential members to Convention Center RFQ Committee).

CONCLUSION/RECOMMENDATION

While the aforestated options present a variety of curative measures, whatever option or options the FCWP Committee recommends any such action(s) must ultimately accomplish two (2) fundamental goals so that any subsequent City Commission action with respect to continuing with the current Lincoln Road RFP (and/or Convention Center RFQ) process may proceed without being voided (as a result of a defect arising from a Sunshine Law violation) and/or potentially challenged under applicable procurement law: 1.) The remedial action taken must be more than ceremonial, and must involve a genuine reconsideration of the matters/actions in a public meeting; and 2.) whatever the cure, the City elects to proceed with, the proposers must be held to, and evaluated in accordance with, their respective original written submissions in response to the RFP and/or RFQ (i.e. if proposers are afforded the opportunity to re-present, it cannot result in their being allowed a "second bite of the apple.")

LINCOLN LANE PARKING LOTS

Potential Evaluation Committee Members Oct 2012

Inigo Ardid	Real Estate Developers Eden Roc Hotel	
Jonathan Beloff	Attorney Planning Board Member	Resident
Israel Berens	Business and Property Owner	
David Berger	Real Estate Developer and Attorney	Resident
Michael Bernstein	Attorney CMB Community Development Advisory Board Member	Resident
William Cary	Assistant Planning Director	City of Miami Beach Planning Department
Michael Goldberg	Sr. VP, Gibraltar Private Bank & Trust	
Jason Hagopian	Architect Chair, CMB Design Review Board	Resident
Jack Johnson	Flamingo Park Neighborhood Association	Resident
Jackie LaLonde	Financial Planner Budget Advisory Board Member	
Nancy Liebman	Former CMB City Commissioner	Resident
Jane Losson	Park View Neighborhood Association	Resident
Carlos Migoya	CEO, Jackson Memorial	
Steven Sawitz	Owner, Joe's Stonecrab	
Graziano Sbraggio	Business Owner	Resident
Rafael Suarez Rivas	Attorney, City of Miami	Resident
Steve Zack	Attorney Former President for ABA and Florida Bar	Resident

LINCOLN LANE PARKING LOTS

Original Evaluation Committee
May 2012

Diego Ardid	Eden Roc Real Estate Developers	
Elsie Howard *	Former Chair of MBVCA	
Jay Levy	Real Estate / Architect	Palm View Resident
Tom Mooney	Preservation and Design Manager	CMB Planning Dept
Alan Randolph	Banker, Lydian Bank Past Chair of Bass Museum MB Chamber of Commerce	Resident
Norberto Rosenstein	Architect Former Historic Preservation Board Member	
Miguel Southwell	Deputy Director of Business Retention and Development Miami International Airport	

** Ms. Howard has indicated that she is not interested in serving on evaluation committees at this time.*

CONVENTION CENTER DISTRICT

**Potential Evaluation Committee Members
Oct 2012**

Paul Cejas	Lincoln Road Property Owner	
Christina Cuervo	Real Estate Developer Former CMB Assistant City Manager	
Dan Gelber	Former State Senator	Resident
Ira Giller	Architect	Resident
Larry Herrup	CPA Former Chair, CMB Board of Adjustment Budget Advisory Committee Member	Resident
Arthur Hertz	GMCVB Orange Bowl Wometco Theaters CEO	
Frank Kruszewski	Continental Property Management MBCC Advisory Board Member	
Matthew Leibowitz	Attorney	Resident
Jay Levy	Real Estate / Architect	Palm View Resident
Joy Malakoff	Banking Former CMB Planning Board Member Board of Adjustment Member	Resident
Tom Mooney	Preservation and Design Manager	CMB, Planning Dept
Alan Randolph	Banking Past Chair of Bass Museum MB Chamber of Commerce	Resident
Miguel Southwell	Deputy Director of Business Retention and Development Miami International Airport	
John Stuart	Architect / Author Chair of Department of Architecture at FIU	Resident
Elsa Urquiza	Property Owner	Resident
Charles Urstadt	Real Estate Advisor Planning Board Member	Resident

CONVENTION CENTER DISTRICT

Original Evaluation Committee Members June 2012

Kathie G. Brooks *	Director, CMB Office of Budget and Performance Improvement (OBPI)	Resident
Jim Goldsmith	Gator Investments Real Estate Investments	
Saul Gross	Commercial Property Owner Former CMB City Commissioner	Resident
Elsie Howard **	Former Chair of MBVCA	
Jackie LaLonde	Financial Advisor Budget Advisory Committee Member	Resident
Martin Margulies	Real Estate Developer Art Collector Philanthropist	
Tim Nardi	GM, The Shore Club Hotel	Resident
Marilys Nepomechie	Architect Professor of Architecture, FIU Preservationist	
Aileen Ugalde	Corporate Counsel, UM	Resident

* Ms. Brooks did not serve on this committee upon advice of the City Attorney's Office as she was being considered for Interim City Manager

** Ms. Howard has indicated that she is not interested in serving on evaluation committees at this time.