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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: October 3, 2012

SUBJECT: REPORT OF THE OCTOBER 3, 2012, FINANCE AND CITYWIDE PROJECTS COMMITTEE (FCWPC) MEETING

The agenda is as follows:

OLD BUSINESS

1. Public presentation regarding status of, and other issues pertaining to, the Lincoln Road Request for Proposals (the "Lincoln Road RFP" or the "RFP"), and the Convention Center Request for Qualifications (the "Convention Center RFQ" or the "RFQ").

ACTION

Following the City Attorney's Office's presentation regarding the potential Sunshine Law issue, an overview by the Interim City Manager as to the Lincoln Road RFP and the Convention Center RFQ, discussion by the Committee, and public comment, the Committee recommended curing any alleged Sunshine Law violation raised in conjunction with the Lincoln Road RFP, by recommending "Option 2" (as such Option is referenced in the City Attorney's memorandum to the Committee, dated October 3, 2012; which Option consists of (i) convening a new evaluation committee, (ii) having the committee view the proposers' original videotaped presentations (from the 5/11/12 evaluation committee meeting), and (iii) having the committee deliberate in the sunshine. With respect to the Convention Center RFQ, the Committee further recommended "Option 1"; which Option consists of (i) re-convening the original evaluation committee, (ii) have it listen to the proposers' presentations (from from the 06/4/12 and 06/5/12 evaluation committee meeting), and (iii) deliberate in the sunshine. In both cases, the proposers should be given the option to be present to answer any questions from the respective committee(s), after listening to the videotaped presentations.

Lincoln Road RFP

The FCWPC began with Chairperson Deede Weithorn stating she'd had a request to bifurcate the two items (the Lincoln Road RFP and Convention Center RFQ), and take two separate votes. Commissioner Jorge Exposito made a motion, that was seconded by Commissioner Michael Gongora, to accept this request. Commissioner Weithorn stated, if time permits, they will take comment from the public within the parameters that Legal will present for the discussion. Any comments made outside of those parameters, the Commissioners should not speak to. Each individual will be

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given two minutes to speak. Commissioner Weithorn then turned the discussion over to Chief Deputy City Attorney Raul Aguila.

City Attorney Aguila began the meeting by advising the public present that the RFP and RFQ are still ongoing, and therefore still subject to the City's Cone of Silence. This means that the Mayor and City Commissioners can't have one on one communications with City staff; or proposers and their teams; or evaluation committee members. He went on to state that the Cone of Silence exempts public presentations at certain duly noticed meetings, and that is the reason that the FCWPC meeting has been publicly noticed today, so that the City Commissioners present can hear the public presentation by the Interim City Manager, have discussion among themselves, and hear public comment. Anyone wishing to speak at today's meeting will have an opportunity to do so.

City Attorney Aguila stated he has also been requested by the Chairperson to establish some "ground rules," in terms of the scope of what is going to be discussed. City Attorney Aguila advised the Commissioners not to engage in a discussion, at this Committee level, on whether or not to reject proposals, continue with the process, etc. City Attorney Aguila suggested that these issues be instead discussed at the Commission meeting on October 24, 2012, when the recommendation from this Committee is before them. With respect to any evaluation committee members that are in attendance, it's recommended that these committee members refrain from discussing the individual findings that led to their decision.

City Attorney Aguila begins by addressing the Sunshine Law issue, raised by one of the proposers to the Lincoln Road RFP, and alleging that the Lincoln Road 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 FCWPC recommends 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, for the Convention Center RFQ.

The specific issue that has been raised regarding the Lincoln Road RFP is that the portion of evaluation committee having to do with the committee's deliberations, ranking of proposals, and final vote(s), was not open to the public. City Attorney Aguila explains that the evaluation committee meeting was not noticed as a public meeting, and therefore not open to the public, due to the City's reasonable interpretation of a recent change in the Sunshine Law, which went into effect on June 2, 2011, and created an exemption pertaining to evaluations and selection committees in bids for RFP and RFQ processes. Prior to June 2, 2011, the City advertised evaluation committee meetings as public meetings (which the City did, by noticing them along with other City meetings in the Weekly Meeting Notices). They were subject to the Sunshine Law like any other board or committee meeting. Following June 2, 2011, when the Sunshine law exemption took effect, 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 the public meeting requirements of the Sunshine Law. The new exemption also provided that, regardless of the exemptions, you still have to maintain a complete recording of any portion of an exempt meeting. No portion of the meeting may be held off the record.

City Attorney Aguila states that, to date, 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. The law is being interpreted differently from city to city, and county to county.

The City therefore took the position that because:

- the Sunshine 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;

The 2011 exemption allowed discretion to no longer hold and/or open committee deliberations to the public (thereby, preserving the integrity of the bidding process, without running afoul of the Sunshine Law). The issue (and the challenge) is where the Sunshine Law gets strictly interpreted to protect the public from irreparable harm. The Sunshine Law states that, even if it was an inadvertent omission, a violation is a violation, since you don't have to show deliberate intent. Therefore, in order to "cure" the Sunshine Law challenges raised on the Lincoln Road RFP, the City Attorney's Office prepared a memorandum for the Committee, presenting the available cure options. The first option is to litigate the challenge from the bidder. The plaintiff's complaint could take the form of an action for declaratory relief, where the plaintiff and defendant tell the court there's a dispute on the interpretation of this law, and request that the court advise as to how the law be interpreted. The concern with litigation is that the City would not be able to move forward with taking any further action on the proposals until the conclusion of the court proceedings. The 2011 exemption is also new law, and we cannot be certain of the outcome. If the City loses, the City would have to pay the plaintiffs attorney fees and any other legal fees expend in defending this issue. City Attorney Aguila states that as an alternative to litigation, there are (3) three administrative options recommended to cure the violation. The Sunshine Law also provides that violations of the Sunshine Law may be cured if the matter discussed "out of the sunshine" is reconsidered in an open meeting.

Following Attorney Aguila's presentation, Interim City Manager Kathie Brooks gave a brief overview of the RFQ and RFP. She explained the City has done a number of studies over the years starting in 2001 and updated in 2008-09 recommending a multi-purpose space/ballroom, an adjacent hotel as well as additional indoor and outdoor meeting space for the Convention Center. The concept was to create a new Convention Center district that had a more walkable environment that benefited both the Convention Center participants and residents. The City retained Arquitectonica to develop a master

plan and on January 11, 2012, the City Commission authorized to issue the RFQ. The primary objectives of the RFQ was to improve the Miami Beach Convention Center (MBCC), redevelop the surrounding area and facilitate the ability of the MBCC to attract high impact conventions, meetings and tradeshow in an increasingly competitive environment. The minimum requirements of the RFQ were Convention Center Enhancements that focused on a Class "A" Renovation, outdoor function space and additional meeting space. A headquarter hotel and the multi-purpose/ballroom of 60,000 net square feet. The RFQ provided for use of the 52 acre site and up to 6.2 million square feet of total FAR. The reason the maximum was allowed was due to the first time the architect masterplanned the site, it constrained the site and resulted in a boxy facility. Allowing the full site provided maximum flexibility for potential greenspace and potential financing by the developer. The proposed development site includes MBCC, Surface Parking Lot, City Offices, 21st Street Community Center and Carl Fisher Club House, The Fillmore Miami Beach at the Jackie Gleason Theater and the 17th Street Parking Garage. The RFQ process is a 2 phase process. Phase 1 qualifications include the relevant experience and financial capability. Phase 2 is the proposal and Key Letter of Intent Terms which includes the Master Plan Preparation/Community Outreach and Negotiations. The responsibilities of the Selected Master Developer are: Create a Master Plan that is financially feasible (includes iconic design, maximizes land value, and provide public benefits), manage the renovation and expansion of the MBCC and all other public components (parking, City offices, public spaces), develop and finance any private components, including the Headquarter Hotel, work with the City to develop a plan to finance the MBCC improvements and expansion and lease the land utilized for any private development. The MBCC RFQ was issued on February 7, 2012 with qualification packages due April 23, 2012. Eight packages were received from CConnectMB, Flagstone Property Group, Matthews Holding Southwest (withdrew its proposal), Portman CMC, Rida Development Corporation, SoBeaCa, LLC South, Beach ACE Turnberry and Village, LLC. The evaluation committee convened June 4 and 5, 2012 and the RFQ subsequently was placed on hold pending the investigation.

City Attorney Jose Smith explained that Kathie Brooks and he spoke with State Attorney Kathy Rundle and her Chief Assistant, Jose Arojo, advising them what would occur at today's Committee meeting. City Attorney Jose Smith read an e-mail sent by Mr. Arojo for the record. It stated, "I was a party to a telephone conference on Monday with the State Attorney and the City Attorney during which we discussed an upcoming public meeting for the Miami Beach City Commission. We were made aware that your City selected officials were expected to question staff regarding the existence of a State Attorney's office investigation of certain Miami Beach construction projects and more specifically, if anything discovered in the investigation should cause a delay in the award bid of the redevelopment of the MBCC. We do not generally comment on ongoing criminal investigations, but since it has been publicly reported in the media that we are involved in the investigation, I feel comfortable with the following comments. We have not come across anything in our investigation at this time that rises to the level of criminal conduct in any transaction we have reviewed involving the RFP or bid submission process relating to the MBCC project. You should know that the Convention Center project is not the focus of our inquiry." City Attorney Smith states that, in a subsequent conversation with State Attorney Rundle, he confirmed that this statement is also applicable to the Lincoln Lane RFP, so neither project should be in any way delayed or impaired in proceeding with what the City Commission decides to do (with regard to the RFP or RFQ). City Attorney Smith added that he was not allowed to comment beyond that.

Commissioner Jorge Exposito asked the State Attorney had indicated when it would have its final response, and City Attorney Smith stated he cannot comment on that.

Interim City Manager Brooks continued explaining that the objective of the Lincoln Lane RFP was to transform and activate North Lincoln Lane from a service alley to a vibrant and pedestrian friendly street and provide an additional connection between Alton Road and Washington Avenue. There were three lots involved: P25 with 86 spaces, P26 with 107 spaces and P27 with 144 spaces. The evaluation criteria for the RFP was to demonstrate success in completing developments of similar magnitude and complexity, experience and qualifications of the Proposer's team and financial strength, as evidenced by audited/reviewed financial statements. Proposals which maximize the economic return to the City, best fulfill the goals and objectives of the RFP. Also, proposals which involve privately-owned property (ies) that leverage the publicly owned property (ies) resulting in maximum public benefit are of high quality and compatible with the scale and character of the area and proposed schedule of project execution. In terms of status of the Lincoln Lane RFP, the RFP was issued January 17, 2012 and proposal packages were due March 23, 2012. There were four proposals received from Lanestar Partners, LLC, Lincoln Road Development, LLC, Lincoln Square, LLC and Team Nelli. The evaluation committee convened on May 11, 2012 and then the RFP developer selection subsequently was placed on hold.

City Attorney Aguila then presented the administrative "cure" options for the alleged Sunshine Law violation. In considering the options below, the Committee need not recommend the same option for both the Lincoln Lane Road RFP and the Convention Center RFQ, but should instead select the option it deems appropriate, given the specific needs, priorities, and expectations for each of those solicitations. The challenge raised was that the deliberations and final vote of the committee should have been opened up to the public. There were seven cases that Mr. Aguila referenced in his research which all basically held that, in order to cure, you have to have a full review of the proposals and a complete re-evaluation. Chairperson Weithorn asked how long it had taken to do the committee evaluations. Interim City Manager Brooks stated it had taken 12-16 hours. City Attorney Aguila went on to state the cure options. The options presented are consistent with the general principle established by the Florida Supreme Court:

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 committee review the original written proposals again, the FCWPC 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 original evaluation committee meeting (in which case, proposers or a representative of their team should be given the option of being 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.

City Attorney Aguila stated that what the respective evaluation committees discussed at their original (respective) committee meetings was a matter of public record, recorded both on tape and on video, and had been made available to members of the public, as well as posted on the City's website. With regard to the Convention Center RFQ, it appears that time is of the essence to improve the Convention Center because it needs to be done, and there are possible plans across the causeway to develop some kind of a convention center facility in Miami. In looking at the cure for the Convention Center RFQ, the most expeditious way to do this might be to reconvene the existing evaluation committee, and have them view the original videotape presentations (that are public record), and have the proposers or their representatives on hand to answer additional questions from the committee (to add what they want, as long as they don't change their original written proposals), and then hold the deliberations in public. That would mean re-scoring and re-ranking them. It would be possible to do this in a day, but it's important to deliberate, rank and score in the sunshine, which is the substance of the complaint that was made.

With regard to the Lincoln Road RFP, the proposer also raised a conflict of interest by a committee member. The proposer allowing the Sunshine Law challenge recommended curing it by letting the City Commission serve as the selection committee and deliberate. City Attorney Aguila added that a concern had been raised by the other proposers that a "cure" not give a proposer an unfair opportunity to change its proposal. Commissioner Gongora asked if there was a statute of limitations on bringing a Sunshine Law complaint, to which City Attorney Aguila stated no. City Attorney Aguila stated again that the process for the Convention Center is a preventive measure. Commissioner Jerry Libbin asked for clarification on Option 3 again. City Attorney Aguila stated the Commissioners would either hear the presentations or watch them.

Lincoln Road Request for Proposals (Public Comment and FCWPC's Recommendation)

Chairperson Weithorn opened the floor to public comment allowing two minutes for anyone that wants to speak about the Lincoln Road RFP only. Attorney for the proposer, Lincoln Road Development, Rafael Andrade, stated they recommend Option 3, and strenuously objected to Option 1 because one of the original evaluation committee members failed to disclose a potential conflict, and that the original committee's scoring/rankings were done in an arbitrary and capricious manner. There were some proposers scored and ranked higher in points that did not supply financials. If the same committee is re-convened, they could be hostile toward his client. Commissioner Ed Tobin asked if that one committee member were removed, would that be satisfactory, and Mr. Andrade stated no it would not be. Commissioner Libbin asked what the objection to Option 2 would be, and Mr. Andrade stated he has no objection to that but understands the importance of time.

Commissioner Tobin asked Legal if the Commission has the right to reject the proposals, and City Attorney Aguila responded the Commission has the right to reject all proposals and not move forward. Mayor Bower asked if there is a garage being built on these lots, and City Attorney Aguila responded that any parking taken away has to be replaced with a garage component.

Attorney for proposer, Team Nolli, Albert E. Dotson Jr., stated the only issue is that deliberations be done in the sunshine. The City has made a significant investment in this process that should not be forgotten. City Attorney Aguila stated that the City deemed all four proposals received were within the minimum requirements and deemed responsive.

Chairperson Weithorn closed public comment and requested each Committee member or Commissioner present to state their opinion on this matter. Commissioner Tobin stated he's okay with reconvening the old evaluation committee and allowing them to take a second crack at it, or let the Commission entertain it, but I want to hear from the public and proposers first before I make a final decision. Commissioner Libbin stated he respects the committee process, and it's valuable to go through this process, and he would lean toward having a new committee convened, which is Option 2. A new committee might reaffirm what the old committee came up with but, in the end, the final decision still lies with the Commission. Commissioner Gongora stated Option 3 would be ideal if the time permitted, but since it doesn't, Option 2 seems more toward where he was leaning. Chairperson Weithorn stated she's leaning toward Option 2, believing very strongly in the committee structure. Commissioner Jonah Wolfson commented that his preference is Option 3, but Option 2 would be okay also. Commissioner Jorge Exposito stated he would go with Option 2. Mayor Bower stated she prefers Option 1, with the same committee, stating the committee probably did a good job, and it would be easier if the same committee reviewed the proposers in the sunshine. Chairperson Weithorn asked for clarification on the committee member that stepped down; if they would be replaced or just stick with the 6 committee members. Legal stated they would move forward with the committee members they have now (i.e. the 6 remaining). A motion was made by Commissioner Gongora to send the recommendation to the City Commission that the City proceed with Option 2 for the Lincoln Road RFP. Commissioner Exposito seconded the motion.

Convention Center Request for Qualifications (Public Comment and FCWPC's Recommendation)

Chairperson Weithorn moved on with opening the floor to public comment regarding the Convention Center RFQ, allowing two minutes to anyone that wanted to speak.

GMCVB representative Bill Talbert stated the Bureau agrees with whatever option moves this project forward.

Attorney for the proposer, Turnberry Lincoln Village, Alex Heckler, stated it's important to move now, since the majority of the voters have decided and are okay with moving forward with the RFQ.

Mangos Tropical Café representative, Josh Wallack, stated he recommends Option 1, as the initial committee was qualified and it's important to continue the plan under the current leadership.

Victor Diaz stated it's important to note that there's been no challenge raised thus far in

regard to the Convention Center RFQ, and the preemptive measures are a good cure. It is a delicate balance in making sure there are no advantages to any proposer in going back through the process, but I would counsel the most expeditious option, which is Option 1.

Bob Goodman, stated he agrees with Option 1, since an excellent committee was chosen and we should move forward with the process.

Resident Eric Zichella stated he just wants consistency and Option 2 allows that.

Convention Center Advisory Board member Roger Abramson stated the Convention Center Advisory Board strongly took Option 3. The residents want the Convention Center to be renovated to help the tourism, but not impact the entire City.

Attorney for proposer, CMS Portman, Lucia Dougherty, stated they don't recommend a new selection committee or a new process, but we recommend Option 1, based on what prior cases have shown throughout the State.

Proposer, Rida Development, representative Matt Bales stated the RFQ selection process was subject to an unfair advantage to his client and they respectfully request none of the options be selected. There should be a new process with a new committee. Commissioner Gongora corrected Mr. Bales stating that is Option 2.

Neighborhood Park Association representative Henry Lowenstein stated there should be periodic town hall meetings to inform and educate the community.

Commissioner Wolfson stated that he would go with Option 2 regarding this matter.

Resident Nancy Leiberman stated we must not get away from the procurement process that has been set forth. This is an opportunity to connect the Convention Center to the City and that's important.

Resident Paul Janas stated Option 2 would be the best possible outcome.

Proposer, CConnectMB, attorney, Wayne Pathman, stated Option 2 or 3 would be the way to go, as this is the biggest project the City has done.

Commissioner Libbin stated he would go with Option 1. Commissioner Tobin stated he is leaning toward Option 1. Commissioner Gongora stated he's not committed to any options, but after listening to what everyone has said, he's leaning toward Option 1. Mayor Bower stated she was going to be consistent and urges everyone to move forward on this, and that they should go with Option 1. Commissioner Exposito stated he is comfortable with going with Option 1. Chairperson Weithorn stated she's comfortable with going with Option 1. A motion was made by Commissioner Exposito to go with Option 1 to re-convene the original committee to hear the videotaped presentations, that there's no new presentations, and that the question and answer portion, with proposers present, be limited and that Legal closely monitor the scope so that there's no potential procurement issues. Commissioner Gongora seconds the motion clarifying that the one committee member that has dropped will just be left off, and the committee will move forward with the current members. The meeting was adjourned.