

December 9, 2014

VIA EMAIL

Mr. Charles Parkin
City Attorney, City of Long Beach
333 West Ocean Boulevard
Long Beach, CA 90802

Dear Mr. Parkin,

This letter is written in response to the recommendation dated December 9, 2014 to award RFP CM14-040 to Plenary Edgemoor Civic Partners ("PECP"). It is understood that the Long Beach City Council is scheduled to vote on this recommendation in a public session this evening. We strongly recommend the City defer a decision until there has been time to investigate the issues outlined in this letter thoroughly and provide the public and City Council with the information required to make this critical long term decision for the City of Long Beach.

Upon careful review of the staff recommendation, we noted that staff and its advisors determined that the PECP financial plan for the Civic Center without Port variant "does not meet the RFP requirements" (Page ES2), but was nonetheless determined to be responsive. We have received legal advice in relation to that decision, which is contained in the attached letter for your reference. In light of that advice, we would request that the City provide us with the detailed rationale for the recommendation and we would be pleased to discuss the issue further with you.

In addition to this concern, we wanted to call your attention to a number of other issues that were either not reflected or inappropriately reflected in the scoring and staff recommendation. We believe this scoring has not provided a recommendation that is in the best interests of the public.

Key issues include:

1. LBCCA has a superior design and technical solution which is financially viable, deliverable in a fast tracked timeframe and meets the City's and community's goals. Key points include:
 - a. Flexibility; a large civic plaza can be included at the steps of City Hall, without loss of master plan functionality or significant financial impact.
 - b. Activation of Broadway; residential with stoops at street level in lieu of retaining a seismically deficient multi-deck parking garage.
 - c. A Library with more usable area and one that meaningfully connects to the existing neighborhood to the North through carefully chosen Park uses to the north of the library.
 - d. A master plan where the completion of the Park is not reliant on completion of the Private Development.

2. LBCCA's proposal represents a \$ 247 million saving to the City over the life of the Project, as compared to the recommended PECP Proposal. This represents a financial gap that is so significant that it will not be able to be overcome without material alterations to PECP's scored design and/or by increasing the City's annual payment above the affordability threshold stated in the RFP. Ultimately, the community will bear the impact of this increased cost either through lack of provision of other vital services or a substandard development.
3. LBCCA has proven complex mixed use property development experience that is unparalleled to the competing team. The lack of experience of PECP as mixed use contractors, rather than as mixed use **developers**, represents a material delivery risk to the City of Long Beach. We believe the City has not appropriately evaluated the risk to the City and the public that the private development would not be delivered as planned.

We strongly recommend the City defer a decision until there has been time to investigate these issues thoroughly and provide the public and City Council with the information required to make this critical long term decision for the City of Long Beach.

This letter also constitutes LBCCA's formal Public Records Act request, pursuant to Government Code Section 6250 et. seq, for the detailed evaluation and scoring sheets prepared by the PTSC and the Advisor Team. Please notify us when the records will be available and we will arrange to pick them up. Of course, we will reimburse the City for any copying charges.

We would very much like the opportunity to work with the City on this exciting project and look forward to the continued opportunity to engage in discussions with both staff and elected officials on these important topics.

Yours Sincerely



Mr. Allan Mackenzie
Long Beach CiviCore Alliance



Mr. Eliot Jamison

Cc:

Mr. Herrera-Cabrera
Mr. Michael Conway
Mr. Richard F. Anthony
Mayor of Long Beach - Robert Garcia
1st District Councilmember - Lena Gonzalez
2nd District Councilmember - Suja Lowenthal
3rd District Councilmember - Suzie Price
4th District Councilmember - Patrick O'Donnell
5th District Councilmember - Stacy Mungo
6th District Councilmember - Dee Andrews
7th District Councilmember - Roberto Uranga
8th District Councilmember - Al Austin
9th District Councilmember - Rex Richardson

December 9, 2014

VIA EMAIL

Messrs. Allan MacKenzie, Bob Tarnofsky,
Justin Davies and Eliot Jamison
Long Beach CiviCore Alliance
800 Parkview Drive North
El Segundo, CA 90245

Re: **City of Long Beach, Request for Proposals Number CM14-040 to Develop, Design, Build, Finance, Operate and Maintain the New Long Beach Civic Center, Port Headquarters, and Potential Related Downtown Development**

Dear Messrs. Mackenzie, Tarnofsky, Davies and Jamison:

This letter is written in response to your request for a legal review of the evaluation of Long Beach CiviCore Alliance ("LBCCA")'s response to the above-referenced Request for Proposals ("RFP") issued by the City of Long Beach (the "City"). The letter is based on information and documents provided to us by LBCCA and may be updated as further information or explanation is received.

The evaluation team *determined that PECP's financial proposal did not meet the requirements of the RFP with respect to its Civic Center without Port variant*. The impact of this determination is explained in detail below. In summary, this letter discusses the following:

- Pursuant to the RFP, each proposer was required to submit technical and financial proposals for both Civic Center and Civic Center without Port variants which would cost the City no more than \$12.6 million annually (as adjusted for inflation). Additionally, each proposer was required to demonstrate that its financing would be appropriately structured and capitalized. Failure to achieve these requirements could render a proposal Non-Responsive and subject to disqualification.

Since 1910

SAN BERNARDINO 550 East Hospitality Lane, Suite 300 • San Bernardino, California 92408
RIVERSIDE 3750 University Avenue, Suite 250 • Riverside, California 92501
SAN DIEGO 550 West C Street, Suite 1810 • San Diego, California 92101
LOS ANGELES 333 South Hope Street, 35th Floor • Los Angeles, California 90071

- PECP was unable to achieve this financial requirement. Accordingly, PECP should not have received a “Pass” rating and therefore should have been deemed Non-Responsive. By the express terms of the RFP, this means that the evaluation team should not have scored the PECP proposal.
- Under California law, a public entity may allow deviations from the requirements of an RFP only if the deviation is “inconsequential,” “insubstantial” or “immaterial.” Deviations that affect a material element of a proposal, such as those that impact price or provide one proposer with an unfair competitive advantage, may not be waived. This is true even where, as here, the public entity has wide latitude in the evaluation and selection process.

A. The RFP Required the Proposals to Include Financial Proposals for Both a “Civic Center with Port” and a “Civic Center without Port” Variant.

As you know, the RFP was seeking proposals (the “Proposals”) for a project (the “Project”) that would consist of two components: (i) the Civic Center and (ii) the Private Development; only those Proposals that included both elements would be evaluated. The RFP further explained that the Civic Center component consisted of two “variants”: (i) the Civic Center with Port and (ii) the Civic Center without Port.

Proposers were required to submit Proposals that included (among other things) financial proposals for both the Civic Center and the Private Development components, and for both the With Port and the Without Port variants. (RFP Section 1.2) More specifically, the RFP required the proposed Projects to cost the City no more than \$12.6 million annually (as adjusted for inflation). Additionally, proposers were required to demonstrate that their financing would be appropriately structured and capitalized. These financial commitments were material elements of the RFP requirements.

As explained in RFP Section 5.2.1, only Proposals that provided all required information would achieve a “Pass” rating and thus would be deemed “Responsive.” For Proposals that did not achieve a “Pass” rating, the proposer would be provided an opportunity to clarify its Proposal. If the clarification was not sufficient, the Proposal could be deemed “Non-Responsive.” The RFP further provided that:

Messrs. Mackenzie, Tarnofsky, Davies and Jamison
Long Beach CiviCore Alliance
December 9, 2014
Page 3

“If the [evaluation team] deems a Proposal to be Non-Responsive, the [evaluation team] will not evaluate the Scoring Criteria and will not score the Proposal.”

In other words, a Proposal that omitted information required by the RFP, and that could not provide a clarification sufficient to overcome the omission, could be deemed Non-Responsive, in which case it would be disqualified from further consideration in the entire RFP process. Thus, the Proposal would not be permitted to proceed to the second major step of the evaluation process, the Scoring Criteria established by RFP Section 5.2.2.

B. PECP’s Proposal was Non-Responsive with Respect to a Material Element of the RFP, and Therefore Should have been Disqualified from further Scoring or Consideration.

The Project Team Selection Committee (the “PTSC”) worked with Arup North America Ltd. (the “Advisor Team”) to evaluate and review the two Proposals. Ultimately, the group produced the “New Long Beach Civic Center Proposal Evaluation Report Executive Summary, Evaluation of Submitted Responses to RFP# CM -14-040” (the “Evaluation”) dated October 2, 2014, and attached as Exhibit A to the Recommendation.

The Evaluation noted that both Proposals were evaluated against the “Pass/Fail Criteria” to determine responsiveness. Because both teams had some “deviations” from the “Pass/Fail Criteria,” they were both provided the opportunity to clarify the deviations before their Proposals would be disqualified, as permitted by Section 5.2.1. One item – the financial proposal for the Civic Center without Port variance in PECP’s Proposal – was not satisfactorily clarified.

Page ES2 (Section 1.2.2) of the Evaluation stated:

“PECP submitted its financial plan for Civic Center without Port variant acknowledging the financial plan could not support subordinated debt. Stress testing by the Advisor Team confirmed this is the case. Upon clarification, PECP suggested that because the proceeds from purchasing the land for Private

Messrs. Mackenzie, Tarnofsky, Davies and Jamison
Long Beach CiviCore Alliance
December 9, 2014
Page 4

Development was treated as a source of funds during construction and would bare construction risk it could therefore be considered an equity contribution. However, *this solution does not meet the RFP requirements* because it does not accomplish the City's desired risk transfer and level of equity oversight in the operating period." (Emphasis added.)

Because of the failure to respond adequately to a required and material element of the RFP without a satisfactory clarification, PECP's Proposal should not have achieved a "Pass" rating, should not have been deemed Responsive, should not have been evaluated pursuant to the Scoring Criteria, and should not have been scored. Instead, however, the PTSC and Advisor Team gave PECP a "Pass" rating and proceeded to score the Proposal.

C. California Law Recognizes that Material Deviations, such as those Regarding the Financial Proposal, Cannot be Waived.

The law does not permit the City to accept a Non-Responsive proposal. "A basic rule of competitive bidding is that bids must conform to specifications, and that *if a bid does not so conform, it may not be accepted.*" *Konica Business Machines U.S.A. Inc. v. Regents of the University of California* (1988) 206 Cal.App.3d 449, 454 (emphasis added). This rule is true in both the competitive bidding situation and the competitive negotiation situation, such as the City is using here. *Cypress Security LLC v. City and County of San Francisco* (2010) 184 Cal.App.4th 1003. A public entity may allow deviations from the rules of the RFP only if the deviation is not material (i.e., if the deviation is "inconsequential" or "insubstantial"). See *Cypress Security LLC at 1015*, (citing *Ghilotti Construction Company v. City of Richmond* (1996) 45 Cal.App.4th 897) (holding that to be considered "inconsequential," a deviation must not give one party an unfair competitive advantage over the other parties); see also *Valley Crest Landscape, Inc. v. City of Davis*, (1996) 41 Cal.App.4th 1432.

In general, the types of "inconsequential", "insubstantial" or "immaterial" deviations or irregularities that may be waived by a public entity include errors such as the failure to sign a form on the appropriate line, typographical errors, or statements that require minimal clarification. *Cypress Security*, 284 Cal.App.4th at 1015. This is consistent with RFP Section 5.5.1, which recognized that the City could ask Proposers

Messrs. Mackenzie, Tarnofsky, Davies and Jamison
Long Beach CiviCore Alliance
December 9, 2014
Page 5

to correct any “minor irregularities” or “errors” in their Proposals, and stated that such errors would not be deemed grounds for disqualification. It is also consistent with the RFP’s definition of “minor irregularities,” which are those “that will not have an adverse effect on the City’s interest and will not give a Proposer an unfair advantage or benefit not enjoyed by other Proposers.” (RFP Section 8.1.13.)

Irregularities affecting a material element of the bid, however, may not be excused. *Valley Crest Landscape*, 41 Cal.App.4th at 1443 (holding that the “City could not permit the mistake as to [a] material element of the bid by “purporting to ‘waive an irregularity’”); see also *Cypress Security*, 284 Cal.App.4th at 1015 (generally recognizing that “immaterial,” “insubstantial” or “inconsequential” deviations are those that could not have affected the amount of the bid).

Here, PECP’s deviation was not immaterial, insubstantial or inconsequential. Rather, the deviation went to the very heart of one of the primary requirements of the RFP: the need for a fiscally sound financial proposal for the Civic Center without Port variant. This was a material element of the Proposal, one affecting the overall financial viability of the Proposal. The Evaluation recognized that PECP’s Proposal did not meet the RFP requirements with respect to this significant element of the RFP, and therefore, it should have deemed the Proposal Non-Responsive.

Even though the City may now decide it will not pursue the “without Port” variant, the RFP was not presented with severable options; both variants were required elements of the RFP. Moreover, the failure to submit a financial plan that meets the RFP requirements for the Civic Center without Port variant also impacts the Civic Center with Port variant given the commonality of site plan and building design between the two. Finally, even after the Port’s initial decision to participate in the Project, the Port has retained the right to change its decision or the extent of its participation. As a result, the Civic Center without Port variant will remain relevant throughout the Exclusive Negotiation Agreement period.

According to the express terms of this RFP, a Non-Responsive Proposal is not to be scored. (RFP, Section 5.2.1.) While the Evaluation noted that “Section 5.2.1 of the RFP gives the City latitude to determine responsiveness,” nowhere in the RFP is there any provision that the failure to provide one of the required elements of the RFP could simply be overlooked or ignored. As such, the Advisor Team could not waive this

Messrs. Mackenzie, Tarnofsky, Davies and Jamison
Long Beach CiviCore Alliance
December 9, 2014
Page 6

issue or score PECP lower in this category, even if its objective in doing so was, as the Evaluation stated, to achieve the laudable objective of promoting “competition” (an objective we note was achieved in any event because two proposers were given the opportunity to submit Proposals).

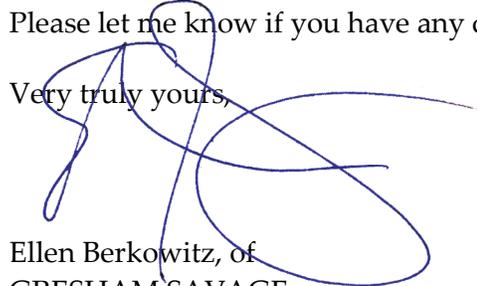
D. Public Records Act Request.

I recommend that LBCCA submit a formal Public Records Act request, pursuant to Government Code Section 6250 et. seq., for the detailed evaluation report prepared by the PTSC and the Advisor Team. I also recommend that you seek clarification from the City for its decision to score PECP’s Non-Responsive Proposal.

* * * *

Please let me know if you have any questions or comments regarding these issues.

Very truly yours,



Ellen Berkowitz, of
GRESHAM SAVAGE
NOLAN & TILDEN,
A Professional Corporation

EB:crb