



# Rio Nuevo

TUCSON, ARIZONA

400 West Congress, Suite 152 ~ Tucson, AZ 85701 ~ 520-623-7336 ~ FAX: 520-882-3699 ~ [info@rionuevo.org](mailto:info@rionuevo.org)

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October 3, 2014

Ron Schwabe, CEO  
PEACH PROPERTIES HM, INC.  
44 East Broadway Blvd., Unit 300  
Tucson, AZ 85701

Re: Rio Nuevo Arena Site RFP 14-2  
Peach Properties HM, Inc. Protest

Dear Mr. Schwabe:

Pursuant to the Rio Nuevo Multipurpose Facilities District ("District") Procurement Code Section 28-82, the following is the Contract Officer's decision in the above referenced protest.

## CHRONOLOGY

The District's RFP 14-2 was released on May 27, 2014 ("RFP"). The RFP solicited proposals for the potential sale and development of the property generally known as the "Arena Site." The RFP articulated "Development Parameters" that expressed elements the District was interested in seeing incorporated into any future development of the Arena Site. Those Development Parameters were explicitly incorporated into the evaluation criteria to be utilized by the RFP's "Evaluation Committee." The District's Board of Directors ("Board") served as the Evaluation Committee and, as such, would score any proposals that were received pursuant to the scoring process provided in the RFP.

The deadline for "Proposals" in response to the RFP was June 30, 2014. Two Proposals were timely submitted; one by Peach Properties HM, Inc. ("Peach") and one by Nor-Generations, LLC ("Nor-Gen"). Copies of each of these Proposals were provided to each of the Evaluation Committee members, together with an Evaluation Committee Member Statement ("Member Statement(s)") and a blank "Score Sheet".

Each Committee Member completed their respective Score Sheets, signed their respective Member Statements and returned both to the RFP Administrator. The RFP Administrator then created an "Initial Score List" by combining the Member scores from all of the "Score Sheets." As indicated in the Initial Score List, the Peach Proposal received an initial score of 5115 and the Nor-Gen Proposal received an initial score of 5290.

At its July 15, 2014 meeting, the Board voted to interview both Peach and Nor-Gen and produce a "Final List" by combining the Initial Score List with the "Interview Scores." This procedure was in accordance with the RFP. The interviews were held during the Special Meeting of the Board on August 12, 2014 ("August 12<sup>th</sup> Meeting"). Thereafter, the Evaluation Committee members submitted their respective "Interview Score Sheets" to the RFP Administrator who combined those scores with the Initial Score List to obtain the Final List.

As reflected in the Final List, Peach received an interview score of 3460, and a final score of 8575, while the interview score for Nor-Gen was 4255, for a final score of 9545. Based upon this Final List, at its August 26, 2014 meeting, the Board voted to proceed with attempting to negotiate an acceptable agreement with the number one ranked proposer, Nor-Gen.

Peach timely filed its "Protest" on September 2, 2014. As an interested party, Nor-Gen filed its "Response" on September 12, 2014. No other information was filed by any other interested party.

### **THE PROTEST**

The Protest asserts that District's Procurement Code was violated. This assertion is based upon (1) statements made by Board Member Alberto Moore and Secretary Chris Scheafe during the August 12<sup>th</sup> Meeting, and (2) Board Member Moore's alleged application of inappropriate criteria resulting in "grossly disproportionate" scoring by Board Member Moore. As relief, the Protest asks the Contract Officer either to disregard all of Board Member Moore's "votes" (apparently meaning Board Member Moore's "scores") or cancel the RFP.

### **THE ANALYSIS**

#### **General Principles**

As a predicate, it is important to note that generally speaking, for a procurement protest to be successful, the protester must establish fraud or bad faith. See *Sulpher Springs Valley Electric Cooperative v. City of Tombstone*, 99 Ariz. 110, 113, 407 P.2d 76,78 (1965). Additionally, public officials, such as the members of the Evaluation Committee, enjoy broad discretion when evaluating competitive proposals. See *Brown v. City of Phoenix*, 77 Ariz. 368, 373, 272 P.2d 358, 362 (Sup. Ct., 1954). This discretion is even broader if the rejection of any or all bids is authorized; as the subject RFP does. Moreover, tribunals will assume that the actions of public officers are taken in good faith. See *Caldwell & Santmeyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed Cir 1995). Finally, if the reasonableness of the resulting decision is "fairly debatable" it will be upheld. *Peabody v. City of Phoenix*, 14 Ariz. App. 576, 580, 485 P.2d 505, 569 (App. 1971)

**Board Member Moore's August 12<sup>th</sup> Speech**

Prior to his verbal evaluation of Nor-Gen's proposal, Board Member Moore's "speech" did little more than echo many of the concepts that were expressed by the Peach team during its presentation. Indeed, giving Board Member Moore the benefit of the doubt, his statements all fit within one or more of the RFP criteria themselves. As a result, those statements do not indicate that he utilized either new or inappropriate criteria.

The RFP's evaluation criteria incorporated the Development Parameters of Section 1.2 of the RFP. That criteria specifically refers to the importance of an urban or mixed use downtown Tucson project and its "prominent location," coordination and support for surrounding developments, including specifically referencing the gem and mineral show "held in Tucson every February," and support by the community and downtown neighborhoods, stakeholders interested in the success of downtown Tucson. The specific concerns articulated by Board Member Moore merely provided his perspective on these Development Parameters and the questions asked in each category of the scoring criteria in Article II of the RFP.

Board Member Moore's truncated endorsement of the Nor-Gen's proposal can hardly be said to have influenced the scoring of any of the other Members. The other Members had just spent more than two hours hearing detailed and comprehensive presentations of both Peach and Nor-Gen and engaging each in question and answer periods. It is not reasonable to conclude that the scoring by any of these other Members was influenced by Board Member Moore's very brief and interrupted statement on the Nor-Gen Proposal.

**Secretary Sheafe's Comments**

Taken in context, it is apparent that Secretary Sheafe's comments after Board Member Moore's statements on Nor-Gen were not an endorsement of that perspective. Instead, fairly construed, Secretary Sheafe was merely assisting Chairman Fletcher McCusker and Board Counsel Chris Schmaltz in terminating Board Member Moore's positive evaluation of Nor-Gen prior to final scoring by the Board. So viewed, Secretary Sheafe's comments do not support Peach's request for relief.

**Board Member Moore's Scoring**

Peach does not allege that Board Member Moore was guilty of either fraud, bad faith, or that he was biased due to personal/financial gain. Instead, Peach vaguely argues that Board Member Moore was "influenced by outside sources and/or considered factors [beyond those set forth in the RFP]," as evidenced by his "grossly disproportionate" scores.



In scoring the Proposals, Board Member Moore gave Nor-Gen a score of 1,000, while giving Peach's Proposal a 775. This difference of 225 points is consistent with the range of the scores of other Evaluation Committee members. As a result, the scores given by Board Member Moore in applying the Evaluation Criteria to the Proposal can hardly be considered "grossly disproportionate."

Reasonable minds may differ on Board Member Moore's decision to give Nor-Gen a perfect score of 1,000 while only awarding Peach 70 points after the interviews. This disparity of 930 points is significantly larger than the range of scores given by the other Board Members. While an extreme scoring decision, the interview scores by Board Member Moore may be merely reflective of his strong view of the relative worth of the Nor-Gen Proposal over the Peach Proposal from the interviews. Or that Board Member Moore viewed the scoring as more akin to a "vote" (an either/or proposition), much like Peach characterized it incorrectly in its Protest. Either way, without more evidence of bad faith, fraud, or personal/financial gain by Board Member Moore, this numerical disparity is insufficient to overcome the presumptions that Board Member Moore acted in good faith, that he honestly believed the two August 12<sup>th</sup> Meeting presentations warranted the scores he granted to each and that his scores were based upon his careful application of the RFP criteria.

#### DECISION

The Peach Protest fails to persuade the Contract Officer that there was a breach of either the Procurement Code or the terms of the RFP. At best, the Peach Protest presents nothing more than mere suspicion of bias or prejudice on Board Member Moore's part. Suspicion of misconduct is insufficient to overcome the presumption that Board Member Moore acted in good faith. As a result, the Peach Protest is denied.

Pursuant to Section 28-84 of the District Procurement Code, an appeal of the Contract Officer's decision may be filed within seven (7) days from the date the decision is issued. The requirements related to any appeal can be found in the District's Procurement Code Section 28-84.

RIO NUEVO MULTIPURPOSE FACILITIES DISTRICT

Michele Bettini  
Contract Officer

APPROVED AS TO FORM

District Counsel