

**DATE:** May 5, 2005

**TO:** Chairman Hennessee  
Commissioner Blomgren  
Commissioner Ferran  
Commissioner Parsons  
Commissioner Wilson

**COPY:** Mayor Tom Potter

**FROM:** Donald F. Mazziotti

**SUBJECT:** Beam Construction & Management, LLC Protest of the Burnside Bridgehead Mixed-Use Redevelopment Project (Request for Developer Proposals #04-05)

On Wednesday, May 4, 2005 PDC received a letter from Beam Construction & Management, LLC (“Beam Development”) protesting the Commission’s decision to award the Burnside Bridgehead Mixed-Use Redevelopment Project pursuant to the Request for Developer Proposals #04-05 (“Burnside Bridgehead Project”) to Opus Northwest. Beam Development attached to its protest letter a public records request for public records relating to the Burnside Bridgehead Project. Both the protest letter and the public records request are attached to this memo.

Protest Process

I have consulted with our Interim General Counsel and he recommends that Beam Development’s protest should be forwarded directly to the Commission.

- a. Process as Described in the Initial RFP

The Request for Developer Proposals #04-05 (the “RFP”) describes in Section IX, the selection process, and in subsection K of Section XI, the process for protesting a decision. The initial RFP established the Executive Director as the decision-maker in the selection process and the ultimate decision-maker on any protest. Section IX (E) of the RFP states that the Executive Director, based on input and recommendations from staff and the evaluation committee, will in his sole discretion:

“Determine the Development Entity that has the overall best proposal and qualifications to meet the desired project objectives; OR  
Determine that none are acceptable; OR  
Determine that additional information and/or negotiations with one or more of the proposers is necessary to make a determination.”

Subsection K of Section XI establishes a Protest process. In general, this Protest section states that “a proposer submitting a responsive proposal or a proposer advised that their proposal was non-responsive is entitled to protest”

The protest must be delivered in writing to PDC’s General Counsel. Section XI (K)(2)(b) states that “[t]he written protest shall specify the specific action or decision by PDC being protested, and describe how the proposer has been or would be adversely affected or aggrieved by PDC’s action or decision.”

The initial review of the protest is to be done generally within five business days by PDC’s Development Director. The decision of PDC’s Development Director may be appealed to the Executive Director within three business days by the proposer submitting the protest, or any other proposer who is not satisfied with her decision. The Executive Director must render his decision “in a timely manner” and his decision is final. He may (a) reject the protest; or (b) implement a remedy to the protest.

#### b. Modified Process

In December, 2004 the selection process was modified to both change the decision-maker from the Executive Director to the Commission and extend the timeline for a decision. On December 10, 2004 an email was sent to the Commission describing the change in the process to make the Commission the decision-maker. Attached to that email was a project update that was being distributed to the public. This project update also showed the change in the process to make the Commission the decision-maker.

On January 4, 2005 the Executive Director sent a memo to the City Councilors which described the revised schedule for public input. This memo identified the revised process including the identification of the Commission as the decision-maker.

On January 19, 2005 an email was sent to representatives of each of the three proposers which detailed the remaining process, which indicated that the final decision would be made by the Commission.

It is clear that all affected and interested people were informed that the selection process and time line had changed. The selection process continued until the Commission made its final decision on April 27, 2005.

Although this change in the process to make the Commission the final decision-maker was distributed widely, there was no formal addendum to the RFP changing the decision-making process. Consequently, the protest process language was not changed to reflect that the Commission was now the decision-maker.

c. Recommended Process For Processing the Protest

The Interim General Counsel has concluded that because the decision-maker was changed from the Executive Director to the Commission, the party/entity reviewing the protest should be changed from the Executive Director to the Commission. Therefore, the appeal should go directly to the Commission.

It made sense for the Executive Director to be the final decision-maker on a protest when the Executive Director was also the final decision-maker on the selection of a developer for the project. But it does not make sense for the Executive Director to be the final decision-maker on a protest where the Commission selects the developer. If this were done, the illogical result would be to have the Executive Director reviewing a decision of the Commission.

d. Next Steps

Staff intends to draft and distribute an addendum to the RFP that describes the next steps in the process for reviewing the protest Beam Development has delivered to PDC.

The Commission has broad authority to revise its process to satisfy the need for processing the proposals. Section XI (A) "General Conditions" of the RFP states:

- A. This request for proposals is not a solicitation of competitive bids. The Portland Development Commission by this request for proposals specifically reserves the right in its sole discretion to determine which proposal best serves the public good, and to:
  - 1. Revise the solicitation, evaluation or selection process including extending the deadline or canceling without selecting a developer.

2. Waive informalities and irregularities in the proposals received in response to this solicitation.
3. Disqualify without recourse or appeal any or all proposals.
4. Reject any or all proposals with or without cause.
5. Determine the timing, arrangement and method of any presentation throughout the process.
6. Verify and investigate the qualifications and financial capacity of the proposer, and any of the information provided in the proposal.

With this broad authority, the Commission may revise the RFP to reflect a change in the evaluation and selection process.

This addendum will describe the next steps to be taken to review and evaluate the protest and will include a timeline for each of those steps. Staff is currently working on this proposed addendum and will distribute it to all three proposers and to the public at large.

Staff intends to immediately notify Beam Construction and the other two proposers of this process.

Please contact me or the Interim General Counsel if you have any questions.