

February 1, 2019

**VIA MESSENGER AND E-MAIL [Llam@santaclaraca.gov]**

Ms. Linh Lam  
Assistant Director of Finance/City Auditor  
City of Santa Clara  
1500 Warburton Ave.  
Santa Clara, CA 95050

Re: Bid Protest, Request for Proposal: Management and Operation of the Santa Clara Convention Center and Convention/Visitor Services (RFP CMO-001)

Dear Ms. Lam:

The purpose of this letter is to protest the City of Santa Clara's (the "City") Notice of Intended Award for the Request for Proposal for the Management and Operation of the Santa Clara Convention Center (the "Convention Center" or "SCCC") and Convention/Visitor Services (RFP CMO-001) (the "RFP" and the "Project", respectively) on behalf of unsuccessful Proposer SMG ("SMG").<sup>1</sup> By the Notice of Intended Award, dated January 23, 2019, the City indicated that it will award the Project to Global Spectrum LP, dba Spectra Venue Management (hereinafter "Spectra") under the reasoning that Spectra's proposal scored more favorably based on the evaluation and weighting criteria specified in Section 16 of the RFP.

In evaluating RFP CMO-001, the City relied on flawed evaluation and weighing criteria, ignored relevant considerations, failed to act transparently, and ultimately, arbitrarily and capriciously awarded the Project to Spectra. As a result, and as further detailed below, the City's decision to award the Project to Spectra, and not to SMG, is not well-reasoned and should be reconsidered. SMG respectfully requests that the City take either one of two actions:

1. Overturn the Notice of Intended Award to Spectra and reopen the RFP to the public for the submission of proposals, using the corrected evaluation criteria recommended herein; or
2. Overturn the Notice of Intended Award to Spectra and continue negotiations with the final two Proposers in consideration, SMG and Spectra, to ultimately renegotiate the best and final offer for the City in a transparent and fair manner.

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<sup>1</sup> The RFP and all related City documents are incorporated by reference herein, but are not attached in the interest of brevity.

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**I. The Flawed RFP Procedure and Evaluation Criteria.**

**A. Arbitrary Weighing of Phase 1 vs. Phase 2 Evaluation Criteria.**

Perhaps the most egregious error in the City’s RFP procedure is the arbitrary and inequitable weights assigned to the stated evaluation criteria. Section 16 of the RFP provides that the City will conduct a two-phase evaluation and selection process. In Phase 1, the RFP provided that “the City will evaluate all responsive proposals per the evaluation criteria and weights” listed in Section 16.3, reproduced in Table 1, below. In Phase 2, the RFP provided that the City will evaluate Proposers on the basis of a Financial Proposal and Oral Presentation.

**Table 1**

Description	Weight	
	Phase 1	Phase 2
Quality of proposal	5%	
Experience of firm	25%	
Expertise of team assigned to project	25%	
Technical / Project Approach	25%	
Value added products/capabilities	20%	
Financial Proposal incl. Management Fee, Capital Investments, and City Subsidy, if any		50%
Oral Presentations		50%
<b>TOTAL</b>	<b>100%</b>	<b>100%</b>

The facial problem with this Phase 1/Phase 2 approach is the fact that it artificially inflates the importance of the Financial Proposal and Oral Presentation, while it negates the importance of the other evaluation criteria. By dividing the RFP into two “100% weights,” the evaluation of Proposers at Phase 2, and ultimately the Project award, is limited *solely* to consideration of the Financial Proposal and Oral Presentation. The City confirms this reading of Table 1 in its Notice of Intended Award:

Phase 2: In this phase of the evaluation process, *scores were reset and 100% of the final award recommendation was based on the Phase 2 scores* which consisted of an Oral Presentation (50% weight) and Financial Proposal (50% weight).

(Emphasis added.)

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By *resetting* the scores, the criteria relied upon to *get* a Proposer to Phase 2 (i.e., quality of the proposal, experience of the firm, expertise of the team, technical/project approach, and value added) *are not even considered* in making the final Project award. Given the significance of the Phase 1 criteria, it is illogical, and arguably absurd, that none of these criteria would contribute to the City's comparison of the final two (2) Proposers against each other. The weighing methodology applied by the City ignores half of the relevant criteria and risks awarding the Project on an arbitrary and capricious basis. This result is surely not what the City intended as it does not further the City's goal of selecting the best overall proposal.

These flaws are well illustrated by comparing the City's evaluation criteria to those used by other jurisdictions in awarding similar projects. For example, in August of 2018, the City of Sacramento issued an RFP for construction management services for its convention center renovation and expansion project.<sup>2</sup> Like the City, Sacramento utilized a two-phase evaluation approach, summarized in the table on the following page.

*[see next page]*

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<sup>2</sup> (City of Sacramento RFP, August 2018, [https://www.ebidboard.com/docs/1809/060071/SCC%20CCT%20RFP\\_CM%20SERVICES-Final%208-30-18.pdf](https://www.ebidboard.com/docs/1809/060071/SCC%20CCT%20RFP_CM%20SERVICES-Final%208-30-18.pdf) [last accessed February 1, 2019].)

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**Table 2**

<b>WRITTEN PROPOSAL</b>	<b>MAXIMUM POINTS</b>	<b>REVIEWER SCORE</b>
<b>Introductory Letter</b> – Reflects project understanding and summarizes critical issues, challenges, milestone tasks, and appropriate resourcing.	<b>5</b>	
<b>Project Team</b> – Team organization, qualifications and experience of the firm, project manager, team, and sub-consultants on similar projects. Experience with City procedures and team has worked together on past projects.	<b>20</b>	
<b>Availability</b> - Key personnel are available and committed to the project	<b>5</b>	
<b>Workplan</b> – Assignment, understanding, and organization of tasks, understanding of interrelationship of critical tasks, hour commitment to each task, deliverables.	<b>25</b>	
<b>Quality Control</b> - Consultant’s internal controls, communications with City are adequate and timely, and provide assurance for complete submittals.	<b>5</b>	
<b>SUBTOTAL FOR SHORTLISTING</b>	<b>60</b>	
<b>References</b> – See worksheet	<b>10</b>	
<b>SUBTOTAL TO INTERVIEWS</b>	<b>70</b>	
<b>INTERVIEW (if requested by City)</b>		
<b>Presentation by PM</b> - Project understanding, critical issues, innovation, and solutions.	<b>10</b>	
<b>Presentation by team</b> – Experience, roles and responsibilities, communication and coordination between team members, agencies, and City.	<b>10</b>	
<b>Q&amp;A</b> – Response to panel’s questions.	<b>10</b>	
<b>SUBTOTAL WITH INTERVIEWS</b>	<b>30</b>	
<b>LBE 5% Preference Points (Local firms only)</b>	<b>5</b>	
<b>TOTAL</b>	<b>105</b>	
<b>RANKING OF CONSULTANT FIRM (assigned after completion of scoring)</b>		
<b>Name of Evaluator:</b>	<b>Date Evaluated:</b>	

Like the City, Sacramento’s RFP procedure consisted of a Phase 1 written proposal and Phase 2 interviews. However, the critical difference is the fact that Sacramento’s final ranking was based on the *combined* Phase 1 and Phase 2 scores and awarded the project to the “highest *overall*

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*ranked* firm.” In Sacramento, the Phase 1 written proposal contributed up to 60 points to the final score and the Phase 2 interview contributed up to 30 points to the final score, with the remaining 10 points being awarded for references. Unlike the City’s RFP procedure, Sacramento guaranteed that the final Project award was based on the Phase 1 *and* Phase 2 factors. Stated otherwise, Sacramento imposed a 60:30 ratio of Phase 1 to Phase 2 criteria in making its final Project award, while the City imposed a 0:100 ratio of Phase 1 to Phase 2 criteria.

As another example, in September of 2018, the City of Riverside issued a RFP for a 7.6 acre development project, including a convention center expansion.<sup>3</sup> Riverside also implemented a Phase 1/Phase 2 procedure. In Phase 1, seven (7) evaluation criteria were analyzed on a weighted scale. In Phase 2, Riverside conducted interviews for at least the top two (2) responsive Proposers. However, unlike the City, Riverside *re-scored* the interviewees’ proposals using the same seven (7) evaluation criteria after the interviews to make its final award. The City of Oakland utilized a similar procedure in its September of 2014 RFP for the rehabilitation and reuse of its convention center.<sup>4</sup> After the Phase 2 interviews, the evaluation panel scored the submittals using the same Phase 1 evaluation criteria. In doing so, Riverside and Oakland guaranteed that the final Project awards were based on the *combined* Phase 1 *and* Phase 2 criteria.

These three (3) examples highlight the issues with the City’s Phase 1/Phase 2 RFP procedure, which artificially discounted the important Phase 1 criteria in awarding the Project. In correcting its evaluation criteria, the City should look to these examples to ensure the final Project award is based on all relevant factors and avoid an arbitrary and capricious award.

## **B. Failure to Consider Relevant In-State Experience.**

The City’s evaluation procedure set forth in Table 1 is additionally flawed for its failure to consider the Proposers’ relevant convention center experience in the State of California. Sourcing convention center management and operations services from entities with relevant, in-state experience should be of great value to the City and its taxpayers. However, this important factor is *not* included in the evaluation criteria or even mentioned in the RFP, including in RFP Attachment B – Statement of Qualifications.

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<sup>3</sup> (City of Riverside RFP, September 18, 2018, <https://www.riversideca.gov/cedd/pdf/Lot-33-RFP.pdf> [last accessed February 1, 2019].)

<sup>4</sup> (City of Oakland RFP, September 22, 2014, <http://www2.oaklandnet.com/oakca1/groups/ceda/documents/webcontent/oak049322.pdf> [last accessed February 1, 2019].)

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The City’s failure to consider relevant in-state experience directly prejudiced SMG. SMG manages several *full service* convention centers in California, as demonstrated below:

**Table 3**

Name	City	State	Seating
<b>Convention Centers</b>			
Moscone Center	San Francisco	CA	742,000
Long Beach Convention Center	Long Beach	CA	224,000
Palm Springs Convention Center	Palm Springs	CA	130,600
Fresno Convention Center	Fresno	CA	96,000
Ontario Convention Center	Ontario	CA	90,000
Valdez Hall	Fresno	CA	32,000

The City discounted SMG’s relevant experience and instead chose to award the Project to Spectra, which has no apparent experience in the California convention center industry. While Spectra undeniably has a presence in California, stadiums and fairgrounds do not pose the same unique challenges as convention center operations and management services, including but not limited to, clients served, event types hosted, level of service expectations, and role the venue plays in the overall economic health of the hospitality community it serves. The City’s failure to evaluate this aspect of SMG’s proposal is imprudent and should be reconsidered.

**C. Failure to Disclose Phase 2 Evaluation Criteria.**

As discussed above, the Oral Presentations and Financial Proposals were given undue weight by the City, each constituting 50% of the final Project award. However, the relative importance of the Oral Presentations and Financial Proposal was not communicated in the RFP and was not foreseeable by the Proposers. Despite the RFP’s rubric of the Phase 1 criteria, it does not provide a similar breakdown of how the Oral Presentations or Financial Proposals will be scored, *despite the fact* that the City apparently has a delineated rubric of the same. The Notice of Intended Award includes a table summarizing the criteria considered in scoring each Proposer’s Oral Presentation and Financial Proposal:

**Table 4**

CRITERIA	Spectra	SMG
<i>Oral Presentation (50%):</i>		
General Marketing	8.8	8.1
Transition Plan	8.0	8.6
Financial Plan	8.3	8.7
Community Benefits	9.2	7.6
Overall Presentation	9.0	8.2
<b>Subtotal Oral Presentation</b>	<b>43.3</b>	<b>41.2</b>
<i>Financial Proposal (50%):</i>		
Financial Plan	11.1	10.3
Management Fee	11.3	10.2
Financial Resources	10.7	10.1
Other Submissions	10.6	10.1
<b>Subtotal Financial Proposal</b>	<b>43.7</b>	<b>40.7</b>
<b>Final Phase 2 Score</b>	<b>87.0</b>	<b>81.9</b>

Remarkably, this information was *not* provided to the Proposers in either the RFP or the Phase 2 – Oral Presentation Agenda. The Phase 2 scoring criteria clearly should have been communicated to the Proposers *prior* to undertaking the Oral Presentation and Financial Proposal. Providing the scoring criteria only after the successful Proposer had been chosen could be interpreted as a post-hoc rationalization of the City’s award. Given that the *appearance of favoritism* undermines the integrity of the public bidding process and can result in a City’s award being invalidated, such post-hoc rationalizations should be avoided.<sup>5</sup>

**D. Lack of Transparency in Identifying all Evaluation Criteria.**

In total, the City relied on thirteen (13) unique criteria in evaluating the proposals in Phases 1 and 2:<sup>6</sup>

1. Quality of proposal (Phase 1)
2. Experience of firm (Phase 1)
3. Expertise of team assigned to project (Phase 1)
4. Technical/project approach (Phase 1)
5. Value added products/capabilities (Phase 1)

<sup>5</sup> (*Advanced Real Estate Services, Inc. v. Superior Court* (2011) 196 Cal.App.4th 338, 353 [citing *Schram Construction, Inc. v. Regents of University of California* (2010) 187 Cal.App.4th 1040, 1049].)

<sup>6</sup> See Table 1, Table 4.



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6. General marketing (Phase 2)
7. Transition plan (Phase 2)
8. Financial plan (Phase 2)
9. Community benefits (Phase 2)
10. Overall presentation (Phase 2)
11. Management fee (Phase 2)
12. Financial resources (Phase 2)
13. Other submissions (Phase 2)

By artificially dropping the Phase 1 criteria from its final consideration (see Section A, *supra*) and failing to disclose the Phase 2 criteria in advance (see Section C, *supra*), the City obscured the “big picture” of the evaluation procedure. In the interest of transparency in its bidding process, the City should have fully disclosed its comprehensive evaluation criteria in a single rubric, like that used by Sacramento. (See Table 2.)

#### **E. Inequitable Weighing of Phase 2 Evaluation Criteria.**

In addition to the procedural concerns pertaining to the undisclosed Phase 2 criteria, the substance appears likewise flawed. Per Table 4, the Oral Presentation and Financial Proposal component criteria are equally weighted. This approach is inconsistent with the RFP.

Several sections of the RFP address the substantive factors the City will rely on in awarding the Project, including Section 15.9 (management and operations plan), Section 15.10 (marketing plan/sales plan), and Section 15.11 (transition plan). Each of these factors is thoroughly explained in the RFP and Proposers are given additional direction on how to provide information responsive to each. To a Proposer, this indicates that such items should be more heavily emphasized and that the Project award may depend, in large part, on the Proposer’s responsiveness to these factors. Conversely, there is *no mention* in the RFP of several of the determinative Phase 2 criteria listed in Table 2. For example, “community benefits,” which accounted for the largest scoring discrepancy between SMG and Spectra, *is not mentioned, at all, in the body of the RFP*. It is patently unfair for the City to place equal weight on two criteria, one of which is extensively addressed in the RFP (i.e., transition plan), and the other of which is not mentioned at all (i.e., community benefits).

Likewise, the Phase 2 – Oral Presentation Agenda misled the Proposers regarding the relative importance of the evaluation criteria. The agenda indicates that Proposers should allot their time as follows: forty (40) minutes to general and marketing, thirty (30) minutes to the transition plan, thirty (30) minutes to the financial plan, and *only* fifteen (15) minutes to community benefits. The Proposers might reasonably interpret this time allocation to suggest the relative importance and therefore scoring weight of the criteria. Simply put, the City’s materials do not accurately reflect the City’s scoring priorities and misled the Proposers.



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Further, the City should have placed greater weight on the most important criteria, namely the transition plan, marketing plan, and financial plan. It is unquestionable the Proposers' financial performance and ability to effectively transition personnel systems are of the greatest priority in ensuring the Project's long-term viability. It is hard to imagine that the City's taxpayers would find a Proposer's presentation style and/or community benefits to be equally important in expending City resources as the Project's financial viability.

The error in not emphasizing the Proposers' transition plans, marketing plans, and financial plans is even more apparent when viewed alongside the City's September 18, 2018 audit of the Convention Center's operations and management, attached as **Exhibit "A."** The audit reveals marked concerns with the Convention Center's financial management:

[T]he Contractor's financial management of the CVB's [convention/visitor services] operations has weaknesses in its internal controls, especially in the area of bill payment, while its information management activities have structural gaps that if addressed, could enhance managerial decision-making.<sup>7</sup>

In reference to the marketing plan, the audit states:

A key change needed to increase the SCCC's operational sustainability and performance is to update the overall marketing strategy. . . . Both the SCCC and the CVB operate as separate entities and could benefit from an integrated and comprehensive marketing plan.<sup>8</sup>

The audit recommends that the City implement a "comprehensive and integrated business and marketing strategy," among others, to ensure the Convention Center's success.<sup>9</sup> In a November 27, 2018 presentation of the audit's findings, attached as **Exhibit "B,"** the City recommended that it "[p]artner with the Chamber to successfully *transition* Convention Center/CVB to a potential new operator."<sup>10</sup>

In light of the audit, the City should have placed *greater* emphasis on the Convention Center's known weaknesses, including the transition plan, marketing plan, and financial plan, in awarding the Project. The failure to do so, but instead weigh these crucial factors equally with presentation style and/or community benefits, is a clear error on the City's part.

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<sup>7</sup> See Exhibit A, p. 2.

<sup>8</sup> See Exhibit A, p. 2.

<sup>9</sup> See Exhibit A, p. 3.

<sup>10</sup> See Exhibit B, p. 21 (emphasis added).

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#### **F. Flaws in Conducting the Oral Presentations.**

The Proposers were unable to adequately prepare for the Oral Presentations given the misleading information provided by the City. The Phase 2 – Oral Presentation Agenda describes the meeting formal as “informal.” This fact, combined with the City’s failure to disclose the Phase 2 evaluation criteria, rendered it impossible for Proposers to know that ten-percent (10%) of the final Phase 2 scoring would be determined by the “overall presentation.” The Oral Presentations should not have been advertised as informal when the City knew that the Proposers’ performance at the presentations would account for at least ten-percent (10%) of their decision to award the Project.

Further, the structure of the Oral Presentations prejudiced SMG as compared to Spectra. The RFP provided that Proposers may submit proposals either with or without CVB. However, the Phase 2 – Oral Presentation Agenda *did not* provide a different agenda or time allotment for those Proposers with CVB, such as SMG, or without CVB, such as Spectra. In essence, SMG had *twice as much* material to cover in its Oral Presentation as Spectra did, and its presentation had to address the more complicated content of the CVB. By requiring SMG to present this information in the same timeframe as Spectra, the City, in essence, dictated that SMG’s presentation of its proposal was more rushed and thus more susceptible to negative scoring by the City. The evaluation team also heavily questioned SMG on the CVB content, further adding to its time constraints. It was inherently unfair to hold SMG and Spectra to the same presentation agenda given the differing amounts of information each was responsible for presenting, particularly as the Oral Presentation accounted for *fifty-percent* (50%) of the final Project award. A more equitable result would have been to allow SMG proportionally more time to present its proposal.

The inequity of this result is even more apparent in light of the Best and Final Offer (“BAFO”) request issued to SMG by the City on January 22, 2019. The BAFO request indicated that the City had decided the CVB services would not be considered in the final award. Thus, SMG was not only prejudiced by allotting its Oral Presentation time to CVB, but the material it covered during that time would not even be considered in the final Project award. By requiring SMG to cover twice as much material as Spectra during its presentation, and then discounting half of that material from the final consideration, the City essentially allotted SMG *half as much time* as Spectra to address the information that would ultimately determine the Project award.

#### **G. Illusory Consideration of the “Best and Final Offer”**

The timing of the BAFO and the Notice of Intended Award is troubling. On January 17, 2019, the City requested that SMG submit a BAFO by the deadline of January 22, 2019. Per the City’s instructions, SMG submitted the BAFO to Mr. Giovannetti on January 22, 2019 at 5:35 p.m. The *day after the BAFO was submitted*, on January 23, 2019 at 5:00 p.m., the City issued its Notice of Intended Award. Given the complexity and magnitude of this Project, it is hard to

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imagine that the City was able to meaningfully analyze SMG's BAFO *and* independently verify the Proposers' financial projections in *less than twenty-four (24) hours*. The City's independent verification was essential as the financial performance projections submitted by SMG and Spectra in the BAFOs were vastly dissimilar, particularly the Net Operating Income ("NOI"). SMG's extensive California experience reveals that Spectra's claimed nearly \$3,000,000.00 NOI is unachievable and unprecedented. It was incumbent on the City to meaningfully compare and independently verify these projections prior to awarding the Project, and it is difficult to imagine that it did so in such a short period of time.

This fact is even more concerning given that the Notice of Intended Award was not scheduled to be released, per the RFP's timeline of events, until February 4, 2019. It would appear that not only did the City provide only a cursory and rushed review of SMG's BAFO, but it did so *without reason*. The City had *additional twelve days* in which it could have fully and fairly analyzed SMG's BAFO or requested further negotiations, yet it declined to do so. This fact only confirms the City's apparent post-hoc rationalization of the predetermined Project award. By all appearances, the BAFO request was a mere formality issued after the City had made up its mind to award the Project to Spectra.

#### **H. Failure to Define Bid Protest Procedures.**

Finally, the City has unfairly restricted SMG's ability to file this bid protest by failing to clearly outline the bid protest procedures. Section 3.1.4 of the Procurement and Contract Process Integrity and Conflict of Interest Guidelines, attached and incorporated into the RFP, requires that the Notice of Intended Award include instructions for filing a protest. The City did not comply with this requirement. As a result, counsel for SMG was forced to contact Mr. Giovannetti, personally, to clarify the procedures for filing a protest. The City has needlessly introduced uncertainty into the bid protest procedure and has prejudiced SMG by the same.

#### **II. Conclusion.**

In light of the foregoing, SMG is understandably concerned by the procedure used to award the Project to Spectra. The flawed evaluation criteria, withheld information, and illusory consideration of SMG's BAFO are sufficient to raise, at the very least, the appearance of an arbitrary and capricious Project award. SMG respectfully submits these concerns to the City and asks that it take either one of the following actions:

1. Overturn the Notice of Intended Award to Spectra and reopen the RFP to the public for the submission of proposals, using the corrected evaluation criteria recommended herein; or

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2. Overturn the Notice of Intended Award to Spectra and continue negotiations with the final two Proposers in consideration, SMG and Spectra, to ultimately renegotiate the best and final offer for the City in a transparent and fair manner.

Respectfully submitted,

RUTAN & TUCKER, LLP



Ash Pirayou

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