



Legislation Text

File #: 2018-0037, Version: 1

DATE: April 10, 2018

SUBJECT:

- A) RESOLUTION SELECTING PROTEA PROPERTY MANAGEMENT, INC. AS THE SUCCESSFUL PROPOSER OF THE REQUEST FOR PROPOSALS (RFP 17-52ME, WATERFRONT RETAIL OPPORTUNITY) (RFP) AND CONCLUDING THE RFP, RESERVING CERTAIN RIGHTS THEREUNDER**
- B) RESOLUTION AUTHORIZING PROPERTY MANAGEMENT AGREEMENT BETWEEN THE SAN DIEGO UNIFIED PORT DISTRICT AND PROTEA PROPERTY MANAGEMENT, INC. (PROTEA) ENDING JUNE 30, 2021 WITH TWO OPTIONS TO EXTEND BY ONE YEAR EACH AND GRANTING PROTEA A LIMITATION OF LIABILITY AND A WAIVER OF CONSEQUENTIAL AND EXEMPLARY DAMAGES**

EXECUTIVE SUMMARY:

On Monday, August 28, 2017, staff issued the Request for Proposals (RFP 17-52ME, Waterfront Retail Opportunity) (RFP)¹ for the interim management and operations of Seaport Village (Seaport) after the lease with Seaport Village Operating Company, LLC (SVOC)² expires on September 30, 2018, which is currently managed by Terramar Retail Centers, LLC (TRC). Seaport consists of approximately 90,000 square feet of specialty retailers, restaurants, outdoor entertainment, and parking on an approximately 14-acre Bayfront site located at 849 West Harbor Drive in San Diego, CA (Site) (Attachment A). The District received three complete proposals from Gafcon, Inc. on behalf of Protea Property Management, Inc. (Protea), NewMark Merrill Companies (NewMark), and Stream Realty Partners, L.P. (Stream).

At the January 9, 2018 meeting, the Board of Port Commissioners (Board) conditionally selected Protea as the successful proposer to the RFP, subject to the Board's approval of a renegotiated management fee that does not include an incentive management fee, a transition fee, or leasing commissions (as the Board directed staff to remove leasing services from the scope of services). The Board's conditional selection of Protea did not conclude the RFP and the RFP remains open until the Board takes action to conclude it.

On January 24, 2018, staff received a revised management fee proposal (Revised Proposal) from Protea, which is further discussed in the Discussion section below. As a result of staff's negotiations, Protea reduced their management fee by over 50% and the District Costs were reduced by over 70%. Staff subsequently negotiated a property management agreement with Protea for the interim management and operations of Seaport that would end on June 30, 2021 with two options to extend by one year each (Property Management Agreement). The District agreed to limit Protea's liability under the Property Management Agreement to Five Million Dollars (\$5,000,000) and waive claims for consequential, incidental, special or exemplary damages due to the age and condition of the

structures and infrastructure on the Site. The limitation of consequential damages excludes attorneys' fees and costs paid under the indemnity provisions of the Agreement.

Based on the Board's conditional selection of Protea and the Revised Proposal, staff recommends that the Board make their final selection of Protea as the successful proposer, conclude the RFP process and authorize the Property Management Agreement with Protea ending on June 30, 2021 with two options to extend by one year each. The Board has the discretion to accept, modify or reject staff's recommendation. If the Board selects Protea as the successful proposer, this would conclude the RFP process; however, it is recommended that in making such a selection, the District reserve all of its rights under the RFP and as permitted under law.

RECOMMENDATION:

- A) Adopt a Resolution Selecting Protea Property Management, Inc. as the Successful Proposer of the RFP and Concluding the RFP, Reserving Certain Rights Thereunder; and,
- B) Adopt a Resolution Authorizing Property Management Agreement Between the San Diego Unified Port District and Protea Property Management, Inc. Ending June 30, 2021 with Two Options to Extend By One Year Each and Granting Protea a Limitation of Liability and a Waiver of Consequential and Exemplary Damages, Excluding Consequential Damages for Attorneys' Fees and Costs Paid Under the Indemnity Provisions of the Property Management Agreement.

FISCAL IMPACT:

Based on Protea's Revised Proposal, and using assumptions based on Seaport's current operations, staff expects that if the District were to enter into an agreement with Protea for the management and operations of Seaport, the estimated fiscal impact to the District for the initial three-year term could be approximately:

District Costs (rounded)	District Net Revenue Potential (rounded)
\$753,800	\$30,543,900

"District Costs" are and shall be defined as Protea's management fees.

"District Net Revenue Potential" includes and shall be defined as: total Seaport revenue, less Seaport expenses and District Costs.

COMPASS STRATEGIC GOALS:

As part of efforts to support a vibrant and active waterfront, the District initiated a public solicitation process for the interim management and operation of Seaport between the time SVOC's lease expires and the time the redevelopment of the Site begins. Due to the high profile nature of Seaport, it is important to test the market and undertake a competitive process to ensure that Seaport's

potential is maximized.

This agenda item supports the following Strategic Goals:

- A Port that the public understands and trusts.
- A vibrant waterfront destination where residents and visitors converge.

DISCUSSION:

On Monday, August 28, 2017, staff issued the RFP and launched a national marketing campaign that reached nearly one million people. The RFP invited proposals from firms to manage and operate Seaport on the District's behalf for a three-year term, with two potential options to extend by one year each.

On October 12, 2017, the District received seven proposals from across the country and four of the seven were deemed incomplete, as the proposers did not submit one or more of the required documents, such as: lessee questionnaire, representative sites, or proposal components outlined in the RFP. The following three proposers were deemed complete:

- Protea
- NewMark
- Stream

At the January 9, 2018 meeting, the Board conditionally selected Protea as the successful proposer to the RFP, subject to the Board's approval of a renegotiated management fee that does not include an incentive management fee, a transition fee, or leasing commissions (as the Board directed staff to remove leasing services from the scope of services). The Board's conditional selection of Protea did not conclude the RFP and the RFP remains open until the Board takes action to conclude it.

Protea's Revised Management Fee Proposal

Following the Board meeting, staff commenced negotiations with Protea for the Property Management Agreement. On January 24, 2018, staff received a Revised Proposal that reduced the base management fee to 1.7% with a monthly minimum management fee of \$10,000 from the date the agreement commences. Therefore, if the District were to enter into an agreement with Protea prior to October 1, 2018, Protea would charge a minimum monthly fee of \$10,000 through September 30, 2018 as the District would not be collecting Seaport's revenues during this time. As per the RFP, the services that would be rendered to the District by Protea through the Property Management Agreement for the period prior to October 1, 2018 would include, but are not limited to: facilitate annual building inspections, transition planning and implementation with current operator; budgeting and budget monitoring; manage parking in accordance with the Reciprocal License and Use Agreement³; establish and implement a marketing and activation program for attracting visitors and the community to Seaport. When the District begins collecting revenues on October 1, 2018, Protea would receive a management fee equal to 1.7% of gross revenues through the remaining term of the agreement with a \$10,000 monthly minimum. The Property Management Agreement defines gross revenue as payments received from tenants for: rent payable under the leases, use of parking spaces, common area expenses, and late charges collected by Protea (unless excluded by gross

revenue exclusions outlined in the Property Management Agreement).

Staff requested that the District's economic consultant Jones Lang LaSalle, Inc. (JLL) prepare a report explaining the breakdown of staff's financial analysis as it relates to Protea's original proposal submitted with the RFP (Original Proposal) (Attachment B) and Revised Proposal (JLL Report) (Attachment C). Some portions of Protea's Original Proposal remain confidential pending the completion of negotiations. The redacted version of Protea's Original Proposal is attached as Attachment B. The JLL Report provides a detailed breakdown of District Costs and District Net Revenue Potential for each of the proposals. A comparative summary of anticipated District Costs and District Net Revenue Potential for an initial three-year term, based on current Seaport operating assumptions, is provided below for Protea's Original Proposal and Protea's Revised Proposal.

	District Costs (rounded)	District Net Revenue Potential (rounded)
Protea Original Proposal (including commissions)	\$2,413,400	\$28,884,200
Protea Revised Proposal (excluding commissions)	\$753,800	\$30,543,900

Property Management Agreement for Management and Operations of Seaport

Staff negotiated the Property Management Agreement (Attachment D) which includes services that were identified in the RFP that Protea would be required to complete both before and after the lease with SVOC expires on September 30, 2018. Such services include, but are not limited to, property management responsibilities, financial accounting and management services, reporting responsibilities, parking responsibilities, and marketing and activation responsibilities. Under the Property Management Agreement, Protea would be required to submit to the District, for the District's approval, an operating budget for Seaport within thirty (30) days following the execution of the Property Management Agreement and no later than December 1 of each year of the term of the Property Management Agreement. It should be noted that the Property Management Agreement would require Protea to maintain all records related to Seaport in a location satisfactory to the District and accessible in real-time to the District twenty-four (24) hours per day, seven (7) days per week through a password protected, online portal.

As described in Protea's Revised Proposal above, Protea would receive a management fee equal to \$10,000 per month from the commencement date of the Property Management Agreement through October 1, 2018. After October 1, 2018, Protea would receive a management fee equal to 1.7% of the gross revenue generated by Seaport (subject to negotiated exclusions), but in no event less than \$10,000 per month. The District agreed to limit Protea's liability under the Property Management Agreement to Five Million Dollars (\$5,000,000) and waive claims for consequential, incidental, special or exemplary damages due to the age and condition of the structures and infrastructure on the Site. The limitation of consequential damages excludes attorneys' fees and costs paid under the indemnity provisions of the Agreement.

The Property Management Agreement provides the Executive Director of the District or her designee with the right to administratively terminate the Property Management Agreement, with or without

cause, and without incurring any liability whatsoever to Protea for any damage or loss, including without limitation, lost profits, by giving Protea one (1) day prior written notice if (a) the Exclusive Negotiating Agreement⁴ between the District and Protea (ENA) expires or is terminated and a Definitive Agreement (as defined in the ENA) is not executed by the District and 1HWY1⁵, the selected developer for the redevelopment of the Central Embarcadero, prior to or concurrently with the expiration or termination of the ENA; (b) the District and 1HWY1 enter into a Definitive Agreement (as defined in the ENA) and the Definitive Agreement expires or is terminated; or (c) there is an Uncured Default, as defined in the Property Management Agreement. If, at any time, the Executive Director of the District or her designee does not desire to proceed with the Property Management Agreement for any other reason not previously addressed, the Executive Director shall seek the direction of the Board to terminate the Property Management Agreement.

In the event the Property Management Agreement were to terminate or expire, Protea would have certain obligations to the District, including but not limited to, cooperation with the District for a period of sixty (60) days after such expiration or termination to transition Seaport and the services back to the District.

Staff Recommendation

Based on the Board's conditional selection of Protea and the Revised Proposal, staff recommends that the Board make their final selection of Protea as the successful proposer, conclude the RFP process and authorize the Property Management Agreement with Protea ending on June 30, 2021 with two options to extend by one year each.

Next Steps

The Board has the discretion to accept, modify or reject staff's recommendation. If the Board selects Protea as the successful proposer of the RFP and conclude the RFP process, the RFP process would conclude, but the District would reserve all of its rights under the RFP and as permitted under law.

General Counsel's Comments:

The General Counsel's Office has reviewed this agenda sheet and the Property Management Agreement as presented and approves this agenda sheet and the Property Management Agreement as to form and legality.

Environmental Review:

The Board action, including without limitation, consenting to a management agreement does not constitute an "approval" or a "project" under the definitions set forth in California Environmental Quality Act (CEQA) Guidelines Sections 15352 and 15378 because no direct or indirect changes to the physical environment would occur. CEQA requires that the District adequately assess the environmental impacts of projects and reasonably foreseeable activities that may result from projects prior to the approval of the same. Any project developed as a result of Board's action or direction that requires the District or the Board's discretionary approval resulting in a physical change to the environment will be analyzed in accordance with CEQA prior to such approval. CEQA review may result in the District, in its sole and absolute discretion, requiring implementation of mitigation

measures, adopting an alternative, including without limitation, a “no project alternative” or adopting a Statement of Overriding Consideration, if required. The current Board action in no way limits the exercise of this discretion. Therefore, no further CEQA review is required.

In addition, the proposed Board action complies with Section 87 of the Port Act, which allows for visitor-serving commercial and industrial uses and purposes, and the construction, reconstruction, repair, and maintenance of commercial and industrial buildings, plants, and facilities. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board action is consistent with the Public Trust Doctrine.

The proposed Board action does not allow for “development,” as defined in Section 30106 of the California Coastal Act, or “new development,” pursuant to Section 1.a. of the District’s Coastal Development Permit (CDP) Regulations because they will not result in, without limitation, a physical change, change in use or increase the intensity of uses. Therefore, issuance of a CDP or exclusion is not required. However, development within the District requires processing under the District’s CDP Regulations. Future development, as defined in Section 30106 of the Coastal Act, will remain subject to its own independent review pursuant to the District’s certified CDP Regulations, Port Master Plan, and Chapters 3 and 8 of the Coastal Act. The Board’s action in no way limits the exercise of the District’s discretion under the District’s CDP Regulations. Therefore, issuance of a CDP or exclusion is not required at this time.

Equal Opportunity Program:

Due to limited known sub opportunities, no SBE goal was established for this agreement.

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Attachment(s):

Attachment A:	Location Map
Attachment B:	Protea Original Proposal
Attachment C:	JLL Report
Attachment D:	Property Management Agreement

¹Request for Proposals (RFP) RFP 17-52ME Waterfront Retail Opportunity, filed with the Office of the District Clerk as Document No. 67492.

²Lease between District and Seaport Village Operating Company, LLC, on file in the Office of the District Clerk as Document No. 11337, as amended.

³Reciprocal License and Use Agreement between District and Seaport Village Operating Company, LLC, on file in the Office of the District Clerk as Document No. 64492.

⁴Exclusive Negotiating Agreement between District and Protea Waterfront Development, LLC, on file in the Office of the District Clerk as Document No. 67343.

⁵Some or all of the principals of Protea Property Management, Inc. are also members of the entity Protea Waterfront Development, LLC, which is expected to be the managing member of 1HWY1, the selected developer for the redevelopment of the Central Embarcadero.