

**MEMORANDUM  
NO. 2023-012**

TO: ANNE GERWIG, MAYOR  
MICHAEL NAPOLEONE, VICE MAYOR  
MICHAEL DRAHOS, COUNCILMAN  
JOHN MCGOVERN, COUNCILMAN  
TANYA SISKIND, COUNCILWOMAN

CC: Jim Barnes  
Senior Staff  
Chevelle Addie

FROM: Laurie S. Cohen *L.S.C.*

DATE: May 18, 2023

RE: Blue Road / Project Lighthouse P3 Proposal

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As a follow up to my comments at the May 9, 2023 Council meeting concerning the proposal submitted by Blue Road for the Project Lighthouse development, I requested that Mark Stempler, Esq., our outside counsel for purchasing and procurement matters, review the proposal and give an opinion concerning whether it meets the requirements of Section 255.065, Florida Statutes. Attached is a memorandum prepared by Mr. Stempler containing his opinion.

If you have any questions regarding this, or any other matter, please do not hesitate to contact me.

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West Palm Beach, FL 33401  
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**Becker**

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## MEMORANDUM

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**Attorney-Client Privileged**

**TO:** Laurie Cohen, Village Attorney  
**FROM:** Mark J. Stempler  
**DATE:** May 16, 2023  
**RE:** Unsolicited Proposal Received Regarding a Performing Arts Center

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Laurie,

You asked us to examine whether Blue Road's unsolicited proposal for the development of a Wellington Performing Arts Complex could be considered a qualifying project under Florida law. In sum, it does not appear that this unsolicited proposal meets the statutory definition of a qualifying project.

The unsolicited proposal received from Blue Road on or about May 9, 2023, includes the construction of a performing arts building. In addition, the project includes a residential building with dedicated parking, office space, retail space, and a commercial parking lot.

A "qualifying project" as defined in Section 255.065(1)(i), and incorporated into the Village's Purchasing Manual, is defined as:

1. A facility or project that serves a public purpose, including, but not limited to, any ferry or mass transit facility, vehicle parking facility, airport or seaport facility, rail facility or project, fuel supply facility, oil or gas pipeline, medical or nursing care facility, recreational facility, sporting or cultural facility, or educational facility or other building or facility that is used or will be used by a public educational institution, or any other public facility or infrastructure that is used or will be used by the public at large or in support of an accepted public purpose or activity;
2. An improvement, including equipment, of a building that will be principally used by a public entity or the public at large or that supports a service delivery system in the public sector;
3. A water, wastewater, or surface water management facility or other related infrastructure; or

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4. Notwithstanding any provision of this section, for projects that involve a facility owned or operated by the governing board of a county, district, or municipal hospital or health care system, or projects that involve a facility owned or operated by a municipal electric utility, only those projects that the governing board designates as qualifying projects pursuant to this section.

In my opinion, and based on my review of the issues, the proposed performing arts center would likely be considered a cultural facility or recreational facility pursuant to the qualifying project definition. However, there are several components of this proposal that appear to fall outside the definition. The residential and office building component would likely not serve the public at large per se, but rather a defined and paying segment. Further, the residential and office buildings would not be operated, or maintained by the Village. Whether the buildings were owned by the Village would not change the analysis because the Village would not be operating the buildings. Further, the proposed retail space, though arguably serving the public, would not be operated or maintained by the Village.

While there are public private partnerships which involve residential living, I have not located a similar project in scope which considered construction of the exact or similar facilities. There is very little authority regarding the interpretation of the definition of a qualifying project.

For the reasons set forth above, we do not believe that the unsolicited proposal from Blue Road meets the definition of a qualifying project under the public/private partnership Florida statute incorporated in to the Village's Purchasing Manual.

In addition, the documents submitted do not appear to meet the definition of a proposal under Section 255.065(1)(h), Fla. Stat. "Proposal" means a plan for a qualifying project with detail beyond a conceptual level for which terms such as fixing costs, payment schedules, financing, deliverables, and project schedule are defined. Payment Schedules were not provided in the proposal, and the financing may arguably be submitted at a conceptual level. A similar argument could be made regarding the project schedule which was submitted. The project also does not provide significant detail regarding the design or construction of the project. We can examine this further if the Village is considering the project as a qualifying project.

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In addition, you asked us to examine whether if this proposal were accepted, it could be challenged by a person or entity who does not otherwise respond to an advertisement to provide these services. Pursuant to the Purchasing Manual, a "prospective" bidder or proposer may submit a protest in writing to the Purchasing Manager challenging the terms, conditions or specifications of a solicitation. This is more commonly known as a specification challenge. Though not expressly stated, this provision could arguably apply to unsolicited proposals which either transition either into a competitive procurement if accepted by the Village, or which are advertised pursuant to the public notification period for two weeks in a newspaper of general circulation and the Florida Administrative Register, per Section 255.065(3)(b), Fla. Stat.. The challenge or protest period for solicitation challenges would arguably begin to run and would expire three (3) days

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after the solicitation is advertised likely for the second time in the newspaper and Florida Administrative Register.

Also, note that pursuant to the Village's Purchasing Manual, should the Village reject or otherwise decide not to consider an unsolicited proposal, such decision shall not be grounds for a protest.