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April 2, 2015

Via E-Mail and Hand-Delivery
Mayor John P. "Jack" Seiler
Vice Mayor Romney Rogers
Commissioner Bruce Roberts
Commissioner Dean Trantalis
Commissioner Robert McKinzie
City of Fort Lauderdale
100 N. Andrews Avenue
Fort Lauderdale, FL 33301

ALL COMMISSIONERS RECEIVED

Re: Unsolicited Proposal for Las Olas Marina Expansion and Integrated Mixed-Use Project ("Las Olas Marina Expansion") - by LOMMXD, LLC ("LOMMXD")

Dear Mayor and Commissioners:

On April 18, 2014, our client LOMMXD submitted to the Fort Lauderdale City Commission (the "Commission") an unsolicited proposal for a public-private partnership to construct, develop, operate, and own the Las Olas Marina Expansion (the "Proposal"). The Proposal was submitted pursuant to Fla. Stat. §287.05712 (the "P3 Legislation"). In compliance with the City of Fort Lauderdale's (the "City") Res. 13-187, LOMMXD paid $25,000.00 upon submission of the Proposal (the "Application Fee").

The intent of this letter is to provide the City and the Commission a summary regarding the required procedures governing unsolicited proposals submitted pursuant to the P3 legislation after the Proposal was submitted and the Application Fee accepted.

The P3 Legislation became effective on July 1, 2013. It was enacted to provide Florida's cities and towns with the ability to enter into "public-private partnerships" to make improvements through "qualifying projects." The P3 Legislation expressly states as follows:

> [T]here are inadequate resources to develop new educational facilities, transportation facilities, water or wastewater management facilities and infrastructure, technology infrastructure, roads, highways, bridges, and other public infrastructure and government facilities for the benefit of residents of this state, and that a public-private partnership has demonstrated that it can meet the needs by improving the schedule for delivery, lowering the cost, and providing other benefits to the public.

Fla. Stat. § 287.05712(2)(a) 2. The P3 Legislation additionally provides a legislative finding that there is public need for a timely and cost-effective creation of projects serving a public need and purpose, and that "such public need may not be wholly satisfied by existing procurement methods." Fla. Stat. § 287.05712(2)(a)1.

The P3 Legislation goes so far as to provide Procurement Procedures. These Procurement Procedures govern the creation of public-private partnerships for the development or operation of a "qualifying project". A "responsible public entity" (which under the statute includes municipalities) may receive unsolicited proposals for qualifying projects upon the payment of a "reasonable application fee". *See also* House of Representatives Final Bill Analysis HB 85 (stating that "[t]he bill provides that a responsible public entity may receive unsolicited proposals **or** may solicit proposals for qualifying projects and may thereafter enter into an agreement with a private entity...").

Subsection 4 of the P3 Legislation specifically sets forth the procedure after receipt of an unsolicited proposal. Upon such receipt, the responsible public entity is limited to the following procedure for the continued solicitation of the qualifying project:

> [I]f the public entity receives an unsolicited proposal for a public-private project and the public entity intends to enter into a comprehensive agreement for the project described in such unsolicited proposal, the public entity shall publish notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for 2 weeks stating that the public entity has received a proposal and will accept other proposals for the same project.

Fla. Stat., § 287.05712(4). The timeframe within which the public entity is permitted to accept competitive proposals is determined on a "project-by-project" basis; "however, the timeframe for allowing other proposals [may not be] more than 120 days, after the initial date of publication." Fla. Stat., § 287.05712(4). Section 287.05712(6)(c) further establishes that following receipt of an unsolicited proposal, the only mechanism for soliciting further proposals is pursuant to the notice provision quoted above. Upon expiration of the public notification period, the responsible public entity "shall rank the proposals received in order of preference." Only after such a ranking, does the law permit the responsible public entity to engage in negotiations with the highest ranked firms, and if negotiations fail, may move on to the second highest ranked firm, and so on as necessary.

Pursuant to subsection (3)(f), while the City could have "adopt[ed] guidelines **so long as such guidelines are not inconsistent with [the statute]**", the City did not adopt any further guidelines except for establishment of the Application Fee approved pursuant to Res. 13-187. In the Agenda Memo for Res. 13-187, the City Manager stated, "**changes were enacted to Section 287.05712, Florida Statutes creating Public-Private Partnerships....because of these changes, it is no longer necessary for the City to enact its own ordinance regarding unsolicited proposals...[other than] to establish a reasonable application fee.**"

Florida courts have repeatedly held in a variety of contexts that where the legislature expressly provides a statutory requirement, the municipality must adhere to the statutory requirement. *See e.g., City of Miami v. Romfh*, 63 So. 440 (Fla. 1913) (finding that an express statutory requirement of the issuance of public notice through publication prior to the issuance of municipal bonds was not merely "formal and directory" and that the statutory procedure "cannot be dispensed with"); *City of Ocala v. Red Oak Farm, Inc.*, 636 So. 2d 81 (Fla. 4th DCA 1994) (finding a municipality could not take property through the power of eminent domain because the municipality did not "strictly compl[y]" with the express statutory requirements concerning a petition in eminent domain); *Sharpe, Inc. v. Neil Spear, Inc.*, 611 So. 2d 66 (Fla 1st DCA 1992) (holding that a statute requiring certain claimants on a public construction project to provide the contractor with pre-suit notices was "clear and unambiguous," and that a claimant that failed to comply with the statutory notices was precluded from bringing an action under Florida law). Under the plain language of Subsection 4 of the P3 Legislation, if the City has received an unsolicited proposal in accordance with the requirements of that statute and accepted the Application Fee, Florida law requires that the municipality must consider that proposal. *See also Koile v. State*, 934 So. 2d 1226, 1230 (Fla.

2006) (noting that while interpreting a statute, one must always begin with the "actual language of the statute itself").

Subsection (4)(d) of the P3 Legislation also provides criteria to be considered by a public body during evaluation of a proposal:

> 1. Is the proposal in the public's best interest.
>
> 2. Is the proposal for a facility that is owned by the responsible public entity or for a facility for which ownership will be conveyed to the responsible public entity.
>
> 3. Are adequate safeguards in place to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of the agreement by the responsible public entity.
>
> 4. Are adequate safeguards in place to ensure that the responsible public entity or private entity has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes.
>
> 5. Will the facility be owned by the responsible public entity upon completion or termination of the agreement and upon payment of the amounts financed.

Fla. Stat. § 287.05712(4)(d). So long as the proposal satisfies the above criteria, the notice procedure provided in subsection (4) of the P3 Legislation **must** be employed.

LOMMXD began its discussions regarding the subject property with the City Manager in February 2014. After discussions with the City Manager, on April 18, 2014 LOMMXD submitted the Proposal pursuant to the P3 Legislation and paid the Application Fee. As a result, under the express language of the P3 Legislation, we believe the City must consider that proposal. If the City elects to seek competitive proposals, then it may do so only pursuant to the notice procedure quoted above.

After an unsolicited proposal has been submitted and the Application Fee has been paid, the City must follow the strict procedure enunciated under Florida law in considering that proposal and providing notice for competitive proposals. The notice requirement mandated by the P3 Legislation is the sole method for the City to seek competitive proposals.

Thank you for your consideration of this analysis. If you have any comments or questions, or if we can provide any additional information, please do not hesitate to contact me.

Very truly yours,

Stephanie J. Toothaker

SJT:msh

cc: Lee R. Feldman, City Manager
Cynthia A. Everett, City Attorney
John Herbst, City Auditor
Jenni Morejan, Director of Department of Sustainable Development
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