From:	William Clague
To:	Damon Moore
Cc:	Mitchell Palmer; Alex Nicodemi; Charlie Hunsicker; Juliet Shepard
Subject:	Hidden Harbour Mitigation Site Agreement; CAO Matter No. 2020-0213
Date:	Wednesday, June 10, 2020 4:10:27 PM
Attachments:	Hidden Harbour Mitigation Agreement (CAO Comments).pdf

Damon:

Pursuant to the above Request for Legal Services you have asked this Office to review a cooperative agreement (Agreement) between the Southwest Florida Water Management District (SWFWMD) and the County for funding of mitigation activities on the County's Hidden Harbour property. I provide the following advice in response to the RLS:

1. The Agreement follows a standard SWFWMD form that has been accepted by our Office in past transactions. In our experience, SWFWMD, as a grantor for such projects, is reluctant to agree to significant changes to its form. I have therefore limited my review to legal concerns that could give rise to claims against the County.

2. Attached are marked pages reflecting my suggested changes, which are limited to matters of clarification.

3. Staff should carefully review the business terms to assure that it is prepared to perform them. Staff should pay particular attention to Sections 5.1 and 6.1, which I have flagged in my mark up, as these sections impose considerable ongoing obligations on the County.

4. The RLS states that the Parks and Natural Resources Department intends to enter into the Agreement. As we have advised in the past, the County is the correct party to the Agreement (as reflected in the document), and the Agreement should be approved by the Board and executed by the Chairperson or the County Administrator.

Subject to resolution of the concerns identified above, I have no objection from a legal standpoint to the Agreement being scheduled for consideration by the Board. I express no opinion as to the business judgment of entering into the Agreement.

This concludes my response to the RLS. Please let me know if you have any questions or concerns.

William Clague, Chief Assistant County Attorney
Manatee County Attorney's Office
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Bradenton, FL 34205
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CAO Comments
06/10/09

AGREEMENT NO: 19CN0002597

COOPERATIVE AGREEMENT
BETWEEN THE
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT
AND
MANATEE COUNTY
FOR
HIDDEN HARBOUR FDOT MITIGATION SITE UPLAND BUFFER RESTORATION AND SITE MANAGEMENT AND MAINTENANCE (D040)

THIS COOPERATIVE AGREEMENT (Agreement) is made and entered into by and between the SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, a public corporation of the State of Florida, whose address is 2379 Broad Street, Brooksville, Florida 34604-6899, hereinafter referred to as the "DISTRICT," and MANATEE COUNTY, a political subdivision of the State of Florida, whose address is 1112 Manatee Avenue West, Bradenton, Florida 34205, hereinafter referred to as the "COUNTY."

WITNESSETH:

WHEREAS, the COUNTY proposed a project to the DISTRICT for funding consideration under the DISTRICT'S Florida Department of Transportation Mitigation Program; and

WHEREAS, the project consists of upland restoration and maintenance of wetlands that is comprised of approximately 44.25 acres located on the north side of the Manatee River, in Manatee County, hereinafter referred to as the "PROJECT"; and

WHEREAS, DISTRICT funding for the PROJECT includes funds from the Florida Department of Transportation (FDOT), Catalog of State Financial Assistance number: CSFA 55.031.

NOW THEREFORE, the DISTRICT and the COUNTY, in consideration of the mutual terms, covenants and conditions set forth herein, agree as follows:

1. <u>PROJECT CONTACTS AND NOTICES.</u>

Each party hereby designates the individual set forth below as its prime contact for matters relating to this Agreement. Notices and reports shall be sent to the attention of each party's prime contact as set forth herein by U.S. mail, postage paid, by nationally recognized overnight courier, or personally to the parties' addresses as set forth below. Notice is effective upon receipt.

Contract Manager for the DISTRICT:
Philip Rhinesmith
Southwest Florida Water Management District
2379 Broad Street
Brooksville, Florida 34604-6899

progression of the PROJECT the DISTRICT determines that it is likely that the Measurable Benefit, as set forth in the Project Plan, will not be achieved, the DISTRICT shall provide the COUNTY with fifteen (15) days advance written notice that the DISTRICT shall withhold payments to the COUNTY until such time as the COUNTY demonstrates that the PROJECT shall achieve the required resource benefits, to provide the COUNTY with an opportunity to cure the deficiencies.

3.8 The DISTRICT has ~~not~~ no obligation and shall not reimburse the COUNTY for any costs under this Agreement until the Notice to Proceed with construction has been issued to the COUNTY'S contractor.

3.9 Each COUNTY invoice must include the following certification, and the COUNTY hereby delegates authority by virtue of this Agreement to its Project Manager to affirm said certification:

> "I hereby certify that the costs requested for reimbursement, as represented in this invoice, are directly related to the performance under the Hidden Harbour FDOT Mitigation Site Upland Buffer Restoration and Site Management and Maintenance (D040) agreement between the Southwest Florida Water Management District and Manatee County (Agreement No. 19CN0002597), are allowable, allocable, properly documented, and are in accordance with the approved Project Budget. This invoice includes $_____ of contingency funds expenditures. The COUNTY has been allocated a total of $_____ in federal, state, local or grant monies for the PROJECT (not including DISTRICT funds) and $_____ has been allocated to this invoice, reducing the DISTRICT'S share to $_____."

3.10 Any travel expenses which may be authorized under this Agreement shall be paid in accordance with Section 112.061, Florida Statutes (F.S.), as may be amended from time to time. The DISTRICT shall not reimburse the COUNTY for any purpose not specifically identified in the Scope of Work Paragraph. Surcharges added to third party invoices are not considered an allowable cost under this Agreement. Costs associated with in-kind services provided by the COUNTY are not reimbursable by the DISTRICT and may not be included in the COUNTY'S share of funding contributions under this Agreement.

4. <u>COMPLETION DATES.</u>

The COUNTY shall commence and complete the PROJECT and meet the task deadlines in accordance with the Project Schedule, including any extensions of time provided by the DISTRICT in accordance with the Project Contacts and Notices Paragraph of this Agreement. In the event of hurricanes, tornados, floods, acts of God, acts of war, or other such catastrophes, or other man-made emergencies such as labor strikes or riots, which are beyond the control of the COUNTY, the COUNTY'S obligations to meet the time frames provided in this Agreement shall be suspended for the period of time the condition continues to exist. During such suspension, this Agreement shall remain in effect. When the COUNTY is able to resume performance of its obligations under this Agreement, in whole or in part, it shall immediately give the DISTRICT written notice to that effect and shall resume performance no later than two (2) working days after the notice is delivered.

The suspension of the COUNTY'S obligations provided for in this Paragraph shall be the COUNTY'S sole remedy for the delays set forth herein.

5. REPAYMENT.

5.1 The COUNTY shall repay the DISTRICT all funds the DISTRICT paid to the COUNTY under this Agreement, if: a) the COUNTY fails to complete the PROJECT in accordance with the terms and conditions of this Agreement, including failing to meet the Measurable Benefit; b) the DISTRICT determines, in its sole discretion and judgment, that the COUNTY has failed to maintain scheduled progress of the PROJECT thereby endangering the timely performance of this Agreement; c) the COUNTY fails to appropriate sufficient funds to meet the task deadlines, unless extended in accordance with Subparagraph 1 of the Project Contacts and Notices Paragraph; or d) a Paragraph or Paragraphs of this Agreement setting forth the requirements or expectations of a Measurable Benefit resulting from the PROJECT is held to be invalid, illegal or unenforceable during the term of this Agreement, including the duration of the operation and maintenance obligations set forth in this Agreement. Should any of the above conditions exist that require the COUNTY to repay the DISTRICT, this Agreement shall terminate in accordance with the procedure set forth in the Default Paragraph.

See comments

5.2 Notwithstanding the above, the parties acknowledge that if the PROJECT fails to achieve the Measurable Benefit specified in this Agreement, the COUNTY may request the DISTRICT Governing Board to waive the repayment obligation, in whole or in part.

5.3 In the event the COUNTY is obligated to repay the DISTRICT under any Paragraph of this Agreement, the COUNTY shall repay the DISTRICT within a reasonable time, as determined by the DISTRICT in its sole discretion.

5.4 The COUNTY shall pay attorneys' fees and costs incurred by the DISTRICT, including appeals, as a result of the COUNTY'S failure to repay the DISTRICT as required by this Agreement.

5.5 This Repayment Paragraph, including all subparagraphs, shall survive the expiration or termination of this Agreement.

6. OPERATION AND MAINTENANCE.

6.1 The COUNTY shall be responsible for the perpetual operation and maintenance of the completed PROJECT facilities, to ensure the proper maintenance and hydrologic operation of the PROJECT, and to conform to all the conditions specified in the environmental permits issued for the PROJECT, in such a manner that the Measurable Benefit as set forth in Project Plan is maintained. In the event the PROJECT is not operated and maintained for a minimum of twenty (20) years, the COUNTY shall pay the DISTRICT an amount of five percent (5%) of total DISTRICT monies contributed to the PROJECT for each year or a fraction thereof for early termination of the PROJECT. The rights and remedies in this Paragraph are in addition to any other rights and remedies provided by law or this Agreement.

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6.2 Within thirty (30) days after construction is completed, the COOPERATOR shall provide the DISTRICT with construction record drawings, signed and sealed by a professional engineer, certifying that the Measurable Benefit has been achieved. COUNTY The COUNTY shall provide the DISTRICT with an operation and maintenance plan that ensures that the Measurable Benefit will be maintained. Every two (2) years following the completion of the PROJECT, the COUNTY shall generate a report describing the operations and maintenance activities that took place during the reporting period that certifies that the Measurable Benefit set forth in the Project Plan has been maintained. The COUNTY'S obligation to generate reports shall continue until the expiration of the 20-year operation and maintenance period.

6.3 The DISTRICT retains the right to audit any certification and the COUNTY shall provide documentation as requested by the DISTRICT to support its certification that the Measurable Benefit has been maintained.

6.4 This Operation and Maintenance Paragraph, including all subparagraphs, shall survive the expiration or termination of this Agreement.

7. CONTRACT PERIOD.

2020 ?

This Agreement shall be effective July 1, 2019 and will remain in effect through June 30, 2023, or upon satisfactory completion of the PROJECT and subsequent reimbursement to the COUNTY, whichever occurs first, unless amended in writing by the parties. The COUNTY shall not be eligible for reimbursement for any work that is commenced, or costs that are incurred, prior to the effective date of this Agreement.

8. PROJECT RECORDS AND DOCUMENTS.

Each party shall allow public access to PROJECT documents and materials made or received by either party in accordance with the Public Records Act, Chapter 119, F.S. Should either party assert any exemption to the requirements of Chapter 119, F.S., the burden of establishing such exemption, by way of injunction or other relief as provided by law shall be upon the asserting party. The COUNTY, upon request, shall permit the DISTRICT to examine or audit all PROJECT related records and documents during or following completion of the PROJECT at no cost to the DISTRICT. These records shall be available at all reasonable times for inspection, review, or audit. "Reasonable" shall be construed according to circumstances, but ordinarily shall mean normal business hours of 8:00 a.m. to 5:00 p.m., local time, Monday through Friday. In the event any work is subcontracted, the COUNTY shall similarly require each subcontractor to maintain and allow access to such records for inspection, review, or audit purposes. Payments made to the COUNTY under this Agreement shall be reduced for amounts found to be not allowable under this Agreement by an audit. If an audit is undertaken by the DISTRICT, all required records shall be maintained until the audit has been completed and all questions arising from it are resolved. The COUNTY will maintain all such records and documents for at least five (5) years following completion of the PROJECT. If an audit has been initiated and audit findings have not been resolved at the end of the five (5) years, the records shall be retained until resolution of the audit findings, which would include an audit follow-up by the inspector general if the findings result from an external auditor, or

or Paragraphs of this Agreement setting forth the requirements or expectations of a Measurable Benefit resulting from the PROJECT is held to be invalid, illegal or unenforceable during the term of this Agreement, this Agreement shall terminate in accordance with Subparagraph 1 of the Repayment Paragraph. This Paragraph shall survive the expiration or termination of this Agreement.

25. DISCRIMINATION.

Pursuant to Subsection 287.134(2)(a), F.S., an entity or affiliate who has been placed on the discriminatory vendor list may not submit a bid, proposal, or reply on a contract to provide any goods or services to a public entity; may not submit a bid, proposal, or reply on a contract with a public entity for the construction or repair of a public building or public work; may not submit bids, proposals, or replies on leases of real property to a public entity; may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity; and may not transact business with any public entity. The COUNTY agrees to include this Paragraph in all contracts issued as a result of this Agreement.

26. SCRUTINIZED COMPANIES.

Pursuant to Section 287.135, F.S., a company that, at the time of submitting a bid or proposal for a new contract or renewal of an existing contract, is on the Scrutinized Companies that Boycott Israel List, or is engaged in a boycott of Israel, is ineligible to, and may not bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental entity for goods or services in any amount. If the goods or services are in the amount of $1 million dollars or more, the company must also not be on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List or be engaged in business operations in Cuba or Syria. By signing this Agreement, the COUNTY certifies that it is not on any of the lists or engaged in any of the prohibited activities identified above, as applicable based upon the amount of this Agreement. The COUNTY agrees to notify the DISTRICT if it is placed on any of the applicable lists or engages in any of the prohibited activities during the term of this Agreement. The DISTRICT may immediately terminate this Agreement at its option if the COUNTY is found to have submitted a false certification, is placed on any of the applicable lists or engages in any prohibited activities.

27. COMPENSATORY TREATMENT MITIGATION.

The PROJECT shall not be used by the COUNTY or any other entity as compensatory water quality treatment or wetland mitigation, or any other required mitigation due to impacts for any projects. The PROJECT shall not be used for WUP withdrawal credits. In the event the PROJECT is used for compensatory water quality treatment or mitigation or WUP withdrawal credits in violation of this Paragraph, the COUNTY shall repay the DISTRICT all funds the DISTRICT paid to the COUNTY under this Agreement. The PROJECT can be used for self-mitigation due to impacts specifically associated with the construction of the PROJECT. This Paragraph shall survive the expiration or termination of this Agreement.

(except as expressly described in the Project Plan)