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MEMORANDUM

DATE: August 6, 2020
TO: Robert Brown, Environmental Protection Division Manager
Parks and Natural Resources Department
THROUGH: Mitchell O. Palmer, County Attorney Approved by *M. Palmer 8-7-2020*
FROM: Sarah E. Warren, Assistant County Attorney Approved by *S. Warren*
RE: **Restore America's Estuaries grant contract for Lake Manatee
Watershed Improvement Project; CAO Matter No. 2020-0276**

The Parks and Natural Resources Department requested legal review of a Grant Agreement between Manatee County and the Restore America's Estuaries for Lake Manatee Watershed Improvement Project.

Brief Answer:

I have reviewed the draft agreement and find it to be legally sufficient. Because there were no specific legal issues raised in the Request for Legal Services, I have limited my review to identifying legal issues and concerns that could result in a misunderstanding or dispute, or give rise to a claim or case against the County. Therefore, I recommend revising the draft as reflected in the attached mark-up. I express no opinion as to the business judgment of entering into the Agreement.

Discussion and Recommendations:

A grant has been awarded to Manatee County in the amount of \$175,000.00 for the Lake Manatee Watershed Improvement Project on Duette Preserve through the Tampa Bay Environmental Restoration Fund, which is to be managed by the Tampa Bay Estuary Program (TBEP) and Restore America's Estuaries (RAE). While the draft agreement is legally sufficient, I recommend that the Department request the following revisions as reflected in the attached mark-up. My comments are further explained below

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for your consideration:

1. Title and Introduction: In the title, an “E” was added to the word, MANATEE. Also, in the first paragraph, extra spaces were added so that the day and month could be written in. It further appears that RAE is a 501(c)(3) organization, so we have added that information after the entity’s name in the Introductory section.
2. Section 4 gives RAE authority to deny payments if it determines that expected resource benefits are not achieved. I have added language that would tie payments to the Scope of Work (Exhibit A).
3. Be careful about starting work before the contract starts. No costs can be incurred prior to the Agreement effective date, pursuant to Section 5.
4. Section 7 is entitled “Requirements of Section 287.058,” a Florida statute that applies to local government procurements. It applies when a government entity hires a contractor to perform services on the government’s behalf. Section 287.058, F.S. would not apply to a private sector entity, which is procuring services *from* the County. (This statute would have been applicable in an agreement with the Tampa Bay Estuary Program, which is a government entity.) The County would agree to these provisions, but the reference to the statute should be deleted.
5. Section 8 is entitled “Contract Data, Documents, Patent, and Copyrights,” but there is no mention of patents or copyrights in this section. In any event, the County cannot promise non-disclosure of public records unless they are exempt under the law.

We also recommend deleting the sentence in Section 8 that states, “The CONTRACTOR shall not use any of the data or reports developed pursuant to this agreement *without the express written consent of RAE.*” (emphasis added) The County is bound by the provisions of the Public Records Act, which require us to retain, preserve, and make available all public records for copying and inspection upon request. We could not agree to withhold reports or data that constitute public records until we have permission from RAE, nor could we monitor or limit the use of these documents by the public.

6. In Section 9(b), the Public Records Act would seem to prevent us from allowing another entity to remove documents from our premises. We can copy the documents upon RAE’s request. A change is not required in 9(c), but be aware that this section gives RAE the right to require additional reports, beyond what is required in the Agreement or the attached scope of work.
7. Section 12, Funding Recognition, requires the County to obtain RAE’s

approval before it recognizes RAE for its contributions. We have not revised this section, but note that it would be more efficient if RAE provided the County with its guidelines in advance of the County's recognition efforts.

The second sentence applies to signage and requires recognition of Tampa Bay Environmental Restoration Fund; it does not mention recognizing RAE or Southwest Florida Water Management District (SWFWMD) in signage, or the Manatee County Board of County Commissioners (for providing matching funds). This would be worth a clarifying phone call or email prior to creating signs.

8. Pursuant to Section 14, Period of Agreement, the agreement begins on the effective date (perhaps August 11, 2020) and ends November 30, 2021. This seems to conflict with the Scope of Work, which discusses an 18-month term. While the end of the term is extended until "satisfactory completion of the project," you may want to lengthen the term to avoid any confusion on this issue.
9. Section 17, Termination, allows either party to terminate the agreement without cause, upon 15 days' notice. Moreover, RAE can terminate because of "lack of funds" with 24 hours' notice. Abrupt termination of the agreement could be problematic for the County if the County is dependent upon RAE funding to complete the project. We would recommend that, at a minimum, we seek some assurance and evidence that the funding has been approved and appropriated--before the County begins the project.

In addition, we revised Section 17 to include a new title and subsection that eliminates the need for several sentences in this Section. The revision requires the party terminating the agreement (for no cause or for lack of funds) to provide immediate notice to the other party via telephone or email. This is to compensate for the minimal 24-hour notice of termination in the Agreement when there is a lack of funds.

10. In Section 23, Notices, we revised this section to allow for use of email, U.S. Mail, or other postal delivery services for regular communications. This removes the requirement that "All notices and other communications" be sent only via hand delivery or certified mail.
11. We have deleted a sentence in Section 25 that states, "Nothing in this agreement shall be effective if contrary to Federal or Florida law". We have replaced it with a severability clause, which severs from the agreement any provisions that are in violation of the law, but leaves all other provisions intact. The second sentence regarding governing law should remain where it is.
12. Signature blocks have been revised to reflect County standards.

13. In reviewing a similar contract two years ago, Assistant County Attorney Katharine Zamboni suggested that recitals (“whereas” clauses) be added to describe the relationship between the parties. We suggest that you do the same here, adding a clause that describes the relationship between RAE and the Tampa Bay Estuary Program.
14. We added a phrase to the end of the section on subcontractors to note that written consent of RAE to subcontract portions of this Agreement shall not be unreasonably withheld.
15. We added that the parties who sign the agreement must have the authority to legally execute and bind the parties to this Agreement.
16. A few revisions were made to the Scope of Work, Exhibit A. Please see redlined contract version for those minor corrections.

Conclusion:

The draft grant agreement is legally sufficient, but we recommend that the County incorporate the revisions shown in the attached redlined agreement to resolve the legal concerns we address in this memo. This concludes my response to this Request for Legal Services. Should you have any further questions or if I can be of further assistance, please do not hesitate to contact this Office.

SEW

Enclosures

Copies to: Cheri Coryea, County Administrator
John Osborne, Deputy County Administrator
Karen Stewart, Deputy County Administrator
Charlie Hunsicker, Director, Parks and Natural Resources Department