
From: William Clague
Sent: Friday, June 23, 2017 1:14 PM
To: Charlie Hunsicker
Cc: Mitchell Palmer; Alex Nicodemi; Juliet Shepard
Subject: FDEP Agreements; RLS-2017-0341
Attachments: Agr No. 17ME3 - CAO Comments dtd 6.23.17.pdf

Charlie:

Pursuant to the above Request for Legal Services you have asked this office to review two grant agreements (Agreements) between the Florida Department of Environmental Protection (FDEP) and the County. One of the Agreements (17ME2) provides for FDEP funding of a portion of the cost of a feasibility study for dredging in Passage Key Inlet. The other Agreement (17ME3) provides for FDEP funding of a portion of the cost of permitting jetty improvements in Longboat Pass. The Agreements were originally scheduled for approval by the Board without legal review. Mr. Palmer asked that you defer action on them and submit them for review, to allow our office to address the issues described below.

I provide the following advice in response to the RLS:

1. Attached are marked pages of one of the Agreements (17ME3) reflecting my comments and suggested changes, which apply to both Agreements as they are virtually identical.
2. The Agreements follow standard FDEP forms. In our experience, FDEP, as a grantor for such projects, is reluctant to agree to significant changes to its forms. Therefore, I have limited my substantive comments to those matters that could have a significant impact on the County's interests. The RLS notes that many of the terms are worded to favor FDEP's interests. While I agree with this interpretation, most of the terms are consistent with the practices of government agencies in providing grant funds.
3. I have flagged for concern Section 22.B (originally flagged by Mr. Palmer in his discussion with you), which authorizes FDEP to terminate the agreement "for convenience". In our view, a termination-for-convenience clause is not appropriate in a grant transaction where the County depends on the grant to fully fund work that is part of a capital project. The Agreements already provide a right of FDEP to terminate for cause, and make FDEP's obligations subject to legislative appropriation, such that Section 22.B is not needed to protect FDEP's legal interests. The County will extend its own finances to contract for the services to complete the work, and could be placed in the position of fully funding the work after undertaking it at FDEP's behest. Therefore, we advise that Section 22.B should be deleted from the Agreements.

If FDEP refuses to delete Section 22.B, then we would insist that, at the very least, the following language be added: "The LOCAL SPONSOR shall be reimbursed for all work undertaken and performed prior to the LOCAL SPONSOR'S receipt of notice of termination to the extent that it is otherwise eligible for reimbursement pursuant to this Agreement."

We also emphasize that the County should (a) place a termination-for-convenience clause in all of its agreements with contractors performing the grant-funded work, and (b) make sure that it has available funds budgeted to complete the work, to the extent that it will be unable to terminate the work mid-stream in the project. Finally, we advise that in any future FDEP grant for construction activities, a termination-for-

convenience clause should be submitted to this office for additional legal review because of the heightened risk of liability on the part of the County.

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

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

Bill Clague
Assistant County Attorney
Manatee County, Florida
ph. 941-745-3750
fx. 941-749-3089
william.clague@mymanatee.org

political subdivision
of the State of
Florida

AGREEMENT No: 17ME3
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER RESTORATION ASSISTANCE
BEACH MANAGEMENT FUNDING ASSISTANCE PROGRAM
STATE OF FLORIDA
GRANT AGREEMENT FOR
LONGBOAT PASS IMP IMPLEMENTATION (MANATEE COUNTY)

THIS AGREEMENT is entered into between the FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION (hereinafter referred to as the "DEPARTMENT" or "DEP"), whose address is 3900 Commonwealth Boulevard, MS 3601, Tallahassee, Florida 32399, and MANATEE COUNTY, a local government (hereinafter referred to as the "LOCAL SPONSOR"), whose address is 5502 33rd Avenue Drive West, Bradenton, Florida 34209, for the project described herein.

WHEREAS, the DEPARTMENT, pursuant to Sections 161.091 - 161.161, Florida Statutes (F.S.), provides financial assistance to eligible governmental entities for beach erosion control and inlet management activities under the Florida Beach Management Funding Assistance Program; and

WHEREAS, pursuant to 62B-36.005(2)(d), Florida Administrative Code (F.A.C.), the LOCAL SPONSOR has resolved to support and serve as local sponsor, has demonstrated a financial commitment, and has demonstrated the ability to perform the tasks associated with the for the beach erosion control project as described herein; and

WHEREAS, unencumbered FY 2012-2013 funds in the amount of \$131,250, have become available to provide for inlets projects in accordance with s. 161.143(5)(c), Florida Statutes; and

WHEREAS, the Longboat Pass IMP Implementation (Manatee County) project was the next unfunded project on the FY 2016/2017 Local Government Funding Request prioritized list of Inlet Management Projects.

NOW, THEREFORE, in consideration of the mutual benefits to be derived hereunder, the DEPARTMENT and the LOCAL SPONSOR do hereby agree as follows

1. The DEPARTMENT does hereby retain the LOCAL SPONSOR to implement the inlet management project known as the LONGBOAT PASS IMP IMPLEMENTATION (MANATEE COUNTY), (hereafter referred to as the PROJECT), as defined in Attachment A (Grant Work Plan), attached hereto and made a part hereof. The LOCAL SPONSOR does hereby agree to perform such services as are necessary to implement the PROJECT in accordance with the terms and conditions set forth in this Agreement, and all attachments and exhibits named herein that are attached hereto and incorporated by reference. For purposes of this Agreement, the terms "Grantee", "Recipient" and "Local Sponsor" are used interchangeably.
2. This Agreement shall begin on the last date executed and end on March 31, 2021. Pursuant to Section 161.101 (18), F.S., and 62B-36.009, F.A.C., work conducted on this PROJECT by the LOCAL SPONSOR or its subcontractor and approved by the DEPARTMENT beginning on or after October 25, 2016, may be eligible for reimbursement by the DEPARTMENT.
3. The LOCAL SPONSOR shall implement the PROJECT and complete said PROJECT upon the terms and conditions set forth in this Agreement and all present and future requisite authorizations and environmental permits. The PROJECT consists of feasibility study.

a

4. For tasks specified in Table 1 in Attachment A, the LOCAL SPONSOR shall develop a detailed Scope of Work, which shall include a narrative description of each task, a corresponding detailed budget for each deliverable under that task and a schedule for completion of each task and deliverable. Each Scope of Work shall be approved by the DEPARTMENT as to content, deliverables, and schedule prior to incorporating into Attachment A, as an amendment or change order to this Agreement pursuant to paragraph 39.
5. The DEPARTMENT has determined that 100 percent of the non-federal PROJECT cost is eligible for state cost sharing. Therefore, the DEPARTMENT's financial obligation shall not exceed the sum of \$131,250 for this PROJECT or up to 75 percent of the non-federal PROJECT cost, if applicable, for the specific eligible PROJECT items listed, whichever is less. Any indicated federal cost sharing percentage is an estimate and shall not affect the cost sharing percentages of the non-federal share. *
6. The DEPARTMENT and the LOCAL SPONSOR agree that any and all activities associated with the PROJECT that are not shown in the Grant Work Plan in Attachment A are the responsibility of the LOCAL SPONSOR and are not a part of this Agreement. The LOCAL SPONSOR agrees that any costs for the specific eligible PROJECT tasks that exceed the estimated PROJECT costs for that task shall be the responsibility of the LOCAL SPONSOR. Any modifications to the estimated TOTAL PROJECT COSTS shown in Attachment A, Table 1, shall be provided through formal amendment to this Agreement.
7. All notices and written communication between the parties shall be sent by electronic mail, United States Mail, a courier delivery service, or delivered in person. Notices shall be considered delivered when reflected by an electronic mail read receipt, a courier service delivery receipt, other mail service delivery receipt, or when receipt is acknowledged by recipient. Any notices between the parties shall be delivered to the contact person at the addresses below:

LOCAL SPONSOR

Charlie Hunsicker
Manatee County
5502 33rd Ave. Dr. West.
Bradenton, Florida 34209
(941) 745-3727
charlie.hunsicker@mymanatee.org

DEPARTMENT

Dena VanLandingham, Program Grant Administrator
Department of Environmental Protection
Beach Management Funding Assistance Program
3900 Commonwealth Blvd, MS 3601
Tallahassee, Florida 32399
(850) 245-2970
Dena.Vanlandingham@dep.state.fl.us

Any changes to the contact information for DEPARTMENT personnel shown above or in paragraph 8 must be reduced to writing in the form of an email notification from the DEPARTMENT.

8. The LOCAL SPONSOR's Project Manager for all matters is Charlie Hunsicker, Phone: (941) 745-3727. The DEPARTMENT's Project Manager for all technical matters is Vincent George. Phone: (850) 245-2972 and the DEPARTMENT's Program Grant Administrator for all administrative matters is Dena VanLandingham. Phone: (850) 245-2970.
9. The LOCAL SPONSOR shall perform as an independent contractor and not as an agent, representative, or employee of the DEPARTMENT.

termination, the DEPARTMENT shall provide ten (10) calendar days' written notice of its intent to terminate and shall provide the LOCAL SPONSOR an opportunity to consult with the DEPARTMENT regarding the reason(s) for termination.

- B. The DEPARTMENT may terminate this Agreement without cause and for its convenience by giving thirty (30) calendar days' written notice to the LOCAL SPONSOR. Notice shall be sufficient if delivered pursuant to paragraph 7 as set forth in this Agreement.
- C. The DEPARTMENT may terminate this Agreement in the event that all tasks identified in Attachment A, Grant Work Plan have been certified complete and approved by the DEPARTMENT, and all eligible reimbursements have been provided to the LOCAL SPONSOR. Prior to termination, the DEPARTMENT shall provide ten (10) calendar days' written notice of its intent to terminate and shall provide the LOCAL SPONSOR an opportunity to consult with the DEPARTMENT to verify that all eligible items have been completed and reimbursed.
23. No payment will be made for deliverables deemed unsatisfactory by the DEPARTMENT. In the event that a deliverable is deemed unsatisfactory by the DEPARTMENT, the LOCAL SPONSOR shall perform the services again as needed for submittal of a satisfactory deliverable, at no additional cost to the DEPARTMENT, within ten (10) calendar days of being notified of the unsatisfactory deliverable. If a satisfactory deliverable is not submitted within the specified timeframe, the DEPARTMENT may, in its sole discretion, either: 1) terminate this Agreement for failure to perform, or 2) the DEPARTMENT'S Project Manager may, by letter specifying the failure of performance under this Agreement, request that a proposed Corrective Action Plan (CAP) be submitted by the LOCAL SPONSOR to the DEPARTMENT. All CAPs must be able to be implemented and performed in no more than sixty (60) calendar days.
- A. A CAP shall be submitted within ten (10) calendar days of the date of the letter request from the DEPARTMENT. The CAP shall be sent to the DEPARTMENT'S Project Manager for review and approval. Within ten (10) calendar days of receipt of a CAP, the DEPARTMENT shall notify the LOCAL SPONSOR in writing whether the CAP proposed has been accepted. If the CAP is not accepted, the LOCAL SPONSOR shall have ten (10) calendar days from receipt of the DEPARTMENT letter rejecting the proposal to submit a revised proposed CAP. Failure to obtain the DEPARTMENT approval of a CAP as specified above shall result in the DEPARTMENT'S termination of this Agreement for cause as authorized in this Agreement.
- B. Upon the DEPARTMENT'S notice of acceptance of a proposed CAP, the LOCAL SPONSOR shall have ten (10) calendar days to commence implementation of the accepted plan. Acceptance of the proposed CAP by the DEPARTMENT does not relieve the LOCAL SPONSOR of any of its obligations under the Agreement. In the event the CAP fails to correct or eliminate performance deficiencies by LOCAL SPONSOR, the DEPARTMENT shall retain the right to require additional or further remedial steps, or to terminate this Agreement for failure to perform. No actions approved by the DEPARTMENT or steps taken by the LOCAL SPONSOR shall preclude the DEPARTMENT from subsequently asserting any deficiencies in performance. The LOCAL SPONSOR shall continue to implement the CAP until all deficiencies are corrected. Reports on the progress of the CAP will be made to the DEPARTMENT as requested by the DEPARTMENT'S Project Manager.
- C. Failure to respond to the DEPARTMENT'S request for a CAP or failure to correct a deficiency in the performance of the Agreement as specified by the DEPARTMENT may result in termination of this Agreement.

See Comments

- B. The LOCAL SPONSOR is hereby advised that the Federal and/or Florida Single Audit Act Requirements may further apply to lower tier transactions that may be a result of this Agreement. The LOCAL SPONSOR shall consider the type of financial assistance (federal and/or state) identified in Attachment E, Exhibit 1 when making its determination. For federal financial assistance, the LOCAL SPONSOR shall utilize the guidance provided under U.S. Office of Management and Budget (OMB) Circular A-133, Subpart B, Section 210 for determining whether the relationship represents that of a subrecipient or vendor. For state financial assistance, the LOCAL SPONSOR shall utilize the form entitled "Checklist for Nonstate Organizations Recipient/Subrecipient vs Vendor Determination" (form number DFS-A2-NS) that can be found under the "Links/Forms" section appearing at the following website:

<https://apps.fldfs.com/fsaa>

The LOCAL SPONSOR should confer with its chief financial officer, or audit director or contact the DEPARTMENT for assistance with questions pertaining to the applicability of these requirements.

27. In accordance with Section 216.347, F.S., the LOCAL SPONSOR is hereby prohibited from using funds provided by this Agreement for the purposes of lobbying the Legislature, the judicial branch or a state agency. Further, in accordance with Section 11.062, F.S., no state funds, exclusive of salaries, travel expenses, and per diem, appropriated to, or otherwise available for use by, any executive, judicial, or quasi-judicial department shall be used by any state employee or other person for lobbying purposes.
28. The LOCAL SPONSOR covenants that it presently has no interest and shall not acquire any interest that would conflict in any manner or degree with the performance of services required.
29. This Agreement has been delivered in the State of Florida and shall be construed in accordance with the laws of Florida. Wherever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law. If any provision of this Agreement shall be prohibited or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement. Any action hereon or in connection herewith shall be brought in Leon County, Florida.
30. No delay or failure to exercise any right, power or remedy accruing to either party upon breach or default by either party under this Agreement, shall impair any such right, power or remedy of either party. Nor shall such delay or failure be construed as a waiver of any such breach or default, or any similar breach or default thereafter.
31. To the extent required by law, the LOCAL SPONSOR will be self-insured against, or will secure and maintain during the life of this Agreement, Workers' Compensation Insurance for all of its employees connected with the work of this PROJECT. In the case any work is subcontracted, the LOCAL SPONSOR shall require the subcontractor similarly to provide Workers' Compensation Insurance for all of the subcontractor's employees unless such employees are covered by the protection afforded by the LOCAL SPONSOR. Such self-insurance program or insurance coverage shall comply fully with the Florida Workers' Compensation Law, Chapter 440, F.S. In case any class of employees engaged in hazardous work under this Agreement is not protected under Workers' Compensation statutes, the LOCAL SPONSOR shall provide, and cause each subcontractor to provide, adequate insurance satisfactory to the DEPARTMENT, for the protection of its employees not otherwise protected.
32. To the extent required by law, the Grantee will secure and maintain insurance coverages in the amounts and categories specified below, during the life of this Agreement. The Grantee shall provide documentation of any private insurance or self-insurance, as may be applicable to governmental

40. The LOCAL SPONSOR shall comply with all applicable federal, state and local rules and regulations in providing services to the DEPARTMENT under this Agreement. The LOCAL SPONSOR acknowledges that this requirement includes, but is not limited to, compliance with all applicable federal, state and local health and safety rules and regulations. The LOCAL SPONSOR further agrees to include this provision in all subcontracts issued as a result of this Agreement.

When applicable,

41. The LOCAL SPONSOR shall obtain from each owner of upland property, which is adjacent to the erosion control PROJECT, a sufficient property interest in order to construct, maintain, monitor, and repair the erosion control PROJECT prior to entering each individual property to conduct such activities.

an

42. If a force majeure occurs that causes delays or the reasonable likelihood of delay in the fulfillment of the requirements of this Agreement, the LOCAL SPONSOR shall promptly notify the DEPARTMENT orally. Within seven (7) calendar days, the LOCAL SPONSOR shall notify the DEPARTMENT in writing of the anticipated length and cause of the delay, the measures taken or to be taken to minimize the delay and the LOCAL SPONSOR's intended timetable for implementation of such measures. If the parties agree that the delay or anticipated delay was caused, or will be caused by a force majeure, the DEPARTMENT may, at its discretion, extend the time for performance under this Agreement for a period of time equal to the delay resulting from the force majeure upon execution of an amendment to this Agreement. Such agreement shall be confirmed by letter from the DEPARTMENT accepting, or if necessary, modifying the extension. A force majeure shall be an act of God, strike, lockout, or other industrial disturbance, act of the public enemy, war, blockade, public riot, lightning, fire, flood, explosion, failure to receive timely necessary third party approvals through no fault of the LOCAL SPONSOR, and any other cause, whether of the kind specifically enumerated herein or otherwise, that is not reasonably within the control of the LOCAL SPONSOR and/or the DEPARTMENT. The LOCAL SPONSOR is responsible for the performance of all services issued under this Agreement. Failure to perform by the LOCAL SPONSOR's consultant(s) or subcontractor(s) shall not constitute a force majeure event.

43. This Agreement and any Amendments or Change Orders to this Agreement may be executed in two or more counterparts, each of which together shall be deemed an original, but all of which together shall constitute one and the same instrument. In the event that any signature is delivered by facsimile transmission or by e-mail delivery of an electronic data file, such as Adobe Acrobat ® (.pdf), such signature shall create a valid and binding obligation of the party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or ".pdf" signature page were an original thereof, pursuant to Section 668.004, F.S.

44. State and federal monitoring required by permit is eligible for reimbursement pursuant to program statute and rule. In order to comply with Florida Auditor General report 2014-064 regarding conflicts of interest and to be consistent with Section 287.057(17)(a)(1), F.S., all monitoring data and statistical analysis must be provided directly and concurrently from the monitor to the DEPARTMENT/LOCAL SPONSOR/permittee/engineering consultant. The LOCAL SPONSOR's engineering consultant must provide an adequate mitigation plan, consistent with Section 287.057(17)(a)(1), F.S., including a description of organizational, physical, and electronic barriers to be used by the LOCAL SPONSOR's engineering consultant, that addresses conflicts of interest when contracting multi-disciplinary firms for PROJECT engineering and post-construction environmental monitoring services, or when the PROJECT engineering consultant firm subcontracts for post-construction environmental monitoring. Environmental monitoring includes hardbottom, seagrass, and mangrove resources. DEPARTMENT approval of the mitigation plan will be required prior to execution of this Agreement. If at any time the LOCAL SPONSOR and/or its engineering consultant fails to comply with this provision, the LOCAL SPONSOR agrees to reimburse the DEPARTMENT all funds provided by the DEPARTMENT associated with environmental monitoring for the PROJECT listed in Attachment A.

a political subdivision
of the State of Florida

IN WITNESS WHEREOF, the undersigned have signed and executed this Agreement on the respective dates under their signatures:

MANATEE COUNTY

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: Board of County Commissioners

By: _____
Department of Environmental Protection
Secretary or designee

By: _____
Title: Commission Chair

Print Name and Title

Print Designee Name and Title

Date: _____

Date: _____

FEID No. 59-6000727

Attest: Angelina Colonasso, Clerk
to the Board of County
Commissioners and Comptroller

Dena VanLandingham,
Program Grant Administrator

By: _____
Deputy Clerk

Vincent George,
DEP Project Manager

Local Sponsor's Attorney (if necessary)

Print Name and Title

*If someone other than the Commission Chair signs this Agreement, a resolution, statement or other documentation authorizing that person to sign the Agreement on behalf of the County/City must accompany the Agreement.

List of Attachments/Exhibits included as part of this Agreement:

Specify Type	Letter/ Number	Description (include number of pages)
Attachment	A	Grant Work Plan (2 pages)
Attachment	B	Contract Payment Requirements (1 page)
Attachment	C	Request for Payment, Parts I - IV (4 pages)
Attachment	D	Project Completion Certification (1 page)
Attachment	E	Special Audit Requirements (5 pages)