

O'Bryant, Thomas W

From: Erica Richards <Erica.Richards@swfwmd.state.fl.us>
Sent: Tuesday, April 11, 2017 11:25 AM
To: Mackesey, Brendan
Cc: O'Bryant, Thomas W; Burnes, Robert M
Subject: RE: Lake Seminole Restoration Project SWFWMD Agreement Amendment

Hi Brendan,

The District's indemnification is required language in our CFAs and we cannot agree to remove or alter it.

Please feel free to give me a call to discuss the potential issues you note below, I may be able to shed some light.

Thanks!

Erica E. Richards

Senior Attorney
813.985.7481 x 2139

From: Mackesey, Brendan [mailto:bmackesey@co.pinellas.fl.us]
Sent: Monday, April 10, 2017 11:48 AM
To: Erica Richards <Erica.Richards@swfwmd.state.fl.us>
Cc: O'Bryant, Thomas W <tobryant@co.pinellas.fl.us>; Burnes, Robert M <rburnes@co.pinellas.fl.us>
Subject: FW: Lake Seminole Restoration Project SWFWMD Agreement Amendment

Hey Erica:

The Pinellas County Attorney's Office is currently reviewing a CFA (N191) between SWFWMD and the County for a Lake Seminole Dredging Project (attached). Though titled as a new Agreement, this document is really more of a Second Amendment to the Original Agreement – which is attached along with the First Amendment thereto. Regardless, Section 10 of the CFA requires that the County indemnify SWFWMD under certain circumstances.

As outlined in County Resolution 06-70 (also attached), the County does not indemnify other parties under most circumstances. If County indemnification must be provided in the CFA, the County requests that the language provided in Section III of County Resolution 06-70 be used. Please confirm whether SWFWMD will delete the current indemnification language or alter it accordingly.

Another headsup: There a few other issues with the CFA that the County is hoping to resolve at the Staff level but may ultimately require your review. It follows that I've included an e-mail below summarizing said issues for your reference. There is quite a bit of history involving this Project -- feel free to call me if you'd like to discuss further.

Thanks as always for your prompt and professional assistance.

Regards

Brendan P. Mackesey

Assistant County Attorney

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From: Mackesey, Brendan

Sent: Monday, April 10, 2017 11:35 AM

To: Burnes, Robert M <rburnes@co.pinellas.fl.us>

Cc: O'Bryant, Thomas W <tobryant@co.pinellas.fl.us>

Subject: FW: Lake Seminole Restoration Project SWFWMD Agreement Amendment

Hey Rob,

As mentioned last week, Thom O'Bryant and I spotted a few issues with the attached Second Amendment (though titled as a new agreement, I will refer to it as the Second Amendment here) w/SWFWMD for the Lake Seminole Dredge Project. Some of these issues appear to be simple scrivener's errors, while others are more substantive. I will e-mail SWFWMD's attorney about removing SWFWMD's boilerplate indemnity language, but I think the other requested revisions are better suited to be directed to the applicable Project Manager (at least initially). With that said, I advise alerting the Project Manager to the following issues:

- First and second paragraphs on page 1: I presume the reason to backdate the effective date of this amendment to December 31, 2016 is because that is when the Original Agreement expired (see Original Agreement par. 6)? Backdating a contract—while legally proper in most circumstances— is generally not advisable. If this is SWFWMD's SOP/preference, however, I am OK with it in theory. In fact, it appears SWFWMD backdated the Original Agreement and First Amendment to same as well:
 - o The Original Agreement apparently became effective June 1, 2010 (see Original Agreement par. 6) despite not being fully executed until August 19, 2010.
 - o Likewise, despite not being fully executed until December 28, 2011, the first paragraph of the First Amendment to the Original Agreement does state that the First Amendment is effective as of October 1, 2011.
 - o It follows then, that I don't think the dates referenced in the first and second paragraphs on page 1 are *de facto* problematic, but it is advisable to get clarity as to why SWFWMD backdated the Original Agreement, First Amendment, and desires to do the same here (funding reasons I presume).
- Section 7 at bottom of page 3: Looks like "New Paragraph 28" ("Scrutinized Companies") should instead read "New Paragraph 27." This is because the Original Agreement appears to end at paragraph 26 ("Documents"); i.e., there is no paragraph 27.
- Section 8 middle of page 4: Using the same reasoning, should "New Paragraph 29" ("Severability") read "New Paragraph 28"?
- Section 9 at bottom of page 4: Now that we have a concrete estimate for the amount of organic sediments to be dredged – 903,500 cubic yards, as reflected in paragraph 2 of Section 9 – I advise striking the following sentence in paragraph 1 of Section 9: "These documents estimate that there are approximately 1 million cubic yards of organic sediments in the Lake."
- Section 9 at bottom of page 5. I advise striking or amending the sentence "The COUNTY will provide funding for all dredging costs beyond \$16,000,000." This sentence seems unnecessary given that Section 3 ("Funding") of the Original Agreement—as amended by Section 1 of Amendment 1 to the Original Agreement—caps SWFWMD's total max contribution to the "Project" at \$8,567,712.00. Section 3 of the Original Agreement goes on to the state that "[t]he COUNTY agrees to provide all remaining funds necessary for the satisfactory completion of the PROJECT." If SWFWMD is insistent on retaining this sentence, I advise replacing the

undefined term “dredging costs” with the line-item term “Construction and Construction Management” and inserting a maximum cap. Although the County’s performance of the Project is contingent upon BCC appropriation of adequate funding (see Section 3.7 of Original Agreement, as amended by Amendment 1 thereto), and I am not aware of the budget intricacies involved, a maximum cap would presumably assuage Admin/BCC concerns that costs for the Project could be much higher than originally anticipated. Indeed, the Agreement can always be amended again to account for higher projected costs, and the County may want to seek more funds from SWFWMD or third parties if costs do in fact increase. In sum, in my opinion, the blanket sentence that “the COUNTY will provide funding for all dredging costs beyond \$16,000,000” leads to more questions than answers and could create legal nuances down the line.

- Finally, for several reasons better explained verbally (e.g., the new funding language and the fact that the Original Agreement and First Amendment were both signed by the BCC Chair), I advise having the BCC Chair sign this Second Amendment – not the County Administrator – and having the signature block adjusted accordingly.

Brendan P. Mackesey

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