

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY

Meeting Date: July 7, 2015

Consent Regular
 Public Hearing

Department

Submitted By: County Attorney

Submitted For: Water Utilities Department

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to approve: A) a Settlement Agreement with CDM Constructors, Inc., settling claims brought by each party against the other arising from a contract dated June 8, 2010, R-2010-0909, authorizing CDM Constructors, Inc., to perform Design/Build Services (WUD 10-027) and Work Authorization No. 6, approved under R-2011-0927 on June 21, 2011, authorizing CDM Constructors, Inc., to perform Design/Build Services on a project commonly referred to as the SRWRF Digester Biogas Renewable Energy Project.

Summary: On June 8, 2010, the Board of County Commissioners ("BCC") approved a contract numbered R-2010-0909, authorizing CDM Constructors, Inc., to perform Design/Build Services (WUD 10-027) on a project commonly referred to as the Southern Region Water Reclamation Facility ("SRWRF") Digester Biogas Renewable Energy Project. Thereafter, the BCC approved Work Authorization No. 6 (R-2011-0927) on June 21, 2011, authorizing CDM Constructors, Inc., to perform Design/Build Services on project WUD 09-030. CDM Constructors, Inc., claims that it has experienced delays and unanticipated project costs, as a result of problems with the project's sole-source vendor. For its part, the County asserts that it has experienced operational difficulties with two generator engines provided as part of the Project, and has incurred costs in resolving same.

The proposed Settlement Agreement provides that CDM Constructors, Inc., will provide the County with a \$25,000 credit, reflecting liquidated damages to be assessed by CDM Constructors, Inc., from the sole-source vendor. CDM Constructors, Inc., will pay the County an additional \$25,000, to compensate for interruptions in generator operations. CDM Constructors, Inc., will further waive its claims to additional compensation under Work Authorization No. 6, resulting from uncontrollable circumstances. In exchange, the County would agree to extend the time for substantial completion on the project by 428 calendar days, and would agree not to impose liquidated damages on CDM Constructors, Inc., as a result of project delays. The County will further close out Work Authorization No. 6 and pay out the contract balance and release of retainage, which amounts to \$139,536.06. Countywide (ATP)

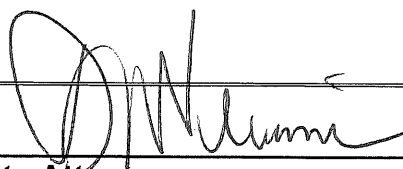
(continued on page 3)

Attachments:

- 1. Settlement Agreement

Recommended by: _____

County Attorney



Date

7/1/15

Approved by: _____

n/a

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2015	2016	2017	2018	2019
Capital Expenditures	_____	_____	_____	_____	_____
Operating Costs	_____	_____	_____	_____	_____
External Revenues	\$ (50,000)	_____	_____	_____	_____
Program Income (County)	_____	_____	_____	_____	_____
In-Kind Match (County)	_____	_____	_____	_____	_____
NET FISCAL IMPACT	\$ (50,000)	_____	_____	_____	_____
# ADDITIONAL FTE POSITIONS (Cumulative)	_____	_____	_____	_____	_____

Is Item Included in Current Budget? Yes _____ No X

Budget Account No.: Fund 4011 Department 721 Unit 4211 Object 6692

Reporting Category _____

B. Recommended Sources of Funds/Summary of Fiscal Impact:

C. Departmental Fiscal Review: Silvia Morist

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Development and Control Comments:

Sherry Brown
7/10 MS 6/26 6/29 OFMB 6/26

J. J. Jacobson 7/15/15
 Contract Development and Control

B. Legal Sufficiency:

Emily Taylor Petrele
 Assistant County Attorney

C. Other Department Review:

 Department Director

THIS SUMMARY IS NOT TO BE USED AS A BASIS FOR PAYMENT.

Background and Justification: (continued from page 1)

On June 8, 2010, the Board of County Commissioners ("BCC") approved a contract numbered R-2010-0909, authorizing CDM Constructors, Inc., to perform Design/Build Services (WUD 10-027) on a project commonly referred to as the Southern Region Water Reclamation Facility ("SRWRF") Digester Biogas Renewable Energy Project. Thereafter, the BCC approved Work Authorization No. 6 (R-2011-0927) on June 21, 2011, authorizing CDM Constructors, Inc., to perform Design/Build Services on the same project.

The SRWRF Digester Biogas Renewable Energy Project included generators that provide additional capacity in the event of an emergency or a disaster. The generators use digester biogas as a renewable energy source, which allows the Facility to conserve fuel for the existing diesel generators in the event of a disaster and to save money on fuel expenses.

The generators include two 375-kilowatt (kW) internal combustion engines and a gas treatment system with necessary equipment to parallel the existing on-site utility. Because a portion of the project was funded by the Federal American Recovery & Reinvestment Act, the materials for the project were required to be supplied by a domestic supplier. CDM Constructors, Inc., experienced difficulties in securing the two engines needed for the generators from the only available domestic supplier. The difficulties with the sole-source vendor caused approximately 428 days of delay in the project. The same difficulties also cost CDM Constructors, Inc., \$114,000 in additional costs. A separate SBE subcontractor issue cost CDM Constructors, Inc., an additional \$20,000. CDM Constructors, Inc., claims that it incurred additional construction management costs of \$125,000.00. In total, CDM Constructors, Inc., claims that its unanticipated costs on the project were approximately \$259,000.00.

For its part, the County experienced extended periods of time where the engines failed to perform after the two generator engines were placed into service. After seeking relief from CDM Constructors, Inc., and its vendor, the County incurred approximately \$69,401.39 in costs to identify and remedy the cause of the operational issues with the engines. During the period of time when the engines failed to perform, the County incurred additional energy costs of \$89,956.00, which would not have been necessary if the generators were operational. Thus, the County's total losses associated with operational problems with the generator engines were \$159,357.39.

The proposed Settlement Agreement provides that CDM Constructors, Inc., will provide the County with a \$25,000 credit, reflecting liquidated damages to be assessed by CDM Constructors, Inc., from the sole-source vendor. CDM Constructors, Inc., will pay the County an additional \$25,000, to compensate for interruptions in generator operations. CDM Constructors, Inc., will further waive its claims to additional compensation under Work Authorization No. 6, resulting from uncontrollable circumstances. In exchange, the County would agree to extend the time for substantial completion on the project by 428 calendar days, and would agree not to impose liquidated damages on CDM Constructors, Inc., as a result of project delays. The County will further close out Work Authorization No. 6 and pay out the contract balance and release of retainage, which amounts to \$139,536.06.

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter "the Agreement") is entered into this _____ day of _____, 2015, by and between Palm Beach County ("the County"), a charter county and political subdivision of the State of Florida, and CDM Constructors, Inc., a foreign for-profit corporation authorized to do business in the State of Florida.

WHEREAS, the County and CDM Constructors, Inc. entered into a contract on June 8, 2010, numbered R-2010-0909, authorizing CDM Constructors, Inc. to perform Design/Build Services (WUD 10-027) and the County issued Work Authorization No. 6, approved under R-2011-0927 on June 21, 2011, authorizing Design/Build Services, on a project commonly referred to as the SRWRF Digester Biogas Renewable Energy Project; and

WHEREAS, CDM Constructors Inc., was issued a contractual Notice To Proceed (NTP) on July 20, 2011, for Work Authorization 6, with a substantial completion period of 400 calendar days; and

WHEREAS, CDM Constructors, Inc., reached substantial completion on October 24, 2013, 828 calendar days after the NTP; and

WHEREAS, CDM Constructors, Inc., advised the County that the extended delivery of the project was due to the inability of a sole-source equipment vendor to meet performance requirements in the contract, specifically Reagan Equipment Company, who provided two Waukesha-brand, small, internal combustion engines for the project; and

WHEREAS, CDM Constructors, Inc., advised the County that its SBE minority subcontractor, Hardee Industries, went out of business and failed to pay its SBE subcontractor, Proshell, for work performed, causing CDM Constructors, Inc., to terminate its contract with Hardee and execute a new contract with Proshell at additional cost; and

WHEREAS, CDM Constructors, Inc., contended that the delay was caused by circumstances beyond its control, and averred that it incurred additional costs during the project including, an additional \$74,000 to execute the purchase order with Reagan, an additional \$40,000 for additional engineering services caused by the vendor performance issues, an additional \$20,000 for Hardee/Proshell contractual issues, and \$125,000 for additional construction management costs; and

WHEREAS, CDM Constructors, Inc., has sought a time-extension on the project as a result of the foregoing from the County; and

WHEREAS, the County experienced extended interruptions in operation for the two 375 kW biogas generator engines, installed as part of the project; and

WHEREAS, the County has advised CDM Constructors, Inc., that it has incurred approximately \$69,401.39 in costs to determine and remedy the operational issues with the

generators, and \$89,956.00 in energy payments as a result of the interruptions in generator operations, for a total loss of \$159,357.39; and

WHEREAS, the parties desire to enter into this Agreement for the purpose of compromising and settling the disputes between the parties, and to avoid time-consuming litigation, the parties acknowledging that this Agreement does not and shall not constitute an admission that any conduct of any of the parties was wrongful, unlawful, negligent or violative of any statute or regulation or common law; and

NOW THEREFORE, in consideration of the mutual obligations set forth herein and the recitals set forth above, as well as other good and valuable consideration the receipt of which the parties acknowledge, it is agreed by and between the parties that:

1. The Recitals in this Agreement are true and correct.
2. Within 15 days of the execution of this Agreement, CDM Constructors, Inc., will issue the County a \$25,000 credit under Work Authorization No. 6 to the County-CDM Constructors, Inc., Contract, reflecting the liquidated damages to be assessed by CDM Constructors, Inc., from the sole-sourced vendor.
3. CDM Constructors, Inc. will pay the County an additional \$25,000, to compensate for the interruptions in generator operations.
4. CDM Constructors, Inc. hereby waives any claim for additional compensation, beyond that provided under the terms of this Agreement, for claims incurred under Work Authorization No. 6 as a result of uncontrollable circumstances.
5. The time for substantial completion on the SRWRF Digester Biogas Renewal Energy Project is hereby extended by 428 calendar days. The County agrees not to assert liquidated damages against CDM Constructors, Inc. as a result of project delays for Work Authorization No. 6.
6. The County hereby waives, releases, and forever discharges, all claims known to the County as of the effective date of this Agreement against CDM Constructors, Inc., arising out of the work performed by CDM Constructors, Inc., on the SRWRF Digester Biogas Renewal Energy Project, Work Authorization No. 6. This release does not release any claims for latent defects which are not currently known to the County.
7. The County will close out Work Authorization No. 6 and pay CDM Constructors, Inc. \$139,536.05 within 15 days of the effective date of this Agreement. The parties agree that the sum of \$139,536.05 represents full and final payment of the contract balance and the release of retainage for services performed under Work Authorization No. 6.
8. This Settlement Agreement has been entered into for the purpose of resolving disputed claims and shall not be construed as an admission of any liability or wrongdoing by either party. Each party has availed itself of the advice of legal

counsel and has knowingly and voluntarily entered into this Settlement Agreement in consideration for the promises, obligations and rights set forth herein.

9. This Settlement Agreement shall inure to the benefit of the County and CDM Constructors, Inc., and their parent, subsidiary, related and affiliated companies or entities, and their officers, directors, commissioners, shareholders, employees, assigns, executors, heirs, administrators and insurers.
10. This Settlement Agreement may be signed in counterparts, and each counterpart or set thereof shall be deemed to be a duplicate original.
11. This Settlement Agreement shall be governed by the laws of the State of Florida without giving effect to its conflict of laws, rules or principles.
12. Should any provision of this Settlement Agreement be determined by a court of competent jurisdiction to be invalid, the validity of any of the other provisions hereof shall not be affected thereby. The parties shall replace such invalid provisions by new provisions the contents of which shall approximate the invalid provisions as much as possible.
13. Should any legal action be brought by a party for breach of this Agreement or to enforce any provision herein, each party to such action shall bear its own attorneys' fees, court costs, and such other costs as may be fixed by the court.
14. Neither this Agreement nor any provision of this Agreement can be modified or waived in any way, except by an agreement in writing.

IN WITNESS WHEREOF, the Parties have by their duly authorized corporate officers signed this Agreement effective as of the date indicated above.

ATTEST:

SHARON R. BOCK
CLERK & COMPTROLLER

PALM BEACH COUNTY, a political
subdivision of the State of Florida

By: _____
Deputy Clerk

By: _____
Chair

APPROVED AS TO FORM AND
LEGAL SUFFICIENCY

By: *Shirley A. Petuch*
Chief Assistant County Attorney
Senior

(OFFICIAL SEAL)

CDM Constructors, Inc.

By: *Andrew C. Kowen*
Title: *S.V.P.*

