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Agenda Item No.
1(D)2
May 11, 2010

MEMORANDUM
BOARD OF COUNTY COMMISSIONERS
Commissioner Rebeca Sosa
District 6

TO:	The Honorable Carlos A. Gimenez, Chair, Government Operations Committee	DATE:	May 7, 2010
FROM:	Rebeca Sosa, County Commissioner, District 6 RM for Sosa	SUBJECT:	Request for Discussion Item; Government Operations Committee 5-11

I respectfully request placement of a discussion item onto the May 11, 2010, Government Operations Committee Agenda. This discussion will regard the Miami-Dade Water and Sewer / Munilla Construction Management (MCM) Inc. - South District Waste Water Treatment Plant - **Contract No. S-808(A)**.

Contract No. S-808(A) involves the purchase of diesel-fueled generators as secondary power equipment. Submitted for discussion is correspondence regarding the contract (incl. 3 items – dated March 8th, April 19th, and May 4th).

cc:

R.A. Cuevas Jr., County Attorney
Jenelle Snyder, Assistant County Attorney

May 4th, 2010

Commissioner Rebeca Sosa
Government Operations Committee
Stephen P. Clark Center
111 NW 1st Street, Suite 320
Miami, Florida 33129

Re: MDWASA - MCM/ Contract No.: S-808 (A) - South District Waste Water Treatment Plant
Request for approval of a Deductive Change Order

Dear Commissioner Sosa:

By this letter we request you move a Win-Win change order that will ultimately save the county over $850,000 and simultaneous resolve an impasse over the interpretation of contract language which did not clearly describe the county's strenuous interpretation that the contractor finance $16.5 million of the contract amount for a period of four years.

Contrary to the customary public construction contract where the contractor is paid for the progress of the work on a monthly basis, MDWASA is interpreting a provision of the subject contract as requiring MCM to advance some $16.5 million for custom made to order generators until their complete assembly and installation (which could take some four years); MCM and its counsel disagree with the county's interpretation. We are at an impasse, we suggested a **WIN-WIN Deductive Change Order** solution to the problem, which not only solves the impasse, but **saves the county over $850,000 in tax savings**:

The proposed solution has been approved by the County attorneys subject to MDC Board approval for a deductive change order to the contract.

Background Information:

In this project MCM is obligated to supply seven (7) diesel fueled generators (the "Generators") at a cost in excess of $16.5 million. MCM has contracted with Engine Systems, Inc. ("ESI"), the Manufacturer required by MDWASA which the county knew required monthly progress payments as the manufacturing components were being assembled.

The County has now taken the extraordinary position that MCM cannot be reimbursed these progress payments as they are incurred, and instead, must wait until completion, in nearly four years, before MCM will be repaid for the Generators. There is no clear language in the contract making this requirement; moreover, nothing in the contract prohibits progress payments or joint checks. I am enclosing as exhibit "A" a copy of our letter to the Assistant County attorneys addressing this issue.

You should know that immediately after the delivery of the above letter, Jorge Munilla, our President, Gus Fernandez, our Senior Project Manager, and Alfredo de Armas, our legal counsel, met with Mr. Gillman and Mr. Hugo Benitez. We proposed to have the county purchase the generators directly from ESI, something that the county has done many times before. This would unblock the impasse and, as a byproduct, would result in a net savings to the County of more than $850 thousand in sales tax savings. The basis of a deductive change order is set out in our letter memorializing our conversations with the Assistant County attorneys, also enclosed as exhibit "B".

Unfortunately, after our meeting, the Assistant County attorneys informed us that staff would not approve the deductive change order without board approval.

Win-Win Solution:

Under the proposed deductive change order, the county would become responsible for buying the generators directly from the manufacturer, ESI (that payment would be deducted from our contract); but! MCM would be required to provide consents from both its surety and that of ESI, both of which would stipulate that notwithstanding the direct purchase of the generators by the county, each would agree to comply with all the pertinent requirements, guarantees and warrantees of the original Contract with MDWASA (as if there had been no deductive change order!); thus MCM would continue to be wholly liable for the performance, delivery, and installation of the Generators

This solution would resolve the conflict; it would reconcile the language of the contract; it would result in a net savings to the County of more than $850 thousand; and it would relieve a local contractor of the incredible hardship of having to advance more than $16 million with little hope of recovering these funds within four years.

Again, nowhere does the contract prohibit progress payments or joint checks. Indeed, these are standard in the industry and are expressly included in the contract[ii]. If the County meant to stand standard procedures on their head, it should have said so clearly and unambiguously!

Please. **This is a matter of extreme importance and we appeal to your sense of fairness, legality, and propriety to sponsor our claim in a meeting of the full Commission and remind you that your approval of this change order will ultimately save the county over $850,000!**

Thanking you in advance for your anticipated considerations,

Sincerely
MCM

Pedro Munilla

Endnotes:

[i] Had the requirement for financing $16.5 million for three years been made in clear and succinct manner as part of the RFP, all contractors, except maybe national giants would have protested the requirement at an earlier stage of the bidding process because of its obvious anticompetitive nature which would have led to earmarking the award to very specific contractor(s).

It should be noted that MCM had no choice over the manufacturer, this was a MDWASA decision; moreover, MDWASA regularly purchases made to order generators from this same manufacturer and issues it progress payments as the generators are being assembled and installed.

[ii] The applicable provision for our contract permitting joint checks and progress payments follows:

28. PARTIAL AND FINAL PAYMENT

* * *

The Contractor may request, in writing, the value of labor, equipment and or materials, supplied by subcontractors, vendors or manufacturers to the Contractor, that the County pay this portion of his monthly progress payment as a joint check, payable to the Contractor and such Subcontractors, Vendors or manufacturers.

Monday, March 08, 2010

Henry Gillman, Esquire
Assistant County Attorney
Miami-Dade County

By electronic mail only: hgill@miamidadee.gov

Re: Munilla Construction Management/ Contract No.: S-808 (A) - South District Waste Water Treatment Plant
HLD - Upgrade to 285mgd-Electircal Distribution System

Dear Henry:

MCM has asked me to comment on the pending issues regarding the progress payments for the seven generators. As MCM has previously explained, our subcontract with Engine Systems, Inc. ("ESI") requires progress payments as set forth in the attached spreadsheet. MCM has requested that WASD provide progress payments against verification of payment by MCM, receipt by MCM of materials and surety consents. Alternatively, MCM has requested that joint checks be made to MCM and ESI pursuant to the provisions of Article 28 of the General Covenants and Conditions. These joint checks would be made in accordance with the attached spreadsheet. WASD believes that this procedure is prohibited under the prime Contract. Accordingly, the County takes the position that MCM will have to advance the entire cost of the generators ($16.5 million) and forego payment for approximately 4 years or until the generators are in place, operating and tested by WASD. I understand that the County bases its position on the following language of the General Conditions:

GENERAL COVENANTS AND CONDITIONS

27. SCOPE OF PAYMENT

* * *

Only net **quantities** of finished work will be **measured** and paid for. This shall apply to both unit price and aggregate sum items.

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I respectfully submit that the County's reliance on this language for the proposition that progress payments for generators are prohibited, is misplaced.

First, the language regarding net quantities obviously deals with materials, not an operational generator. This is made abundantly clear by the sentence's operative verb: "measured". A generator, at best, would be counted, never "measured". Not surprisingly, that is exactly how the term is uniformly interpreted in cases that deal with disputes regarding the quantities of material payable to contractors. See *Somers Constr. Co. v. United States*, 106 Ct. Cl. 1, 10 (Ct. Cl. 1946) "As stated in the specifications, these are **net quantities of material** in place in the completed levee.

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The record discloses that the actual quantities of haul and borrow material were respectively 107,789 and 103,305 cubic yards." [E.S.] Other cases using these terms deal with such diverse commodities as grain[1], whisky[2], eggs[3], butter[4], oil[5], etc. Never, ever, are the terms "quantities" and "measured" used with reference to a manufactured product. To say that payment to MCM is due only after the project engineer *measures* the generators is a very forced construction. It simply does not fit the intent of the quoted language, and it renders the whole provision the veriest nonsense. There is no way that any **measurement** of the generators was contemplated as a condition to payment.

Second, as a general rule, words will be given their common meanings. The intransitive verb "to measure" means "to take or make a measurement"[6], or "the act of measuring or the process of being measured"[7] or "a method of determining quantity, capacity, or dimension"[8]. The generators may very well be measured, for example to determine their dimensions and placement, but certainly they are not measured in any way having to do with payment. For that purpose they are "counted", a term that is not used, it must be assumed, because the provision simply does not apply to the generators.

Third, where a contract provision in a bid is susceptible to two equally logical interpretations, the contractor's interpretation will be favored over that of the agency that drafted the provision. See *Department of General Services vs. J.A. Jones Construction, Co.*, 76-577BID, 1976 Fla. Div. Adm. Hear.: "Both interpretations appear to be reasonable in light of the ambiguous wording of this specifications. No evidence was presented at this hearing to demonstrate with any degree of certainty that either interpretation is faulty or rest upon an obvious error. In this type situation the law is abundantly clear that the contract specifications will be interpreted against the drafter and in favor of the contractor." IN addition, to the extent that there is an ambiguity, it must be resolved against the County. See generally *Orino v. United States*, 111 Ct. Cl. 491, 518-519 (Ct. Cl. 1948) "If there is any doubt that such was the full intent of the language in question, which we are unable to concede in view of the many facts which support the conclusion we have reached, nevertheless it has been for many years the rule in cases such as this that 'doubtful expressions should, therefore, according to a well-known rule, be construed most strongly against the party who uses the language'. *Garrison* v. *United States*, 7 Wall. 688, 690; *Gibbons* v. *United States*, 15 C. Cls. 174, 192; *Callahan Construction Co.* v. *United States*, 91 C. Cls. 538, 611-612."

Fourth, the contract must be read as a whole and interpreted so that there is no internal contradiction. As shown, the language relied upon by the County refers

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[1] W. W. Cargill Co. v. Minnesota, 180 U.S. 452 (U.S. 1901)
[2] KOLMAR, INC. v. UNITED STATES, 13 Cust. Ct. 134 (Cust. Ct. 1944)

[3] L & L Started Pullets, Inc. v. Gourdine, 592 F. Supp. 367 (S.D.N.Y. 1984)
[4] Commonwealth ex rel. Bureau of Weights & Measures v. C. G. Heyd & Co., 156 Pa. Super. 428 (Pa. Super. Ct. 1945)
[5]

[6] Merriam-Webster Online Dictionary. 2010.
[7] The American Heritage® Dictionary of the English Language, Fourth Edition
[8] The American Heritage® Science Dictionary.

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exclusively to commodities or materials that are measured for payment. Progress payments for unit items or for work performed are not prohibited by that provision. See for example *Harvey v. Water Valley*, 55 F.2d 873 (5th Cir.-OLD 1932), where the contract had the same language: "With reference to quantities, [the contract] provided that "only net quantities of work finished according to the plans and specifications will be paid for." Notwithstanding this language, it appears that partial payments were properly made by the municipal corporation. In addition, while there is no language prohibiting progress payments on the generators, the contract, in other sections, does call for progress payments. Thus, the following language permits progress payments to MCM:

> 28. **PARTIAL AND FINAL PAYMENT**
>
> * * *
>
> The Contractor may request, in writing, the value of labor, equipment and or materials, supplied by subcontractors, vendors or manufacturers to the Contractor, that the County pay this portion of his monthly progress payment as a joint check, payable to the Contractor and such Subcontractors, Vendors or manufacturers.

This provision applies. There is no other provision that says that this provision does not apply to unit items, and any such interpretation in the absence of such an express prohibition renders the provision illusory. I understand that the County believes that Section 01025, 1.01, (D) of Addendum No. 5 excludes progress payments for unit price items, but, once again, no such express exclusion is made. That provision merely recites the manner of calculating prices for unit items by multiplying the number of units by the unit price. Nowhere does it state that payment will only be made in a lump sum at the end of the project. To the contrary, that the intent of this provision is merely to calculate the total price for unit items is made clear by the preceding sentence that shows where the bid price for labor work and materials is to be entered. The entire subsection is thus seen to deal only with the preparation of bid prices:

> D. Measurement: All labor, materials and work performed for construction of the facilities shall be included in the aggregate price entered in the Proposal for each bid item, except for unit price items. Payment of unit price items shall be determined by multiplying the unit price by the actual measurements of the completed items, in place, ready for service and accepted by MDWASD.

Further evidence of the limited purpose of this provision is the fact that Subsection B of the same section is the subsection that deals with the manner of payment. Each subsection deals with a discrete topic. Again, to state that Subsection D deals with when payment is due is a very forced construction. The discrete topic dealt with in Subsection D is the manner of presentation of the proposal. It has nothing to do with when payment is due, and can be easily reconciled with the partial and progress payments provided for in Section 28. Courts are required to adopt interpretations which harmonize related provisions, so that both can be given effect. *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249 (Fla. 1987); *Jones v. State*, 813 So.2d 22 (Fla. 2002). In order to harmonize all of these provisions, progress payments must be allowed under Section 28 and Subsection D must be construed narrowly so that it deals only with the preparation of the proposal -- its intended subject matter.

The same holds true for Subsection 1.02(F).

Subsection 1.02(F) provides:

F. Item 6: Generator package

...Work will not be deemed complete until all equipment is in service, tested, inspected, accepted by the Department and approved for use by the Building Department and the Engineer.

01025-5 Addendum No. 5

The discrete issue that this subsection deals with is when work is deemed completed. This is relevant for any number of reasons, including the payment of retainage, and the conclusion of the schedule. However, it has nothing whatsoever to do with partial payments and it certainly does not prohibit partial or progress payments. Again, this provision is easily reconciled with Section 28. The only way that it contradicts Section 28 is if, contrary to the plain language used, it is deemed to prohibit progress or partial payments. If that was the County's intent, and "completion" was meant to be a condition to any payment at all, the term "paid" would appear somewhere in the quoted sentence.

Finally, I submit that the County's interpretation is grossly unfair and would result in undue hardship to MCM. Progress payments are the norm and bidders and proposers rely on them. Certainly, MCM did not understand that it would be forced to finance the purchase of the generators for some 4 years. It behooved the County, if it really intended to prohibit progress and partial payments, to say so clearly and unambiguously in plain language. This is an extraordinary alteration of traditional operating procedures. This is especially true here where the purchase of the generators is 30% of the project cost, and MCM is dealing with a single source vendor earmarked by the County. What is more, the use of joint checks would result in a substantial sales tax savings to the County. The County is exempt from sales tax pursuant to F.S. Section 212.08(6) *Exemptions; political subdivisions.* MCM offers to treat any such sales tax savings as a deductive change order.

Henry, I thank you for your consideration of these suggestions and I look forward to discussing this in person.

Very truly yours,

J. ALFREDO DE ARMAS

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Monday, April 19, 2010

Henry Gillman, Esquire
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By electronic mail only: hgill@miamidade.gov

Re: Munilla Construction Management/ Contract No.: S-808 (A) - South District Waste Water Treatment Plant
HLD - Upgrade to 285mgd-Electrical Distribution System ("Contract")

Dear Henry:

I would like to memorialize our understanding so that we can then agree on a deductive change order.

MCM is obligated under the contract to purchase secondary power equipment consisting of seven (7) diesel fueled generators (the "Generators") and associated components as described by pay item # 6 under specification section 01025, and more specifically described under specification section 16230 as produced, assembled, provided and tested by Engine Systems Incorporated ("ESI"), and more specifically described in their agreement with MCM dated July 6th 2009. MCM requested that WASD provide progress payments against verification of progress by MCM/ESI, and subject to consents of surety agreeing to indemnify the County for its payment(s). Alternatively, MCM requested that joint checks be made to MCM and ESI pursuant to the provisions of Article 28 of the General Covenants and Conditions. WASD, on the other hand, took the position that MCM will have to advance the entire cost of the generators ($16.5 million) and forego reimbursement from the County for approximately four (4) years or until the Generators are in place, operating and tested by WASD.

In a letter memorandum dated March 8, 2010, we have explained that WASD's interpretation of the contract would result in undue hardship to MCM, because, in effect, MCM would be required to advance more than $16 million with little hope of recovering that cost in less than four (4) years. To demonstrate this point, I enclose a chart juxtaposing

forecasted income vis-à-vis forecasted cost. The projections depicted in that chart clearly show the significant and adverse impact on cash flow that MCM would suffer if the payment for the Generators occurred as contemplated by WASD.

After our discussion we have agreed on the following resolution.

MCM will be issued a Deductive Change Order for the express purpose of removing the value of the Generators and associated components from the Construction Contract, and the County will provide a corresponding Purchase Order to ESI for said items.

The Deductive Change Order shall be for equipment values only and will not in any way relieve MCM as the Contractor of any of the responsibilities described in the Construction Contract, including, but not limited to bonds, insurance, indemnification, coordination, engineering, installation, fueling, testing, warranties, and any and all other services or obligations described or implied under the current agreement between the County and MCM. For the purpose of moving forward:

1. Deductive Change Order will be issued from MCM in favor of the County. The County will issue its own purchase order directly to ESI.
2. ESI will sell the Generators directly to the County.
3. The County will pay ESI directly for the purchase of the Generators and associated components.
4. The County will acquire title to the Generators when ESI delivers the Generators to the construction site.
5. The County will be a named insured on any insurance policy acquired to insure the construction project, and more specifically the Generators.

It should be noted that this Deductive Change Order will not only avoid the undue financial hardship on MCM, but it will also result in cost savings to the County. That is, because the County is directly purchasing the supplies from the vendor, and taking title directly from the vendor, the County, being an exempt entity can realize sales tax savings by extending its Consumer Certificate of Exemption to ESI. Accordingly, when issuing the Deductive Change Order, the cost of the Generators, in addition to all charges, including sales tax, related to the Generators, will be deducted from project cost.

MCM will, of courseprovide both a consent of Surety from Zurich (our Surety) as well as from the surety of ESI, as well as full indemnities from both MCM and ESI agreeing to fully indemnify the County for its undertaking the aforementioned tasks (effectively canceling out any risk to the County). Further, MCM will also reduce all costs associated with the County issuance of the purchase order and payment(s) from the Contract Price. In addition, MCM agrees to indemnify the County should the Department of Revenue later reverse its position and determine that the purchase is not tax exempt.

Henry, I trust that I have accurately set forth our agreement and I look forward to hearing from you.

Very truly yours,

/ss/
J. ALFREDO DE ARMAS

AV