



Legislation Text

File #: 2022-919, Version: 1

Report to Carson Reclamation Authority

Monday, November 07, 2022

Consent

SUBJECT:

CONSIDER A SETTLEMENT AGREEMENT WITH RE|SOLUTIONS, LLC

I. SUMMARY

The Carson Reclamation Authority (“Authority”) proposes to enter into a Settlement Agreement (“Agreement”) with RE|Solutions, LLC, a Colorado limited liability company (“RES”, together with the Authority, collectively, the “Parties”), which provides for the termination of the DMA (defined below) and the orderly wind-down of RES’s responsibilities for the 157 Acre Site.

On July 12, 2017, the Parties entered into an Environmental Remediation and Development Management Agreement (the “Original DMA”), which provided for, among other things, RES to provide for all of the environmental and development management services required by the Authority for the former Cal-Compact Landfill (the “Property” or “157 Acre Site”). On June 20, 2019, the Parties entered into an Amended and Restated Environmental Remediation and Development Management Agreement (the “DMA”), which amended, restated, and superseded all provisions under the Original DMA for the development of Cell 2 (the “CAM Project”) and other cells on the Property (the “Remainder Cells”).

The CAM Project has been subject to litigation involving CAM-Carson, LLC (“CAM”) for several years, and CAM and the Parties are working toward settling the litigation (“CAM Litigation”) and on the potential return of CAM to the CAM Project.

The Parties seek to provide for (a) the transition of the management of the Property from RES to the Authority or its designee, (b) the termination of the DMA, and, (c) the execution and delivery of certain Release Agreements in order to fully and finally resolve the CAM Litigation (in the event CAM returns to the CAM Property).

II. RECOMMENDATION

1. APPROVE a Settlement Agreement with RE|Solutions, LLC.

2. AUTHORIZE the Chair to execute the document and related documents in a form acceptable to the Authority Counsel.

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III. ALTERNATIVES

TAKE another action the Board deems appropriate.

IV. BACKGROUND

The Authority and CAM entered into a Conveyancing Agreement on September 6, 2018 (the “Conveyancing Agreement”), which provided that the Authority was required to install the Remedial Systems and Site Development Improvements within the Subsurface Lot of Cell 2 to enable the development of CAM’s proposed project, a fashion retail outlet mall on the Property (the “CAM Project”).

After execution of the Conveyancing Agreement, RES commenced with the installation of the Remedial Systems and Site Development Improvements on behalf of the Authority (through RES’ various subcontractors) pursuant to the terms of the Original DMA and DMA. A dispute arose between CAM, the Authority, and RES during the fall of 2019 as to Authority’s ability to complete the Remedial Systems and Site Development Improvements required for Cell 2 and regarding RES’s alleged breach of contract in performing its duties.

CAM filed a civil action in the Superior Court of California, County of Los Angeles in April 2020 against RES, the City, the Authority, and the Successor Agency to the Carson Redevelopment Authority (the “Successor Agency”), captioned CAM-Carson, LLC v. Carson Reclamation Authority, et. al, Case No. 20STCV16461, and thereafter Authority filed a cross-complaint therein (the “CAM Litigation”). The Parties, the City, and the Successor Agency entered into a Common Interest and Confidentiality Agreement with respect to the Litigation and their potential claims against each other, dated January 21, 2021, and a Tolling Agreement, dated January 21, 2021 (collectively, the “RES Litigation Agreements”), in order to allow for a joint defense of the claims in the CAM Litigation.

In August 2022 CAM, the City, and the Authority entered into a Second Amendment to Conveyancing Agreement (the “Conveyancing Agreement Amendment”), which will allow CAM to proceed with the CAM Project under certain terms and conditions and settle the CAM Litigation (amongst all parties including RES), pursuant to certain Release Agreements to be delivered pursuant to the Settlement Agreement or the Conveyancing Agreement Amendment. However, pursuant to the terms and conditions of the Conveyancing Agreement Amendment, CAM is unwilling to pay for any costs or expenses of the Authority with respect to RES’ ongoing work on behalf of the Authority going forward. The Authority now needs to replace the overall site management structure it had under RES, possibly with a combination of new professional (environmental) service vendors and newly created City staff positions.

Therefore, the Parties seek to provide for the transition of the management of the Project from RES to the Authority or its designee and to terminate the DMA.

Wind-Down of RES' Work on the Property and Termination of the DMA

The "Wind-Down Term" is the period commencing on the Effective Date and expiring ninety (90) days later, during which time, RES will cooperate to transfer the contracts it is managing on behalf of the Authority to the Authority or its designee and allow for the orderly transition of its services. However, if CAM's Diligence Period is extended, the Authority may extend the Wind-Down Term for up to an additional ninety (90) calendar days upon delivery of written notice to RES.

The Parties agree that the DMA shall terminate effective upon the expiration of the Wind-Down Term (as may be extended). In the event that the Diligence Period under the Conveyancing Agreement Amendment expires and CAM elects to terminate the Conveyancing Agreement Amendment and revive/continue with the Litigation, the Authority shall provide notice to RES, and the Wind-Down Term and the Settlement Agreement shall terminate upon the terms and conditions set forth in such notice from the Authority (provided, however, any such terms and conditions shall not expand or increase any obligations of RES), except for the specific terms described in the Settlement Agreement which survive the expiration or termination of the agreement.

During the Wind-Down Term, RES shall not be required to maintain the staffing commitment set forth in the DMA except to ensure sufficient staffing to serve the requirements of the Authority during the Wind-Down Term. RES shall also not be required to perform certain other responsibilities set forth in the DMA. If the Authority requests that RES assign any one of the project subcontracts to the Authority or its designee during the Wind-Down Term, from and after the assignment of such project subcontract, RES shall no longer be responsible for the management or payment of the applicable subcontractor.

The compensation due to RES from the Authority shall be limited to (a) payment of RES' invoiced time based on the hourly rates set forth in the Settlement Agreement for the performance of RES's responsibilities under the DMA, (b) reimbursement of approved project expenses, and (c) reimbursement of approved project subcontractor costs for work performed prior to as applicable.

Under the provisions of the DMA, nearly all the contractors working on the site are contracted to RES and not directly to the Authority. The assignment of all the project subcontracts has been previously approved as the Parties entered into a Collateral Assignment of Project Documents, dated June 20, 2019 (the "Collateral Assignment"), under which RES assigned and transferred all project subcontracts to the Authority, and gave a security interest in and to all of RES' right, title, and interest in the project subcontracts. The Authority may directly assume the obligations of RES under each project subcontract by notice to such project subcontractor. On or before the expiration or termination of the Wind-Down Period, the Authority shall give notice to each project subcontractor of the Authority's election to terminate the DMA and require performance of the subcontractor under the applicable subcontract, in favor of the Authority.

RES shall assist the Authority in its responses to CAM's due diligence requests and generally with CAM's investigations of the Property during the Diligence Period.

Survival of Certain DMA Matters

Unless and until CAM executes a Release agreement in favor of RES and the Authority, certain matters shall survive the termination of the DMA including each Party's claims for a breach of the DMA, negligence, fraud, or willful misconduct arising during the term of the DMA term, including without limitation claims for unpaid Services Fees or Termination Fees, and RES's right to receive the payments set forth in the DMA. In addition, other items shall survive the termination of the DMA, whether or not the Releases are executed, including RES' right to be insured pursuant to the DMA, certain rights and obligations with respect to the allocation of the self-insured retention for a joint insured claim, and a limitation of liability on pile design.

Close-Out Items

Within ten (10) days of the Effective Date, RES shall

- (i) Prepare a list of the of the permits that (A) have been issued with respect to the Project and (B) relate to RES' performance of its scope of work under the DMA (the "DMA Permits"); and
- (ii) (prepare a form of notice (content of notice to be reasonably approved by RES and the CRA Executive Director and General Counsel) to be issued to third parties and regulatory agencies regarding the termination of the DMA and RES' status regarding the Project and identify the contact information for the replacement project manager (once approved the "RES Notice").

The list of the DMA Permits shall specifically identify any permits that are held in the name of RES. Upon the expiration of the Wind-Down Term (or earlier if required by the Authority by written notice from the Authority to RES), (1) RES shall transfer/assign all Project utilities, trailer or equipment leases and other Project "general condition" items to the Authority or its designee (who shall expressly assume such matters), (2) if not previously completed, RES shall close out the Project wage determination with the California Department of Labor held by/issued to RES, (3) the Parties shall jointly contact the regulatory agencies that have issued the DMA Permits and, at the Authority's request, other regulatory agencies that have jurisdiction over the Project, to notify them of the termination of the DMA and the contact information for the replacement project manager, (4) RES shall coordinate with the Authority and any applicable regulatory agencies to have all permits transferred/assigned to the Authority (to the extent the permit(s) require transfer/assignment), (5) RES shall respond to any information requests or requests for supplemental reporting (content of notice to be reasonably approved by RES and the Authority Executive Director and General Counsel) issued by regulatory agencies that have been contacted pursuant to clauses (4) and (5), and (6) the Authority and RES (which a carbon copy to the other party) shall be entitled to provide the RES Notice to third parties related to the Project (including regulatory agencies).

Release Agreements

As part of the Settlement Agreement, the Authority, City, and Successor Agency have

approved a form of Release Agreement, and RES shall approve a different form of Release Agreement (the "Release Agreements"). If all the conditions precedent in the Conveyancing Agreement Amendment (the "Release Conditions") have been satisfied, the Authority shall provide RES written notice of such and within two (2) business days after such notice the Parties shall execute four (4) original counterparts of each Release Agreement. The RES Litigation Agreements would immediately terminate upon the distribution of the fully executed release agreements above.

V. FISCAL IMPACT

The fiscal impact of the Settlement Agreement is still to be determined. Once the Wind-Down period is completed and the DMA is terminated, the Authority will no longer pay the RES Hourly Services fee, which is currently about \$80,000 per month. However, the services RES provides for that fee - contract management, site management, public outreach, and environmental advisory services, will need to be replaced through a combination of new staff positions and construction management services, and a new environmental contractor. The full cost of replacing RES is unknown at this point.

VI. EXHIBITS

1. Settlement Agreement with RE|Solutions, LLC (pgs. 6-35)

Prepared by: John S. Raymond, Executive Director