



Agenda Report

2725 Judge Fran Jamieson
Way
Viera, FL 32940

New Business - County Attorney

J.2

9/15/2020

Subject:

Request permission to retain outside counsel for contractor dispute and potential litigation relating to the construction of the Central Disposal Facility (CDF) Slurry Wall Landfill Phase VI Side Slope Closure.

Fiscal Impact:

Undetermined at this time

Dept/Office:

County Attorney's Office/Solid Waste Department

Requested Action:

Authorize the Solid Waste Department to hire outside counsel to represent the County in resolving construction deficiencies and potential litigation regarding the contract with Thalle Construction Company, Inc. (Thalle) for the construction of the Central Disposal Facility (CDF) Slurry Wall Landfill Phase VI Side Slope Closure project.

Summary Explanation and Background:

Construction of the Central Disposal Facility (CDF) Slurry Wall Landfill Phase VI Side Slope Closure project is approaching completion. Solid Waste staff has found latent construction defects with the landfill gas collection system, liner system and stormwater system and notified the contractor. The contractor, Thalle, has hired SCS Engineers to investigate the cause of the defects and Solid Waste staff is monitoring the investigation. The contract price is \$11,246,873.60 and there are separate performance and maintenance bonds, each in the amount of the contract value.

Historically, the Board has hired outside counsel to represent the County in construction cases and to assert any breach of contract and liquidated damages claims which may arise. Any breach of contract claim will also involve the surety company which will give rise to the possibility that the County can recover attorney's fees paid, although it is also possible Thalle could recover fees from the county.

It is advisable to involve legal counsel with substantial experience in construction law as this area of practice is a niche specialty that is extremely document and engineering intensive. This office has contacted the Milne Law Group, which is a highly recommended law firm with a specialty in construction law cases. The attached proposed contract indicates an hourly rate of \$250 / hr. for partners, \$225/ hr. for associates and \$150 / hr. for paralegals.

It is recommended that Board authorize the Chair to execute the attached agreement with the Milne Law

Group, subject to the inclusion of the Board Policy (BCC-036) applicable to outside counsel, which is also attached.

Clerk to the Board Instructions:

Kimberly Powell, Clerk to the Board, 400 South Street • P.O. Box 999, Titusville, Florida 32781-0999

Telephone: (321) 637-2001

Fax: (321) 264-6972

Kimberly.Powell@brevardclerk.us



September 16, 2020

M E M O R A N D U M

TO: Eden Bentley, County Attorney

RE: Item J.2., Request for Permisssion to Retain Outside Counsel for Contractor Dispute and Potential Litigation Relating to the Construction of the Central Disposal Facility (CDF) Slurry Wall Landfill Phase VI Side Slope Closure

The Board of County Commissioners, in regular session on September 15, 2020, authorized Solid Waste Management Department to hire outside counsel to represent the County in resolving construction deficiencies and potential litigation regarding the contract with Thalle Construction Company, Inc. for the construction of the Central Disposal Facility (CDF) Slurry Wall Landfill Phase VI Side Slope Closure Project; and authorized you to execute the necessary documents in retaining an attorney identified in either Milne Law Group, Kirwin Norris, or Gray Robinson at a rate not to exceed \$300 per hour.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Kimberly Powell, Clerk to the Board

cc: Solid Waste Management

POLICY

TITLE: Legal Services with Outside Counsel

NUMBER: BCC-36

CANCELS July 25, 2006

APPROVED: July 29, 2008

ORIGINATOR: County Attorney

REVIEW: July 29, 2011

I. OBJECTIVE

To establish guidelines for the retention and use of outside legal services and shall be attached and incorporated into all contracts executed by outside counsel.

II. DEFINITIONS AND REFERENCES

III. DIRECTIVES

A. TRANSACTION MANAGEMENT AND STRATEGY

1. Cooperation

We seek a cooperative teamwork approach to working with outside counsel and believe this is best achieved through open and active communications. The responsible Assistant County Attorney and your firm should consult on the management, strategy, procedure and all other significant aspects of a transaction or case. You and your firm should advise the attorney in advance of all important meetings, hearings, and other major events in a transaction or case.

2. Conflicts of Interest

The County expects its counsel to be free of conflicting interests and the appearance of conflicting interest. Potential conflicts are to be discussed with the responsible Assistant County Attorney immediately. The County expects financial concessions (e.g., return of fees paid) if a conflict or appearance of conflict requires the retention of alternate counsel.

3. Communications

Simultaneously with finding, copies of critical pleadings, motions, discovery, and correspondence should be forwarded to the responsible Assistant County Attorney after they have been served.

We expect you to be diligent in re-using off-the-shelf research to reduce your workload and our costs.

The principal contact between your firm and the County will be the responsible Assistant County Attorney. Please keep the County Attorney advised of any contacts you have with other County personnel outside of the Legal Department.

4. Staffing

The efficient and economical use of resources requires the County pre-approve both the staffing and the specific individuals within your firm who will be working on the County matter. The County will not pay fees for unapproved staff, nor for time spent by more than one attorney attending meetings, witness interviews, depositions, hearings, or other proceedings. The County will not pay fees in excess of eight (8) hours per day for any one individual except under exigent circumstances, the County will not pay any incremental costs resulting from substitution of counsel and then only with advance approval. If there is any uncertainty as to the level of effort County desires for any matter, we encourage you to discuss this candidly with the responsible Assistant County Attorney.

The employee at the lowest level of your firm's organization structure who is capable of doing the job, and who routinely does the job, should be the one assigned to it. For example, partners should not be billing for research, digesting depositions, drafting routine pleadings, or routine administrative work. Lawyers should not be billing for work that is typically assigned to a paralegal or an administrative employee, unless it results in lower overall costs to the County.

The responsible Assistant County Attorney should be consulted when it may be more efficient or economical for the County to perform certain tasks. In such event, a prompt determination will be made as to whether it is appropriate for County personnel to perform such tasks.

We expect you to utilize all the resources of the firm, including conferences with other firm attorneys, and we expect your firm to share the costs of such conferences. The billings for intra-office conferences shall be kept to a minimum.

5. Budgeting

From time to time for fiscal planning purposes, the responsible Assistant County Attorney may request a written budget applicable to the matter or case for which you have been retained. From time to time, we may request that you set specific limits on the time and resources you devote to certain matters. The County attorney may specify that the budget will be a not-to-exceed authorization and excesses shall be absorbed by the firm. In appropriate situations, we may also request "fixed price" or contingency fee arrangements. The Board of County Commissioners approve said budget. Once a budget is approved, your firm must stay within the budgeted amount unless an expanded budget is approved by the County Commission.

6. Work Handled by In-House Counsel

In order to effectuate cost savings, at the discretion of your firm, the responsible Assistant County Attorney may be used to coordinate employee witnesses and perform the initial factual investigation and in-house interviews. The Assistant County Attorney will arrange for any necessary meetings or interaction between outside counsel and County employees.

7. Discovery

We believe that discovery is necessary and essential for effective litigation. However, discovery, if not effectively controlled and managed, can result in major costs. Effective can result in obtaining fast results, thus perhaps saving County money in the long run. Discovery should proceed expeditiously to the extent necessary to obtain reasonably timely resolution of the litigation. Deposition schedules of county employee should be cleared with the Assistant County Attorney. Only one attorney from your law firm should attend a deposition or hearing related to discovery unless prior approval is obtained.

8. Strategy and Settlements

It is the policy of the County Attorney's Office to keep the Board of County Commissioners apprised of major developments in pending litigation. The County Attorney and the responsible Assistant County Attorney will be involved in any strategy or settlement discussions or proceedings. All demands, counter-demands and in-court pronouncements regarding settlements should be discussed with the County Attorney for scheduling and presentation to the Board of County Commissioners at an executive session. Any final settlement of any matter is subject to the express approval of the County Attorney and the Board of County

Commissioners. Alternate dispute resolution should be considered for all litigation and disputes.

9. Rate Increases

There shall be no increases in the rates charged by a firm's members or employees, as applied to a case involving the county, without County Commission approval after at least sixty (60) days' advance written notice. Approval of a reasonable rate increase shall not be unreasonably withheld every fourth year in the course of the litigation.

10. Minimum Charges

There shall be no standard minimum charges for any services performed such as telephone calls, file review, etc. Only the actual time expended shall be charged.

11. Disbursements

The County will not pay for administrative expenses such as secretarial time, work processing, overtime, or file maintenance. These expenses are to be included in your hourly rate. The County will reimburse the firm for copying costs, postage, and other reasonable and necessary expenses at the firm's costs.

12. Travel and Lodging

The County will pay reasonable travel expenses and time spent on County matters while traveling. The County does not authorize first class travel and request that the lowest rates possible be obtained. Reasonable mileage will be reimbursed at the statutory rate.

If travel time is devoted to working for one or more clients, the County should be billed only for the proportional time related to the County matter.

Food and beverage expenses shall be limited to the following: breakfast, \$6.00; lunch, \$11.00; dinner, \$19.00 per each twenty-four hour period, or at such other rate of compensation established by law or county resolution or ordinance.

13. Dispute Resolution

The County reserves the right to examine and audit books, records, other documents and supporting material for the purpose of evaluating compliance with this procedure, and the fees charged to the County. Such books and records shall be made available to the County during business

hours for examination, audit or reproduction. The County shall employ, at its sole discretion, its internal audit department or independent outside auditors for purposes of accomplishing this audit. If an error is found that exceeds ten per cent (10%) of your firm's total annual billings to the county for the year in which the audit is conducted, then your firm shall pay the cost of the audit.

14. Media Coverage

The County will handle all outside or press coverage regarding legal or business matters. Any inquiries made to the firm are to be directed to the responsible Assistant County Attorney.

C. BILLINGS

1. Fees and Hourly Rates

All fees and hourly rates for legal services must be discussed and approved at the time of initial engagement. It is expected that all legal services shall be rendered at reasonable and competitive rates and that your hourly rates or fees shall be less than or no higher than the rates or fees charged to corporate clients of the firm.

2. Statements for Services

Statements must be submitted and conform to the following format: (a) identification of the specific individual in your firm performing the services; (b) the date and a brief description of the services rendered; (c) the time spent; (d) the billing rates of the attorneys and paralegals whose services appear on the statements; and (e) the County division or business unit involved. Statements should also itemize disbursements in detail, e.g., number of copies made times the rate. For travel disbursements, the statement should show a breakdown of the charges to include airfare, hotel, meals, and other expenses. For each specific matter or case, the statement should also include a total showing the total fees and costs from the inception of the case to date and another separate total showing the total for charges since the last billing period. Where a statement covers more than one matter or case, the requisite information should be provided separately for each matter.

To decrease the administrative burden of small billings, the County Requires all statements of \$250.00 or less to be held until the next billing cycle or until the final statement.

3. Billing Frequency

Billings should be rendered at least on a monthly basis. Alternatively,

billings on a less frequent basis may be acceptable, provided that monthly costs estimates are provided. The County will not pay any service or interest charges on statements for legal fees except to the extent required by law.

4. Subcontract Services

At the opening of the file or upon request by your firm, the County will decide whether we will pay directly for subcontracted services (e.g., court reporters: experts). Unless advised otherwise, we prefer the firm to pay these costs directly and to then include them on the next billing.

5. Maximum Billable Hours Per Day

No more than eight (8) hours per day for any one individual may be charged to the county except under exigent circumstances and only with the approval of the County Attorney.

D. PRIOR APPROVALS

1. The County reserves the right not to pay for the following activities unless approved in advance by the County Attorney.
 - a. Any extensive legal research to be performed by the firm.
 - b. Special services such as private investigators and experts provided such approval shall not be unreasonably withheld if your firm determines that such services are necessary for the successful prosecution of the litigation.
 - c. Extensive copying. The County Attorney should be consulted to determine if the copying can be done by an outside service or County at lower cost.
 - d. Extensive express document/communication deliveries (e.g., Federal Express, DHL). Electronic mail is the preferred means for rapid document delivery. See Section IV, Computerization below.

E. COMPUTERIZATION

The County suggests that all word processing be accomplished using WordPerfect as a standard to facilitate increased productivity between the County and outside counsel. If your firm can demonstrate that hourly rates are lower as a result of separate word processing charging, such charges may be separately authorized.

The use of computers can improve efficiency, communication and cost savings between the County and outside counsel. The following applications may be considered: (1) electronic mail to facilitate instantaneous communication; (2) billing software to electronically produce monthly statements; (3) docketing and calendaring system to ensure meeting, court and statute-of-limitation dates; (4)

document assembly system to permit laying new work over old; and (5) litigation support system to track large numbers of documents in litigation.

From time to time, your firm may be requested to make prior research as well as an index of your prior research available to the County. Such research would be provided at cost.

F. PUBLIC RECORDS

Your firm should be aware that many documents made available to you by the County and some documents produced by your firm in connection with the matter for which you have retained may be subject to disclosure upon a request made under the Florida Public Records Law. If a request for public records is made to your firm with regard to documents pertaining to the County, you should immediately notify the County Attorney and determine whether any exemption or privilege exists for the records requested. To the extent that no exemption or privilege exists, you should conform to County policy by promptly responding to public records requests by allowing inspection and copying, if requested, of the public records at issue.

G. OPTIONAL GUIDELINES

Following is a list of proposals that we view as effective means to increase efficiency and reduce the cost of legal services. These proposals will be discussed and determined at the time of initial engagement.

1. Billing Rates

There are numerous alternative billing arrangements that can lower the cost of legal services without compromising the outcome or working a disadvantage to your law firm. These include:

Identifying certain matters to be paid for on a contingency or risk-sharing basis

A block of hours at a reduced rate, with the rate changing after a specified number of hours have been expended on the matter.

No charge for start up time, such as learning various aspects of the case or familiarizing new lawyers with the case.

Discounted rates for all hours charged above a specified number, this can apply to a particular matter or to all matters handled by our firm.

A discount on all billings for the year, after the total billings reach a specified amount.

A rebate on total billings for the year, dependent on the difference between the actual billings and a guaranteed minimum billing amount.

A fixed hourly rate for certain types of ceases, independent of whether the work is done by a senior or junior attorney.

Billing rate adjustments to be made only at the start of each calendar year, with the prior approval of the County.

A fixed total fee for identified transaction or cases.

IV. RESERVATION OF AUTHORITY

The authority to issue and/or revise this policy is reserved to the Board of County Commissioners of Brevard County, Florida. The provisions set forth in this policy are subject to compliance with all applicable law.

DONE ORDERED and ADOPTED in Regular Session this 29 day of July A.D. 2008.


ATTEST:

By


Scott Ellis, Clerk

BOARD OF COUNTY COMMISSIONERS
OF BREVARD COUNTY, FLORIDA

By


Truman G. Scarborough, Jr., Chair
(as approved by the Board on July 29, 2008)

MICHAEL E. MILNE*
PETER J. KAPSALES◊



MARGARET M. EFTA
BROOKS R. FUSSELMAN
TYLER K. WALKER

**FLORIDA BAR CONSTRUCTION BOARD CERTIFIED
◊ ALSO LICENSED IN D.C.*

September 8, 2020

Sent Via Electronic Mail

Board of County Commissioners of Brevard County, Florida
Attn: Bryan Andrew Lober
2725 Judge Fran Jamieson Way
Melbourne, FL 32940
christine.valliere@brevardfl.gov

Re: CDF Slurry Wall Landfill Phase VI Sideslope Closure
Brevard County, Florida

PROFESSIONAL LEGAL FEE SERVICES AGREEMENT

Dear Mr. Lober:

This letter will serve as our written agreement for the performance of legal services by our firm on behalf of ***Brevard County Attorney's Office***, in connection with the above referenced matter. Our goal is to provide you with quality legal services. Although we will do our best to serve you, we cannot guarantee success on any given matter. If you should have any questions or concerns regarding our services at any time please advise us immediately.

LEGAL SERVICES:

We will perform the necessary legal services on your behalf upon receipt of a signed and dated copy of this agreement and the requisite retainer.

ATTORNEY FEES AND COSTS:

Our fees are based upon an hourly rate and will depend on the actual time spent. Billable legal services include but are not limited to: preparation of documents, telephone calls, attendance at depositions, court appearances, review of documents, negotiations and preparations for trial, if any. Attorney and paralegal time will be billed at .10-hour increments and the hourly rates are as follows:

Partner: \$250.00 per hour
Associate: \$225.00 per hour
Paralegal: \$150.00 per hour

These rates do not apply to appellate /coverage matters.

In the course of representing **Brevard County Attorney's Office**, it may be necessary for us to incur expenses for items such as deposition transcripts, court reporters, witness fees, expert fees, computerized legal research, notary service, overnight and special delivery services, postage, photocopying, facsimile transmissions, long distance charges, travel, lodging, meals, etc. Expense items incurred will be itemized separately and billed on our statements. Necessary vendor litigation costs (i.e., court reporter charges, expert fees, etc.) that exceed \$1,000.00 will be forwarded to you directly for payment.

A statement for attorney fees and costs will be forwarded to you on a monthly basis. Each statement is reviewed by the responsible attorney and then processed through our accounting department. The statements are payable upon receipt.

If you fail to pay our statement in full within 30 days of receipt of the bill, we reserve the right to place a lien on all files in our possession and their content until we have received payment in full. We further reserve the right to decline the continuation of legal services to you, if you fail to pay our statements timely. Your failure to pay shall constitute your express consent to our withdrawal of our appearance as your counsel of record.

Notwithstanding our withdrawal as counsel because of your failure to pay the legal fees and costs, we may file a claim in court to recover these fees and costs.

RETAINER:

We will be waiving the retainer fee in this matter.

TERMINATION:

You have the right to terminate our representation at any time. We have the same right, subject to an obligation to give you reasonable notice to arrange alternative representation. In either event, fees and costs incurred on or before the date of termination must be paid as described above. Unless we otherwise agree, the terms and conditions of this letter will apply to all matters for which you engage us as counsel.

The County has provided us with a copy of the County's policy (No. BCC-36) concerning "Legal Services with Outside Counsel." We agree that this Firm will abide by the County's requirements in BCC-36. If the foregoing terms meet with your approval, please execute the duplicate original of this letter and return it to our office.

Should you have any questions regarding this engagement letter, please contact us immediately.