

Project Development Agreement

Siemens Industry, Inc., a Delaware corporation, through its Building Technologies Division, with its principal place of business located at 1000 Deerfield Parkway, Buffalo Grove, Illinois 60089 ("Siemens"), and The City of Palm Coast, Florida, with its principal place of business located at 160 Cypress Point Parkway, Palm Coast, Florida 32164 ("Client") (collectively the "Parties"), enter into this Project Development Agreement this 19th day of November, 2012 ("PDA") and agree as follows:

RECITALS

WHEREAS, Siemens responded to the Request For Proposals RFP No. PW-U-12-12, Energy Savings Performance Contract on June 28, 2012;

WHEREAS, the Parties agree that Siemens will perform work under this PDA with the intention that Siemens will prepare a draft Performance Contracting Agreement ("PCA") in compliance with FL ST § 489.145;

WHEREAS, Siemens' obligations under the PCA will include a guarantee by Siemens of the estimated savings intended to be generated by implementing the scope identified therein;

WHEREAS, Siemens must first perform an in-depth energy audit of Client's facilities, to determine a feasible scope of work as outlined in Appendix 1, in proposed City owned facilities as listed in Appendix 2 attached to this agreement with estimated savings to be included in the PCA ("Investment Grade Audit" or "IGA"); and,

WHEREAS, the Parties agree that Siemens shall perform the IGA in accordance with the terms herein and that the Client shall pay Siemens in accordance with the same.

NOW THEREFORE, as a result of the Recitals, which are specifically incorporated herein and for the mutual consideration contained herein, the Parties agree as follows:

AGREEMENT

1. Term. Upon the date hereof, or upon such later date as agreed upon by the Parties (the "Effective Date"), Siemens shall commence performing the IGA. The term for performing the IGA shall conclude upon the submission of the draft PCA to the Client by Siemens. Siemens shall use reasonable efforts to complete the IGA no later than one hundred-twenty (120) days from the Effective Date.
2. Required Information. The Client authorizes Siemens, its employees, agents, consultants and subcontractors, on a need to know basis, to inspect and copy all information and data that Siemens reasonably deems is necessary to sufficiently perform the IGA, whether such information is in the Client's possession or in the possession of a third-party to which the Client shall provide Siemens with sufficient releases in order to obtain such information. The Client shall provide Siemens, its employees, agents and contractors, with reasonably unrestricted access to the Client's buildings that will be addressed in the IGA (the "Facilities"). In addition, Client shall promptly provide Siemens with the Facilities':
 - a. Utility data for the past two (2) year(s), including but not limited to, actual copies of electrical, gas, water invoices, or other utility invoices requested by Siemens ("Utility Data");
 - b. Information on the Facilities' hours of operation and modes of operation ("Operational Data");
 - c. Names and contact information of persons with whom Siemens can confer regarding any of the Utility Data, Operational Data, financial information and general day-to-day issues that may arise during performance of the IGA ("Contact Persons");

- d. If applicable, an audited financial statement for the fiscal year immediately preceding the Effective Date; and,
- e. Any and all information requested by Siemens reasonably necessary in order for Siemens to perform the IGA.

3. Representations, Warranties and Covenants of the Parties.

- a. Each party represents, warrants and covenants to the other that:
 - i. It has all requisite power and authority, whether statutory or otherwise, to enter into this Agreement, and that its execution hereof has been duly authorized and does not and will not constitute a breach or violation of any of its organizational documents, any applicable laws or regulations, or any agreements with third parties;
 - ii. It has done and will continue to do all things necessary to preserve and keep in full force and effect its existence and the PDA;
 - iii. This PDA is a legal, valid and binding obligation of the party, in accordance with its terms, and all requirements of the party have been met and procedures have been followed by the party to ensure the enforceability of the PDA; and,
 - iv. To the party's best knowledge, there is no pending or threatened suit, action, litigation or proceeding against or affecting the party that impacts the validity or enforceability of this PDA.
- b. Siemens further represents, warrants and covenants to the Client that Siemens is duly authorized to do business in all locations where the work under the PDA is to be performed.
- c. Client further represents, warrants and covenants to the Siemens that 1) any information provided to Siemens, or that is provided to Siemens, by the Client or on behalf of the Client, is accurate and that Siemens is entitled to rely on the accuracy of the same in performing the IGA, and 2) Siemens shall not be held liable to the Client in any manner whatsoever for any error, inaccuracy or omission that is caused solely by Siemens' reliance on the information supplied by the Client or information provided to Siemens on behalf of the Client.

4. Fee. Siemens shall perform the IGA for the fixed fee of **\$53,683.00** (Fifty three thousand six hundred eighty three dollars and no cents) (the "Fee").

5. Payment of the Fee.

- a. In the event that the IGA demonstrates that the criteria set forth in Exhibit A-Project Criteria ("Project Criteria") will be feasible as scope to be performed under the PCA and Siemens is able to draft a PCA to include the Project Criteria, then the Client shall be liable to Siemens for the Fee.
- b. On the Effective Date and during the period of time that the IGA is being performed, Siemens will direct resources to develop the draft PCA. Where a draft PCA is completed, it will be submitted to the Client within the time period set forth in Section 1 hereof. The draft PCA will include a price that will include the Fee amount. Therefore, if the PCA is executed, the Client will have no obligation to pay the Fee under the terms hereof as the Fee will be paid to Siemens under the terms of the PCA.
- c. In the event that the Client is liable to Siemens for the Fee pursuant to clause 5.a. and Siemens has provided the Client with a draft PCA pursuant to clause 5.b., but the Client does not enter into the PCA with Siemens within one hundred and twenty (120) days following submission of the draft PCA to the Client, Siemens will submit an invoice to the Client for the Fee. The Client shall pay Siemens in immediately available funds no later than one hundred and twenty (120) days from the date of invoice.

- d. If during the performance of the IGA, Siemens believes that the Project Criteria cannot be reasonably achieved and, therefore, a draft PCA cannot be provided to the Client, then the Client shall not have any obligation to pay the Fee.
6. Termination. The Client may terminate this Agreement at any time with fifteen (15) days prior written notice to Siemens. The Client shall then pay to Siemens a termination fee equal to Siemens' reasonable costs and expenses incurred up to the date of termination.
7. Insurance. Both Parties shall maintain fully adequate, comprehensive insurance on their respective goods, services, and operations, as applicable.
8. Indemnity. Siemens and the Client shall indemnify and hold each other harmless from and against all damages, losses and expenses suffered or paid as a result of any and all claims, demands, suits, causes of action, proceedings, judgments and liabilities, fines, penalties and costs, including reasonable attorney's fees and disbursements, incurred in litigation or otherwise assessed, incurred or sustained by or against the indemnified party arising out of or in connection with this PDA to the extent that such damages, losses and expenses result from the negligence or willful misconduct of the indemnifying party.
9. Limitation of Liability. ANYTHING HEREIN NOTWITHSTANDING, IN NO EVENT SHALL EITHER THE CLIENT OR SIEMENS BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING COMMERCIAL LOSS, LOSS OF USE, OR LOST PROFITS, EVEN IF EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND, IN ANY EVENT, SIEMENS' AGGREGATE LIABILITY FOR ANY AND ALL CLAIMS, LOSSES OR EXPENSES ARISING OUT OF THIS PDA, OR OUT OF ANY DELIVERABLES FURNISHED UNDER THIS PDA, WHETHER BASED IN CONTRACT, NEGLIGENCE, STRICT LIABILITY, AGENCY, WARRANTY, TRESPASS, INDEMNITY OR ANY OTHER THEORY OF LIABILITY, SHALL BE LIMITED TO THE LESSER OF \$1,000,000 OR THE TOTAL COMPENSATION RECEIVED BY SIEMENS FROM THE CLIENT UNDER THIS PDA.
10. Exclusivity. During the term of this PDA, the Client shall not negotiate with any third-party for the same or a substantially similar project as that which is the subject of this PDA.
11. Deliverables. All non-proprietary notes and reports that are specifically prepared by Siemens under this PDA (the "Deliverables") shall become the Client's personal property upon the Client's execution of the PCA or upon the Client's payment of the Fee, whichever is earlier. Any reuse of the Deliverables for other projects or locations without the written consent of Siemens, or use other than by the Client, will be at such other user's sole risk and without liability to Siemens; and, unless expressly prohibited by law, the Client and the other users, jointly and severally shall indemnify, defend and hold Siemens harmless from any claims, losses or damages arising from such unauthorized use.
12. Intellectual Property. Notwithstanding the foregoing, the Client shall not, by virtue of this PDA, acquire any ownership interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual proprietary rights, or similar items of property which are owned by Siemens, any of Siemens' subcontractors, or by any of Siemens' consultants, whether or not they are used in connection with the work provided under this PDA.
13. Confidentiality. Any information concerning Siemens or the Client that is designated as proprietary and disclosed in confidence to the other party during the term of this PDA is disclosed in confidence. The party that receives such confidential information shall not publish or disclose the same to any other entity or person without the prior written approval of the disclosing party. To the extent that the Parties have entered into a confidentiality agreement or will enter into such an agreement during the term of this PDA, then the terms contained in the confidentiality agreement shall be incorporated by reference herein.

14. Choice of Law, Jurisdiction and Venue. THIS PDA SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF FLORIDA, WITHOUT REGARD TO CHOICE OF LAW PROVISIONS. JURISDICTION AND VENUE SHALL LIE WITH THE STATE OR FEDERAL COURTS IN THE COUNTY IN WHICH THE SUBJECT PROJECT WILL BE PERFORMED. THE PARTIES EACH WAIVE ANY RIGHTS THAT EACH OF THEM MAY HAVE TO A TRIAL BY JURY. FURTHERMORE, EACH PARTY WAIVES ANY OBJECTION THAT IT MAY HAVE BASED ON IMPROPER VENUE OR FORUM NON CONVENIENS.

15. Merger Clause. Upon execution and delivery, this PDA: (a) constitutes the entire agreement and understanding between the Parties relating to the subject matter hereof; (b) supersedes any and all prior agreements and understandings of the Parties, oral or written, relating to the subject matter hereof; and, (c) shall not be amended, supplemented, contradicted or otherwise modified by evidence of prior, contemporaneous or subsequent oral agreements of the Parties.

IN WITNESS WHEREOF, the Parties hereto have caused this Project Development Agreement to be duly executed by their respective authorized signatories as of the date first above written.

ATTEST:

CITY OF PALM COAST, FLORIDA

Virginia A Smith, City Clerk

BY: Jon Netts, Mayor

Date: _____

Approved as to form and legality:

William E. Reischmann, Jr., City Attorney

Siemens Industry, Inc.

Sign

Print

Title

Project Development Agreement

Appendix 1 – Project Criteria

1. Scope of Investment Grade Audit ("IGA"). The scope of the IGA shall include City of Palm Coast (COPC) owned Facility(s) located within the city limits as identified in Exhibit 2. The IGA will include an energy consumption analysis and scope for a IGA that may include the following Facility Improvement Measures ("FIM" or "FIMs") in addition to other options that may be identified during the course of the TEA:
 - a. Lighting Improvements: Interior
 - i. Occupancy sensors
 - ii. Fixture and or ballast and lamp replacement
 - iii. Day lighting
 - iv. Lighting controls
 - v. Motion Sensors/photo cell control
 - b. Lighting Improvements: Exterior (including LED or other energy efficient technology)
 - i. Parking Lot
 - ii. Recreation areas, courts, play fields, park areas and pools
 - iii. Streets, right of ways, entrances
 - iv. Signage
 - v. Building
 - vi. Security
 - vii. Landscape
 - viii. Traffic signals
 - c. Water Conservation
 - i. Irrigation upgrades and controls
 - ii. Plumbing fixtures
 - iii. Fountains
 - iv. Pools
 - d. Pumping Equipment Optimization
 - i. Pumping Stations, WTP/WWTPs and Lift Stations
 - ii. Pool and Fountain Pumping Equipment
 - iii. Irrigation Pumps and equipment
 - e. HVAC Systems
 - i. Equipment replacement
 - ii. Heat recovery
 - iii. Piping modifications
 - iv. Pumping variable frequency drives
 - v. Fan variable frequency drives
 - f. Building Automation
 - i. Outdoor air control
 - ii. Unoccupied setback mode
 - iii. Reheat optimization
 - iv. Chilled water/condenser reset

g. Utility Systems

- i. Water treatment plants
- ii. Well fields
- iii. Treatment plant grid

h. Miscellaneous

- i. Solar Power
- ii. Geo-thermal
- iii. Reclaimed water
- iv. Insulation
- v. Windows/building envelope
- vi. Alternative fleet fuels

2. Collect General Facility(s) Information. Siemens shall collect general Facility(s) information such as: size, age, construction type, condition and general use of the Facility(s). Siemens shall also collect and summarize each Facility(s) utility cost and consumption data for the most recent 24-month period.

COPC shall provide (or cause its energy suppliers to provide) all reasonably available records and data concerning energy, fuels and water usage for the Facility(s) for the most current 24-month period, including: utility records; occupancy information; descriptions of changes in the structure of the Facility(s) or its heating, cooling, lighting or other systems or energy requirements; descriptions of all major energy- and water-consuming or energy- and water-saving equipment used in the Facility(s); and any comfort problems, code deficiencies and a description of energy management procedures presently utilized. COPC shall also make available a record of any energy related improvements or modifications that have been installed during the past three years, are being installed, or are planned to be installed in the Facility(s). COPC shall also make available to Siemens copies of drawings, equipment logs and maintenance work orders.

3. Analyze Existing Systems and Equipment

- a. Siemens shall compile an analysis based on a physical inspection of the major electrical and mechanical systems at the Facility(s) including:

- i. Cooling systems and related equipment
- ii. Heating and heat distribution systems
- iii. Automatic temperature control systems and equipment
- iv. Air distribution systems and equipment
- v. Outdoor ventilation systems and equipment
- vi. Exhaust systems and equipment
- vii. Hot water systems
- viii. Electric motors (5HP and above), transmission and drive systems
- ix. Interior and exterior lighting
- x. Water consumption end uses, such as restroom fixtures, water fountains, irrigation, etc.
- xi. Other major energy using systems, if applicable

- b. The analysis shall address the following considerations:

- i. The loads, efficiencies or hours of operation for each system (engineering estimates may be used where the Facility(s) operating or climatic conditions necessitate, but for large fluctuating loads with high potential savings, appropriate measurements are required unless waived by COPC; and
- ii. Current operating condition for each system. Siemens shall conduct interviews with Facility(s) operation and maintenance staff regarding the Facility(s)'s mechanical

systems operation, occupancy patterns and any problems with comfort levels or equipment reliability.

4. Siemens shall conduct a feasibility study and present COPC with a list of potential FIMs for consideration. COPC shall review the list and provide feedback regarding which FIMs Siemens should fully develop for inclusion in the project.
5. Establish Base Year Consumption and Reconcile with End Use Consumption Estimates. Siemens shall average the most recent 24-months of utility bills to establish Base Year consumption for electricity, fossil fuels and water, or select the most representative contiguous 12-month period. Siemens shall consult with Facility(s) staff and account for any unusual or anomalous utility bills which may skew Base Year consumption from a reasonable representation.

Siemens may, upon recommendation by COPC, analyze loading, usage and/or hours of operation for all major end uses representing more than 5% of total Facility(s) consumption including, but not limited to:

- a. Lighting
- b. Heating
- c. Cooling
- d. HVAC motors (fans and pumps)
- e. Plug load (independent devices greater than 5%)

Where loading and/or usage is highly uncertain, Siemens shall employ spot measurement and/or short term monitoring at its discretion or at the request of COPC. Reasonable applications of measurement typically include variable loads that are likely FIMs, such as cooling equipment.

6. Develop List of FIMs. Siemens shall:
 - a. Identify and propose potential FIMs;
 - b. Estimate the cost, savings and life expectancy of each proposed FIM, if installed pursuant to a PCA;
 - c. Specify Facility(s) operations and maintenance procedures which will be affected by the installation/implementation of the proposed FIMs;
 - d. For savings estimates using computer simulations, Siemens shall provide access to the program and all inputs and assumptions used, if requested by the COPC;
 - e. Provide a preliminary savings measurement and verification plan for each proposed FIM;
 - f. Provide calculations for any rate savings proposals;
 - g. Provide supporting calculations for any proposed maintenance or other operational savings;
 - h. Estimate any environmental costs or benefits of the proposed FIMs (e.g., disposal costs, avoided emissions, water conservation, etc.); and
 - i. For all proposed FIMs, Siemens shall adhere to all applicable state, federal and local codes and regulations in effect at the time that the IGA is performed.
7. Select Final Recommended FIMs. Siemens shall, in consultation with COPC, recommend specific FIMs from the IGA for installation and implementation at the Facility(s) via a PCA.

8. Provide Cost Estimates. Siemens shall provide estimates of all costs associated with the installation and implementation of the FIMs including:
- a. Pricing per FIM to include engineering/design, construction management and commissioning costs
 - b. Initial training costs
 - c. Annual service fees including:
 - i. Measurement and verification
 - ii. Maintenance
 - iii. Performance monitoring
 - iv. Ongoing training services
9. Develop Savings Estimates. COPC will provide Siemens with sufficient general and specific guidance to develop the savings estimates for the Audit. In the event that questions arise as to the calculation of savings or whether certain items will be allowed as savings, Siemens shall seek written guidance from COPC and COPC shall provide such guidance to Siemens within a reasonable time thereafter. COPC's good faith rejection of certain calculations of savings or rejection of certain items as allowable savings identified in the Technical Energy Audit shall be at the risk of Siemens.
10. The following items will be allowed as operational savings or in the development of savings:
- a. COPC material/commodity cost
 - b. Outside maintenance labor cost (if applicable)
 - c. Agreed escalation rates for natural gas of 2%
 - d. Agreed escalation rates for electricity of 2%
 - e. Agreed escalation rates for water of 2%
 - f. Agreed escalation rates for material/commodity cost savings of 2%
 - g. Agreed escalation rates for allowable labor savings of 2%
11. Format of the Investment Grade Audit Report.
- a. An executive summary which describes the Facility(s), FIMs evaluated, analysis methodology, results and a summary table presenting the cost and savings estimates for each FIM.
 - b. A discussion of FIMs not evaluated in detail and the explanation of why a detailed analysis was not performed.
 - c. A summary of all utility bills, Base Year consumption and how it was established, and end use reconciliation with respect to the Base Year including a discussion of any unusual characteristics and findings.
 - d. Detailed descriptions for each FIM including analysis method, supporting calculations (may be submitted as appendices), results, proposed equipment and implementation issues.
 - e. Conclusions, observations and caveats regarding cost and savings estimates.
 - f. Appendices which document the data relied upon to prepare the analysis and how that data

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Appendix 2 – City Owned Facilities

307 Palm Coast Parkway – Fire Station #22

1 Wellfield Grade – Public Works/Streets & Drainage

305 Palm Coast Parkway – Community Center and Playground

2 Utility Drive – Utility Department Admin Offices

26 Utility Drive – Wastewater Treatment Plant

4 Corporate Drive – Water Treatment Plant #1

50 Citation Boulevard – Water Treatment Plant #2

5455 Belle Terre Parkway – Indian Trails Sports Complex

339 Parkview Drive – Frieda Zamba Swimming Pool

5750 Belle Terre Parkway, Fire Station #23

20 Palm Harbor Drive – Palm Harbor Golf Course and Maintenance Facility

400 Peavy Grade – Water Treatment Plant #3

9 Corporate Drive - Fire Station #21

1250 Belle Terre Parkway – Fire Station #25

1505 Palm Harbor Parkway – Fire Station #24

100 Cooper Lane – Palm Harbor Golf Course Club House

350 Sesame Boulevard - Seminole Woods Park

975 Central Avenue – Central Park

1290 Belle Terre Parkway – Tennis Center

1385 Rymfire Drive – Ralph Carter Park

31 Greenway Court – Linear Park

18 Florida Park Drive – Holland Park

2860 Palm Coast Parkway – Heroes Park

150 Waterfront Park Road – Waterfront Park

39A Boston Lane – Re-pump site for irrigation to Ribbon Lake

Florida Park Drive – Golf Course irrigation transfer pump

Elevated Storage Tanks – I95 and S.R. A1A

Town Center – Cigar lake Reclaimed Water Pump Station