

ORDINANCE NO. 822

AN ORDINANCE OF THE CITY OF BROOKSVILLE, FLORIDA, AUTHORIZING A CONTRACT AWARD TO ENCORE CONSTRUCTION COMPANY WITHOUT COMPETITIVE SELECTION FOR THE COMPLETION OF THE WATER REUSE FACILITY; ESTABLISHING CRITERIA FOR THE AWARD; PROVIDING FOR SEVERABILITY, CONFLICTS, REPEAL, AND CODIFICATION; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City of Brooksville, Florida, (“City”) is a municipal corporation duly created and existing pursuant to the Constitution and laws of the State of Florida; and,

WHEREAS, the City is vested with home rule authority pursuant to Article VII, Section 2 of the Constitution of the State of Florida; and,

WHEREAS, pursuant to Chapter 166, Florida Statutes, and Section 1.03 of the Charter of the City of Brooksville, the City may exercise any power for municipal purposes except when expressly prohibited by law; and,

WHEREAS, the City Council of the City of Brooksville granted certain approvals to establish and authorize a planned development project, more commonly known as Southern Hills Plantation Planned Development Project (the PROJECT);

WHEREAS, the City, Hampton Ridge Developers, LLC, LandMar Group, LLC, and LandMar Management, LLC entered into a development agreement dated May 28, 2003, and titled *City of Brooksville Florida Development Agreement for Hampton Ridge Project* (the DEVELOPMENT AGREEMENT) which is recorded in the public record at Book 1855 Page 1059;

WHEREAS, the Development Agreement requires Hampton Ridge Developers, LLC, LandMar Group, LLC, and LandMar Management, LLC (collectively, the DEVELOPER) to provide various public facilities including potable water, sanitary sewer capacity and service, over-sizing of certain utility lines, transportation system requirements, reservation of property for a school, and other public facilities, including providing for reuse/reclamation capacity at the City’s Cobb Road Wastewater Treatment Facility (the “WRF Project”);

WHEREAS, the Development Agreement was subsequently amended by the *First Amendment to the City of Brooksville Florida Development Agreement for Hampton Ridge Project* (the FIRST AMENDMENT) dated October 18, 2004, and recorded in the public record at Book 1916 Page 1719 and by the *Second Amendment to the City of Brooksville Florida Development Agreement for Hampton Ridge Project* (the SECOND AMENDMENT) dated November 29, 2004, and recorded in the official public record at Book 1938 Page 1758 and by the *Third Amendment to the City of Brooksville, Florida Development Agreement for Hampton Ridge Project* (the THIRD AMENDMENT) dated May 5, 2008 and recorded in the official public record book at Book 2565 Page 508;

WHEREAS, the City and Hampton Ridge Developers, LLC entered into that certain *Agreement Between the City of Brooksville and Hampton Ridge Developers, LLC to facilitate Cooperative Funding Provided by the Southwest Florida Water Management District for the Construction of Reclaimed Water Storage, Pumping, Transmission and Distribution Systems*, (the SUPPLEMENTAL AGREEMENT), dated May 17, 2004, and amended on July 12, 2005, which is recorded in the public record at Book 1870 Page 1517 to 1524;

WHEREAS, the City and Hampton Ridge Developers, LLC subsequently entered into the *Cobb Road WRF Agreement* dated December 21, 2006, and recorded in the public record at Book 2404 Page 782 (the WRF AGREEMENT). The WRF AGREEMENT was subsequently amended and restated by the *Amended and Restated Cobb Road WRF Agreement* (the AMENDED WRF AGREEMENT), dated April 21, 2008, and recorded in the public record at Book 2569 Page 432;

WHEREAS, pursuant to paragraph 1 of the AMENDED WRF AGREEMENT, the City approved the amount and the form of proposal from Encore Construction Company (ENCORE) to DEVELOPER dated October 27, 2006 to provide for an upgrade of the Cobb Road Wastewater Treatment Facility to provide for 3 million gallons per day of treatment capacity and add reclaim components (the WRF PROJECT);

WHEREAS, the DEVELOPER entered into that *Engineers Joint Contract Documents Committee ("EJCDC") Suggested Form of Subagreement between Design/Builder and Subcontractor on the basis of a Fixed Price* dated January 5, 2007 with ENCORE (the ENCORE SUBAGREEMENT) based on the amount and form approved by the City Council in the AMENDED WRF AGREEMENT;

WHEREAS, the City accepted Bond No. 82036733 in the amount of \$7,821,600.00, posted by the DEVELOPER, as principal, with Chubb Group Insurance Companies/Federal Insurance Company, as surety, and the City as the named obligee to secure completion of the infrastructure obligations set forth in the WRF and AMENDED WRF AGREEMENTS;

WHEREAS, the City and the Southwest Florida Water Management District (the SWFWMD) entered into that certain *Cooperative Funding Agreement No. 04CON000079*, (the COOPERATIVE FUNDING AGREEMENT) dated June 1, 2004, as subsequently amended, for additional funding for the WRF Project;

WHEREAS, pursuant to the COOPERATIVE FUNDING AGREEMENT, the WRF PROJECT is to be substantially completed by April 2012;

WHEREAS, the City and Hampton Ridge Developers, LLC also entered into a *Utility Infrastructure Agreement* (the UIA), dated June 10, 2004, which is recorded in the public record at Book 1855 Page 1041;

WHEREAS, the DEVELOPMENT AGREEMENT, the SUPPLEMENTAL AGREEMENT, the WRF AGREEMENT, the AMENDED WRF AGREEMENT, the COOPERATIVE FUNDING AGREEMENT and the UIA are collectively referred to as the Project Agreements (the PROJECT AGREEMENTS);

WHEREAS, on June 10, 2009, the DEVELOPER and their affiliated companies ("LANDMAR DEBTORS") filed for protection under Chapter 11 of the U.S. Bankruptcy Code in Austin, Texas (the "BANKRUPTCY COURT") in a case styled In re Crescent Resources, LLC, et. al Case No. 09-11507 (the BANKRUPTCY CASE);

WHEREAS, as of the commencement date of the bankruptcy petition, June 10, 2009, an automatic stay from enforcement against the LANDMAR DEBTORS or property of their estate was imposed by Sec. 362 of the U.S. Bankruptcy Code; thereby preventing the City from taking any action against the LANDMAR DEBTORS until the stay was lifted;

WHEREAS, the LANDMAR DEBTORS have filed a plan of reorganization and have sought permission from the BANKRUPTCY COURT to assume portions of the PROJECT AGREEMENTS, and to reject portions of the Project Agreements,

WHEREAS, the LANDMAR DEBTORS assigned selected assumed portions of the PROJECT AGREEMENTS to GreenPointe Communities, LLC ("GREENPOINTE") and GREEN POINTE has rejected any assumption of obligations for waster reuse or wastewater treatment plant expansion under the DEVELOPMENT AGREEMENT, SUPPLEMENTAL AGREEMENT and the AMENDED WRF AGREEMENT;

WHEREAS, prior to February 23, 2011 the LANDMAR DEBTORS rejected any further obligations under the PROJECT AGREEMENTS, including the AMENDED WRF AGREEMENT;

WHEREAS, the Confirmation Order of the Federal Bankruptcy Court in the BANKRUPTCY CASE deemed the ENCORE SUBAGREEMENT to be rejected as of February 23, 2011;

WHEREAS, the City filed suit to collect on collect on Bond No. 82036733, and subsequently, the City entered into a settlement agreement with Chubb Group Insurance Companies/Federal Insurance Company to resolve the performance bond claim;

WHEREAS, ENCORE has partially performed its obligations under the ENCORE SUBAGREEMENT and has installed the reuse transmission pipeline between Southern Hills Plantation and the entrance to the Cobb Road Wastewater Treatment Facility;

WHEREAS, ENCORE has agreed to honor its obligations, under the ENCORE SUBAGREEMENT, pursuant to a letter dated June 27, 2011 which is attached hereto as Exhibit A and incorporated herein as if set forth in *haec verba* and subject to the limitations and modifications set forth herein;

WHEREAS, the time to competitively award the WRF PROJECT will (1) jeopardize the funding for the WRF PROJECT given the deadlines in the various agreements and permits, (2) materially increase the cost of the project, and (3) create an undue hardship on the public health, safety, or welfare;

WHEREAS, ENCORE is uniquely qualified to undertake the WRF PROJECT because it is currently under contract to perform work on the WRF PROJECT;

WHEREAS, entering into an amended agreement with ENCORE is not being done in an arbitrary or capricious manner;

WHEREAS, Coastal Engineering Associates, Inc., as engineer of record for the WRF PROJECT, has provided a written recommendation that the WRF PROJECT be awarded to ENCORE without competitive selection;

WHEREAS, the City Council held a public meeting on July 18, 2011 to considered whether or not to proceed with a the WRF PROJECT under a reduced scope of work without competitive selection; and

WHEREAS, by a four-fifths vote the City Council approved moving forward with the WRF PROJECT under a reduced scope of work which is reflected in the Project Budget Worksheet, attached hereto as Exhibit B and incorporated herein in *haec verba*;

WHEREAS, in accordance with the requirements of Section 255.20 (10), public notice was published on July 27, 2011, before final action of the City Council on this ordinance or an amended agreement with ENCORE; and

WHEREAS, the City Council held a public meeting on August 1, 2011 to consider this ordinance; and

WHEREAS, in accordance with the requirements of Section 255.20 (10), public notice was published on August 5, 2011, of the City Council's intent to consider a final amended and restated agreement with ENCORE; and

WHEREAS, the City Council will hold a public meeting on August 15, 2011 to consider for approval a final amended agreement with ENCORE for completion of the WRF PROJECT;

WHEREAS, in light of the LANDMAR DEBTORS rejection of its obligations under the PROJECT AGREEMENTS and the ENCORE SUBAGREEMENT, and given the time constraints for maximizing use of available grant funds under the COOPERATIVE FUNDING AGREEMENT, the City deems it in the best interest of the health, safety and welfare of the public to assume the place of the DEVELOPER with respect to the ENCORE SUBAGREEMENT, subject to the limitations set forth in the Amended Agreement.

NOW THEREFORE BE IT ORDAINED by the City Council of the City of Brooksville, as follows:

SECTION 1. PURPOSES AND FINDINGS OF FACT. The preceding recitals are true and correct, and are incorporated herein, in *haec verba*. It is the intent and purpose of this Ordinance to provide the authority and mechanisms within the parameters of federal, state and local laws, to allow the expenditure of performance bond proceeds to fund completion of the WRF PROJECT by ENCORE CONSTRUCTION COMPANY, under a reduced scope of work and an amended contract entered into without competitive bid.

SECTION 2. AUTHORIZATION TO PROCEED WITH CONTRACT AMENDMENT WITHOUT COMPETITIVE BID. The City Council authorizes staff to negotiate an amendment to the ENCORE SUBAGREEMENT previously entered into by and between ENCORE CONSTRUCTION COMPANY and HAMPTON RIDGE DEVELOPERS, INC. The amendment shall reflect the reduced scope of work for the WRF PROJECT contemplated by the Project Budget Worksheet, which is attached hereto as Exhibit B and incorporated herein, and that such amendment to the contract shall be undertaken without competitive bid. Any amendment to the ENCORE SUBAGREEMENT which is proposed for City Council's consideration shall be for a not-to-exceed contract price of \$3,285,000.

SECTION 3. SEVERABILITY. If any section, subsection, sentence, clause, phrase or portion of this Ordinance, or application hereof, is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion or application shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof.

SECTION 4. CONFLICTS AND REPEALER. This Ordinance shall be cumulative of all provisions of the ordinances of the City of Brooksville, Florida, except where the provisions of this Ordinance are in direct conflict with the provisions of such other ordinances, in which event all ordinances or parts thereof in conflict with this Ordinance are hereby repealed to the extent of such conflict.

SECTION 5. EFFECTIVE DATE. This Ordinance shall take effect and be in force after approval of same by the City Council of the City of Brooksville

CITY OF BROOKSVILLE

By: Frankie Burnett
Frankie Burnett, Mayor

Attest: Janice L. Peters
Janice L. Peters, CMC, City Clerk

NOTICE Published on July 29, 2011 per F.S. Section 255.20(10)
PASSED on First Reading August 1, 2011
NOTICE Published on August 5, 2011
PASSED on Second & Final Reading August 15, 2011

APPROVED AS TO FORM FOR
THE RELIANCE OF THE CITY
OF BROOKSVILLE ONLY:

VOTE OF COUNCIL:
Bernardini NAY
Bradburn AYE
Burnett AYE
Johnston AYE

Thomas S. Hogan, Jr.
Thomas S. Hogan, Jr., City Attorney