

EXHIBIT "A"

May 24, 2011

Encore Construction Company, LLC  
Attn: Mr. Tim Behler, Vice President  
270 East Crown Point Road  
Winter Garden, FL 347487

**RE: ITB 110161 - HIGHLAND LAKES WATER TREATMENT PLANT  
IMPROVEMENTS**

Mr. Behler,

It has been brought to my attention your bid and the resulting contract amount may not contain costs associated with furnishing the Variable Frequency Drives as specified in Section 262923 Variable Frequency Drive (VFD) of the Invitation to Bid document.

Prior to issuing the Notice to Proceed I will require confirmation your company can provide the scope of work for the original contract amount.

Complete the attached 'Contract Price Confirmation' and return to my office by 4:00 PM Thursday, May 26, 2011. If a response is not received by then the City will assume the material was not included, the bid was nonconforming as a result, and the contract will be revoked and awarded to the next highest responsive and responsible bidder. The City may also choose to file a claim with the surety providing your bonds.

Respectfully,



Mike Thornton  
Purchasing Manager

attachment



Purchasing Division  
204 N. 5<sup>th</sup> Street, Leesburg, FL 34748  
Phone: (352)728-9880 / Fax: (352)326-6618  
e-mail: [purch@leesburgflorida.gov](mailto:purch@leesburgflorida.gov)

EXHIBIT "A"

**CONTRACT PRICE CONFIRMATION**

**City of Leesburg, Florida**  
**ITB 110161 – Highland Lakes Water Treatment Plant Improvements**

Encore Construction Company, LLC  
270 East Crown Point Road  
Winter Garden, FL 347487

Initials

\_\_\_\_\_ The bid/contract amount submitted under ITB 110161 does include providing the variable frequency drives. I confirm the work will be performed for the contract amount as a prerequisite to issuance of the Notice to Proceed.

\_\_\_\_\_ I confirm my company CANNOT perform the scope of work for the base contract amount. I realize the City will terminate the agreement with Encore Construction Company, LLC and proceed with bid award to the next highest responsive and responsible bidder.

\_\_\_\_\_  
Acknowledgement By (Signature)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name / Title

Please return the signed and dated confirmation by e-mail to [purch@leesburgflorida.gov](mailto:purch@leesburgflorida.gov), by fax to (352)326-6618 or by other means to our office located at 204 N. 5<sup>th</sup> Street, Leesburg, FL 34748.

June 1, 2011

**VIA Facsimile (352) 326-6618 & U.S. Mail**

Mike Thornton  
Purchasing Manager  
204 N. 5<sup>th</sup> Street  
Leesburg, Florida 34787

**RE: ITB 110161 – Highland Lakes Water Treatment Plant Improvements  
Agreement for Contractor Services dated May 9, 2011**

Dear Mr. Thornton:

Thank you for granting the previous extension of time to respond to your May 24, 2011 letter regarding the above referenced project. Below is Encore Construction Company, LLC's ("Encore") response to your May 24, 2011 letter.

Encore's bid response was responsive to and conforming with the requirements of ITB 110161– Highland Lakes Water Treatment Plant Improvements ("ITB) and the Agreement for Contractor Services dated May 9, 2011 ("Agreement") was properly awarded to Encore. The ITB provides for Siemens Water Technologies ("Siemens") to provide the Variable Frequency Drive (VFD) as part of the \$170,000.00 allowance under Bid Item No. 10. As indicated by the Section 012000 of ITB, "payment for Bid Item No. 10 shall be at the actual City Contractor [Siemens Water Technologies] invoiced amount." The City provided all bidders with the \$170,000.00 allowance number for Item No. 10 by including it in the Schedule of Bid Items spreadsheet. If the \$170,000.00 allowance is not enough to cover the VFD and other devices, instrumentation, systems, equipment and services to be provided by Siemens, then additional cost based on the actual Siemens' invoiced amount is the City's responsibility in accordance with the ITB and Agreement.

Subsection O of Section 011100 –Summary of Work of the ITB states:

O. Breakdown of Instrumentation, Control and SCADA System Work

1. It is the intent that at the conclusion of this project the City will own and operate an integrated and fully functional set of instrumentation, control and SCADA system improvements for the Highland Lakes Water Treatment Plant

(including Well No. 2). The City, the Contractor, and Siemens Water Technologies each will furnish and install part of the required improvements. The purpose of this paragraph is to provide a general description of the instrumentation, control, and SCADA systems work to be performed by the City, the Contractor and Siemens Water Technologies. The Contractor will have ultimate responsibility for the successful performance of all instrumentation, control and SCADA systems installed or modified during this project except for the work performed by the City.

- a. Work to be performed by the City: The City will furnish and install fiber optic service to the project site and terminate the fiber optic service in a control panel to be supplied and installed by Siemens Water Technologies. This is the extent of the City's work.
- b. The Contractor will furnish and install all conduit control wiring, including pull strings. The Contractor will also furnish and install electrical panels and equipment, lighting panels and equipment, electrical equipment, electrical circuits, conduits and wiring, and equipment not otherwise furnished by Siemens Water Technologies.
- c. Siemens Water Technologies will furnish and start-up all measuring devices, instrumentation and control devices and equipment, motor control centers, panels, and equipment, variable speed drives and enclosures, and communication equipment and systems. Siemens Water Technologies will connect the Highland Lakes Water Treatment Plant controls to the SCADA system via the fiber optic system, and will connect Well No. 2 and lift stations via radio.

Subsection O. 1. c. cited above clearly provides that Siemens is to provide all variable speed drives, which includes the Variable Frequency Drive you reference in your letter. Thus, under subsection O. 1. b., the Contractor is not to furnish the VFD since Siemens is to furnish. Encore disputes that the City has any bond claim or any other claim against Encore.

At this point, we see one of three potential options that can be taken to resolve this situation. The first option would be for the City to honor the Agreement and process a change order to increase the allowance by the amount necessary to procure the Siemens' VFDs (\$220,530.00 including taxes) and Encore in turn would agree not to require additional markups for the increase in the costs of project bonds, insurance, or other fees on the Agreement due to the increase. The second option would be for the City and Encore to work together with the Engineer of record (AECOM) to find an alternative VFD manufacturer and/or scope within the next thirty (30) days and if an alternative is found, the City will process a change order for the actual additional cost of the VFD alternative plus applicable taxes. The last option involves the City exercising its ability to cancel the Agreement for convenience, pay Encore \$25,000.00 for its time and expense and return Encore's bid bond, contract performance and payment bonds, insurance certificates and all other transmitted materials.

EXHIBIT "B"



Please consider these options and provide a response to us on how the City desires to proceed by Friday, June 10, 2011. If you have any questions or would like to discuss this matter further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy M. Behler, Sr.", written in a cursive style.

Timothy M. Behler, Sr. Vice President  
Encore Construction Company, LLC

EXHIBIT "C"

June 9, 2011

Encore Construction Company  
Attention: Timothy M. Behler, Sr. V.P.  
Post Office Box 771599  
Winter Garden, Florida 34777 – 1599

RE: ITB 110161 – Highland Lakes Water Treatment Plant Improvements,  
Agreement for Contractor Services dated May 9, 2011

Dear Mr. Behler:

The City of Leesburg has reviewed your response dated June 1, 2011, and has given it careful consideration, after which I must advise you that the City disagrees with your conclusions. The language quoted in your letter is contained in the Invitation to Bid, but cannot be considered independently of the context of the entire document, other portions of which make it clear the Variable Frequency Drive in question was to be included within the scope of work for the project and in your company's bid on the project.

In Section 011100, "Summary of Work," Item A provides (emphasis added):

Furnish all labor, *materials, equipment and incidentals* and construct and place into service improvements to the Highland Lakes Water Treatment Plant in conformance with the Contract Documents. The work generally includes, but is not limited to, the following: \*\*\*

3. Installation of five split case horizontal centrifugal pumps for pumping potable water. Four pumps shall be rated at 1463 gpm at 186 feet total head. One pump shall be rated at 800 gpm at 186 drivers. *All pumps shall have variable frequency drivers.*

In Section 012000, "Measurements And Payment," Item D ("Description of Pay Items") provides a summary of the work to be accomplished for the pay items in the Bid Form. Subsection D(6) states:

6. Base Bid Item 6: High Service and Well Pumps and Equipment
  - a. This lump sum pay item includes, but is not limited to, furnishing all labor, *equipment and materials* and modifying the existing well pumps, and installing the high service pumps, motors, *VFDs*, lining



Purchasing Division  
204 N. 5<sup>th</sup> Street, Leesburg, FL 34748  
Phone: (352)728-9880 / Fax: (352)326-6618  
e-mail: purch@leesburgflorida.gov

## EXHIBIT "C"

and coatings, above grade valves, pipe, fittings, and all other items required for a complete installation, unless such items are covered by other items of the Bid Form.

- b. Payment shall be made for the well pumps modified ***and for the high service pumps and equipment furnished***, and installed in the high service pump building complete and operating to the satisfaction of the Owner.

These portions of the ITB make it abundantly clear the VFDs were to be included in the bid, not excluded and paid for separately by the City. The next three lowest bidders did understand that this equipment was to be included in their bids, and they did so. Adding the cost Encore is asking to add to its bid for the VFD would render it the fifth lowest bidder, with the four ahead of Encore all having included the VFD in their total bid amount.

Encore's assertion that the \$170,000.00 allowance for Siemens on the spreadsheet was to be for this purpose is refuted by Section 012000, Item D, Subsection D(10) which states:

10. Base Bid Item 10: Allowance for Siemens Water Technologies Furnished ***Instrumentation and Control Equipment and Systems.***

- a. An Allowance has been established for the City Contractor (Siemens Water Technologies) to furnish start – up ***identified instrumentation and control equipment and systems***, to integrate the new water treatment plant onto the City's SCADA System, and rapid telemetry.

As clearly stated, the allowance for Siemens on the spreadsheet was for controls and instrumentation related to the interface between the plant and the SCADA system, not for the VFDs. Other bidders understood this as well, but the City is advised that despite having been informed by Siemens of the cost of the VFDs, Encore made a conscious decision to omit that cost from its bid, making the bid nonresponsive to the ITB.

The City has confirmed with Sanders Company, Inc. a price quote for the Danfoss VFDs was provided to Encore by e-mail on March 25, 2011. If there was any confusion as to whether the \$208,000 cost on the price quote should be included in your bid it should have been questioned then. The Sanders Company quote clearly states,

*“No other equipment and/or services are included other than those specifically stated on this Scope of Supply. . . .”*

The only equipment listed on the Scope of Supply quote are the VFDs and material directly related to the VFDs. The Scope of Supply clearly does not include the instrumentation and control items covered under the \$170,000 allowance.

The City does not believe its ITB was in any way misleading or unclear on the issue in question, thus the City rejects all options offered by Encore in your letter dated June 1, 2011. The City is

EXHIBIT "C"

unwilling to alter the design of the VFDs or project to accommodate an oversight by another party. The City will not accept a design other than the one issued with the ITB.

Any increase to Encores' original bid price renders the bid no longer the lowest bid. Any change in the design as proposed by Encore would make your firm the 4<sup>th</sup> or 5<sup>th</sup> lowest bid, depending on the change.

The City extends its original offer to terminate the Agreement for convenience at no cost to the City. Should Encore refuse this offer the City will declare the bid nonconforming and terminate the Agreement. Further, the City may assert a claim against Encore and its surety for nonperformance.

Should Encore accept the offer to terminate for convenience, the termination for convenience document would contain a mutual release by each party to the other of any and all claims and causes of action related to this bid and the contract. This is a one time, non – negotiable offer which will remain open through 4:00 p.m. on June 15, 2011, after which it shall be considered withdrawn. If the offer is not accepted by that deadline, the City will re – evaluate its position and take such action as it deems to be in its best interests which may include a formal declaration of default and assertion of a claim against the bid bond, the performance and payment bond, or both.

Please consider this offer carefully and communicate your response at your earliest convenience, to avoid further delay in the project which will increase the damages suffered by the City due to the decision of Encore not to include the VFDs in its bid price as specified in the ITB.

Respectfully,

A handwritten signature in black ink that reads "Mike Thornton". The signature is written in a cursive, flowing style.

Mike Thornton  
Purchasing Manager

cc: Jay Evans, City Manager  
Ray Sharp, Director – Environmental Services  
Fred Morrison, McLin & Burnsed, PA

June 13, 2011

Attn: Mike Thornton, Purchasing Mgr.  
City of Leesburg-Purchasing Division  
204 N. 5th Street  
Leesburg, FL 34748

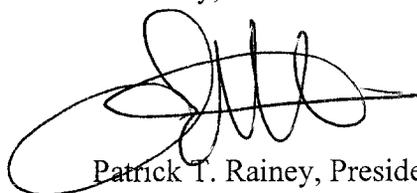
Dear Mr. Thornton,

We are in receipt of your letter dated June 9, 2011. Encore Construction has determined that the best outcome for all parties is to accept the City's offer to Terminate for Convenience. Therefore our acceptance to Terminate for Convenience is made subject to mutually agreeable terms of the Release document.

I am copying Dan Langley, Esq. of Fishback Law firm with this letter. He is representing Encore Construction Company, LLC in this matter. I have asked him to work with the City Attorney and to prepare the Release document for execution by all parties.

Your assistance in this matter is appreciated. If I can be of further assistance, please do not hesitate to call upon me.

Sincerely,



Patrick T. Rainey, President  
Encore Construction Company, LLC

Cc: file, D. Langley