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10/16/14  
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October 15, 2014

**HAND DELIVERED OR BY FAX (352) 334-2096, 9:30 A.M.**

Mr. Brent Gotschalk  
City Auditor  
City of Gainesville  
222 East University Avenue  
Gainesville, FL 32614

14 OCT 15 PM 1:40  
CITY OF GAINESVILLE

**RE: Navigant Investigative Review Agreement**

Brent,

I received a call from the Mayor yesterday asking if I would consider contacting you to share my views of the proposed Navigant Contract with an eye toward possible tweaks that could be made to help ensure that prior to being presented to the Commission that the contract reflects as fully as possible the Commission's stated purposes and the best interests of the City, GRU, GRU customers and Gainesville citizens.

As I told the Mayor, I have believed and continue to believe that Navigant is capable of competently or excellently performing the tasks assigned to it, my misgivings about the procurement and evaluation process notwithstanding. Last year I brought Navigant to the attention of some Commissioners, provided documentation of past work performed by Navigant, and suggested to commissioners that if a forensic audit of GRU were to be approved Navigant should be recruited.

As I also told the Mayor, I am impressed by the qualifications and experience of the individuals Navigant has agreed to assign to this project -- not only the lead investigator Todd Lester, but also the other staff that has been promised. Given the strength of this promised staff, my positive opinion would be unlikely to change even if Mr. Lester is unable to participate in the project -- a possibility suggested in the RFP. But in the event another Navigant staffer is proposed to lead the project, I would hope that person would also have strong relevant qualifications and experience, and I would expect the City to make relevant adjustments to the high hourly rate to be paid for the team leader based on differences in qualifications and experience.

My observations and comments:

**Section 1.1 Primary Objectives.** It is in my view certainly relevant to recite these overarching principles, to the extent they continue to represent part of the focus of the majority of the members of the Gainesville City Commission. I also think it is important to include a section that specifically in the contract itself the strategies and tasks Navigant in its binding proposal<sup>1</sup> has agreed to employ to address these broad principles. The failure to specifically recite these already agreed upon services in the contract itself could later be asserted by Navigant to be a change requiring additional compensation. Additionally, it is a huge oversight in my view to include here only a vague requirement of a “written report” limited to the recited so-called “primary objectives” without a requirement of a written report addressing other objectives and the addressing with some specificity the outcomes of tasks Navigant agreed to undertake in its proposal<sup>1</sup>, which, again, in my view should be specifically recited in the contract. Given the cost of the investigative review and the importance of its conclusions it would be appropriate to include more specific requirements as to the nature of the written report. As stated here it could arguably be no more than the Power Point presentation. If specifics of the report – including a minimum page length, say 200 pages for instance – are not included, the City may find itself in the position of having to pay extra for a meaningful report, assuming a meaningful report is the goal of the majority of the City Commission.

**Section 1.2 Contract Documents.** In order to avoid possible confusion, and conflicting provisions, I suggest that the two listed RFP documents be removed, as well as the Navigant Power Point document. The technical and price proposals should be retained, but the language referring to them should be changed to clarify that Navigant is not just “directed to” these documents, but is “directed to follow the requirements of these documents, unless the requirements are expanded by separate written agreement.”

**Section 1.3 Minimum Requirements.** In order to avoid possible confusion and conflicting provisions I suggest that the title of this section be renamed to be simply “Requirements,” and that those portions of this section be eliminated that restate matters already described in Navigant’s proposal. It is not in the City’s interests to set “minimum requirements” that are below the requirements already agreed to in its proposal. The language should be something to the effect that “These requirements are not intended to change or limit the scope or nature of the work describe in Navigant’s May 7, 2014 date proposal for “External Investigative Review of Gainesville Regional Utilities.”

**Section 1.4 Expert Witness Testimony.** This section is important to include, but it is not clear what is meant by the phrase “To the extent that City requests Consultant to reach conclusions or form opinions, Consultant is obligated to give City, Consultant’s best independent judgment *without regard to the impact that such conclusions or opinions may have upon the investigative review.*” Presumably this sentence is meant to be read in the context of expert witness testimony. If that is the case, since expert witness testimony would presumably come after the completion of the investigative

review, what impact could such after-the-fact testimony have upon the investigative review? Assuming the intention of the phrase is as hypothesized here, more effective and pertinent language might be "*without regard to the apparent consistency or lack of consistency of such conclusions or opinions with summary statements contained in the investigative review.*"

**Section 1.5 Not a Financial Audit.** The inclusion in the proposed contract of this restatement may be useful in my view given the demonstrated past confusion expressed by some commissioners and members of the public regarding the difference between a financial statement audit and an investigative review.

**Section 2 Standards for Investigative Review.** While I think I understand the intention of including this section, the cited sections and paragraphs of the City Auditor's Policies and Procedures Manual as I read them apply specifically to auditors and audits, not investigators and investigative reviewers. Aside from these nomenclature differences, many of the cited sections and paragraphs of the manual simply do not fit in the circumstances of an outside firm, particularly not the references to whistleblowers. The "Confidentiality" and "Correspondence and Contact with the Media" sections also do not fit. The "Public Access to Office Records" section not only does not fit, but is redundant and in possible conflict with Section 5 of the contract. Given the inherent ambiguities resulting from reference to the cited manual, substantial interpretation of its meaning in the context proposed could arise. Furthermore, in light of the policy of the courts to defer to administrative agencies with regard to interpretation of their own rules it may be functionally impossible for Navigant to follow this provision and maintain its independence from the City, limiting language in Section 2 to the contrary notwithstanding. I respectfully suggest this section be eliminated entirely, and the remainder of the contract renumbered accordingly.

**Section 3 Independence.** The boiler plate language regarding independence is necessary, but it would make more sense to remove the word "including," which erroneously suggests that current and former employees of the City and persons with interest an involvement in the investigative review are "parties." The "ethical screen language is fine" – I assume from its stated scope that GREC was contacted and asked to provide a waiver as required by the City Commission resolution and refused to do so – but I believe that it would be useful to make clear that such an "ethical screen" does not prohibit access to records created by those screened, provided those records are available without the necessity of contact with the excluded persons or entities (e.g. public records created by the excluded persons or entities).

**4. Independent Contractor.** In my view this section is necessary, succinct and well-drafted.

**5. Public Records.**

### **5.1 Consultant Acting on Behalf Of City In Conducting The Investigative Review**

This is a useful section that I should be much appreciated by citizens interested in this process.

**5.2 Records Confidential and Exempt During Investigation** Whether there is the force of law behind the City's designation of the Consultant as "an independent inspector general performing certain functions otherwise performed by the City Auditor" is an open question in my view. Legally or not, this Section imposes public records restrictions on the Consultant. It is what it is.

**5.3 Handling Public Records Requests** Again, whether there is the force of law behind the provisions purporting to require the Consultant not to provide documents to the public is an open question in my view. The language reciting a requirement public records to be preserved and turned over to the City is appropriate and should be appreciated by the public.

**5.4 Duty to Defend** Balanced, succinct and well drafted in my view.

## **6 Compensation**

**6.1 Compensation Rate** Much of this segment is unnecessary in my view, provided that Navigant's responses to the Request for Proposal is incorporated by reference as I have suggested, but in my view there is no harm in including the redundant language provided it precisely tracks the language in Navigant's incorporated responses.

**6.2 Invoices** Fine.

**6.3 Payment** Fine.

**6.4 Not to Exceed Amount** Fine.

**6.5 Additional Fees** Fine.

**7. Term** Fine. However, as to the referenced "deliverables set forth in this Contract" I restate here what was stated above in reference to Section 1.1 that the "deliverables" should be more specifically describe. Given the cost of the investigative review and the importance of its conclusions it would be appropriate to include specific requirements as to the nature of the required written report. If specifics of the report – including a minimum page length, say 200 pages for instance – are not included, the City may find itself in the position of having to pay extra for a meaningful report, assuming a meaningful report is the goal of the majority of the City Commission.

**8 Termination** Fine

**9. Insurance** Fine

## **10.0 Indemnification; Limitation of Liability**

**10.1 Indemnification** I would suggest including as a grounds for indemnity Navigant's failure to perform to fully perform as a because of limitations resulting from perceived or asserted conflict of interest or independence impairment arising from its prior or possibly continuing contractual relationship with GREC. Navigant in its FERC filing for GREC not only was privy to information about who GREC's owners were (information not available to the City at that time) but also was privy to information about GREC's financial involvement with three solar contracts involving GRU customers, the investigation of which conceivably could lead to information related to improper influence with regard to local decision-makers. Such an indemnification provision, in my view, should include liquidated damages of at least the amount of the City's contract commitment with Navigant.

**10.2 Limitation of Liability** The \$300,000 liability limit is fine as long as Navigant is not granted approval to charge the City more than \$300,000 and as long as the City does not have a combined cost of more than \$300,000 in the event it is called upon to defend a losing public records suit on Navigant's behalf. In order to ensure against those possibility it would be better to include a provision limiting liability to \$300,000 or the combined amount GRU's contract commitment plus any expenditures made by the City in a losing public records defense of Navigant.

**11. Sovereign Immunity.** Fine.

**12. Notices** Fine.

**13. Assignment** Fine.

**14. Jurisdiction and Venue** Fine.

**15. No Third Party Beneficiaries** Fine.

**16. Attorneys' Fees and Costs** This is a highly unusual provision. In my view, recovery should be limited to reasonable attorneys' fees and taxable costs at most. Non-taxable costs are wholly inappropriate, in my view, particularly such non-taxable costs as "costs of investigation," "electronic discovery costs," "information technology support charges," and "consultant and expert witness fees." The effect of exposing the City to such irregular and potentially hugely costly liabilities for asserting its contractual rights could have a chilling effect on the City's willingness to seek to enforce it rights.

**17. Entire Agreement** Fine.

## NOTES

<sup>1</sup> 1. **Project initiation:** Meet with "the city of Gainesville" to confirm the scope and schedule for the performance of this review.

– – **Identify available documents** (i.e. documents determined to be relevant and suggested up front by the City and GRU; presumably Navigant will exercise its required independence by significantly expanding the scope of its records identification as required to perform a meaningful investigative review.)

– – **Identify key personnel** (i.e. those suggested upfront by the City and GRU; presumably Navigant will exercise its required independence by significantly expanding the scope of its records identification as required to perform a meaningful investigative review.)

– – **Develop issues analysis** (i.e. those issues suggested upfront by the City and GRU; presumably Navigant will exercise its required independence by deepening its issues analysis as required to perform a meaningful investigative review.)

– – **Set an agreed-upon schedule and budget** (i.e. as agreed by "the city of Gainesville," which in this case presumably means the City Auditor; from the limitation language included in the Navigant proposal, it is clear that a meaningful investigative review product will require more than the services included in \$180,000 amount bid by Navigant, which, coincidentally, reflects exactly the amount the City Auditor in February was quoted in The Gainesville Sun as suggesting would likely be the minimum bid amount; see comments in subsequent sections related to what expansions of the Navigant investigative review process would be necessary for there to be a meaningful investigative review.)

### 2. **Data collection and organization:**

– – **Review documents related to city/GRU relationship and processes** including charters, by laws, policies, procedures etc. (Hopefully, this task will be delegated to a lower level/lower paid Navigant staffer who would produce a summary report for the use of the Navigant team's higher level evaluators to apply in analyzing information and data.)

– – **Review documents related to GREC development** -- designs, financial analyses, contracts, etc. (Given the fact that Navigant's proposal -- unlike the other two proposals considered -- did not include legal personnel in the bid price, if this task is to be adequately it may be necessary for an upward price adjustment to pay for attorney assistance.)

– – **Identify additional documents required to complete** review (These records should include, among other things, the original RFP documents submitted by Nacogdoches Power LLC; Records related to the changed evaluation metrics that

resulted in Nacogdoches moving from third place in ranking to first place in ranking among the three short listed proposers between November 2007 and April 2008; Records showing the bid price that was approved in relation to Nacogdoches May 2008 bid (\$77 per megawatt hour all-in) and records showing the June 2008 request by Nacogdoches for a 42% price increase after Nacogdoches had already secured the bid based on points awarded for its price proposal submitted in April [and it should be noted by Navigant in its tracing of decision-making related to GREC that the per megawatt hour prices charged by GREC to GRU for the period between commercial operation on December 17, 2013 and the end of the fiscal year September 30, 2014 GRU has ended up paying more than 100% more than the originally bid all in per megawatt hour bid price]; Records related to contract negotiation including, records related to the then General Manager's task of securing the out-of-the-Sunshine agreement with certain City Commission "decision-makers" to remove from future consideration the Commission-voted required "back-door-out" clause; Records related to the 2009 suppressed report from a Haddad Consulting advising that the construction cost index proposed by Nacogdoches for price increases going if applied retroactively to the period from November 2007 when the original RFPs were submitted through the start of 2009 indicated that construction prices for that period had declined rather than increased; Records submitted to or displayed to the Commission in April and May 2009 falsely implying increases in construction and material costs; Records that I have recently have shared with the city attorney and the interim general manager at GRU containing GREC's admission that the claimed FDEP "required" NOx level reductions and related pollution control equipment previously asserted by GREC as a basis for an upward "equitable adjustment" in the contract were not "required" by FDEP but were in fact requested by Nacogdoches for its own purposes; etc.)

-- **Determine if additional e-discovery is required** (The Navigant proposal -- unlike the Wyndom Brannon proposal -- does envision actual searching for and reconstructing deleted data, and also does not include data mining/analysis; these tasks, necessary for a meaningful investigative review, presumably will result in an upward adjustment of required contract payments.)

-- **Interview key personnel** (The Navigant proposal -- unlike the Wyndom Brannon proposal which included up to 45 interviews designed among other things identify conflicting claims for further investigation -- envisioned only a few interviews designed to assist with finding document not found in the initial review process; an expansion of this task, necessary for a meaningful investigative review, presumably will result in an upward adjustment of required contract payments.)

-- **Consider establishing a Sharepoint site** to house the documents and improve the efficiency of collection and analysis processes (This simple Microsoft off-the-shelf product is an organizational tool inferior to and different the signature Navigant Encase computer forensic software used by Navigant's certified computer examiners to conduct data collection and investigations using a repeatable and defensible process allowing the examiner to determine where the data originated, which type of user activity created the data and when the data was last accessed, and can recover files and partitions,

detect deleted files by parsing event logs, file signature analysis and hash analysis, even within compounded files or unallocated disk space; assignment of an Encase certified examiner, necessary for a meaningful investigative review, presumably will result in an upward adjustment of required contract payments.)

### **3. Investigative review of GREC contracts chronology and timeline and process controls review:**

-- **Review documents gathered** (This review if it is to result in a meaningful investigative review will depend on what documents have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

-- **Review chronology prepared by the city** (This is a necessary step -- the City Auditor in the RFP prepared a beginning chronology necessary for understanding the scope of the investigative review -- but hopefully this basic chronology will have been also reviewed by Navigant earlier in the process in order to make decisions regarding services necessary to achieve the scope of investigative review suggested by the beginning chronology.)

-- **Add items identified from other documents to the chronology** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what documents have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

-- **Review for gaps in chronology** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what documents have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

-- **Evaluation of actions taken by individuals in relation to the PPA negotiations and contracting against the requisite policies, procedures and internal controls, including delegations of authority** with a focus on the transparency of negotiations, required communication protocols and standards, and representations made by the various parties during the process (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what documents have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

-- **Select interviews of key personnel to identify additional information that may influence the findings** (The Navigant proposal -- unlike the Wyndom Brannon proposal which included up to 45 interviews designed among other things identify conflicting claims for further investigation -- envisioned only a few interviews designed to assist with finding documents not found in the initial review process; to the extent that the task



here described envisions the possibility of Navigant's findings being influenced by interviews resulting in conflicting claims it would involve an expansion of the number and scope of the interviews described in the Navigant proposal and therefore will likely result in an upward adjustment of required contract payments if a meaningful investigative review is the goal.)

#### **4. Analysis of GREC project and PPA History:**

-- **Review procurement process** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what documents have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

-- **Review project proposals** (Meaningfully reviewing the project proposals that were evaluated as part of the procurement process may require Navigant to secure agreement from Covanta and Sterling Planet to allow Navigant to review portions of their proposals designated confidential or trade secrets; efforts to secure these agreements should be initiated early in the process.)

-- **Review documentation of negotiations** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements; with regard to negotiations, available records document frequent meeting and communications between certain members of the City Commission and members of the GRU-GREC negotiating team; private email accounts of these Commissioners and negotiating team members should be subject to review for communications related to contract negotiations, which are public records.)

-- **Detailed analysis of financial projections** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements; readily available financial projections by GRU have been presented to the Public Service Commission and the City Commission formally as a body; readily available financial projections have been prepared by GRU's financial advisory partner PFM; much more detailed financial projections also were prepared by GREC for submission to its lenders which presumably were reviewed by Former General Manager Robert Hunzinger prior to his execution of a June 30, 2011 dated "Consent and Agreement" to various changes in the GRU-GREC PPA and reviewed by former Assistant City Attorney Skip Manasco prior to his signing of a June 27, 2011 legal opinion for the benefit of GREC's lenders.)

-- **Review all documents related to the project and the PPA including the power supply environment in Florida** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and

how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements; in addition to the power supply environment in Florida, where post-GREC biomass plant construction has stalled, it would be useful to examine the power supply environment in Georgia, where contemporaneous and similar biomass plant have been constructed at a fraction of the per megawatt hour cost claimed by GREC.)

-- **Review documents related to the justification choose to move forward with the project** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

-- **Review changes in the ownership and management structure at GREC during the period October 2007 through November 2013** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements; the Washington D.C. office of Navigant itself in April 2013 prepared for submission to FERC detailed information regarding GRECs ownership structure at a time when Arbitration filings by GRU indicated GRU's inferior knowledge of GREC's ownership structure; it should be clarified in the Navigant contract that although Navigant has agreed to an "ethical screen" limiting contact with Navigant personnel involved in Navigant's FERC filing on behalf of GREC that such "ethical screen" does not prohibit Navigant in its investigative review from accessing and making use of the public record documents filed by Navigant that provide significant information regarding GRECs ownership structure.)

-- **Conduct select interviews of key personnel to identify additional information** (The Navigant proposal -- unlike the Wyndom Brannon proposal which included up to 45 interviews designed among other things identify conflicting claims for further investigation -- envisioned only a few interviews designed to assist with finding documents; to the extent that the task here described envisions an expansion of the number and scope of the interviews described in the Navigant proposal it will likely result in an upward adjustment of required contract payments if a meaningful investigative review is the goal.)

##### **5. Report and recommendation development:**

-- **Identify root causes for changes in construction and operation costs** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

– – **Identify responsible parties** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

– – **Determine whether there are economic benefits to be gained from third parties** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements; with regard to possible economic benefits to be gained from third parties, it may be necessary for Navigant to seek records from GREC that GREC has heretofore questionably claimed to be exempt from the Florida public records laws; the Navigant contract should clarify whether GREC's public records law exemption claims apply as to the City's agent – Navigant – in relation to records in the possession of the City or GRU, and, if so, the relative responsibility of Navigant and the City in legally challenging GREC assertions of public records law exemptions.)

– – **Develop a detailed timeline of events and potential failures in controls that led to the concerns with the current PPA as amended** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements.)

– – **Identify potential inappropriate or unauthorized behavior by representatives of the parties to the PPA** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements; with regard to inappropriate behavior, the contract should expand the scope of evaluation beyond the parties to the PPA, which considered literally would involve only the City and GREC; there are persons or entities related to the parties whose potential inappropriate behavior are highly relevant and may be necessary for a meaningful investigative review, e.g. Ron and Dian Fagen, who have held conflicting and shifting roles as owners of GREC, contractor for construction of the GREC facility, and EPC contractor for the entire GREC project.)

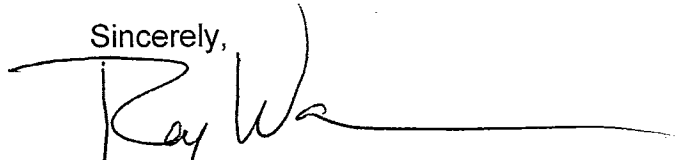
– – **Present recommendations concerning governments, processes and controls that will enhance the working relationship between GRU management and the city commission.** (The efficacy of this step to the process of achieving a meaningful investigative review will depend on what records have been gathered and how they have been gathered, which, in turn, will depend upon whether or not the Navigant contract is upgraded to included the above described minimum requirements; additionally, this step should be clearly defined as focusing on enhancing the legitimate working relationship between GRU management and the City Commission, while

offering conclusions related to the failure of processes and controls when individual members of the City Commission make out-of-the-Sunshine agreements with GRU management, which agreements are not disclosed in subsequent public meetings in which official action is taken, e.g. private agreements to remove the GRU-GREC "back door out" or "termination or convenience" clause it should also be established that recommendations will be contained in an extensive (200-page-plus, or instance) written report to the Commission with reference to extensive gathered documentation which should returned to the City and made available for review by Commissioners and the public.)

Please forgive the almost certainly numerous typing and possibly sense errors. In order to fulfill my commitment to the mayor I woke up early this morning and wrote without proofreading in order to assure that this document might be completed and delivered to City Hall before my work day tasks descended.

Feel free to contact me if you would like to discuss these matters further.

Sincerely,



RAY WASHINGTON