



Legislation Text

File #: 160435., Version: 1

RETENTION OF WINSTON & STRAWN LLP, TO REPRESENT THE CITY OF GAINESVILLE D/B/A GAINESVILLE REGIONAL UTILITIES IN MEDIATION WITH GAINESVILLE RENEWABLE ENERGY CENTER, LLC (NB)

On March 10, 2016, Gainesville Renewable Energy Center ("GREC") filed an arbitration demand with the American Arbitration Association ("AAA"), AAA Case No. 01-16-0000-8157, to resolve a dispute between GREC and the City of Gainesville d/b/a Gainesville Regional Utilities ("GRU") concerning GREC's planned maintenance outage in April of 2016. On March 17, 2016, the City Commission approved the retention of outside counsel to represent the City in the arbitration. The outside counsel, Winston & Strawn LLP, has experience in PPA related litigation and AAA arbitration.

On June 17, 2016, pursuant to Section 24.1 of the PPA, GREC submitted a Notice of Claim disputing GRU's withholding of payment arising from the following four operational issues: (1) shutdown charges, (2) available energy payments during startup, (3) withholding of previously paid amounts, and (4) payment decrease for failure of GREC to meet operating level. GREC amended its arbitration demand to include the four additional issues. In addition, a sixth issue has arisen in the course of the arbitration, resulting in GRU disputing GREC's reporting of availability. On August 4, 2016, the City Commission approved increasing the scope of representation and fee cap for Winston & Strawn LLP to include the additional claims.

Rule R-9 of the AAA Commercial Arbitration Rules and Mediation Procedures requires mediation of disputes that exceed \$75,000. However, since mediation is only a useful tool if both parties are willing to participate in good faith to resolve the disputes, the rule allows either party to provide notice that they are unilaterally opting-out of mediation. To date neither party has opted-out.

Winston & Strawn and the City Attorney's Office have encouraged good faith efforts to resolve the issues in the current arbitration, as well as to address other issues that have arisen or are anticipated to arise in future daily operational management of the PPA. To this end, GREC has recently agreed to participate in a facilitated mediation to discuss and potentially resolve issues of importance to both parties.

The PPA is a complex, long-term contract that requires daily operational management by both GREC staff and GRU staff. As evidenced by the six disputes that have arisen over the past year, there are operational issues that are not addressed in great detail in the PPA and absent the parties willingness to resolve these operational issues, future arbitrations are likely. Each party to any such dispute, even if they believe their arguments to be the most compelling, should consider that arbitrations are time consuming and expensive (the current arbitration is anticipated to cost GRU over \$2.5 million in outside counsel fees, a significant amount of time of 3 in-house counsel for GRU and the actual costs of mediation) and in the end, each party is bound by the decision made by a single person, the arbitrator.

A successful mediation, or other mutual resolution efforts, would allow the parties to exercise control over the outcome of the issues (rather than having to accept the decision rendered by an arbitrator), would greatly reduce the expected costs of the current arbitration process and could address other operational issues that lack clarity

in the PPA in order to provide certainty in dealing with those issues in the future and reducing the need for future arbitrations.

If the mediation leads to resolution of the arbitration claims or addresses other PPA operational issues that could be memorialized in an amendment to the PPA or other document, any such agreements will be presented to the City Commission and will be subject to the approval by the City Commission and by the City Attorney, as to form and legality. If the parties are unable to resolve the arbitration claims through the mediation process, then the arbitration will proceed and the arbitrator's decision will be binding on the parties pursuant to Section 24 of the PPA.

The parties are currently discussing the location of the mediation, dates and selection of the mediator. At the time of writing this agenda item, New York City or Washington, DC are being considered, as alternatives to the City's first choice of Gainesville and GREC's first choice of Boston. The dates being considered are in late October.

Winston & Strawn LLP has agreed to cap their legal fees at \$50,000.00 for preparation of a mediation memo for the mediator, one (1) day of mediation preparation and one (1) day of mediation with GREC. In addition, GRU will be billed for costs of the mediation (to be split with GREC), as well as travel costs for Winston & Strawn and GRU staff attending the mediation. Legal services above those anticipated above will be billed at regular hourly rates. Funding for expenses related to the mediation will be paid either from GRU budgeted funds for legal expenses or from unanticipated cost savings that GRU realizes.

City Commission (1) authorize the Office of the City Attorney, on behalf of the General Manager for Utilities, to retain Winston & Strawn LLP for representation of GRU in mediation with GREC; and (2) authorize the General Manager or his designee, to negotiate with GREC potential resolution of any and/or all claims or issues related to the PPA on terms mutually agreeable to the parties, subject to final approval of the City Commission and subject to approval by the City Attorney as to form and legality.