



Legislation Text

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CEM ENTERPRISES, INC. V. CITY OF GAINESVILLE; ALACHUA COUNTY CASE NO.: 2005-CA-3143
(B)

The City Commission 1) approve the terms of the settlement agreement; 2) authorize the City Attorney to settle the lawsuit on behalf of the City.

In the fall of 2004, the City was under a consent order from the Florida Department of Environmental Protection (FDEP) to stabilize the banks of the landfill that exist along a portion of the Sweetwater Branch Creek. The erosion of the old landfill bank was causing the contents of the landfill to wash into the stream thus polluting the stream. In December 2004, the City Commission approved the award of a bid to CEM Enterprises for the project, and subsequently the City and CEM entered into a contract. The City utilized the services of Golder & Associates, Inc., a consulting engineer to provide day to day supervision of the project and the site. It became apparent early during CEM's time on the project that CEM was having difficulty performing the project and in fact CEM abandoned the worksite prior to the expiration of the contract. The City therefore terminated the contract.

In August 2005, CEM filed a breach of contract Complaint against the City. CEM sought delay damages, extended site conditions damages and loss of productivity/efficiency damages. CEM contended that the claimed damages arose from allegedly deficient plans and specifications and the City's interference or lack of cooperation. Essentially, CEM asserted that it was impossible to complete the job under the terms of the contract, and the City would not compensate CEM to construct the project using a different approach.

The City filed a counterclaim against CEM for breach of contract and indemnification. The City's breach of contract claim was based on CEM's failure to construct the project in a timely fashion. The City's indemnification claim was based on CEM's obligation to contractually indemnify the City for any damages incurred as a result of CEM's default and actions while on the job.

The City hired a completion contractor, EBC, who successfully completed the project under the same contractual conditions given to CEM. The City submitted the completion report to FDEP which accepted the work done on the project.

The City was represented in the lawsuit by The Robertson Group, a Gainesville law firm, particularly its lead attorney Peter A. Robertson, who served as special counsel to the City. Mr. Robertson is Board Certified in Construction Law. The parties participated in Court-ordered mediation with a retired Circuit Judge, but mediation ended in an impasse. Since the parties were unable to reach an amicable resolution to the competing claims, the matter went to a jury trial in September 2006.

In September 2006, after a six-day trial, a jury determined the City breached the contract with plaintiff CEM Enterprises, and returned a verdict in favor of the plaintiff in the amount of \$734,549.74 as compensation for the breach of contract claim. If the verdict was allowed to stand, under the terms of the contract, the plaintiff could request the Court order the City to pay the plaintiff's attorneys' fees, expert witness, and costs associated with the litigation, in addition to the sum indicated by the jury. The City's special counsel identified several errors that could have led to the jury's verdict, and sought a re-trial of the matter on those grounds. The Circuit Court granted the City's motion, in part, by ordering a new trial on the issue/amount of damages only. The Circuit Court refused to

overturn the jury's decision as to liability.

Both the City and CEM appealed the Circuit Court's ruling. The City appealed the Circuit Court's denial of a new trial on liability, and CEM appealed the Circuit Court award of a new trial on damages. On January 23, 2008, the First District Court of Appeal issued an order denying both parties' claims by affirming the decision of the Circuit Court, and entered its Mandate on February 8, 2008 commanding that the Circuit Court commence further proceedings in accordance with its decision. No further appellate review was available to either party.

The case was sent back to the Circuit Court for a new trial on damages only. The trial is scheduled to commence on October 6, 2008. The Court also ordered the parties to participate in mediation which took place on May 30, 2008. At the mediation, the parties entered into a proposed settlement, subject to approval of the City Commission. At the mediation CEM demanded payment of approximately \$1.6 million, which amount included the amount awarded by the previous jury, additional damages CEM intended to argue were attributable to the breach of contract, attorneys' fees, prejudgment interests and costs that CEM would have been entitled to under the contract. In the interest of avoiding further litigation, including another jury trial and costs, the parties entered into a proposed settlement whereby the City would pay \$900,000 in full and complete settlement to CEM upon the City Commission's approval of the settlement agreement. CEM would release all claims against the City and agree to provide cooperation and assistance to the City regarding any claims the City may pursue against others in relation to the Sweetwater Branch Creek project.

It is the recommendation of the City Manager, Special Counsel, and the City Attorney's Office that the case be settled on these terms. If the matter is not settled, the case will proceed to another jury trial as to the matter of damages since the City was previously found liable for the breach of contract.

Fiscal Impact: The settlement is a liability of the Solid Waste Enterprise Fund. It is management's proposal that the General Fund make a short-term loan to the Solid Waste Fund to initially fund the payment of the settlement. Subsequently, during fiscal year 2009 \$900,000 would be added to the proposed borrowing that has been scheduled to fund portions of the FY09-FY13 Capital Improvement Plan. This incremental \$900,000 in proceeds would go to the General Fund to repay the short-term loan which funded the settlement. The Solid Waste Fund would be responsible for paying the debt service on the \$900,000, which would run over a term of 20 years. In this manner the rate impact on Solid Waste fees resulting from the settlement would be distributed over the long term, versus the rate impact that would occur if the entire settlement was folded into the next rate adjustment.