



Town of Chino Valley

MEETING NOTICE TOWN COUNCIL

**SPECIAL MEETING
Tuesday, October 7, 2014
6:00 P.M.**

**Public Library Community Room
1020 W. Palomino Road
Chino Valley, Arizona**

AGENDA - AMENDED

- 1) CALL TO ORDER; ROLL CALL**
- 2)** An executive session pursuant to A.R.S. § 38-431.03(A)(4) for discussion or consultation with the Town Attorney in order to consider its position and instruct the Town Attorney regarding the Town's position regarding a Settlement and Release Agreement AND ADDENDUM NO. 1 that is the subject of negotiations related to the Construction Manager at Risk Contract between the Town of Chino Valley and Fann Contracting, Inc. dated June 12, 2003 and all amendments thereto. (Robert Smith, Town Manager)
- 3)** Consideration and possible approval of the Settlement and Release Agreement AND ADDENDUM NO. 1 that is the subject of negotiations related to the Construction Manager at Risk Contract between the Town of Chino Valley and Fann Contracting, Inc. dated June 12, 2003 and all amendments thereto. (Robert Smith, Town Manager)
- 4) ADJOURNMENT**

Dated this 2nd day of October, 2014.
Amendment dated this 6th day of October, 2014.

By: **Jami C. Lewis, Town Clerk**

The Town of Chino Valley endeavors to make all public meetings accessible to persons with disabilities. Please call 636-2646 (voice) or 1-(800) 347-1695 (Arizona Relay Service) 48 hours prior to the meeting to request a reasonable accommodation to participate in this meeting.

Supporting documentation and staff reports furnished to the Council with this agenda are available for review on the Town website at <http://www.chinoaz.net/clerk/townagenda.shtml>, and in the Public Library and Town Clerk's Office.

CERTIFICATION OF POSTING

The undersigned hereby certifies that a copy of this notice was duly posted at Chino Valley South Campus, Chino Valley Post Office, and Chino Valley North Campus in accordance with the statement filed by the Town Council with the Town Clerk.

Date: _____ Time: _____ By: _____
Jami C. Lewis, Town Clerk



TOWN OF CHINO VALLEY COUNCIL AGENDA ITEM STAFF REPORT

Town Council Special Meeting

Item No. 2.

Meeting Date: 10/07/2014
Contact Person: Robert Smith, Town Manager
 Phone: 928-636-2646 x-1201
Department: Town Manager
Item Type: Executive
Estimated length of staff presentation: None
Physical location of item: N/A

Information

AGENDA ITEM TITLE:

An executive session pursuant to A.R.S. § 38-431.03(A)(4) for discussion or consultation with the Town Attorney in order to consider its position and instruct the Town Attorney regarding the Town's position regarding a Settlement and Release Agreement and Addendum No. 1 that is the subject of negotiations related to the Construction Manager at Risk Contract between the Town of Chino Valley and Fann Contracting, Inc. dated June 12, 2003 and all amendments thereto. (Robert Smith, Town Manager)

RECOMMENDED ACTION:

Fiscal Impact

Attachments

No file(s) attached.



TOWN OF CHINO VALLEY COUNCIL AGENDA ITEM STAFF REPORT

Town Council Special Meeting

Item No. **3.**

Meeting Date: 10/07/2014
Contact Person: Robert Smith, Town Manager
 Phone: 928-636-2646 x-1201
Department: Town Manager
Item Type: Action
Estimated length of Staff Presentation: None
Physical location of item: N/A

Information

AGENDA ITEM TITLE:

Consideration and possible approval of the Settlement and Release Agreement AND ADDENDUM NO. 1 that is the subject of negotiations related to the Construction Manager at Risk Contract between the Town of Chino Valley and Fann Contracting, Inc. dated June 12, 2003 and all amendments thereto. (Robert Smith, Town Manager)

SITUATION & ANALYSIS:

N/A

Attachments

Settlement Agreement and Release

Addendum No. 1

Addendum No. 1 Exhibit A-1

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("Agreement") is entered this _____ day of _____, 2014, by and between the Town of Chino Valley, Arizona, a political subdivision of the State of Arizona ("Town") and Fann Contracting, Inc., an Arizona corporation ("Fann"). Town and Fann may be jointly termed "Parties" or individually "Party."

RECITALS

A. On May 28, 2003, Town issued a Request for Proposals for a construction manager-at-risk contract to finance, construct and operate the Chino Valley Wastewater Collection, Treatment and Effluent Discharge Project No. S-0301 having a total treatment capacity of 1.0 million gallons per day (MGD) to be constructed in phases corresponding to demand.

B. Town and Fann entered into a Construction Manager-at-Risk Contract (as defined below) for the construction, financing and operation and maintenance of the Project over a 10 year period, for an initial construction cost of Seven Million Seven Hundred Ninety-Six Thousand Eight Hundred Nineteen Dollars (\$7,796,819.00), with an additional Two Million Six Hundred Thousand Dollars (\$2,600,000.00) of construction costs related to Phases III, IV, V, and VI.

C. Fann offered and the Town accepted an alternate financing agreement whereby the improvements would be payable through a Four Thousand One Hundred Dollar (\$4,100.00) connection fee for the first Three Thousand One Hundred Fifty (3,150) of new residential connections to the Project (totaling Twelve Million Nine Hundred Fifteen Thousand Dollars (\$12,915,000.00)), but excluding all hook-ups in and around the Chino Meadows area, as more specifically delineated by Town and Fann ("Connection Fees").

D. Pursuant to the terms of the Construction Manager-at-Risk Contract, Fann also agreed to provide Operations and Maintenance Services (as defined below) for all phases of the Project after they were constructed and accepted by Town for Twenty-One Dollars (\$21.00) per residential unit per month that is connected to the Project a ten (10) year term, with no minimum quantity of connections being required.

E. Town and Fann have entered into an Agreement Extending Operations and Maintenance Services dated August 12, 2014 which is scheduled to expire on October 16, 2014.

F. To date, phases I, II, III and IV of the Project have been constructed by Fann and accepted by Town, providing a treatment plant with a permitted capacity of 0.5 MGD and with an agreed total cost, including financing costs and cost adjustments, of Ten Million Five Hundred Thirty-Seven Thousand Dollars (\$10,537,000.00) to be paid through Connection Fees.

G. Fann has received payments in the amount of Five Million Five Hundred Two Thousand Two Hundred Dollars (\$5,502,200.00) (paid as a combination of connection fees and pre-payments from developers), leaving Five Million Thirty-Four Thousand Eight Hundred Dollars (\$5,034,800.00) payable through Connection Fees as of June 30, 2013 for those phases of the

Project that have been completed, as stated in F.

H. From time to time, disputes have arisen between Fann and Town as to their respective rights and obligations under the Construction Manager-at-Risk Contract (as defined below).

I. Town no longer desires to have Fann obligated to construct phases V or VI and increase the Wastewater Treatment Plant capacity from 0.5 MGD to 1.0 MGD.

J. Town and Fann desire to fully and finally settle and release each other from past and future rights and obligations under the Construction Manager-at-Risk Contract (as defined below) in accordance with the terms and conditions set forth in this Settlement Agreement and Release.

NOW THEREFORE, in consideration of the covenants and mutual promises set forth herein, the Parties agree as follows:

AGREEMENT

1. Definitions

“Construction Manager-at-Risk Contract” or “CMAR Contract” means the contract entered into between the Town and Fann dated June 12, 2003 for the construction, financing and operation of the Chino Valley Wastewater Collection, Treatment and Effluent Discharge Project and all duly authorized and executed addendums, amendments, revisions and change orders related to such contract.

“Construction Services” means the services performed by Fann pursuant to the CMAR Contract related to the construction of the Project. “Construction Services” does not include any services described in the CMAR Contract related to the operations and maintenance of the Project, notwithstanding that Operations and Maintenance Services are included in the CMAR Contract.

“Effective Date” shall mean the date this Agreement is fully executed as reflected in the latest date set next to a party’s signature below.

“Operations and Maintenance Services” means the services performed by Fann pursuant to the CMAR Contract for the operations and maintenance of the Project after completion of the Construction Services, including, without limitation, Exhibit A, Schedules 1, 2, 3 and 4, and Appendix D, thereto.

“O&M Termination Date” means the date established for the termination of Operation and Maintenance Services pursuant to Section 7.1.

“Project” means the Chino Valley Wastewater Collection, Treatment and Effluent Discharge Project No S-0301.

“Wastewater Treatment Plant” means that portion of the Project that treats sewage delivered to the Project.

2. **Preamble and Recitals.** The foregoing Preamble and Recitals are incorporated in the Agreement as if set forth in full.

3. **Term/Termination:**

3.1. This Agreement’s term shall commence on the Effective Date and continue until the later of the following:

3.1.1. Full payment as set forth in Section 4 of this Agreement; or

3.1.2. The one-year anniversary of the O&M Termination Date as set forth in Section 7.

4. **Settlement of Amount Owed for Construction of the Project.** Town agrees to pay to Fann the amount of Three Million Three Hundred Ten Thousand Dollars (\$3,310,000.00) in full settlement of all amounts owed to Fann for Construction Services (the “Settlement Amount”), payable through any combination of the following:

4.1. Any hook-up fees received by Town and paid to Fann between June 30, 2014 and January 1, 2015 will be applied against the Settlement Amount.

4.2. One or more lump sum payments may be paid by Town to Fann. Such payments may be made at any time without penalty. Lump sum payments made on or before January 1, 2015 shall be applied against the Settlement Amount. Lump sum payments made after January 1, 2015 shall first be applied to pay any accrued and unpaid interest and then against the Settlement Amount.

4.2.1. Commencing January 1, 2015, Town shall pay Fann, on the first of each month, monthly payments amortized to defray the balance left remaining or owing to Fann on the Settlement Amount. Monthly payments shall be calculated using an amortization schedule with term ending December 1, 2025 at a simple interest rate of nine percent (9%), with the last monthly payment due December 1, 2025. An illustration of how monthly payments are calculated is attached as Exhibit A.

5. **Termination of CMAR Contract Obligation to Construct Wastewater Treatment Plant Expansion.** Fann and Town shall have no further obligation to construct the expansion of the Wastewater Treatment Plant from 0.5 MGD to 1.0 MGD as required by the CMAR Contract.

6. **Construction and Equipment Warranties and Representations.** Fann shall remain responsible for any and all unexpired construction and equipment warranties and representations under the related to the portion of the Project that was constructed under the CMAR Contract.

7. **Extension of Contract for Operations and Maintenance Services/Transition.**

7.1. The Parties understand and agree that the Agreement Extending Operation and Maintenance Services is scheduled to expire by its own terms on October 16, 2014. Fann agrees to continue to provide Operation and Maintenance Services under current terms and conditions to and through the O&M Termination Date, which shall be the earlier of:

7.1.1. August 31, 2015; or

7.1.2. The date specified in a written notice of termination from Town to Fann not less than fifteen (15) days prior to the date of termination; or

7.1.3. Sixty (60) days following termination pursuant to Section 3 of this Agreement.

7.2. Transfer of control and responsibility of Operation and Maintenance Services shall occur effective 5:00 p.m. on the O&M Termination Date.

7.3. Fann shall cooperate with Town to ensure an orderly transition, including providing access to equipment, manuals and other information as requested by Town and its representatives.

7.4. Not later than fifteen (15) days prior to the O&M Termination Date, Fann shall provide Town operations and maintenance manuals for all equipment encompassed by the Contract for Operations and Maintenance Services.

7.5. Not later than fifteen (15) days prior to the effective date of this Settlement and Release Agreement, Fann shall provide Town with complete and accurate maintenance, repair and inspection records and reports related to the plant facilities and equipment in a form and manner acceptable to Town. The accuracy and completeness of said records shall be attested to, in writing, by the Plant Operator or other person with knowledge as to the accuracy of the records.

8. **Compensation for Operations and Maintenance Services.** Fann and Town understand and agree that Fann's entire compensation for Operations and Maintenance Services is Twenty-One Dollars (\$21) per connected service to the Project and billed by the Town for sewer service, payable by Town to Fann on the ____ day of each month, with the final payment payable to Fann thirty (30) days following the O&M Termination Date.

9. **Representations and Warranties.**

9.1. Fann warrants and represents that through and including the O & M Termination Date, Fann shall:

9.1.1. Provide the Operations and Maintenance Services set forth in the CMAR Contract, including, without limitation, Exhibit A, Schedules 1, 2, 3, and 4, and Appendix D thereto; and

9.1.2. Maintain all equipment in good working order, consistent their age, normal wear and customary utility practice in the Southwest United States.

9.2. Town shall provide notice of any breach of these warranties and representations within one (1) year of the O&M Termination Date.

10. Release.

10.1. Fann irrevocably and unconditionally releases and discharges Town from any and all claims, demands, liens, agreements, covenants, actions, suits at law or equity, obligations, debts, damages, judgments, liabilities, attorneys' fees, costs, and expenses of whatever kind, known or unknown, suspected or unsuspected, which it had or has based on the CMAR Contract, whether the facts are now known or unknown and whether the legal theory upon which such claim might be based is now known or unknown, except for the enforcement of this Agreement.

10.2. Town irrevocably and unconditionally releases and discharges Fann from any and all claims, demands, liens, agreements, covenants, actions, suits at law or equity, obligations, debts, damages, judgments, liabilities, attorneys' fees, costs, and expenses of whatever kind, known or unknown, suspected or unsuspected, which it had or has based on the CMAR Contract, including whether the facts are now known or unknown, and whether the legal theory upon which such claim might be based is now known or unknown, except for the following:

10.2.1. Enforcement of this Agreement; and

10.2.2. Any and all obligations, liabilities, duties or responsibilities of Fann for warranty, correction of defective work or indemnification of the Town by Fann, as set forth in the CMAR Contract and the O & M Agreement;

11. General.

11.1. Severability. In the event any term or provision of this Agreement is held to be invalid or unenforceable, the validity of the other provisions shall not be affected, and the Agreement shall be construed and enforced as if it did not contain the particular term or provision that is deemed to be invalid or unenforceable.

11.2. Headings. Headings used in this Agreement are intended for convenience or reference only and shall not control or affect the meaning or construction of any provision of this Agreement.

11.3. Modification. This Agreement may be modified only by mutual written agreement of the parties.

11.4. Governing Law. This Agreement will be governed by the laws of the State of Arizona, both as to interpretation and performance.

11.5. Venue. Any action at law, suit in equity or judicial proceeding for the enforcement of this Agreement or any provision thereof will be instituted only in the courts of Yavapai County, State of Arizona.

11.6. Conflict of Interest. This Agreement is subject to cancellation pursuant to the provisions of A.R.S. § 38-511.

11.7. Non-Availability of Funds: Every payment obligation of Town under this Agreement is conditioned upon the availability of funds appropriated or allocated for the payment of such obligations. If funds are not allocated and available for the continuance of this Agreement, this Agreement may be terminated by Town at the end of the period for which the funds are available. No liability shall accrue to Town in the event this provision is exercised, and Town shall be not be obligated or liable for any future payments as a result of termination under this paragraph. In the event this Agreement is terminated under this provision, then the CMAR Contract shall automatically become fully effective and enforceable; provided, however, any and all payments made under Section 4 of this Agreement shall be credited against the Five Million Thirty-Four Thousand Eight Hundred Dollars (\$5,034,800.00) due thereunder as of June 30, 2015.

11.8. Non-Severability. The provisions of this Agreement are not severable. If any portion of this Agreement is held invalid by operation of law, the remaining terms of this Agreement shall be invalid and this Agreement shall be of no force or effect.

11.9. Entire Agreement; Interpretation; Parol Evidence. This Agreement represents the entire agreement of the Parties with respect to its subject matter, and all previous agreements, whether oral or written, entered into prior to this Agreement are hereby revoked and superseded by this Agreement. No representations, warranties, inducements or oral agreements have been made by the Parties except as expressly set forth herein, or in any other contemporaneous written agreement executed for the purposes of carrying out the provisions of this Agreement. This Agreement shall be construed and interpreted according to its plain meaning, and no presumption shall be deemed to apply in favor of, or against the Party drafting the Agreement. The Parties acknowledge and agree that each has had the opportunity to seek and utilize legal counsel in the drafting of, review of, and entry into this Agreement.

11.10. Fees and Costs. Each party shall bear and pay his or its own costs and attorneys' fees with regard to the preparation of this Agreement. In the event legal action or pursuit of alternative dispute resolution (such as mediation or arbitration) is necessary to address an alleged breach or other dispute arising under this Agreement, then the successful party shall be entitled to payment of its reasonable attorneys' fees and costs incurred in securing such relief by the other party.

11.11. Representation by Counsel. Each Party has been represented by legal counsel in the drafting and review of this Agreement, consequently ambiguities, if any, shall not be construed against either Party.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

FANN CONTRACTING, INC.
An Arizona Corporation

THE TOWN OF CHINO VALLEY,
ARIZONA, a political subdivision of the
State of Arizona ("Town")

By: _____

By: _____

By: Chris Marley, Mayor

Dated: _____

Dated: _____

Attest:

By: _____

Jami Lewis, Town Clerk

Approved as to Form:

By: _____

ADDENDUM NO. 1
TO
SETTLEMENT AGREEMENT AND RELEASE

THIS ADDENDUM NO. 1 TO SETTLEMENT AGREEMENT AND RELEASE ("Addendum 1") is entered by and between the Town of Chino Valley, Arizona, a political subdivision of the State of Arizona ("Town") and Fann Contracting, Inc., an Arizona corporation ("Fann") as an integral part of that certain Settlement Agreement and Release by and between Town and Fann dated October __, 2014 ("Settlement") for the purpose of establishing the terms and conditions under which Fann shall cause influent screen #1 to be replaced at the Wastewater Treatment Plant.

RECITALS

- A. Fann provides Operations and Maintenance Services (as defined in the Settlement) under the CMAR Contract (as defined in the Settlement) and will continue to do so for a time under the Settlement.
- B. Influent screen #1 has been taken out of service to be repaired or replaced and it is critical that the repair or replacement occur as soon as possible.
- C. Town and Fann disagree as to which entity is responsible for the costs of repairing influent screen #1 under the CMAR Contract.
- D. Town and Fann agree that there have been technological advancement in influent screens since influent screen #1 was originally placed in service and that there are advantages to replacing influent screen #1 rather than repairing the existing influent screen #1.
- E. Town and Fann desire, as part of the Settlement, to fully and finally settle and release each other relating to their respective obligations to pay the costs of repairing influent screen #1 in accordance with the terms and conditions set forth in this Addendum 1.

NOW THEREFORE, inconsideration of the covenants and mutual promises set forth herein, the Parties agree as follows:

- 1. **Incorporation.** This Addendum 1, including the foregoing Preamble and Recitals, are incorporated into the Settlement as if set forth therein in full and constitute material consideration for entering into the Agreement.
- 2. **Replacement Screen.** Fann, as quickly as practicable (which is estimated to be 15 weeks from the Effective Date), shall cause influent screen #1 to be replaced with a Huber Technology ROTAMAT RPPS (Rotmat Perforated Plate Screen) as described on Exhibit A-1 to this Addendum (the "Replacement Screen"). Town shall approve all engineering drawings prior to Fann securing the Replacement Screen, which approval shall not be unreasonably withheld or delayed by Town.
- 3. **Payment.** Fann shall be responsible for initially pay all costs associated with securing and installing the Replacement Screen, including without limitation, engineering, permitting,

taxes, licenses, labor and material. Town shall pay Fann One Hundred Thirty Two Thousand Five Hundred Dollars (\$132,500.00) (the "RS Amount") once the Replacement Screen is installed and approved in writing by Town, which approval shall not be unreasonably withheld or delayed (the "Acceptance Date"), through any combination of the following:

- a. One or more lump sum payments may be paid by Town to Fann. Such payments may be made at any time without penalty. Lump sum payments made on or before commencement of monthly payments pursuant to 3b below shall be applied against the RS Amount. Lump sum payments made thereafter shall first be applied to pay any accrued and unpaid interest and then against the RS Amount.
- b. Commencing the first of the month following the Acceptance Date, but earlier than February 1, 2015, Town shall pay Fann, on the first of each month, monthly payments amortized to defray the balance left remaining or owing to Fann for the Replacement Screen. Monthly payments shall be calculated using an amortization schedule with a term ending December 1, 2015 at a simple interest rate of nine percent (9%), with the last monthly payment due December 1, 2025.

4. **Construction and Equipment Warranties.** Notwithstanding Paragraphs 5 and 6 of the Settlement, the installation of the Replacement Screen shall be deemed a change order under the CMAR Contract and subject to all construction and equipment warranties and representations provided for other facilities constructed pursuant to the CMAR Contract. Such warranties and representations shall run from the Acceptance Date.

IN WITNESS WHEREOF, the parties have executed this Agreement to be in full force and effect as of the Effective Date set forth in the Settlement.

FANN CONTRACTING, INC.
An Arizona Corporation

THE TOWN OF CHINO VALLEY,
ARIZONA, a political subdivision of the
State of Arizona ("Town")

By: _____

By: _____

By: Chris Marley, Mayor

Dated: _____

Dated: _____

Attest:

By: _____

Jami Lewis, Town Clerk

Approved as to Form:

By: _____

EXHIBIT A-1



DESCRIPTION
ROTAMAT® RPPS MBR Protection Perforated Plate Screen Including: • One (1) x RPPS/780/3 • Channel mounted design • 304 Stainless Steel Construction; pickled and passivated in acid bath • Shafted screw with integrated maintenance free bearing • Polyethylene seal around basket body ensure that no material can bypass the screen • 35° inclined auger tube • 35° inclined screen basket; width: 2.6 ft (780 mm) • Perforated plate spacing: 0.12" (3 mm) • Class 1 Division 1 motor, 1.5-HP, 480 VAC, 3 phase, 60 Hz • Inlet tank with one (1) tank cleaning nozzle • Wall mounted or stand-alone NEMA 4X stainless steel control panel suitable for controlling equipment in a Class 1 Division 2 environment • Integrated screenings washing system IRGA is included • Two (2) solenoid valves for compaction zone and IRGA, 1-inch, 120 VAC, 2-way brass body, Class 1 Division 2 • One (1) solenoid valve for spraybar, 1-inch, 120VAC, 2-way brass body, Class 1 Division 2 • Frost Protection is optional and available for a cost adder • Standard manufacturer's services have been included. Additional manufacturer's services are available on a per diem rate upon request.

Notes

1. Equipment specification is available upon request
2. Budget based upon site having some kind of trash rack upstream to provide protection from large items.
3. If there are site-specific hydraulic constraints that must be applied, please consult the manufacturer's representative to ensure compatibility with the proposed system
4. Electrical disconnects required per local NEC code are not included in this proposal
5. Huber Technology requires 75 PSI water connection for this equipment, to be provided by Owner.
6. Huber Technology warrants all components of the system against faulty workmanship and materials for a period of 12 months from date of start-up or 18 months after shipment whichever occurs first
7. Budget estimate is based on Huber Technology's standard Terms & Conditions and is quoted in US\$ unless otherwise stated