

RESOLUTION NO. 85-11-18

A RESOLUTION OF THE TOWN COMMISSION OF THE TOWN OF LAKE PARK, FLORIDA, AUTHORIZING AND DIRECTING THE MAYOR TO EXECUTE A PROJECT DEVELOPMENT AGREEMENT WITH JOHNSON CONTROLS, INC. FOR GUARANTEED ENERGY, WATER, AND WASTEWATER SAVINGS; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town of Lake Park, Florida (“Town”) is a municipal corporation of the State of Florida with such power and authority as has been conferred upon it by the Florida Constitution and Chapter 166, Florida Statutes; and

WHEREAS, the Town is empowered to enter into contractual arrangements with public agencies, private corporations or other persons; and

WHEREAS, the Town is responsible for maintaining Town owned facilities which provide support and services to the public; and

WHEREAS, the Town requires a contractor to renew aging facility infrastructures and guarantee energy, water, and wastewater savings; and

WHEREAS, pursuant to the Town’s purchasing procedures, the Town may enter into contracts for products or services with contractors who have been awarded a contract from another public agency that has followed a competitive solicitation; and

WHEREAS, the City of Jacksonville Beach, Florida, awarded a competitively solicited Performance Contract for Guaranteed Energy, Water and Wastewater Savings, Contract No. RFQ:05-1415 (hereinafter referred to as the “Contract”) to Johnson Controls, Inc.; and

WHEREAS, the Town and Johnson Controls, Inc. seek to access the Contract in accordance with Article 23 of the Contract, to enter into a performance based contract to improve

Town owned infrastructures and reduce energy, operating and future capital costs within those infrastructures; and

WHEREAS, Johnson Controls, Inc. in accordance with this agreement, will evaluate, and with the Town's approval, implement economically feasible measures to improve certain Town infrastructure; and

WHEREAS, Town Manager has recommended to the Town Commission of Lake Park that it is in the best interest of the Town to enter into an agreement with Johnson Controls, Inc.

NOW THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF LAKE PARK, FLORIDA, AS FOLLOWS:

Section 1. The foregoing recitals are incorporated herein by reference.

Section 2. The Mayor is hereby authorized and directed to execute the agreement with Johnson Controls, Inc, a copy of which is attached hereto and incorporated herein as Exhibit 'I'.

Section 3. This Resolution shall take effect upon execution.

The foregoing Resolution was offered by Vice-Mayor Glas-Castro who moved its adoption. The motion was seconded by Commissioner Lynch and upon being put to a roll call vote, the vote was as follows:

	AYE	NAY
MAYOR MICHAEL O'ROURKE	<u>/</u>	<u>—</u>
VICE-MAYOR KIMBERLY GLAS-CASTRO	<u>/</u>	<u>—</u>
COMMISSIONER ERIN FLAHERTY	<u>Absent</u>	<u>—</u>
COMMISSIONER ANNE LYNCH	<u>/</u>	<u>—</u>
COMMISSIONER ROGER MICHAUD	<u>/</u>	<u>—</u>

The Town Commission thereupon declared the foregoing Resolution NO. 85-11-18 duly passed and adopted this 7 day of November, 2018.

TOWN OF LAKE PARK, FLORIDA


BY: 
MICHAEL O'ROURKE
MAYOR

ATTEST:


VIVIAN MENDEZ
TOWN CLERK



Approved as to form and legal sufficiency:

BY: 
THOMAS J. BAIRD
TOWN ATTORNEY

PROJECT DEVELOPMENT AGREEMENT

THIS PROJECT DEVELOPMENT AGREEMENT ("Agreement") is made and entered into this 7th day of November, 2018 (the effective date) by and between the **Town of Lake Park**, a Florida municipal corporation (hereinafter referred to as the "Town"), whose address is 535 Park Avenue, Lake Park, Florida, 33403, and **Johnson Controls, Inc.** (hereinafter referred to as "JCI"), whose principal address is 15901 SW 29th Street, Suite #801, Miramar, Florida, 33027. (Collectively the "Parties")

WHEREAS, per the Town's purchasing ordinance, the Town is empowered to enter into contractual arrangements with public agencies, private corporations or other persons; and

WHEREAS, pursuant to the Town's purchasing procedures, the Town may enter into contracts for products or services with contractors who have been awarded a contract from another public agency that has followed a competitive solicitation; and

WHEREAS, the City of Jacksonville Beach, Florida, awarded a competitively solicited Performance Contract for Guaranteed Energy, Water and Wastewater Savings, Contract No. RFQ:05-1415 (hereinafter referred to as the "Contract") to JCI, a copy of which is attached hereto and incorporated herein as Exhibit 'A'; and

WHEREAS, the Town and JCI seek to access the Contract, in accordance with Article 23 of the Contract, to enter into a performance based contract to improve Town owned infrastructures and reduce energy, operating and future capital costs within those infrastructures, as set forth in Appendix I hereto (the "Premises");

WHEREAS, JCI in accordance with this Agreement, will evaluate, and with the Town's approval, implement economically feasible measures to improve certain Town infrastructure; and

NOW THEREFORE, in consideration of the mutual covenants and promises hereafter set forth, JCI and the Town agree as follows:

ARTICLE 1. SCOPE OF SERVICES

It is the Parties' mutual understanding that as part of this Agreement, JCI and the Town agree to the following scope of services:

Develop a project which will fund Facility Improvement Measures (FIMs) utilizing utility, operational, maintenance, and capital cost avoidance savings over a maximum period of 20 years per Florida State Statute 489.145.

Develop Facility Improvement Measures (FIMs) which will reduce the Town's operating costs and/or improve facility operating conditions, and/or improve institutional resiliency.

Anticipated project savings and funding sources are as follows;

- Electrical consumption (kwh), Electrical Demand (kW, on-and off-peak), Potable water consumption (kgal), Sewer consumption (kgal), Reclaimed usage (kgal), natural gas consumption (Therms), Customer Steam (MMBtu), and Customer Chilled Water (ton-hours)
- Utility marketing, distribution, and/or delivery costs

- Customer material/commodity costs
- Outside Maintenance Labor Costs
- Existing contract costs savings throughout the project term or other cost savings attributable to the Town's behavioral modifications, facility operating schedule or efficiency plan.
- Escalation rates for utilities, commodities, labor, maintenance, and material shall be the greater of 3% annually or the Consumer Price Index (CPI)
- Utility rate structure adjustments (rate category change)
- Deferred maintenance reduction and/or emergency repair costs.
- Capital Improvement Budget funds; Capital contribution, adjustment, or re-allocation funds; and/or offset of future Town costs.
- Utility Provider and/or State or Federal rebates or grants.

The Detailed Development included in this scope of services will result in the delivery of a written final business case based on a guaranteed maximum price to install FIMS and the realization of guaranteed energy savings for an agreed-to term ("Detailed Development Summary"). Additional FIMS can be included in the scope of work of this Agreement through mutual written agreement of JCI and the Town. Compensation to JCI for the additional development costs incurred as a result of scope of services additions as described above shall be negotiated directly between JCI and the Town.

The end work product will be a specific list of FIMS with the following information:

- i.) Final savings calculations for energy, operational, other savings and a defined measurement and verification plan for each FIM.

- ii.) Final cost data for each FIM and all other project related costs that will be used in the performance contract on a not-to-exceed cost basis.
- iii.) Draft version of the "Implementation Contract" for negotiation of final terms and conditions with the Town.
- iv.) Engineering design plans.

JCI shall commence Services upon execution of this agreement.

ARTICLE 2. RECORDS AND DATA

During the Development Phase, the Town shall make all reasonable efforts to furnish JCI upon its request, accurate and complete data concerning current costs, budgets, facilities requirements, future projected loads, facility operating requirements, collective bargaining agreements, etc. More specific information requested by JCI is included in Appendix B. JCI shall provide a separate document with the required information and the Town shall make every reasonable effort to provide that information within 5 business days of a Town request.

ARTICLE 3. PREPARATION OF "IMPLEMENTATION CONTRACT"

Along with the other scope of services required under this Agreement, JCI shall develop the framework of the subsequent Implementation Contract and the Financing Agreement, if applicable. These Agreements shall be co-developed by JCI and the Town during the Project Development Agreement (PDA). These documents may vary dependent on the Town's desired structure, but where possible shall be standardized JCI documents for most expedient delivery.

ARTICLE 4. PRICE AND PAYMENT TERMS

Pricing for Development:

The Town shall pay to JCI the sum of \$110,442.00 (One Hundred and Ten Thousand, Four Hundred Forty Two and 00/100) within 45 days after the delivery to the Town of the documentation described under Article 1 of this Agreement. However, the Town shall have no obligation to pay this amount if:

1. JCI and the Town enter into the "Implementation Contract" (outlined in Article 3) within 90 days after the delivery to the Town of the documentation described under Article 1 of this Agreement. Costs for the study shall be transferred to the total cost of the Implementation Contract and be subject to the payment terms outlined in the Contract.
2. The business case proposal does not satisfy Section 489.145, Florida Statutes.

ARTICLE 5. INDEMNITY

JCI agrees to indemnify and hold harmless the Town, its elected and appointed officials, its officers, agents and employees, from liabilities, damages, losses and costs, including, but not limited to, reasonable attorneys' fees, to the extent caused by the negligence, recklessness or intentionally wrongful conduct of JCI and any other persons employed or utilized by JCI in provision of the services under this Agreement. To the extent considered necessary by the Town, any sums due to JCI under this Agreement may be retained by Town until all of Town's claims for indemnification have been resolved, and any amount withheld shall not be subject to the payment of interest by Town. This indemnification agreement is separate and

apart from, and in no way limited by, any insurance provided pursuant to this Agreement or otherwise. This paragraph shall not be construed to require JCI to indemnify the Town for its own negligence, or intentional acts of the Town, their agents or employees. PURSUANT TO F.S. SEC. 558.0035, AN INDIVIDUAL EMPLOYEE OR AGENT MAY NOT BE HELD LIABLE FOR NEGLIGENCE. Nothing in this Agreement shall be deemed to be a waiver of the Town's sovereign immunity under Section 768.28, Florida Statutes. This clause shall survive the expiration or termination of this Agreement.

ARTICLE 6. LITIGATION; GOVERNING LAW; VENUE; ATTORNEY FEES

If a dispute arises under this Agreement, the parties shall promptly attempt in good faith to resolve the dispute by negotiation. This Agreement shall be construed and interpreted, and the rights of the parties hereto determined, in accordance with the laws of Florida without regard to conflicts of law provisions. The Town and the Consultant agree that proper venue for any suit concerning this Agreement shall be Palm Beach County, Florida, or, if a federal court claim in the United States District Court, Southern District of Florida. JCI agrees to waive all defenses to any suit filed in Florida based upon improper venue or *forum nonconveniens*. In the event of litigation regarding the Agreement, the prevailing party shall be entitled to its reasonable costs and attorney fees.

ARTICLE 7. CONFIDENTIALITY

This Agreement creates a confidential relationship between JCI and the Town. Both parties acknowledge that while performing this Agreement, each may have access to

confidential information, including but not limited to systems, services or planned services, suppliers, data, financial information, computer software, processes, methods, knowledge, ideas, marketing promotions, current or planned activities, research, development, and other information relating to the other party ("Proprietary Information"). Except as authorized in writing both parties agree to keep all Proprietary Information confidential. JCI may only make copies of Proprietary Information necessary for performing its services. Upon cessation of services, termination, or expiration of this Agreement, or upon either party's request, whichever is earlier, both parties shall return all such information and all documents, data, and other materials in their control that contain or relate to such Proprietary Information.

JCI and the Town understand that this is a confidential project and agree to keep and maintain confidentiality regarding its undertaking of this project to the extent permitted by any exemptions to the Public Records Act. JCI shall coordinate its services only through the designated Town representative and shall provide information regarding this project to only those person approved by the Town. JCI shall be notified in writing of any changes by the designated Town representative.

ARTICLE 8. TIMELINE

It is the intent and commitment of the Parties to work diligently, and cause others under their direction to work diligently toward meeting the timeline shown below:

- Project Development Agreement (PDA) Approved by Town Board – 11/7/18
- JCI Commences detailed Project Development – 11/12/18
- Form of Funding established for the Implementation Agreement – 12/1/18

- Form of Contract established between JCI and Customer – 1/7/19
- JCI provides Implementation Agreement with firm scope and cost to Town – 2/1/18
- Town Commission approves Implementation Agreement – 3/1/18
- Implementation Agreement Executed by Town and JCI – 3/8/18
- Project Implementation Begins – 3/25/18
- Project Final Completion – 10/30/19

These are anticipated timeframes and may be modified by subsequent work plans approved by the Parties.

ARTICLE 9. MISCELLANEOUS PROVISIONS

a.) In the event of any conflict or ambiguity between the terms set forth in this Agreement and the terms set forth in the Jacksonville Beach Contract, the terms and conditions of the Jacksonville Beach Contract shall control.

b.) Notice Format. All notices or other written communications required, contemplated, or permitted under this Agreement shall be in writing and shall be hand delivered, mailed by registered or certified mail (postage prepaid), return receipt requested, electronically emailed, or delivered by overnight courier to the following addresses:

As to the Town : Town of Lake Park, Attn: Town Clerk
535 Park Avenue
Lake Park, FL 33403
townclerk@lakeparkflorida.gov

With a copy to: Town of Lake Park, Attn: Public Works Director
640 Old Dixie Hwy
Lake Park, FL, 33403
Publicworks@lakeparkflorida.gov

As to JCI Johnson Control, Inc.
 Attn: Jon Ridley
 15901 SW 29th Street #801
 Miramar, FL 33027

c.) Contract Documents. The contract documents which comprise the entire Agreement between the Town and JCI consist of the following, which are made a part thereof:

- Jacksonville Beach RFQ 05-1415, titled "Performance Contract for Guaranteed Energy, Water, and Wastewater Cost Savings"
- JCI Response to RFQ 05-1415
- Project Development Agreement
- Appendix A – List of Town facilities to be evaluated; List of FIMS to be evaluated
- Appendix B – List of items requested by JCI from the Town to perform the Detailed Development Phase.

d.). Binding Effect. All of the terms and provisions of this Agreement, whether so expressed or not, shall be binding upon, inure to the benefit of, and be enforceable by the parties and their respective legal representatives, successors, and permitted assigns.

e.) Assignability. This Agreement may not be assigned without the prior written consent of all parties to this Agreement.

f.) Severability. If any part of this Agreement is contrary to, prohibited by, or deemed invalid under applicable law or regulation, such provision shall be

inapplicable and deemed omitted to the extent so contrary, prohibited, or invalid, but the remainder hereof shall be given full force and effect so far as possible.

g.) Headings. The headings contained in this Agreement are for convenience of reference only and shall not limit or otherwise affect in any way the meaning or interpretation of this Agreement.

h.) Construction. The parties acknowledge that each has shared equally in the drafting and preparation of this Agreement, and accordingly, no Court of Administrative Law Judge construing this Agreement shall construe it more strictly against one party than the other, and every covenant, term, and provision of this Agreement shall be construed simply according to its fair meaning.

i. Attorney's Fees. It is hereby understood and agreed that in the event any lawsuit in the administrative proceeding, federal or state courts which is brought to enforce compliance with this Agreement or interpret same, the prevailing party shall be entitled to recover its attorney's fees and costs, including appellate fees and costs.

j. Equal Opportunity. The Town and JCI agree that no person shall, on the grounds of race, color, gender, gender identity, sexual orientation, national origin, ancestry, marital status, disability, religion, creed, or age, be discriminated against in the performance of this Agreement.

ARTICLE 10. OFFICE OF THE INSPECTOR GENERAL

Palm Beach County has established the Office of the Inspector General that is authorized and empowered to review past, present, and proposed Town programs, contracts,

transactions, accounts, and records. The Inspector General has the power to subpoena witnesses, administer oaths, require the production of records, and monitor existing projects and programs. The Inspector General may, on a random basis, perform audits on all Town agreements.

ARTICLE 11. PUBLIC RECORDS

With respect to public records, JCI shall:

- a. Keep and maintain public records required by the Town to perform the service.
- b. Upon the request of the Town, provide any such public records.
- c. Ensure that any public records that are exempt or confidential from public records disclosure are not disclosed except as authorized by law for the duration of the term of this Agreement, and following completion of this Agreement if JCI does not transfer the records which are part of this Agreement to the Town.
- d. Upon the completion of the term of the Agreement, transfer, at no cost, to the Town all public records in possession of JCI or keep and maintain the public records associated with the services provided for in the Agreement. If CJI transfers all public records to the Town upon completion of the term of the Agreement, JCI shall destroy any duplicate public records that are exempt or confidential from public records disclosure. If JCI keeps and maintains public records upon completion of the term of the Agreement, JCI shall meet all applicable requirements pertaining to the retention of public records. All records stored electronically shall be provided to the Town, upon request, in a format that is compatible with the information technology systems of the Town.

- e. **If JCI has questions regarding the application of Chapter 119, Florida Statutes**, including its duty to provide public records relating to this Agreement, JCI shall contact the custodian of public records at: Town Clerk, 535 Park Avenue, Lake Park, Florida 33403, 561-881-3311, townclerk@lakeparkflorida.gov.

ARTICLE 12. FORCE MAJEURE

The Town and JCI are temporarily excused from the performance of their respective obligations under this Agreement when and to the extent that their performance is delayed or prevented by any circumstances beyond their control, including fire, flood, explosion, strikes or other labor disputes, natural disasters, public emergency, war, riot, civil commotion, malicious damage, act or omission of any governmental authority, delay or failure or shortage of any type of transportation, equipment, or service from a public utility needed for their performance, provided that:

- The non-performing party gives the other party prompt written notice describing the particulars of the force majeure, including, but not limited to, the nature of the occurrence and its expected duration, and continues to furnish timely reports with respect thereto during the period of the force majeure
- The excuse of performance is of no greater scope and of no longer duration than is required by the force majeure.
- No obligations of either party that arose before the force majeure causing the excuse of performance are excused as a result of the force majeure.
- The non-performing party uses its best efforts to remedy its inability to perform.

Notwithstanding the above, performance shall not be excused for a period in excess of two months, provided that in extenuating circumstances, the Town may excuse performance for a longer term. Economic hardship of JCI shall not constitute a force majeure.

ARTICLE 13. FISCAL FUNDING OUT

The Town's funding of this Agreement shall be on a Fiscal Year basis and is subject to the Town Commission's annual appropriation. JCI acknowledges that the Town is a municipal corporation, is precluded by the Florida State Constitution and other laws from entering into obligations that financially bind future governing bodies, and that, therefore, nothing in this Agreement shall constitute an obligation of future legislative bodies of the Town to appropriate funds for purposes of this Agreement. Accordingly, the parties agree that the terms within this Agreement or any Schedules relating hereto are contingent upon appropriation of funds. The parties further agree that should the Town fail to appropriate such funds, JCI shall be paid all services rendered up until the actual day of termination.

ARTICLE 14. TERMINATION

1.) Termination for Cause: JCI's obligation to provide further services under this Agreement may be terminated for cause by either the Town or JCI upon thirty (30) calendar days advance written notice in the event of material default by the other party to perform in accordance with the terms hereof through no fault of the terminating party. The 30 day advance notice is intended to provide an opportunity for the non-terminating party to cure the default. If during the thirty (30) calendar

day cure period the non-terminating party cures the substantial breach of the Agreement, the termination notice shall be deemed to have been revoked.

2.) Termination for Convenience: JCI's obligation to provide further services under this Agreement may be terminated for convenience by the Town, effective upon thirty (30) calendar days advance written notice by the Town. In the event that the Town terminates this Agreement for convenience, Town shall pay JCI for the services rendered and costs incurred by JCI through the date of termination.

(The remainder of this page intentionally left blank)

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date hereinabove first written.

ATTEST:

By: *Vivian Mendez*
Vivian Mendez, Town Clerk

TOWN OF LAKE PARK
By: *Michael O'Rourke*
Michael O'Rourke, Mayor

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY
By: *Thomas J. Bajrd*
Thomas J. Bajrd, Town Attorney

STATE OF FLORIDA

COUNTY OF PALM BEACH

The foregoing instrument has been acknowledged before me this 7th day of November 2018 by Michael O'Rourke, Mayor of the Town of Lake Park, and who is personally known to me.



Sharilyn Edwards
Notary Public, State of Florida

WITNESSES:

By: *Garry McCabe*
GARRY MCCABE
Printed Name

Johnson Controls, Inc.:
By: *Mary-Suzanne Powell*
Its: Area General Manager

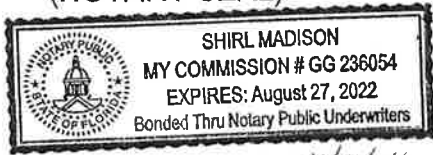
By: *Elder E. Cruz*
Elder E. Cruz
Printed Name

Mary-Suzanne Powell
Printed

STATE OF FLORIDA
COUNTY OF PALM BEACH

The foregoing instrument has been acknowledged before me this 12 day of November 2018 by _____, as _____ of _____, and who is personally known ^{to me} to me or has produced _____ as identification.

(NOTARY SEAL)



11/12/18



Notary Public, State of Florida