

Date: May 2, 2017



CLERK OF THE CIRCUIT COURT – AGENDA ITEM Marion County Commission

SUBJECT: Present Internal Auditor Report No. 2017-04 Regarding EDIG Compliance Review of Eaton's Beach Restoration Group, LLC

INITIATOR: Sachiko H. Leon, Internal Auditor

DEPARTMENT: Clerk of Court

DESCRIPTION/BACKGROUND:

Internal Auditor has completed the final grant compliance review of Eaton's Beach Restoration Group, LLC (Eaton's Beach).

Internal Auditor has concluded that:

- 1) the former County Administration did not comply with applicable sections of the Agreement by providing a grant payment to Eaton's Beach prior to meeting the requirements.**
- 2) Eaton's Beach exceeded the minimum "new to Marion County" job creation requirement for the reporting period.**

The current County Administration is in process of creating Standard Operating Procedures to ensure compliance to future economic development agreements.

BUDGET IMPACT: None

RECOMMENDED ACTION: None, for information purposes only



REPORT NO. 2017-04

EDIG COMPLIANCE REVIEW:

EATON'S BEACH RESTORATION GROUP, LLC

Presented To

The Honorable Board of County Commissioners
Mounir Bouyounes, County Administrator

April 19, 2017

Issued By

David R. Ellspermann, Clerk of the Circuit Court and Comptroller 
Sachiko H. León, CIA, CISA, Internal Auditor 

Executive Summary

Internal Audit performed a compliance review of Eaton's Beach Restoration Group, LLC. (Grantee). The purpose of this review was to determine the overall compliance to the requirements specified in the Economic Development Infrastructure Grant (EDIG) Agreement (Agreement) executed on May 7, 2013, between Marion County (County) and Grantee. Florida Statute Section 125.045, "County economic development powers," allows the counties of the State to expend public funds to attract and retain business enterprises. Per the Statute, the County awarded an EDIG to Grantee. The County subsequently created an ordinance regulating EDIG, but the ordinance did not apply to this Agreement because the executed date of the Agreement preceded the adoption date of the ordinance.

Objective 1: Determine if applicable terms and requirements of the Agreement were met when an EDIG payment was made to Grantee.

Our opinion: The former County Administration overrode internal control (clearly defined requirements in the Agreement) and justified the award payment by stating Grantee had "met the minimum conditions and terms" of the Agreement; however, the Agreement contained no such minimum conditions. Grantee has not yet provided adequate documentation as proof of payments to verify the overall costs of the project. **We recommend** that the current County Administration establish procedures which would ensure compliance to the Agreement.

Objective 2: Determine the number of "new to Marion County" jobs created by Grantee.

Our opinion: Grantee has created 42 "new to Marion County" full-time equivalent (FTE) jobs at the report requirement period of May 2016. We determined that Grantee had exceeded the minimum 25 FTE required by the Agreement.

Grantee utilized an employee leasing company for the entire workforce. Based on our research of employee leasing companies outlined in the bullet points below, it originally appeared that the leasing company was the employer of the leased employees and not of Grantee.

- IRS code 5.1.24, Third-Party Payer Arrangements for Employment Taxes, in particular, Sec. 5.1.24.3.2.1.1, states that "the term "employer" means the person having legal control of the payment of the wages."
- Florida Statutes, Chapter 468, Part XI, which governs employee leasing companies, in particular Sec. 468.529(1) states "[a] licensed employee leasing company is the employer of the leased employees."
- To assess the level of control the leasing company has over the workers, we reviewed the contract between the leasing company and Grantee, which states that the leasing company "assumes responsibility for the payment of wages to contract employees without regard to payments by [Grantee] to [the leasing company] and [the leasing company] assumes full

responsibility for the payment of payroll taxes and collection of taxes from payroll on contract employees.”

- The Agreement Sec. 5 required Grantee to receive prior written approval from the County in order to subcontract any component of the Agreement. Grantee did not receive such approval.

We brought this concern to the County Administration in our draft report and received the following response.

AIHR, a Professional Employer Organization (PEO) provides contractual services for payroll to Eaton's Beach.

Fl. Stat. 468.520 defines "Employee Leasing" as an arrangement whereby a leasing company assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client.

Based upon further discussion with the PEO's General Counsel, and from research of a case referencing "statutory employees" and "common-law employees," it states that the client entity has "common-law" employees, whereas the employee leasing company has "statutory employees." AIHR is obligated by law to withhold taxes and those people are referred to as "statutory employees." But, they ARE NOT the "common law" employees of the leasing company – they are the "common-law" employees of Eaton's Beach – which has the authority to hire, fire, manage, etc., and that is what is contemplated by our grant agreement. AIHR has no authority to hire, or terminate the referenced employees of Eaton's Beach. Eaton's Beach provides the hiring of the employees, scheduling of work hours and terminations.

Finally, [Grantee], owners of Eaton's Beach are listed on the payroll and both are employees of Eaton's Beach.

Florida Statutes Chapter 468, Part XI, Employee Leasing Companies, does not distinguish a "common law" employer from a "statutory employer," but the County Attorney has presented two prior court cases in Florida which supported the County Administration's assertion. We therefore concluded that the assertion was reasonable and that Grantee had created the required "new to Marion County" jobs.

BACKGROUND

The Florida Statute Section 125.045 vested the “County economic development powers” to each county of the State. Per the Statute, the County awarded to Grantee on May 7, 2013, an EDIG in the total amount of \$50,000. The County subsequently created an ordinance regulating EDIG, but the ordinance did not apply to this Agreement because the executed date of the Agreement preceded the adoption date of the ordinance.

The Agreement Section 2, Scope of Services and Funding, states that “the primary purpose ... is for County to provide partial financial support for the installation of proposed infrastructure improvements...., improve the treatment of waste water and storm water on site and to enhance the overall public safety.” Grantee was also to provide up to 25 FTE jobs within 36 months from the execution of the Agreement.

Grantee requested the grant payment of \$50,000, and the former County Administration subsequently approved the request and paid on August 9, 2013.

SCOPE AND APPROACH

The engagement scope included the grant eligibility, grant payment process and a review of the final report provided by Grantee.

This reporting period is the first and final review of Grantee. Our approach was to review the award holistically and included:

- review of the relevant Florida Statutes and County Ordinances
- review of the agreement between the County and Grantee
- interviews with the relevant County and Grantee personnel
- verification of the waste water infrastructure through Marion County Department of Health personnel, and
- review of the documents submitted by Grantee.

RESULTS

Objective 1: Determine if applicable terms and requirements of the Agreement were met when an EDIG payment was made to Grantee.

Table 1 summarizes the relevant compliance components in the Agreement and the status when the EDIG payment was made.

Table 1. The Agreement and Status Summary			
Agreement Section	Responsible Party	Agreement Language	Compliance Status and Comment
1.1 ~ 1.3	Grantee	<p>Construct:</p> <ul style="list-style-type: none"> • more than 200 feet of new public water infrastructure to enhance fire protection and public safety • an enhanced storm water retention area to accommodate both on-site and water drainage requirements from the primary public egress, and • waste water treatment infrastructure at a higher elevation and beyond a 2,000 lineal feet distance from the Lake Weir waterfront. 	<p>In Compliance</p> <p>The Office of the County Engineer (OCE) issued a "Certification of Satisfactory Completion" on October 24, 2013.</p> <p>Marion County Department of Health personnel verified the waste water treatment infrastructure.</p>
2.b)	County	"...the grant...be provided as a reimbursement following the completion of the proposed construction, installation and final inspection and review by the County Engineer."	<p>Not in Compliance</p> <p>Prior to the final inspection and subsequent approval by OCE, and meeting reimbursement criteria, the grant payment was approved on August 9, 2013.</p>
2.c)	County	"...the reimbursement by the County shall be made as a single payment...not exceed \$50,000."	<p>Not in Compliance</p> <p>Payment made by the County based on the document submitted by Grantee did not meet the criteria to be considered as reimbursement of the proposed construction.</p>
2.d)	Grantee	"...provide copies of all related invoices and proof of payment related to the proposed construction...to verify overall costs."	<p>Not in Compliance</p> <p>Grantee has not yet satisfied this requirement.</p>
2.e)	Grantee	"...provide access to County...for inspection or audit of the proposed work...to verify the completion of the proposed infrastructure...of this Agreement."	<p>In Compliance</p> <p>The final inspection was completed by the OCE.</p>
2.g)	Grantee	"...once all conditions...have been accomplished, [Grantee] shall submit an invoice on company's letterhead to County for full payment of grant."	<p>Not in Compliance</p> <p>Grantee submitted an invoice to County for full payment of the grant; however, it did not meet all of the conditions required in the Agreement.</p>

We observed documentation attached to an invoice submitted by Grantee requesting the grant payment of \$50,000 as reimbursement. The documentation contained proof of payments by a general contractor to a subcontractor whose invoice cited work outside of the grant project scope, and supplemented by a letter from the general contractor. In order to meet criteria as reimbursement to Grantee, Grantee needed to demonstrate payments made under Grantee's business name. Agreement Sec. 2.d) required to "provide copies of all related invoices and proof of payment related to the proposed construction of the proposed infrastructure improvements to verify overall costs." Grantee has not yet met this requirement. Grantee, however, submitted an invoice for a grant payment, and the former County Administration subsequently approved the invoice and paid the grant. The former County Administration stated Grantee had "met the minimum conditions and terms"; however, the Agreement language contained no such minimum conditions. Instead, it required to meet all conditions prior to release of the grant payment.

Our opinion: The former County Administration overrode internal control (clearly defined requirements in the Agreement) and justified the award payment to Grantee prior to meeting the required conditions in the Agreement. **We recommend** that the current County Administration establish procedures which would ensure compliance to the Agreement.

Management Response: Concur	
We concur with establishing procedures to ensure compliance to the agreement and procedures currently being implemented-Completion of Standard Operating Procedures in 30 days.	
Target Implementation Date: April 13, 2017	Process Owner: Assistant County Administrator-Public Services

Update 1 : The Code of Ordinance 10-7 has been revised by Ordinance No. 16-33, which defined the roles of the County Administration and Internal Audit. Internal Audit will provide assurance of the County Administration's determination of the Grantee's compliance status prior to release of grant payment.

Update 2: The County Administration obtained a notarized statement from a general contractor who attested to payments received from the Grantee related to the Agreement on April 12th. The County Administration accepted this statement as the required submission of documentation (See Attachment A). We consider the requirement of the Agreement Section 2.d) has been met.

Objective 2: Determine the number of "new to Marion County" jobs created by Grantee.

The Agreement required the County's access to Grantee's quarterly re-employment reports (RT-6, formerly known as UCT-6) to verify the overall employment performance. The County did not have access to Grantee's RT-6 as required by the Agreement. This was due to the fact that all workers at the restaurant site were leased employees. An employee leasing company reported all of its leased employees in Florida collectively as its own employees to the State of Florida.

Our research found the following:

- IRS code 5.1.24, Third-Party Payer Arrangements for Employment Taxes, in particular, Sec. 5.1.24.3.2.1.1, states that “the term “employer” means the person having legal control of the payment of the wages.”
- Florida Statutes, Chapter 468, Part XI, which governs employee leasing companies, in particular Sec. 468.529(1) states “[a] licensed employee leasing company is the employer of the leased employees.”
- To assess the level of control the leasing company has over the workers, we reviewed the contract between the leasing company and Grantee, which states that the leasing company “assumes responsibility for the payment of wages to contract employees without regard to payments by [Grantee] to [the leasing company] and [the leasing company] assumes full responsibility for the payment of payroll taxes and collection of taxes from payroll on contract employees.”
- The Agreement Sec. 5 which required Grantee to receive prior written approval from the County in order to subcontract any component of the Agreement. Grantee did not receive such approval.

Based on the findings listed above, discussion of whether the leased workers could be considered as the Grantee’s employees ensued. We addressed this concern to the County Administration in a draft audit report and received the following response.

AIHR, a Professional Employer Organization (PEO) provides contractual services for payroll to Eaton’s Beach.

Fl. Stat. 468.520 Defines “Employee Leasing” as an arrangement whereby a leasing company assigns its employees to a client and allocates the direction of and control over the leased employees between the leasing company and the client.

Based upon further discussion with the PEO’s General Counsel, and from research of a case referencing “statutory employees” and “common-law employees,” it states that the client entity has “common-law” employees, whereas the employee leasing company has “statutory employees.” AIHR is obligated by law to withhold taxes and those people are referred to as “statutory employees”. But, they ARE NOT the “common law” employees of the leasing company – they are the “common-law” employees of Eaton’s Beach – which has the authority to hire, fire, manage, etc., and that is what is contemplated by our grant agreement. AIHR has no authority to hire, or terminate the referenced employees of Eaton’s Beach. Eaton’s Beach provides the hiring of the employees, scheduling of work hours and terminations.

Finally, [Grantee], owners of Eaton’s Beach are listed on the payroll and both are employees of Eaton’s Beach.

Although Florida Statutes Chapter 468, Part XI, Employee Leasing Companies, does not differentiate a “common law” employer from a “statutory” employer, the County Attorney has presented two prior court cases in Florida which substantiated the County Administration’s assertion.

Our opinion: Based on the additional information presented to us, we accepted the County Administration's assertion and concluded that Grantee has created 42 "new to Marion County" FTE jobs at the report requirement period of May 2016. We determined that Grantee had exceeded the minimum 25 FTE required by the Agreement.

Acronym/Abbreviation List	
Acronym / Abbreviation	Title
EDIG	Economic Development Infrastructure Grant
County	Marion County
FTE	Full-Time Equivalent
Grantee	Eaton's Beach Restoration Group, LLC
PEO	Professional Employer Organization
OCE	Office of the County Engineer
RT-6	Quarterly Reemployment Report

Report Distribution List	
Name	Title
Carl Zalak	Chairman of the Board of County Commissioners
Kathy Bryant	Vice Chair of the Board of County Commissioners
David Moore	District 1 Commissioner
Jeff Gold	District 3 Commissioner
Michelle Stone	District 5 Commissioner
Mounir Bouyounes	County Administrator
Guy Minter	County Attorney
Jeannie Rickman	Assistant County Administrator-Public Services
Michael McCain	Fiscal Manager
John Garri	Finance Director
Randy Keuntjes	Manager of Eaton's Beach Restoration Group, LLC

ATTACHMENT A (PAGE 1 OF 2)



**Marion County
Board of County Commissioners**

Office of the County Administrator

601 SE 25th Ave.
Ocala, FL 34471
Phone: 352-438-2300
Fax: 352-438-2309

MEMORANDUM

Date: April 12, 2017
To: Sachiko Leon, Internal Auditor
From: Jeannie Rickman, Assistant County Administrator
Through: Mounir Bouyounes, P.E., County Administrator *JR MS 4-18-17*
Subject: Receipt of Fabian Dinkins Proof of Payment for Services Rendered, Eaton's Beach

Attached for your review is a copy of the notarized document/correspondence dated March 29, 2017, reflecting proof of payment for services rendered from Fabian Dinkins in regards to infrastructure improvements to Eaton's Beach.

County Administration accepts this document as the required submission of documentation in accordance with Section 2 – Scope of Services and Funding of the approved Economic Development Infrastructure Grant, dated May 7, 2013

Should you have any questions regarding the attached letter please contact my office for assistance.

Attachment:
March 29, 2017 Correspondence from Fabian Dinkins

Empowering Marion for Success

www.marioncountyfl.org

ATTACHMENT A (PAGE 2 OF 2)



CBC061706 / CBC008262 / CBC058594 / CBC060420

"Building To A Higher Standard"



March 29th, 2017

Re: proof of payment for services rendered
Eatons Beach Restaurant

Dear Mr. Keuntjes,

Please accept this letter as proof of payment for the below listed tasks in the amount listed. These were paid over several of the construction draws and as such there are multiple draw checks comprising these expenses.

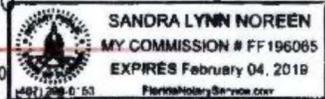
- Fire line - \$23,700.00
- Fire sprinkler system - \$51,980.00
- Storm piping and inlets - \$29,996.00
- Retaining walls DRA and parking lot - \$59,014.00
- Fence and railing on top of retaining walls - \$10,020.00
- DRA excavation - \$4,600.00
- DRA sod - \$902.00
- Septic system - \$79,396.00
- Force main - \$25,741.00
- Demolition - remove existing buildings - \$20,125.00

Acknowledgement of payment for above tasks and services .



 John Fabian, Jr
 General Contractor

Marion County
STATE FLORIDA
 SWORN & signed before me this
 3RD DAY of APRIL, 2017, by
 JOHN EDWARD FABIAN who
 is known personally to me.
 Sandra Lynn Noreen



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