

MEMORANDUM

DATE: July 27, 2016

TO: Public Works

FROM: County Attorney

RE: Resolution No. 16-07-03 to sign IGA/JPA 16-0005916-I with the Arizona Department of Transportation for a bridge on Colcord Road over Gordon Canyon

The Gila County Attorney's office cannot approve this proposed IGA as to form because it lacks language required by statute:

1. Paragraph 1 of the Recitals section cites A.R.S. § 28-401 as authority for the state to enter into this IGA. However, we do not see any authority in that section for the state to enter into this IGA.
2. The proposed IGA references A.R.S. § 41-4401: "The Parties shall comply with the applicable requirements of Arizona Revised Statutes § 41-4401." However, that statute expressly requires that three provisions be "included" in every governmental entity contract: "Every governmental entity *shall* require that every governmental entity contract *include all* of the following provisions." (Emphasis added.) This means that every governmental contract must contain the provisions. Below is a paragraph which complies with that binding directive:

Each party hereby warrants its compliance with all federal immigration laws and regulations that relate to its employees and A.R.S. §23-214(A). If either party uses any subcontractors in performance of this contract, subcontractors shall warrant their compliance with all federal immigration laws and regulations that relate to its employees and A.R.S. § 23-214(A). A breach of this warranty shall be deemed a material breach of the contract subject to penalties up to and including termination of this contract. Each party retains the legal right to inspect the papers of the other party and its subcontractors who work on the contract to ensure that the other or subcontractors are complying with this warranty.

3. The proposed IGA makes clear in many places that the county will be responsible for any costs that exceed the estimates. A.R.S. § 11.952(B)(3) specifies that an IGA must set out: “The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget for the undertaking. Although the IGA declares the source of funding, it says nothing about “establishing and maintaining a budget” as required. Below is a suggested provision:

Each party is responsible to provide for financing and to establish and maintain a budget for its respective obligations under this agreement.

4. A.R.S. § 11.952(B)(4) requires that every IGA make provision for “disposing of property on partial or complete termination.” Here is a suggested contractual provision:

Upon termination of this agreement, each party shall retain its respective property and property belonging to one which was furnished to the other shall be returned to the furnishing party.

The following proposed change to the IGA would be favorable to the county but is not mandatory for the IGA to be approved as to form.

1. Indemnity. The indemnity provision on Page 5, Paragraph 2, causes the county to indemnify the state but not the reverse. However, on Page 3, paragraph 2.a., the IGA states: “The County will ... Designate the State as the County’s authorized agent for the Project.” The county, therefore, will be imputed liability for the negligent acts of its agent, the state. It would be well, then, to include a provision requiring the state to indemnify the county for what the county has to pay because of the state’s negligence.