

Warren County Board of Supervisors

RESOLUTION NO. 141 OF 2017

RESOLUTION INTRODUCED BY SUPERVISORS SOKOL, SEEBER, DICKINSON, MERLINO, STROUGH, BEATY, FRASIER, McDEVITT, SIMPSON, GERAGHTY AND VACANT

APPROVING A SETTLEMENT AGREEMENT WITH SIEMENS BUILDING TECHNOLOGIES, INC.

WHEREAS, on July 29, 2004, the County and Siemens Building Technologies (“SBT”) entered into an agreement (the “Westmount PCA”) concerning the design, installation and performance monitoring of an energy performance project at Westmount (the “Westmount Project”);

WHEREAS, on July 6, 2004, the County entered into a separate Lease Purchase Agreement (the “Westmount Lease”) with Siemens Financial Services, Inc. (“SFS”) for financing of the equipment to be installed by SBT at Westmount (the “Westmount Equipment”);

WHEREAS, on May 22, 2007, the County and SBT entered into an agreement (the “Municipal Center PCA”) (the Westmount PCA and Municipal Center PCA are collectively referred to as the “Contracts”) concerning the design, installation and performance monitoring of an energy performance project at the Municipal Center (the “Municipal Center Project”) (the Westmount Project and the Municipal Center Project are collectively referred to as the “Projects”);

WHEREAS, the PCAs each contained a promise by SBT (the “Performance Guarantee”) that Warren County would achieve a certain amount of guaranteed energy savings on each Project;

WHEREAS, the Warren County Board of Supervisors has raised issues regarding the performance of the Projects;

WHEREAS, SBT asserts that the Projects have performed as promised and that SBT has met all contractual obligations under the Contracts and satisfied all obligations with regard to the Projects;

WHEREAS, on December 31, 2015 the County sold the Westmount Facility to Warren Operations Associates LLC (“WOA”), a private nursing home operator;

WHEREAS, Siemens and the County have expressed a mutual interest and intention to work together

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cooperatively to maximize the efficiency of the systems at the Municipal Center;

WHEREAS, following independent reviews with which Siemens fully cooperated, the County has determined that there is no basis for the County to further investigate Siemens and that it will not pursue any claims against Siemens regarding the Contracts or the related Projects at Westmount and the Municipal Center, and

WHEREAS, Siemens has consistently and reliably provided professional services in connection with both Contracts at Westmount and the Municipal Center, and

WHEREAS, pursuant to the Contracts, Siemens has provided the County with renovated and modernized facilities at Westmount and the Municipal Center, which will continue to provide benefits to the residents of Warren County, and

WHEREAS, the County acknowledges Siemens' cooperation in connection with the County's transfer of the Westmount Cogeneration Facility to WOA, and

WHEREAS, the County acknowledges Siemens' cooperation and assistance in connection with the County's investigation and review of issues related to Westmount and the Municipal Center;

WHEREAS, SBT has agreed, in consideration of the promises and covenants set forth in the settlement agreement, to pay to the County the total sum of Five Hundred Thousand Dollars (\$500,000) within thirty (30) calendar days of the adoption of this Resolution;

WHEREAS, the Parties desire to resolve all issues between them relating to the Contracts and Projects without incurring the expense and business disruption of potential litigation, now, therefore, be it

RESOLVED, that the Warren County Board of Supervisors authorizes the Chairman of the Board to execute a settlement agreement and a forbearance agreement in the forms approved by the County Attorney and the County's special litigation counsel in this matter, and any other documents necessary to implement the terms of the settlement, and to accept payment of the proceeds of the settlement agreement.

SETTLEMENT AGREEMENT AND RELEASE

This Agreement, entered into as of this 4th day of April 2017, by and between the County of Warren, New York (“Warren County” or the “County”) and Siemens Building Technologies, a division of Siemens Industry Inc. (“SBT” or “Siemens”) (Warren County and SBT are collectively referred to herein as the “Parties”), sets forth the terms and conditions under which the Parties have agreed to resolve any and all disputes between them relating to SBT’s work in Warren County, including but not limited to SBT’s work at the Warren County Municipal Center (the “Municipal Center”), a building owned and operated by the County, and the Westmount Health Facility (“Westmount” or the “Westmount Facility”), a nursing home formerly owned and operated by the County.

RECITALS

WHEREAS, on July 29, 2004, the County and SBT entered into an agreement (the “Westmount PCA”) concerning the design, installation, and performance monitoring of an energy-performance project at Westmount (the “Westmount Project”);

WHEREAS, on July 6, 2004, the County entered into a separate Lease Purchase Agreement (the “Westmount Lease”) with Siemens Financial Services, Inc. (“SFS”) for financing of the equipment to be installed by SBT at Westmount (the “Westmount Equipment”);

WHEREAS, on May 22, 2007, the County and SBT entered into an agreement (the “Municipal Center PCA”) (the Westmount PCA and Municipal Center PCA are collectively referred to as the “Contracts”) concerning the design, installation, and performance monitoring of an energy-performance project at the Municipal Center (the “Municipal Center Project”) (the Westmount Project and the Municipal Center Project are collectively referred to as the “Projects”);

WHEREAS, Exhibit C to the Westmount PCA and the Municipal Center PCA each contains a promise by SBT (the “Performance Guarantee”) that Warren County would achieve a certain amount of guaranteed energy savings on each Project;

WHEREAS, the Warren County Board of Supervisors has raised issues regarding the performance of the Projects;

WHEREAS, SBT asserts that the Projects have performed as promised and that SBT has met all contractual obligations under the Contracts and satisfied all obligations with regard to the Projects;

WHEREAS, on December 31, 2015, the County sold the Westmount Facility to Warren Operations Associates LLC (“WOA”), a private nursing-home operator;

WHEREAS, Siemens and the County have expressed a mutual interest and intention to work together cooperatively to maximize the efficiency of the systems at the Municipal Center;

WHEREAS, following independent reviews with which Siemens fully cooperated, the County has determined that there is no basis for the County to further investigate Siemens, and that it will not pursue any claims against Siemens regarding the Contracts or the related Projects at Westmount and the Municipal Center;

WHEREAS, Siemens has consistently and reliably provided professional services in connection with both Contracts at Westmount and the Municipal Center;

WHEREAS, pursuant to the Contracts, Siemens has provided the County with renovated and modernized facilities at Westmount and the Municipal Center, which will continue to provide benefits to the residents of Warren County;

WHEREAS, the County acknowledges Siemens' cooperation in connection with the County's transfer of the Westmount Cogeneration Facility to WOA;

WHEREAS, the County acknowledges Siemens' cooperation and assistance in connection with the County's investigation and review of issues related to Westmount and the Municipal Center;

WHEREAS, the Parties desire to resolve all issues between them relating to the Contracts and Projects without incurring the expense and business disruption of potential litigation;

NOW, THEREFORE, in consideration of the conditions, release, and other considerations set forth below, the sufficiency of which is hereby acknowledged, the Parties agree to the following terms and conditions:

1. TERMS AND CONDITIONS

1.1 SBT agrees to pay Warren County the total sum of \$500,000.00 in the form of a check sent by overnight courier within thirty (30) calendar days of the date on which the Board of Supervisors of Warren County issues the Board Resolution described in paragraph 1.2 below.

1.2 In consideration of this payment, following the execution of this Agreement, Warren County agrees to include in the resolution issued by the Warren County Board of Supervisors approving this Agreement (the "Board Resolution") the following statements:

(a) Following independent reviews with which Siemens fully cooperated, the County has determined that there is no basis for the County to further investigate Siemens and that it will not pursue any claims against Siemens regarding the Contracts or the related Projects at Westmount and the Municipal Center.

(b) Siemens has consistently and reliably provided professional services in

connection with both Contracts at Westmount and the Municipal Center.

(c) Pursuant to the Contracts, Siemens has provided the County with renovated and modernized facilities at Westmount and the Municipal Center, which will continue to provide benefits to the residents of Warren County.

(d) The County acknowledges Siemens' cooperation in connection with the County's transfer of the Westmount Cogeneration Facility to WOA.

(e) The County acknowledges Siemens' cooperation and assistance in connection with the County's investigation and review of issues related to Westmount and the Municipal Center.

1.3 Warren County acknowledges and agrees that it will continue to owe payments to SFS under the terms of the Westmount Lease through July 31, 2017 and that it will fully satisfy all outstanding obligations owed to SFS under the Westmount Lease. Siemens acknowledges and agrees that WOA is currently the owner and operator of the Westmount Facility and, subject to Warren County's compliance with its Lease payments and obligations under this provision, Siemens will not take any action that will interfere with WOA's operation of the Cogeneration Facility at Westmount. Pursuant to the Westmount Lease, following Warren County's final Lease payment, the County will own the Westmount Cogeneration Facility and Equipment free and clear of the security interest granted to SFS in Section 10 of the Westmount Lease, and Siemens will not take any action that will interfere with the County's sale of the Cogeneration Facility and Equipment to WOA or its real-estate holding company. No part of the consideration in Section 1.1 herein is attributable to the Westmount Lease or Project.

1.4 Warren County acknowledges and agrees that the Performance Guarantees under both the Westmount PCA and the Municipal Center PCA are no longer in effect and are null and void.

2. RELEASES

2.1 For and in consideration of the terms and conditions of this Agreement, Warren County and its legal predecessors, partners, members, successors, assigns, affiliates, parents, subsidiaries, agents, servants, officers, directors, employees, and representatives (collectively referred to herein as the “Warren County Releasers”) hereby release and forever discharge Siemens, its legal predecessors, successors, assigns, shareholders, officers, directors, employees, agents, parent companies, and affiliated companies (collectively referred to herein as the “Siemens Releasees”) from any and all actions, causes of action, suits, damages, judgments, claims, demands, attorneys’ fees, and costs, of any nature whatsoever, known or unknown, that the Warren County Releasers may have or had against the Siemens Releasees on account of or in any way relating to SBT’s work at the Municipal Center and Westmount Projects.

2.2 For and in consideration of the terms and conditions of this Agreement, Siemens and its legal predecessors, partners, members, successors, assigns, affiliates, parents, subsidiaries, agents, servants, officers, directors, employees, and representatives (collectively referred to herein as the “Siemens Releasers”) hereby release and forever discharge Warren County, its legal predecessors, successors, assigns, shareholders, officers, directors, employees, agents, parent companies, and affiliated companies (collectively referred to herein as the “Warren County Releasees”) from any and all actions, causes of action, suits, damages, judgments, claims, demands, attorneys’ fees, and costs, of any nature whatsoever, known or unknown, that the Siemens Releasers may have or had against the Warren County Releasees on

account of or in any way relating to SBT's work at the Municipal Center and Westmount Projects.

3. MISCELLANEOUS

3.1 The Parties understand and agree that neither the payment of any sum of money nor the execution of this Settlement Agreement by the Parties will constitute or may be construed as an admission of any wrongdoing or liability whatsoever by any Party.

3.2 This Agreement constitutes the full, complete, and entire understanding, agreement, and arrangement of and between the Parties with respect to the subject matter hereof and supersedes any and all prior oral and written understandings, agreements, and arrangements between them. There are no other agreements, covenants, promises, or arrangements between the Parties related to the subject matter of this Agreement other than those set forth in this Agreement.

3.3 This Agreement shall not be orally amended, altered, modified, or waived, either in whole or in part, and no amendment, alteration, modification, or waiver of this Agreement or any provision hereof shall be binding unless executed in writing by the Party or Parties to be bound thereby.

3.4 If any provision of this Agreement is held to be illegal, invalid, or unenforceable in any jurisdiction, such provision shall be fully severable, and this Agreement shall be construed as if such provision had never comprised a portion of this Agreement.

3.5 The Parties acknowledge that each has had the benefit and advice of independent legal counsel in connection with this Agreement and understands the meaning of each term of this Agreement and the consequences of signing this Agreement.

3.6 The Parties further declare and represent that they have reviewed this Settlement

Agreement in its entirety and that in making this Settlement Agreement they have relied wholly upon their own judgment, belief, knowledge, investigation, independent legal advice, and research, and that they have not been influenced to any extent whatsoever in making this Settlement Agreement by any representation or statements regarding the same by any other Party, or by any person or persons representing or acting for any other Party, other than as set forth in this Settlement Agreement.

3.7 It is understood and agreed that all Parties shall be deemed to have drafted this Settlement Agreement in order to avoid any negative inference by any court or other adjudicator as against the drafter of this Settlement Agreement.

3.8 The Parties represent and warrant that there has been, and there will be, no assignment or other transfer or disposition of any interest in any matter or part or portion thereof made subject to obligations or released in this Agreement, except as referenced in Section 1.3 herein. Warren County understands and agrees that SBT in entering into this Agreement is relying on the representation and warranty of this Paragraph. SBT likewise understands and agrees that Warren County in entering into this Agreement is relying on the representation and warranty of this Paragraph.

3.9 Warren County agrees that the Board of Supervisors, the County Administrator, the County Attorney, and Special Counsel to the County in this matter will not make or cause to be made any public statements about Siemens, its employees, or the Westmount and Municipal Center Projects or Contracts that are inconsistent with or different from the above acknowledgements set forth in Section 1.2 above.

3.10 Warren County agrees and acknowledges that the recitations set forth in Section 1.2 above are a material aspect of this Agreement and that any breach of Section 3.9 above shall

constitute a material breach of this Agreement. Upon written notice by Siemens, the Chairman of the Warren County Board of Supervisors or the Warren County Attorney shall publicly repudiate within 72 hours any statement that is inconsistent with or different from the above acknowledgements set forth in Section 1.2 above. In the event that such repudiation is inadequate to address any injury caused by such a breach of Section 3.9, Siemens shall also be entitled to seek appropriate monetary damages, as well as any attorneys' fees and costs incurred in connection with successfully enforcing this provision.

3.11 Siemens agrees and acknowledges that the payment set forth in Section 1.1 above is a material aspect of this Agreement and that any failure by Siemens to make such payment shall constitute a material breach of this Agreement. In the event of any such breach, Warren County shall be entitled to seek appropriate monetary damages, as well as any attorneys' fees and costs incurred in connection with successfully enforcing this provision.

3.12 Headings. The section headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

3.13 Governing Law. This Agreement is governed by and shall be construed in accordance with the laws of the State of New York.

3.14 Forum. Any litigation, action, or proceeding arising out of any dispute concerning or otherwise attempting to enforce, interpret or remedy any breach of this Agreement shall be brought only in a court of competent jurisdiction (whether federal or state) sitting within the State of New York, County of Albany. With respect to such litigation only, the Parties irrevocably and unconditionally (a) submit to personal jurisdiction with respect to such action, (b) waive any objection to jurisdiction and venue, and (c) agree not to plead or claim in any such court that any such suit, action or proceeding has been brought in an inconvenient forum.

3.15 Each Party hereto shall be solely responsible for its own legal expenses and costs in connection with this matter and Agreement.

3.16 This Settlement Agreement shall be binding on and shall inure to the benefit of the Parties, their respective parents, subsidiaries, and affiliates, as well as their successors-in-interest and assignees.

3.17 Each Party covenants and represents that it is fully authorized to enter into this Settlement Agreement and to carry out the obligations provided for herein. Where a Party hereto has executed this Settlement Agreement on behalf of another Party, such executing Party covenants, warrants, and represents that he or she is and has been authorized to do so by such Party.

3.18 This Settlement Agreement may be executed in counterpart originals with the same force and effect as if fully and simultaneously executed in one single document.

Warren County

Siemens Industry Inc.

By: _____
Ronald Conover

By: _____
Joseph A. Peters

Chairman, Warren County
Board of Supervisors

Northeast Zone Vice President

- and -

- and -

Brian Reichenbach

James A. Gerlach

Warren County Attorney

Northeast Zone Manager, Finance &
Business Administration

REAFFIRMATION AND FORBEARANCE AGREEMENT

This REAFFIRMATION AND FORBEARANCE AGREEMENT (this "Agreement") is entered into this ___ day of April 2017, by and between Siemens Financial Services, Inc. ("SFS") and the County of Warren, New York ("Warren County" or the "County"). SFS and Warren County are sometimes referred to collectively as the "Parties" and each, at times, a "Party."

RECITALS

A. On July 29, 2004, Warren County entered into an agreement with Siemens Building Technologies, a division of Siemens Industry Inc. ("SBT"), concerning the design, installation, and performance monitoring of an energy-performance project at Westmount Health Facility ("Westmount" or the "Westmount Facility"), a nursing home formerly owned and operated by Warren County.

B. On July 6, 2004, Warren County entered into a Lease Purchase Agreement (the "Lease") with SFS for financing of the equipment to be installed by SBT at Westmount (the "Equipment").

C. In Section 18 of the Lease, Warren County agreed that, without SFS's prior written consent, Warren County would neither (i) assign, transfer, pledge, hypothecate, grant any security interest in, or otherwise dispose of the Lease or the Equipment or any interest in the Lease or the Equipment, nor (ii) sublet or lend the Equipment or permit it to be used by anyone other than Warren County or its employees.

D. On December 31, 2015, Warren County sold the Westmount Facility to Warren Operations Associates LLC ("WOA"), a private nursing-home operator, without obtaining consent from SFS.

E. Warren County has requested that SFS forbear from the exercise and enforcement of its rights, powers, and remedies against Warren County under Section 20 of the Lease as they relate to the above-referenced sale, and SFS is willing to forbear from the exercise and enforcement of such rights, powers, and remedies as they relate to the above-referenced sale only upon Warren County's full and complete compliance with and fulfillment of the terms and conditions set forth in this Agreement.

F. On April __, 2017, Warren County and SBT entered into a Settlement Agreement and Release resolving any and all disputes between them relating, among other things, to SBT's work at Westmount.

NOW THEREFORE, in consideration of the mutual promises set forth below and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

TERMS

1. Warren County acknowledges and agrees that it is obligated to continue to make and covenants that it will make all Lease Payments to SFS under the terms of the Lease. Warren County further acknowledges and agrees that in the event that Warren County fails to make a Lease Payment as required by this provision, then this Forbearance Agreement will be null and void and SFS shall retain all rights, powers and remedies otherwise available under the Lease.

2. SFS acknowledges that Warren County has sold the Westmount Facility to WOA, the current owner and operator of the Westmount Facility. SFS agrees not to take any action that will interfere with WOA's operation of the Cogeneration Facility and other Equipment at Westmount so long as Warren County continues to make all Lease Payments in a timely manner.

3. Under the terms of the Lease, once Warren County has made its final Lease payment, (a) SFS will relinquish all security interests granted to SFS in Section 10 of the Lease, and (b) SFS will not take any action that will interfere with the County's sale of the Cogeneration Facility and other Equipment to WOA or its real-estate holding company.

IN WITNESS WHEREOF, this Agreement has been duly EXECUTED, AGREED, and ACCEPTED as of the day and year first above written.

Warren County

Siemens Financial Services, Inc.

By: _____

Ronald Conover

Chairman, Warren County
Board of Supervisors

- and -

Brian Reichenbach

Warren County Attorney

By: _____

Name:

Title:

- and -

Name:

Title: