

**TAB 5**

Law Offices

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TO: City of Palmetto Police Officers' Retirement Plan  
FROM: Scott R. Christiansen *[Signature]*  
RE: Gabriel, Roeder & Smith Contract Negotiations-Fiduciary Responsibility  
DATE: August 6, 2010

Over the last two years we have been negotiating with the actuarial firm of Gabriel, Roeder & Smith regarding the appropriate fiduciary standard that should be agreed to and set forth in new contracts that we have been asked to prepare. These contract revisions have mostly been in connection with requested fee changes by GRS. At this point we are looking to the Board to make a decision regarding the fiduciary language and other contract provisions that should be included in the pending contract with GRS.

First, GRS will not agree to be a fiduciary to the plan within the meaning of the Federal law under the Employee Retirement Income Security Act ("ERISA"). Most investment managers, your consultant, your attorney and most other actuarial firms agree to this high standard.

GRS will agree to language which will make them responsible to inform the Board if they become aware of a material breach of a duty or responsibility by another plan professional, which in some measure is similar to the co-fiduciary responsibility in ERISA.

Section 112.656, Florida Statutes, also provides for fiduciary responsibility under Florida law as follows:

**"112.656 Fiduciary duties; certain officials included as fiduciaries.--**

- (1) A fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.
- (2) Each retirement system or plan shall have one or more named fiduciaries with authority to control and manage the administration and operation of the retirement system or plan. *However, the plan administrator, and any officer, trustee, and custodian, and any counsel, accountant, and actuary of the retirement system or plan who is employed on a full-time basis, shall be included as fiduciaries of such system or plan.*
- (3) A retirement system or plan may purchase insurance for its named fiduciary to cover liability or losses incurred by reason of act or omission of the fiduciary."

GRS will acknowledge in its contract that it is subject to the standard in (1), but will not acknowledge that it is a "fiduciary". As you can see, subsection (2) provides that an actuary of the retirement system or plan who is employed "on a full-time basis", shall be included as a fiduciary of such system or plan. There is no case law or other controlling legal source that interprets what is meant by the phrase "on a full-time basis." Arguably this phrase could mean either (a) an actuary who works for only one plan and does so full-time, such as an employee of the plan or (b) an actuary who is the only actuary for the plan and, therefore, is in a continuing relationship with the plan and provides all of the actuarial services to the plan.

GRS asserts that interpretation (a) is the correct one and since its relationship with our plan does not meet this interpretation, it is not a fiduciary under the statute and the contract should not require it to acknowledge that it is a fiduciary.

On the other hand, however, GRS would be a fiduciary under the statute if interpretation (b) was the correct interpretation and our firm would prefer that GRS acknowledge this fiduciary responsibility in the contract, since it will not agree to the ERISA fiduciary standard..

Since there are two potential interpretations of the statutory language, GRS has suggested that we include a contract provision that states that it is a fiduciary **to the extent required** by Section 112.656. This contract language would leave unresolved the issue of whether it is a fiduciary or not and would mean that we would need to have a court decide whether or not it is a fiduciary under the statute, when and if we ever brought a claim against GRS for breaching its fiduciary responsibility.

We would prefer to resolve the issue at this point by including a contract provision that states that they are a fiduciary **and are subject to Section 112.656 (1)**. Admittedly, if this language is included in the contract, GRS will be subject to the fiduciary responsibility in 112.656 (1), even if a court were to determine that the correct interpretation of the statute was interpretation (a).

At this point we simply want to resolve this issue with respect to the pending contract between GRS and the Board by asking the Board to consider this issue at the next meeting. We feel that either contract provision is acceptable from a legal standpoint and we are not recommending that the Board replace GRS based only on its preference for its suggested language, but if the Board determines that GRS should declare in the contract that it is a fiduciary, they will be unwilling to do so. We are enclosing a copy of a signed contract which has been negotiated with GRS which includes the "to the extent required" language. GRS will not agree to acknowledge fiduciary responsibility beyond this.

The fees proposed in the Agreement were provided to our office by GRS as their current fees for the 2009 valuation period and going forward. These are being presented for Board consideration.

If the Board finds this language, the revised fee schedule and the remainder of the revised contract to be acceptable, the contracts can be approved and executed by the Board. We also enclose a copy of the current contract for comparison purposes. If the Board finds any portion of this revised contract to be unacceptable, we must either further negotiate or seek requests for proposals for a new actuarial firm.

## ACTUARIAL SERVICES AGREEMENT

**THIS CONTRACT** is entered into the \_\_\_\_\_ day of \_\_\_\_\_, 2010, between the **BOARD OF TRUSTEES OF THE CITY OF PALMETTO POLICE OFFICERS' RETIREMENT PLAN**, (herein referred to as the "Board") and **GABRIEL, ROEDER, SMITH & COMPANY** (herein referred to as the "Actuary").

### WITNESSETH

**WHEREAS**, the Actuary has demonstrated the expertise and experience to perform the actuarial services outlined in said proposal.

**NOW, THEREFORE**, in consideration of services to be performed and payments to be made together with mutual covenants and conditions hereinafter set forth, the parties agree as follows:

1. The Actuary shall, within sixty (60) days of receipt of all required employee and financial data, complete and return to the Board the following for each year beginning with an October 1, 2009 valuation:

- A. Actuarial valuation and report. In the course of the valuation, Actuary will determine the funding requirements and generally review the experience of the Fund. (9 copies)
- B. Information required for the Bureau of Local Retirement Systems per Chapter 112, Florida Statutes. (9 copies)
- C. Disclosure information for auditors per Governmental Accounting Standards Board. (9 copies)
- D. Individual Member Certificates which set forth the projected, accrued and vested benefits, along with a statement of accumulated member contributions on the valuation date.
- E. Respond to annual requests for information by auditor.
- F. Preparation and delivery of actuarial certification (page 6a) for the Annual State Report.
- G. Preparation of Individual benefit calculations, excluding PLOP.

2. Following submission of the aforescribed information and material, the Actuary shall meet with the Board to discuss in detail the results of the valuation and do all that is required to make the valuation reasonably acceptable to the Board. After acceptance by the Board, Actuary shall file the report with all appropriate State agencies and do everything necessary to obtain State acceptance.

3. In consideration of the satisfactory performance of services and delivery of work products as provided in paragraphs 1 and 2 of this contract, the Board agrees to pay the Actuary an annual fee of \$9,000.00 for 2009. This annual fee, as well as the hourly rates provided in Section 5. below, shall be increased each year beginning October 1, 2010 in accordance with the change in the Consumer Price Index. It is agreed that this annual fee amount shall be the total compensation to Actuary for performance of the services in paragraphs 1 and 2, including all expenses.

4 The fee calculation of the cost to buy-back credited service shall be \$400. These calculations will be performed and the results provided to the Board within 5 working days of receipt by Actuary.

5. During the contract period, the Actuary shall also perform such additional actuarial services as may be requested by the Board including, but not limited to:

- A. Perform special actuarial studies to determine the costs associated with the implementation of alternative benefit improvements.
- B. Conduct meetings with employee groups to explain plan provisions and answer questions.
- C. Analyze funding trends to predict future contribution requirements..

The charges for this work shall be based upon the amount of time required to complete each task, however, a firm, not-to-exceed, fee quotation shall be provided prior to commencing any work. The hourly charges shall be:

	<u>Hourly Rate</u>
Senior Consultant	\$325-400
Consultant	\$250-300
Senior Analyst	\$175-225
Analyst	\$125-175
Administrative Assistant	\$85 - 115

6. This contract embodies the entire agreement of the parties hereto and no modification thereof shall be made except by written amendment agreed to and executed by both parties.

7. The Board shall deliver to the Actuary all employee and financial data and any such further information as the Actuary shall deem necessary from time to time in order to complete the job.

8. This Agreement shall remain in effect until terminated by either party, as provided for in this paragraph 8. Either party may terminate this Agreement at any time upon thirty (30) days written notice to the other party. In the event that the Board determines to terminate this contract without cause, the Actuary shall be entitled to compensation to the date of such termination, based on the actual work performed.

9. There shall be no change in any terms unless mutually agreed to in writing by the parties hereto.

10. Neither party hereto may assign, convey, or otherwise transfer any of its rights, obligations, or interest herein without the prior express written consent of the other party.

11. The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be governed by the laws of the State of Florida. All prior agreements between the parties are hereby terminated and superseded by this Agreement.

12. This Agreement may be executed in several counterparts, each of which shall be deemed an original.

13. Actuary will be governed in its relations with the Board by the duties and requirements of Florida law. Actuary is an independent contractor and not an agent, employee or subcontractor of the Board. Actuary will not enter into any agreement or take any action contrary to that responsibility. Actuary will not accept or perform an engagement involving the Plan's members for any organization other than the Plan without prior written consent of the Board. Actuary warrants to the Board that the services performed under this Agreement will be performed in accordance with generally accepted industry standards.

In all of its relations with the Board, Actuary shall discharge its duties with respect to the Plan solely in the interest of the participants and their beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the plan. By execution of this Agreement, Actuary acknowledges that it shall be subject to the standards set forth in §112.656, Florida Statutes, to the extent they are applicable to Actuary.

If, in the course of providing actuarial services in this Agreement, the Actuary has knowledge of an apparent, unresolved, material breach of a known duty or responsibility by a plan professional, the Actuary shall disclose such breach to the Board.

14. Any action arising under this Agreement shall be brought exclusively in Manatee County, Florida.

15. Public Entity Crimes Bill - Section 287.133, Florida Statutes, provides that a person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide any goods or services to a public entity, may not submit a bid on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to a public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in Section 287.017, Florida Statutes, for CATEGORY TWO for a period of 36 months from the date of being placed on the convicted vendor list.

IN WITNESS WHEREOF, the Board has signed duplicates hereof, and GABRIEL, ROEDER, SMITH & COMPANY has caused its corporate name to be signed to said duplicates by its proper officers thereunto duly authorized on the day and in the year first above written.

**GABRIEL, ROEDER, SMITH  
& COMPANY**

**BOARD OF TRUSTEES OF THE  
CITY OF PALMETTO POLICE  
OFFICERS' RETIREMENT PLAN**

By: *Justin Palmetto*  
As Senior Consultant  
and Actuary

By: \_\_\_\_\_  
As Chairman

ATTEST:

ATTEST:

By: *Virginia Zagari*  
As Office Manager

By: \_\_\_\_\_  
As Secretary