

City Council Report

915 I Street, 1st Floor

Sacramento, CA 95814

www.cityofsacramento.org

File ID: 2020-01219

Published for 10-Day Review 10/15/2020

Review Item 03

Title: (Contract for Review) Agreement: Agreement for Specialized Consulting Services – Investigation Regarding Accelerated Water Meter Project

Location: Citywide

Recommendation: Accept and publish for review a Motion authorizing the City Manager or the City Manager's designee to execute a Professional Services Agreement with Exponent, Inc. (Exponent) in the not-to-exceed amount of \$2.0 million for specialized consulting services; and continue to October 27, 2020 for approval.

Contact: Marc Lee, Project Manager (916) 808-7481; Michelle Carrey, Supervising Engineer (916) 808-1438; Tony Bertrand, Engineering & Water Resources Division Manager, (916) 808-1461; Department of Utilities; Katherine E. Underwood, Senior Deputy City Attorney, Office of the City Attorney

Presenter: None.

Attachments:

1-Description/Analysis

2-Agreement for Specialized Consulting Services – Investigation/Litigation

Description/Analysis

Issue Detail: The City of Sacramento (City) contracted with A. Teichert & Sons, Inc. dba Teichert Waterworks (Teichert) to construct seven separate public works of improvement as part of the City's Accelerated Water Meter Project (AWMP). To date, the City has identified and confirmed the existence of non-compliant and deficient work on at least six of the seven projects performed by Teichert on the AWMP. Examples of the non-compliant work are: failure to install meter setters pursuant to the contract documents; installation of improper pipe materials; improperly backfilling meter boxes; failure to install tracer wires; and failure to install polyethylene services and water mains pursuant to the contract documents. The City discovered the non-compliant and/or deficient work performed by Teichert on the AWMP primarily through failures at certain installations and resident complaints. The City has requested Teichert identify all addresses and/or locations where Teichert performed non-compliant and/or deficient work on the AWMP and Teichert has refused to do so.

Exponent is a multidisciplinary organization that provides engineering, scientific, environmental, and health consulting services. Technical expertise, such as that possessed by Exponent, is necessary when conducting investigations into complex construction matters such as those presented by the AWMP. Exponent was initially retained to prepare a statistical sampling methodology and inspection protocol to determine the extent of Teichert's non-compliant and/or deficient work on the AWMP. Since Teichert has refused to cooperate with the City's investigation, the City must now proceed with its own investigation into the extent of the non-compliant and/or deficient work performed by Teichert on the AWMP. Based upon Exponent's expertise and familiarity with the project, it is cost efficient to retain Exponent for the next phase of the City's investigation. Exponent will be retained to perform an inspection of Teichert's work on the AWMP, conduct an independent liability analysis, and perform a damages calculus/cost of repair, as needed.

Policy Considerations: City Council approval is required for professional service agreements of \$250,000 or more per City Code 3.64.020.

The Sacramento City Code Section 4.04.020 and Council Rules of Procedure (Chapter 7, Section E.2.d) mandate that unless waived by a 2/3 vote of the City Council, all labor agreements and all agreements greater than \$1,000,000 shall be made available to the public at least ten (10) days prior to council action.

Economic Impacts: None.

Environmental Considerations: This report concerns administrative activities that will not have a significant effect on the environment and do not constitute a “project” as defined by California Environmental Quality Act Guidelines Section 15378(b)(2).

Sustainability: The proposed project is consistent with the 2035 General Plan U 1.1.2 Citywide Level of Service Standards and U 2.1.4 Priority of Water Infrastructure as it improves infrastructure reliability by investigating whether water meters, water mains, and installations were built to City Standards.

Commission/Committee Action: Not applicable.

Rationale for Recommendation:

Authorization of the contract with Exponent, Inc. is necessary for the City’s investigation into the non-compliant and/or defective work performed by Teichert on the AWMP. This firm specializes in this area and the City Attorney’s office has determined that it has the required expertise to protect and defend the City of Sacramento’s interests in this matter.

Financial Considerations: The proposed agreement is for an amount not-to-exceed \$2.0 million. Sufficient funding exists in the Residential Water Metering Program (Z14010000, Fund 6005) to award the agreement.

There are no General Funds allocated or planned for this project.

Local Business Enterprise (LBE): Exponent, Inc. was procured by the City via an alternate selection process, therefore the LBE requirements do not apply.

**AGREEMENT FOR SPECIALIZED CONSULTING SERVICES
INVESTIGATION/LITIGATION**

THIS AGREEMENT is made and entered into on October 9, 2020, by and between the City of Sacramento, a municipal corporation ("City") and Exponent, Inc., a Delaware Corporation, with principal offices at 149 Commonwealth Drive, Menlo Park, CA 94025 ("Consultant").

RECITALS

- A. The City Attorney's Office has determined it is desirable to retain Consultant to provide specialized services (the "Services") to assist the City with its investigation into possible construction defects associated with A. Teichert & Sons, Inc. dba Teichert Waterworks' work on the City's Accelerated Water Meter Program ("Investigation"). Consultant will be retained to perform field inspections, conduct an independent liability analysis, conduct a damages analysis, and provide other such consultation as necessary to meet the goals of the project; and
- B. Consultant has the qualifications, experience, and facilities needed to perform the Services.

NOW, THEREFORE, in consideration of the mutual promises hereinafter set forth, City and Consultant agree as follows:

AGREEMENT

1. SCOPE OF SERVICE

Consultant shall perform Services as directed by the City Attorney's Office, on a confidential basis, to assist in the Investigation, and any litigation which may arise between the City and Teichert as a result thereof.

2. TERM OF AGREEMENT

This Agreement shall be effective upon execution by Consultant and City and shall remain in effect until both parties have fully performed their respective obligations under this Agreement.

3. SCHEDULE FOR PERFORMANCE

Consultant shall perform the Services as expeditiously as is consistent with generally accepted standards of professional skill and care and the orderly progress of work.

4. COMPENSATION

The City shall compensate Consultant for Services performed on a time and expense reimbursement basis as set forth below, provided that the total compensation paid to Consultant pursuant to this Agreement shall not exceed Two Million Dollars (\$2,000,000.00), without prior written City approval.

Payment for Services performed in 2020 will be made at the following hourly rates:

- | | |
|---|------------|
| • Ezra Jampole, Ph.D., P.E., Managing Engineer: | \$235/hour |
| • Gabriel Jen, Ph.D., P.E., Senior Engineer: | \$215/hour |
| • John Oстераas, Ph.D., P.E., Principal Engineer: | \$450/hour |

- Mateusz Radlinski, Ph.D., P.E., Senior Managing Engineer: \$285/hour
- Rene Sachs, Senior Associate: \$195/hour
- Sisi Song, Ph.D., Scientist: \$250/hour
- Duane Steffey, Ph.D., Principal Scientist: \$450/hour
- Heather N. Watson, Ph.D., Managing Scientist: \$290/hour
- John Fessler, Ph.D., P.E., Principal Engineer \$470/hour
- Richard W. Klopp, Ph.D., P.E., F.A.S.M.E. \$535/hour

The City acknowledges that Consultant’s individual professional rates are modified annually on or about January 1; provided, however, no such increases will be made without at least 30 days prior written notice. General and common administrative expenses necessarily incurred by Consultant in performing Services will be reimbursed at cost. Such reimbursable general and common administrative expenses shall include travel by public or commercial transportation, lodging while traveling, materials other than normal office supplies, outside reproductions/printing, mailing/shipping costs, and other definable direct job-charged expenses. The use of Consultant's vehicles for travel will be paid for at the current IRS mileage rate.

In the event the City requires Consultant to procure special project expenses in connection with the Services such as certain laboratory tests, subcontractors or other third-party vendors, City acknowledges that such special project expenses are charged at cost plus fifteen percent.

5. INVOICING AND PAYMENT

Invoices shall be submitted to the City monthly. Invoices shall identify the task/Services performed, name, and hourly rate of persons charged to the project; and shall include a summary of amounts expended to date, amount invoiced, and the remaining expenditure authorization. Copies of invoices for all reimbursable expenses shall be submitted. Each invoice must be labeled “Confidential” and marked with “Attorney-Client Privilege.”

Invoices shall be submitted to the City Attorney’s Office, 915 I Street, Fourth Floor, Sacramento, CA 95814, Attn: Katherine Underwood, Senior Deputy City Attorney. Invoices shall identify the City Agreement No. for this Agreement, and the following Project fund line for payment: 433021-50000-6005-51000000-Z14010108-401.

The City shall endeavor to pay the Consultant within thirty (30) days of invoice date all amounts set forth in a properly documented invoice.

The parties shall exercise good faith and diligence in the resolution of any disputed invoiced amounts.

6. NON-DISCRIMINATION IN EMPLOYEE BENEFITS

This Agreement is subject to the provisions of Sacramento City Code Chapter 3.54, Non-Discrimination in Employee Benefits by City Contractors. Consultant shall comply with all applicable requirements of City Code Chapter 3.54.

7. NOTICES

Any notices or other communications to be given to any party pursuant to this Agreement shall be given by delivering it in writing to the parties at the addresses set forth below:

To City:

Katherine Underwood, Senior Deputy City Attorney
City of Sacramento
915 I Street, 4th Floor
Sacramento, CA 95814
Email: kunderwood2@cityofsacramento.org

To Consultant:

John Osteraas
Exponent, Inc.
149 Commonwealth Drive
Menlo Park, CA 94025
Email: osteraas@exponent.com

Such notice shall be deemed given when deposited into the United States mail, postage prepaid, addressed to the parties at the addresses above. Nothing shall preclude the giving of personal notice or notice by email provided, however, that notice by email shall be followed by notice deposited into the United States mail as outlined above.

8. LICENSES

Except as provided otherwise in this Agreement, Consultant shall, at Consultant's expense, obtain and maintain all required professional licenses to perform the Services.

9. INDEPENDENT CONTRACTOR

It is understood and agreed that Consultant (including Consultant's employees and sub-consultants) is an independent contractor and that no relationship of employer-employee exists between the parties hereto. Consultant shall not be entitled to any benefits payable to employees of the City. The City is not required to make any deductions or withholdings from the compensation payable to Consultant under the provisions of this Agreement. As an independent contractor, Consultant hereby indemnifies and holds City harmless from any and all claims that may be made against City based upon any contention by any third party that an employer-employee relationship exists by reason of this Agreement.

It is further understood and agreed by the parties hereto that Consultant in the performance of its obligation hereunder is subject to the control or direction of City as to the designation of tasks to be performed, and the results to be accomplished by the Services performed, but not the means, methods, or sequence used by Consultant for accomplishing the results.

It is further understood and agreed that as an independent contractor and not an employee or agent of City, neither Consultant nor Consultant's assigned personnel shall have any right to act on behalf of City in any capacity whatsoever as agent, or to bind City to any obligation whatsoever.

10. SUB-CONSULTANTS TO CONSULTANT

Consultant shall not perform the Services or any part thereof by or through any sub-consultant without prior written approval of the City. Consultant will cooperate with any other third party consultants retained by City in furtherance of City's evaluation and analysis of, and response to, any Claims.

11. POTENTIAL CONFLICTS OF INTEREST

Consultant shall disclose its involvement in any projects that may be directly affected by actions taken by City based on the services provided hereunder.

Consultant certifies that it has disclosed to City any actual, apparent or potential conflicts of interest that may exist relative to the services to be provided pursuant to this Agreement. Consultant hereby agrees to advise City in writing of any actual, apparent, or potential conflicts of interest that may develop subsequent to the date of execution of this Agreement and shall give such notice pursuant to Section 6 herein, within ten days of Consultant's knowledge of such conflict. City reserves the right to require Consultant to submit a financial disclosure statement.

Consultant agrees to refrain from other engagements that may present an actual, apparent or potential conflict of interest with respect to the Services covered by this Agreement during the term of this Agreement. Consultant may request a waiver of these requirements from City. The request for a waiver must be in writing and shall contain a disclosure and description of the actual, apparent or potential conflict of interest and Consultant's reasons and justification for requesting such a waiver. The request shall be submitted to City pursuant to Section 6 of this Agreement.

12. OWNERSHIP OF CONSULTANT'S WORK PRODUCT

Exclusive of Consultant IP (defined below), all technical data, evaluations, reports or other work products prepared by Consultant pursuant to this Agreement shall become the property of City and shall be delivered to City upon completion of the applicable Services. Consultant may retain copies thereof for its files and internal use, provided that Consultant's work product under this Agreement shall constitute confidential and privileged information protected by the evidentiary privileges for attorney-client communication and attorney work product, and shall not be disclosed by Consultant to any person or party outside the City without the City's prior written approval, except as mandated by law or court or administrative order. Publication or release of any or all of the information directly derived from work performed or data obtained in connection with Services rendered under this Agreement must first be approved in writing by City.

Consultant shall retain all rights, title and interest in and to its proprietary information (along with any modifications or improvements to such information), including, but not limited to Consultant's know-how, methodologies, techniques, processes, tools, test fixtures, software, data, technologies, trade secrets, and other materials used by Consultant (whether developed by Consultant or licensed by Consultant from any third party) in connection with providing its services ("Consultant IP").

13. INDEMNIFICATION

Consultant agrees to indemnify, hold harmless and defend City and its elected officials, directors, officers, representatives, agents and employees, and each of them, from and against all claims, loss, damage, attorney's fees, charge or expense to which they or any of them may be put or subjected to the extent caused by any negligent or wrongful act or omission of the Consultant, or anyone directly or indirectly employed by the Consultant, not to exceed the price ceiling specified in section 4, above. This limitation of liability is expressly agreed to be fundamental to the Agreement of the

parties and absent these limitations, Consultant would not be willing to enter into this Agreement on the terms stated herein.

The City assumes full and complete responsibility for all uses and applications of Consultant's recommendations, opinions, analysis or other work product under this agreement (collectively referred to herein as "work product"), or failure to use such work product, and agrees, to the extent permitted by law, to indemnify, hold harmless, and defend Exponent, its affiliates, officers, directors, employees, agents, and stockholders against any and all liabilities, damages, losses, claims, demands, actions, causes of action, and costs including attorney's fees and expenses (collectively referred to herein as "Claims") resulting from the death or injury to any person or damage to any property or any other alleged or actual damages resulting from the aforementioned use, application, or nonuse of such work product.

14. INSURANCE

During the entire term of this Agreement, Consultant shall maintain the insurance coverage described below. Full compensation for all premiums that Consultant is required to pay for the insurance coverage described herein shall be included in the compensation specified for the Services provided by Consultant under this Agreement. No additional compensation will be provided for Consultant's insurance premiums.

A. Minimum Scope & Limits of Insurance Coverage

- (1) Commercial General Liability Insurance providing coverage at least as broad as ISO CGL Form 00 01 on an occurrence basis for bodily injury, including death, of one or more persons, property damage, and personal injury, arising out of activities performed by or on behalf of Consultant, and its sub-consultants, products and completed operations of Consultant and its sub-consultants, and premises owned, leased, or used by Consultant and its sub-consultants, with limits of not less than two million dollars (\$2,000,000) per occurrence. The policy shall provide contractual liability and products and completed operations coverage for the term of the policy.
- (2) Automobile Liability Insurance providing coverage at least as broad as ISO Form CA 00 01 for bodily injury, including death, of one or more persons, property damage, and personal injury, with limits of not less than one million dollars (\$1,000,000) per accident. The policy shall provide coverage for owned, non-owned, and/or hired autos as appropriate to the operations of the Consultant.
- (3) Workers' Compensation Insurance with statutory limits, and Employers' Liability Insurance with limits of not less than one million dollars (\$1,000,000). The Workers' Compensation policy shall include a waiver of subrogation in favor of the City. If no work or services will be performed on or at City facilities or City Property, the City Representative may waive this requirement by selecting the option below:

Workers' Compensation waiver of subrogation in favor of the City is not required.
_____ (City Representative initials)

No Workers' Compensation insurance shall be required if Consultant completes the following certification:

"I certify that my business has no employees, and that I do not employ anyone. I am exempt from the legal requirements to provide Workers' Compensation insurance."

_____ (Consultant initials)

- (4) **Professional Liability Insurance** (Errors and Omissions) providing coverage on a claims made basis for errors, omissions, or malpractice with limits of not less than two million (\$2,000,000) dollars. The retroactive date must be prior to the date this Agreement is approved or any Services are performed.

B. Additional Insured Coverage

- (1) **Commercial General Liability Insurance:** The City, its officials, employees, and volunteers shall be covered by policy terms or endorsement as additional insureds as respects general liability arising out of: activities performed by or on behalf of Consultant and its sub-consultants; products and completed operations of Consultant and its sub-consultants; and premises owned, leased, or used by Consultant and its sub-consultants.
- (2) **Automobile Liability Insurance:** The City, its officials, employees, and volunteers shall be covered by policy terms or endorsement as additional insureds as respects auto liability.

C. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

- (1) Except for professional liability, workers compensation and employer's liability, Consultant's insurance coverage, including excess insurance, shall be primary insurance as respects City, its officials, employees, and volunteers. Any insurance or self-insurance maintained by City, its officials, employees, or volunteers shall be in excess of Consultant's insurance and shall not contribute with it.
- (2) Any failure to comply with reporting provisions of the policies shall not affect coverage provided to City, its officials, employees, or volunteers.
- (3) Except for professional liability workers compensation and employer's liability, coverage shall state or include that Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- (4) City will be provided with 30 days written notice of cancellation in the policy language or terms.

D. Acceptability of Insurance

Insurance shall be placed with insurers with a Bests' rating of not less than A:VI. This requirement may, however, be waived in individual cases for Errors and Omissions Coverages only; provided, however, that in no event shall a carrier with a rating below B:IX be acceptable. Self-insured retentions, policy terms or other variations that do not comply with the

requirements of this section must be declared to and approved by the City in writing prior to execution of this Agreement.

E. Verification of Coverage

- (1) Consultant shall furnish City with certificates and required endorsements evidencing the insurance required.
- (2) For all insurance policy renewals during the term of this Agreement, Consultant shall send insurance certificates reflecting the policy renewals directly to:

City of
Sacramento
c/o Exigis LLC
PO Box 947
Murrieta, CA 92564

- (3) Certificate Holder must be listed as:

City of
Sacramento
c/o Exigis LLC
PO Box 947
Murrieta, CA 92564

- (4) The City may withhold payments to Consultant or cancel the Agreement if the insurance is canceled or Consultant otherwise ceases to be insured as required herein.

F. Sub-consultants

Unless City waives such requirement in writing, Consultant shall require and verify that all sub-consultants maintain insurance coverage that meets the minimum scope and limits of insurance coverage specified in subsection A, above.

15. PROFESSIONAL SERVICES

Consultant agrees that the Services shall be performed and completed in a professional manner according to the professional standards observed by a competent practitioner of the profession in which Consultant and any sub-consultants are engaged. No other warranty, express or implied, is made concerning work performed under this Agreement, including Consultant's findings, recommendations, specifications, or professional advice. In the event of a breach of the foregoing standard of care, City's sole and exclusive remedy shall be limited to Consultant re-performing the work at Consultant's expense or reimbursing City up to the amount the City paid Consultant for the work.

Nothing in the Agreement and nothing in Consultant's communications with City should be construed as a promise or guarantee of the outcome of a specific project or of Consultant's services. Consultant can make no such promises or guarantees. Consultant's services are expressions of opinion only. These opinions are limited by Consultant's knowledge of the facts and are based upon its knowledge of the industry at the time that they are made.

The services to be performed by Consultant are intended solely for the benefit of City. No person or entity not a signatory to this Agreement shall be entitled to rely on the Consultant's performance of its services hereunder, and no right to assert a claim against the Consultant by assignment of indemnity rights or otherwise shall accrue to a third party as a result of this Agreement or the performance of the Consultant's services hereunder.

16. CONFIDENTIAL INFORMATION

Consultant agrees to use information received from City only in the performance of Services under this Agreement, and to protect all information received from City and treat it as strictly confidential, and further agrees that Consultant shall not at any time, either directly or indirectly, divulge, disclose, or communicate in any manner any such information to any third party without the prior written consent of City, except as mandated by law or court or administrative order; provided, however, that any information which is or becomes publicly known and made generally available through no wrongful act in violation of this Paragraph, is already in the possession of Consultant, or is obtained by Consultant from a third party without a breach of such third party's confidentiality, shall not be considered confidential.

17. RELIANCE UPON INFORMATION PROVIDED BY CITY TO CONSULTANT

The City shall timely provide Consultant with, or cause to be provided to Consultant, all information needed to perform Consultant's services under this Agreement, including, but not limited to, project plans, specifications, correspondence, progress reports, schedules, contracts, purchase orders, cost reports, submittals, RFI's and other related documentation.

It is understood Consultant will rely on above information provided by the City. It is agreed that the accuracy of such information is not within Consultant's control and Consultant shall not be liable for its accuracy, nor for its verification, except where verification is requested by the City.

18. FINANCIAL RECORDS

Consultant shall retain all financial records, including, but not limited to, documents, reports, books, and accounting records which pertain to any work or transaction performed pursuant to this Agreement for four years after the expiration of this Agreement. Either City or any duly authorized representative of either City shall, with reasonable notice, have access to and the right to examine, audit and copy such records.

19. TERMINATION

The City shall have the right to terminate this Agreement without cause at any time by serving upon the Consultant 30 days advance written notice of termination. The notice shall be deemed served and effective for all purposes on the date it is deposited in the United States mail, postage prepaid and addressed to Consultant at the address indicated in Section 6. In the event the City issues such notice of termination:

- A. Consultant shall immediately cease rendering services pursuant to this Agreement.

- B. Consultant shall deliver to City copies of all writings prepared pursuant to this Agreement. The term "writings" shall be construed to mean and include handwriting, typewriting, computer files and records, drawings, blueprints, printing, photostating, photographing, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.
- C. City shall have full ownership and control of all such writings delivered by Consultant pursuant to this Agreement.
- D. City shall pay Consultant for work performed until the effective date of termination, subject to the limitations prescribed by Sections 4 and 5 of this Agreement.

20. AMENDMENTS

Modifications or amendments to the terms of this Agreement shall be in writing and executed by all parties.

21. SUCCESSORS AND WAIVERS

This Agreement shall bind the successors of City and Consultant in the same manner as if they were expressly named. Waiver by any party of any default, breach, or condition precedent shall not be construed as a waiver of any other default, breach or condition precedent or any other right hereunder.

22. ASSIGNMENT

Consultant shall not assign or transfer its duties, responsibilities or interests pursuant to this Agreement without the express written consent of City, and any purported assignment without such consent will be void.

23. INTERPRETATION AND ENFORCEMENT

Interpretation and enforcement of this Agreement shall be governed by the laws of the State of California.

24. DISPUTES

All claims, disputes, and other matters in controversy between the City and Consultant arising out of or in any way related to this Agreement may be submitted to non-binding mediation before, and as a condition precedent to other remedies provided by law, if agreed to between the parties.

25. CONSEQUENTIAL DAMAGES

Notwithstanding any provision in this Agreement to the contrary, and to the fullest extent permitted by law, neither party shall be liable to the other for loss of profits, revenue, use, opportunity and goodwill; cost of substitute facilities, goods and services; and for any indirect, incidental, consequential, punitive, or exemplary damages resulting in any way from the performance or non-performance of the services whether arising under breach of contract or warranty, tort (including negligence), indemnity, strict liability or other basis of legal liability.

26. ENTIRE AGREEMENT

This instrument and any attachments hereto constitute the entire Agreement between the City and Consultant concerning the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first written above.

CITY OF SACRAMENTO

A Municipal Corporation

By: _____

Print name: Susana Alcala Wood

Title: City Attorney

APPROVED AS TO FORM:



City Attorney

ATTEST:

City Clerk

CONSULTANT:

77-0218904

Federal I.D. No.

1508730

State I.D. No.

1031785

City of Sacramento Business Op. Tax Cert. No.

TYPE OF BUSINESS ENTITY (*check one*):

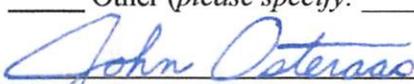
Individual/Sole Proprietor

Partnership

Corporation

Limited Liability Company

Other (*please specify:* _____)



Signature of Authorized Person

John Oстераas, Principal Engineer & Corp. VP

Print Name/Title

Date: October 9, 2020