

 <p style="text-align: center;">Council Communication Office of the City Manager</p>	Date:	October 8, 2018
	Agenda Item No.	9
	Roll Call No.	<u>16-1658</u>
	Communication No.	<u>18-498</u>
	Submitted by:	Steven L. Naber, P.E., City Engineer

AGENDA HEADING:

Approving exception to Request for Proposal (RFP) process for good cause and approving a Professional Services Agreement (PSA) with Springsted Incorporated for professional services to 2019 Right-of-Way Management Fee Update Study, not to exceed \$97,060.

SYNOPSIS:

Recommend approval of exception to the Engineering Department’s RFP process for good cause and approval of the PSA with Springsted Incorporated, Nicholas Dragisich, P.E., Executive Vice President, 380 Jackson Street, Suite 300, Saint Paul, Minnesota, 55101, for a total cost not to exceed \$97,060, based on a lump sum of \$89,560 and reimbursable costs not to exceed \$7,500 to provide professional services for the 2019 Right-of-Way Management Fee Update Study.

FISCAL IMPACT:

Amount: \$97,060

Funding Source: 2018-2019 Operating Budget, Page 76--Right-of-Way Management, EG062083 (funding will be provided for in the amended budget).

ADDITIONAL INFORMATION:

- In 2007 Springsted Inc. conducted a Franchise Fee Study for the City of Des Moines in conjunction with the legal case of Kragnes v. City of Des Moines. That study analyzed the City’s then current fee structure to determine what right-of-way impact costs were being recovered. The Iowa Supreme court subsequently issued a ruling in the Kragnes case providing clearer outlines on the recovery of management fees under the state’s franchise statute which largely agreed with the original study. In 2013, the Council approved an updated study to review the City’s actual costs associated with the management of the right-of-way and a fee structure to recover those costs. That study led to the Council approving an Ordinance using a right-of-way management fee that used historical costs to collect projected management fees upon utilities averaged across all utilities on a linear foot basis.

- The Ordinance was upheld in its entirety by a Federal District Court, following a trial. However, on appeal, the Eighth Circuit held that the Iowa law pertaining to recovery of right-of-way management allows recovery only for those costs that have actually been incurred in the past year, rather than recovery of projected costs for the following year. The Appeals Court did state that if costs can be shown to have been reasonably incurred, the City has a right under the state law to recover those demonstrated costs from utilities as a management fee.
- The updated study will develop an updated cost recovery method which reflects the City's actual costs based on the *Kragnes v. City of Des Moines* and *Qwest et al. v. City of Des Moines* opinions. The study will provide an updated fee schedule based on the cost recovery method, which will be allocated to each of the utilities within the City's right-of-way.
- The City Engineer recommends that good cause exists to exempt the procurement of these professional services from the Engineering Department's RFP process, including advertisement, in order to update the Right-of-Way Management Fee Study. Springsted Incorporated is qualified to perform the professional services and was selected to complete the 2019 Right-of-Way Management Fee Update Study based on:
 - Detailed knowledge and participation in City litigation and the allowable recoverable costs that are outlined in the decisions.
 - This previous knowledge, analysis, and profound knowledge results in Springsted providing the highest quality analysis at the lowest cost to increase the likelihood that the study will be compliant with previous court rulings.
- City staff have negotiated a PSA with Springsted Incorporated for a total cost not to exceed \$97,060, based on a lump sum amount of \$89,560 and reimbursable costs not to exceed \$7,500 to perform the 2019 Right-of-Way Management Fee Update Study.

PREVIOUS COUNCIL ACTION(S):

Date: July 27, 2015

Roll Call Number: [15-1270](#)

Action: [Amending](#) Chapter 102 of the Municipal Code regarding Right-of-way Management Fees. Moved by Hensley that this ordinance do now pass, subject to the following: that Engineering and Legal staff (1) retain degradation cost as a recoverable cost under the proposed ordinance, but remove the degradation cost amount from the right-of-way management fee calculation in order to further review the inclusion of said cost in the City's right-of-way permitting fees, rather than management fees, (2) prepare a proposed right-of-way management fee schedule for implementation of a \$0.12 per equivalent lineal foot fee over a six-year period beginning fiscal year 2017-2018, and (3) consult with affected parties regarding the declaratory judgment process, [#15,386](#). Motion Carried 6-1. Nays: Moore.

BOARD/COMMISSION ACTION(S): NONE

ANTICIPATED ACTIONS AND FUTURE COMMITMENTS:

City staff does not anticipate any future Council actions on this PSA at this time; however, unanticipated changes to this PSA will require a Supplemental Agreement, which may require Council action.

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