

Staff Report

for the Board of Directors Meeting of July 25, 2018

TO: Board of Directors

FROM: Kris Stepanian, Board Secretary
Gary D. King, PE, PhD, Engineering Manager

DATE: July 3, 2018

SUBJECT: Updates to Standard Agreements (Consent)

ENGINEERING

RECOMMENDATION:

Approve updates to the existing Standard Agreements for District work, as recommended by the Administrative Practices Committee on July 3, 2018.

BACKGROUND:

The District currently has four standard agreements accepted by the Board for District work. These agreements are the abbreviated, short construction, long construction, and consulting services agreements. These agreements have provided consistent documents for staff to use on contracting and consulting work for the District.

Recently, these four agreements were reviewed to maintain compliance with new legal concerns by District legal counsel. The attached sheets contain the recommended changes to the contracts. As part of this recommendation, staff requests that we continue to allow the General Manager and District counsel to make minor modifications as needed to accommodate a variety of contract needs for the District.

BUDGETARY IMPACT:

None

GDK/KSt

Attachments:

- Recommended Changes to Standard contracts/agreements

Updates to Construction Contract (Short Form and Long Form)

In addition to uniformity updates, the following clauses have been updated or added upon recommendation of District Counsel:

Indemnity and Defense

CONTRACTOR shall indemnify and hold DISTRICT harmless against claims, liability, or loss for injury or death to person, destruction or damage to or loss of use or diminution in value of property, injury to the environment, economic loss, or fines or penalties, and for associated legal costs, fees, and expenses including attorney and consultant fees, arising out of or relating to CONTRACTOR's services (Claims).

This duty to indemnify shall not extend to Claims to the extent caused by the willful misconduct or active negligence of District. In such case, the obligation to indemnify shall be reduced proportionately by the percentage to which District's willful misconduct or active negligence caused, or contributed to the cause of, the Claim. This duty to indemnify shall extend to Claims by any employee of CONTRACTOR or its subcontractors or suppliers.

In addition to and separate from its duty to indemnify, CONTRACTOR shall defend DISTRICT against suits, actions, or proceedings founded upon Claims. This duty to defend arises upon the commencement of the suit, action, or proceeding founded upon Claims and exists irrespective of any obligation of CONTRACTOR to indemnify.

CONTRACTOR's duties to indemnify and defend are not limited in scope or amount to insurance required by this Agreement.

CONTRACTOR's duties to indemnify and defend shall survive the completion of the CONTRACTOR's work.

Merger

This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged and superseded by this Agreement. In entering into this Agreement, neither party has relied upon any statement representation, warranty, or agreement of the other party except for those expressly contained in this Agreement.

AMENDMENT

The Parties may not amend this Agreement, except by written agreement of the parties.

Updates to Abbreviated Agreement

In addition to uniformity updates, the following has been updated or added upon recommendation of District Counsel:

CONTRACTOR shall indemnify and hold District harmless against claims, liability, or loss for injury or death to person, destruction or damage to or loss of use or diminution in value of property, injury to the environment, economic loss, or fines or penalties, and for associated legal costs, fees, and expenses including attorney and consultant fees, arising out of or relating to CONTRACTOR's services (Claims). This duty to indemnify shall not extend to Claims to the extent caused by the willful misconduct or active negligence of District. In such case, the obligation to indemnify shall be reduced proportionately by the percentage to which District's willful misconduct or active negligence caused, or contributed to the cause of, the Claim. This duty to indemnify shall extend to Claims by any employee of CONTRACTOR or its subcontractors or suppliers.

In addition to and separate from its duty to indemnify, CONTRACTOR shall defend District against suits, actions, or proceedings founded upon Claims. This duty to defend arises upon the commencement of the suit, action, or proceeding founded upon Claims and exists irrespective of any obligation of CONTRACTOR to indemnify.

CONTRACTOR's duties to indemnify and defend are not limited in scope or amount to insurance required by this Agreement.

CONTRACTOR's duties to indemnify and defend shall survive the completion of the CONTRACTOR's work.

MERGER: This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged and superseded by this Agreement. In entering into this Agreement, neither party has relied upon any statement representation, warranty, or agreement of the other party except for those expressly contained in this Agreement.

AMENDMENT: The Parties may not amend this Agreement, except by written agreement of the parties

Updates to Consulting Services Agreement

In addition to uniformity updates, the following clauses have been updated or added upon recommendation of District Counsel:

ARTICLE X – INDEMNIFICATION AND DEFENSE: CONSULTANT shall indemnify and hold District harmless against claims, liability, or loss for injury or death to person, destruction or damage to or loss of use or diminution in value of property, injury to the environment, economic loss, or fines or penalties, and for associated legal costs, fees, and expenses including attorney and consultant fees, arising out of or relating to CONSULTANT's services (Claims).

This duty to indemnify shall not extend to Claims to the extent caused by the willful misconduct or active negligence of District. In such case, the obligation to indemnify shall be reduced proportionately by the percentage to which District's willful misconduct or active negligence caused, or contributed to the cause of, the Claim. This duty to indemnify shall extend to Claims by any employee of CONSULTANT or its subcontractors or suppliers.

In addition to and separate from its duty to indemnify, CONSULTANT shall defend District against suits, actions, or proceedings founded upon Claims. This duty to defend arises upon the commencement of the suit, action, or proceeding founded upon Claims and exists irrespective of any obligation of CONSULTANT to indemnify.

CONSULTANT's duties to indemnify and defend are not limited in scope or amount to insurance required by this Agreement.

CONSULTANT's duties to indemnify and defend shall survive the completion of the CONSULTANT's work.

ARTICLE XVII – MERGER: This Agreement constitutes the final agreement between the parties. It is the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged and superseded by this Agreement. In entering into this Agreement, neither party has relied upon any statement representation, warranty, or agreement of the other party except for those expressly contained in this Agreement.

ARTICLE XVIII – AMENDMENT: The Parties may not amend this Agreement, except by written agreement of the parties.

Updates to Consulting Services Agreement for Professional Design Services

As recommended by District Council, the Consulting Services Agreements for Professional Design Services will have its own template, as the indemnity provision for Professional Design Services is not identical to the indemnity set forth in the Standard Consulting Services Agreement. For that reason, a separate Template is to be used entitled Design Professional Services Agreement, that includes the indemnity provision applicable to that class of contract. This Template should be furnished for work to be performed by architects, landscape architects, professional engineers, and surveyors.

The template will be the same as the Consulting Services Agreement, with the exception of the following indemnity clause:

INDEMNIFICATION: Consultant shall defend, indemnify, and hold District harmless for claims arising out of, pertaining to, or relating to Consultant's negligence, recklessness or that of Consultant's contractors, employees, or agents, or other persons for whom Consultant is legally responsible. In no event shall the cost to defend charged to Consultant exceed its proportionate percentage of fault. Consultant's duty to indemnify, including the duty and the cost to defend, is limited as provided in California Civil Code section 2782.8. Consultant's obligations shall survive the completion or termination of this Agreement.