

South Bay Cities Council of Governments

November 9, 2020

TO: SBCCOG Steering Committee

FROM: Jacki Bacharach, SBCCOG Executive Director

SUBJECT: Contract with McGowan Consulting, LLC.

Adherence to Strategic Plan:

Goal D: Organizational Stability. Be a high performing organization with a clear path to long-term financial health, staffing continuity and sustained board commitment.

Background

McGowan Consulting, LLC, contracted with the South Bay Cities Council of Governments (SBCCOG) last year to host, maintain, and periodically revise the “Environmentally Friendly Landscaping, Gardening, and Pest Control” webpage on the SBCCOG website. This service also includes reporting the web analytics. McGowan Consulting, LLC, contracts with the SBCCOG on behalf of the members of the Beach Cities Watershed Management Group and the Peninsula Watershed Management Group. McGowan wishes to continue this contract with the SBCCOG through June 30, 2021 for the amount of \$5,500.

The SBCCOG Board approved the contract pending legal review on August 27, 2020. The “Environmentally Friendly Landscaping, Gardening, and Pest Control” webpage is currently still being hosted on the SBCCOG website.

Discussion

Even though the new contract was written with the same terms as the previous year which were reviewed and approved by Mike Jenkins, SBCCOG legal counsel in 2019, this year, he identified several issues with the contract language and requested revisions were presented to McGowan Consulting, LLC. Most of the SBCCOG revisions were incorporated into the contract, however there remains two sections that are outstanding (listed below):

8. *Indemnification, Hold Harmless, and Duty to Defend.*
 - a. *To the fullest extent permitted by law, SBCCOG shall, at its sole cost and expense, defend, hold harmless and indemnify McGowan and the members of the Beach Cities Watershed Management Group and the Peninsula Watershed Management Group and their elected officials, officers, attorneys, agents, employees, designated volunteers, successors, assigns and those City agents serving as independent contractors in the role of City officials (collectively “Indemnitees”), from and against any and all damages, costs, expenses, liabilities, claims, demands, causes of action, proceedings, expenses, judgments, penalties, liens, and losses of any nature whatsoever, including fees of accountants, attorneys, or other professionals and all costs associated therewith and the payment of all consequential damages (collectively “Liabilities”), in law or equity, whether actual, alleged or threatened, which arise out of, are claimed to arise out of, pertain to, or relate to the acts or omissions of SBCCOG, its officers, agents, servants, employees, subcontractors, materialmen, consultants or their officers, agents, servants or employees (or any entity or individual that*

SBCCOG shall bear the legal liability thereof) in the performance of this MOU, including the Indemnitees' active or passive negligence, except for Liabilities arising from the sole negligence or willful misconduct of the Indemnitees as determined by court decision or by the MOU of the Parties. SBCCOG shall defend the Indemnitees in any action or actions filed in connection with any Liabilities with counsel of the Indemnitees' choice, and shall pay all costs and expenses, including all attorneys' fees and experts' costs actually incurred in connection with such defense. SBCCOG shall reimburse the Indemnitees for any and all legal expenses and costs incurred by Indemnitees in connection therewith.

2. *SBCCOG shall pay all required taxes on amounts paid to SBCCOG under this MOU and indemnify and hold McGowan harmless from any and all taxes, assessments, penalties, and interest asserted against McGowan by reason of the independent contractor relationship created by this MOU. SBCCOG shall fully comply with the workers' compensation law regarding SBCCOG's employees. SBCCOG shall indemnify and hold McGowan harmless from any failure of SBCCOG to comply with applicable workers' compensation laws. Insurance.*

The SBCCOG legal counsel is requesting that these sections be amended to state:

1. *Indemnification, Hold Harmless, and Duty to Defend.*
 - a. *Each party will indemnify, defend and hold harmless the other, and their respective officers, employees, agents, successors and assigns, from and against any and all claims, damages, liabilities, losses, and costs and expenses, including reasonable attorneys' fees and costs, arising out of the party's negligent or wrongful performance of this agreement or any alleged or actual breach of the agreement.*
2. *Each party shall fully comply with the workers' compensation law regarding employees*

McGowan, Consulting, LLC has explained that they are unable to make these final revisions because their contract for Beach Cities Watershed Management Group is through the City of Manhattan Beach which requires this language to comply with their contract requirement to obtain the same executed indemnity agreement from their subcontractors as applies to them. There is similar language in their contract with the City of Rolling Hills Estates as well. McGowan also communicated that they had spoke to the City of Manhattan Beach in the past regarding this issue and the city would not allow subcontractor revisions.

This information was presented to Mike Jenkins, who does believe that while the risk is very small, he does not recommend a unilateral indemnity clause that disfavors the SBCCOG. He believes that the SBCCOG is not a subcontractor to McGowan, Consulting LLC, but rather a contract for services and therefore, this language could be amended.

RECOMMENDATION

Provide direction.

Complete contract available on request