

COUNCIL ACTION FORM

SUBJECT: APPROVAL OF ONGOING ENGAGEMENT OF OUTSIDE COUNSEL TO ASSIST IN THE CLOSE-OUT OF THE NEW WATER TREATMENT PLANT – CONTRACT 2

BACKGROUND:

In the fall of 2017, a contract was awarded for the construction of the new Water Treatment Plant. The contract contained specific milestone dates for completion of individual elements of the project as well as mandatory dates for substantial and final completion. The contract includes a “liquidated damages” provision to compensate the City for damages incurred as a result of delayed completion, including those damages that are difficult or impossible to quantify.

The contractor on the contract failed to achieve the required milestones, and the engineer has yet to certify that final completion of the contract has been achieved. The contractor has essentially stopped work, and at least one subcontractor has filed notice with the City that they have not been fully paid by the general contractor. Staff is currently withholding \$1,095,000 in retainage as allowed by the contract and under Iowa law.

Construction law is a very specialized practice, and the City Attorney and Water Plant staff have engaged outside counsel from Simmons, Perrine, Moyer, and Bergman (SPMB) to assist in the negotiations with the general contractor, sub-contractors, and their counsel. To date, the legal fees have amounted to \$46,000.35. Under the City’s Purchasing Policies, expenditures of more than \$50,000 requires the authorization of the City Council. Staff is requesting that Council authorize the continuation of outside legal support to assist in protecting the City’s interests in closing out the contract.

Funds are coming from the CIP account for construction of the new treatment plant. It is staff’s intent that any settlement agreement with the contractor include compensation for the attorney’s fees.

It is possible that a voluntary settlement will not be reached with the contractor, and the matter could move to litigation. If that were to occur, Council would be updated and would give direction on any additional action that the City might take.

ALTERNATIVES:

1. Direct staff to continue the engagement with Simmons, Perrine, Moyer, Bergman, PLC for assistance related to the close-out of the New Water Treatment Plant – Contract 2, and to authorize up to an additional \$20,000 in expenditures for the outside legal services.
2. Give alternate direction to staff regarding the contract close-out.

MANAGER'S RECOMMENDED ACTION:

Specialized expertise in contract law is required to resolve a dispute with the contractor on the construction of the new Water Treatment Plant. Over the past several months, City staff has worked with attorneys at Simmons, Perrine, Moyer, and Bergman (SPMB) to negotiate a resolution to the dispute. It is anticipated that the total amount of outside legal fees will exceed \$50,000. While there has been some progress, the parties have not yet reached a mutually agreeable settlement. Under the City's Purchasing Policies, Council authorization is required to continue with SPMB. Funding is coming from the New Water Plant CIP project, and it is anticipated that recouping the legal fees will be a part of a settlement agreement with the contractor. Therefore, it is the recommendation of the City Manager that the City Council adopt Alternative #1 as described above.