



Agenda Report

Date: June 12, 2012
To: Mayor and Council Members
From: Jeffrey W. Collier, City Manager
Subject: Consulting Agreement with Esther Feldman & Associates

RECOMMENDATION

It is recommended the City Council authorize the City Manager to enter into a consulting agreement with Esther Feldman & Associates to represent the City on matters dealing with City-owned property purchased with Proposition A Funds.

BACKGROUND

The City is continuing efforts to facilitate the mineral extraction project within the Whittier Hills pursuant to the mineral lease agreement with Matrix Oil Corporation and Clayton Williams Energy, Inc. A significant portion of the property involved in this project was purchased with grant funds requiring grant agreements between the funding agency and the City that addressed future uses and the methods available for repaying the grants should the property change in use. To this end, the City is continuing efforts to work with the County of Los Angeles to determine the manner in which payment is to be made to comply with the provisions of Proposition A.

Ms. Feldman has participated in the process for the past two years on behalf of the City and in light of the fact that Ms. Feldman is viewed as the expert in this subject area, the City would like to continue to have her assist in these discussions. This activity is anticipated to only require the retention of Ms. Feldman for a period of six (6) months. However, if this process extends beyond six months, the proposed agreement includes a provision to allow an extension of the contract for an additional six months (12 months total) upon mutual consent by both parties. Matrix has agreed to post the necessary deposits with the City to allow for the payments due under this agreement. Ms. Feldman will be working under the terms of a monthly retainer amounting to \$5,000 a month.

FISCAL IMPACT

This contract may total up to \$30,000 for the initial six month period and, if extended, could increase to \$60,000 at the conclusion of the term. Payment will be charged against a deposit posted by Matrix for implementation of the project. There will be no financial impact on the City other than costs associated with administration of the contract.

Submitted by:


Jeffrey W. Collier
City Manager

Attachment: Agreement for Professional Services

Agenda Item: 6.6

**CITY OF WHITTIER
AGREEMENT FOR PROFESSIONAL SERVICES**

THIS AGREEMENT, made and entered into this _____ day of _____, by and between the CITY OF WHITTIER, a municipal corporation located in the County of Los Angeles, State of California, hereinafter referred to as "CITY" and FELDMAN & ASSOCIATES with principal offices at 1158-26th Street, #194, Santa Monica, CA 90403 hereinafter referred to as "CONSULTANT".

WITNESSETH

WHEREAS, CONSULTANT is an independent contractor, the principal members of which are fully qualified and registered as required under the laws of the State of California; and

WHEREAS, The CITY retains and employs CONSULTANT to act as such for CITY to perform such consulting services as may be requested of it by the CITY. CONSULTANT accepts the employment and agrees to render such services as CONSULTANT on the terms and conditions hereinstated.; and

WHEREAS, CONSULTANT is experienced in providing such services for municipal corporations and is able to provide personnel with the requisite experience and background to carry out these duties;

NOW, THEREFORE, in consideration of the mutual covenants, benefits, and premises hereinabove stated, the parties hereto agree as follows:

1. **SERVICES TO BE PERFORMED**

CITY hereby engages CONSULTANT, and CONSULTANT hereby accepts such engagement, to perform the technical and professional services set forth in the scope of services attached hereto as Exhibit "A" and incorporated herein by this reference.

2. **TIME FOR PERFORMANCE**

This Agreement will be effective on June 12, 2012. CONSULTANT shall complete all tasks in accordance with the schedule included in the scope of services by December 12, 2012 unless extended by mutual agreement by CITY and CONSULTANT for a period of up to an additional six months – to June 12, 2013.

3. **PERFORMANCE TO SATISFACTION OF CITY**

CONSULTANT agrees to perform all work in the scope of services as detailed in EXHIBIT A within the time specified.

4. COMPLIANCE WITH LAW

All services rendered hereunder shall be performed by CONSULTANT or under its direct supervision, and all personnel engaged in the work shall be fully qualified and shall be authorized by or permitted under State or local law to perform such services, including, but not limited to, registration as a lobbyist if required for the services rendered hereunder. In addition, in rendering the services hereunder, CONSULTANT shall comply with all applicable local, Los Angeles County, State and Federal Laws.

5. FAMILIARITY WITH WORK

By execution of this Agreement, CONSULTANT warrants that

- (1) It has thoroughly investigated and considered the work to be performed, based on all available information provided by the City.
- (2) It carefully considered how the work should be performed, and
- (3) It fully understands the difficulties and restrictions attending the performance of the work under this Agreement.
- (4) It has the professional and technical competency to perform the work and the production capacity to complete the work in a timely manner with respect to the schedule included in the scope of services.

6. COMPENSATION

A. SERVICES DESCRIBED IN PROPOSAL

For the provision of all services rendered under this Agreement in accordance with the scope of services, attached hereto as Exhibit "A" and all expenses associated therewith, CITY shall pay CONSULTANT an amount that shall not exceed the authorized amount of \$5,000 per month as set forth in the fee schedule, Exhibit "B" attached hereto, unless the CITY has given specific advance approval in writing.

B. ADDITIONAL SERVICES.

For any additional services, change orders or any additional compensation of any nature to be proposed for payment to CONSULTANT by CITY, such modification of this original Agreement

shall be in the form of a written amendment to the Agreement signed by authorized representatives of both parties.

It is specifically understood that oral requests or approvals of such additional services, change orders or additional compensation and any approvals from CITY shall be barred and are unenforceable.

C. PAYMENT PROCEDURE.

CONSULTANT shall receive a monthly retainer in the amount of \$5,000 monthly from the effective date of this agreement. A start-up fee of \$5,000 will be paid upon execution of Agreement and billed against the last monthly retainer fee.

7. TERMINATION

A. TERMINATION FOR CONVENIENCE.

Either the CITY or the CONSULTANT may terminate this AGREEMENT at any time without cause by giving sixty (60) calendar days written notice to the other of such termination and specifying the effective date thereof. If this AGREEMENT is terminated as provided herein, CONSULTANT will be paid an early termination fee equal to the retainer due through the month during which the termination becomes effective.

B. TERMINATION FOR CAUSE.

If for any reason, CONSULTANT shall fail to fulfill in a timely and proper manner its obligation under this AGREEMENT, or if CONSULTANT shall violate any of the covenants or stipulations of this agreement, CITY shall then have the right to terminate this agreement by giving a five (5) calendar day written notice to cure to CONSULTANT. The notice shall refer to this clause, shall specify the nature of the alleged default, and shall specify the effective date of the termination. Within five (5) days, the CONSULTANT will be allowed to propose a cure that will be then considered by the City. If there is not agreement resulting from the proposed cure the parties agree to subject the dispute to mediation. If no agreement is reached, the CONSULTANT will be paid a total amount equal to the service provided as of the termination date. In no event shall the amount payable upon termination exceed the total maximum compensation provided for in this AGREEMENT.

In the event of termination, CONSULTANT shall immediately stop rendering services under this Agreement unless directed otherwise by CITY, and shall deliver to CITY all plans, data, reports, summaries,

floppy disks, and all such other information and materials as CONSULTANT may have accumulated in performing this Agreement.

8. COORDINATION OF WORK

A. Selection of Representatives

Esther Feldman of CONSULTANT is hereby designated as the principal and representative of CONSULTANT authorized to act in its behalf with respect to the work specified in this Agreement and to make all decisions in connection therewith. The foregoing principal may not be changed by CONSULTANT without the express written approval of CITY.

B. Contract Officer

The Contract Officer shall be the City Manager of the City. It shall be the CONSULTANT's responsibility to assure that the Contract Officer is kept informed of the progress of the performance of the services and the CONSULTANT shall refer any decision which must be made by CITY to the Contract Officer. Unless otherwise specified herein, any approval of CITY required hereunder shall mean the approval of the Contract Officer.

9. INDEPENDENT CONTRACTOR

A. CONSULTANT Status

CONSULTANT is an independent contractor and not an employee of CITY. Neither CITY nor any of its employees shall have any control over the conduct of the CONSULTANT or any of the CONSULTANT's employees, except as herein set forth and, CONSULTANT expressly warrants not to, in any time or in any manner, represent that CONSULTANT, or any of CONSULTANT's officers, employees or agents, are in any manner officers, employees, or agents of CITY. It is distinctly understood that said CONSULTANT is and shall at all times remain as to the CITY a wholly independent CONSULTANT, and that CONSULTANT's obligations to the CITY are solely such as are prescribed by this Agreement.

B. CONSULTANT's Personal Services - Inducement

This Agreement contemplates that the CONSULTANT's personal services and those of CONSULTANT's officers, employees, and agents are a substantial inducement to the CITY for entering into this Agreement. CONSULTANT may not assign any interest in this Agreement, except upon written consent of CITY.

Furthermore, unless expressly provided otherwise in CONSULTANT's proposal, CONSULTANT shall not subcontract any portion of the performance contemplated under this Agreement without the prior written approval of the CITY. Nothing in this Agreement shall be construed as preventing CONSULTANT from employing as many employees as CONSULTANT deems necessary for the proper and efficient execution of this Agreement.

10. PERS ELIGIBILITY INDEMNITY.

In the event that CONSULTANT or any employee, agent, or subcontractor of CONSULTANT providing services under this Agreement claims or is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the City, CONSULTANT, solely as a result of the provision of services pursuant to this contract, shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of CONSULTANT or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, CONSULTANT and any of its employees, agents, and subcontractors providing service under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims, solely as a result of the provision of services pursuant to this contract, to, any compensation, benefit, or any incident of employment by CITY, including but not limited to eligibility to enroll in PERS as an employee of CITY and entitlement to any contribution to be paid by CITY for employer contribution and/or employee contributions for PERS benefits.

11. INDEMNITY

CONSULTANT hereby agrees to protect, indemnify and hold CITY and its employees, officers and servants free and harmless from any and all losses, claims, liens, demands and causes of action of every kind and character including, but not limited to, the amounts of judgment, interests, court costs, legal fees and other expenses incurred by the CITY arising in favor of any party, including claims, liens, debts, personal injuries, including employees of the CITY, death or damages to property (including property of the CITY) and without limitation by enumeration, all other claims or demands of every character occurring or arising directly out of the negligence, recklessness or willful misconduct of CONSULTANT in the

performance of its services under this Agreement. This provision is not intended to create any cause of action in favor of any third party against CONSULTANT or the CITY or to enlarge in any way the CONSULTANT'S liability but is intended solely to provide for indemnification of the CITY for liability for damages or injuries to third persons or property arising from CONSULTANT'S gross negligence or willful misconduct, CONSULTANT'S maximum aggregate liability to CITY in connection with or in any manner related to this Agreement (whether in an action in contract or tort or otherwise) will be limited to the total amount paid by CITY to CONSULTANT hereunder.

CITY hereby agrees to protect, indemnify and hold CONSULTANT and its employees, officers, directors and agents (collectively, the "Other Indemnified Parties") free and harmless from any and all claims, demands and causes of action brought to challenge the Project, or any other claim, demand, action or proceeding related to the Project, in which CONSULTANT or any of the Other Indemnified Parties are named as a defendant or are otherwise required to participate, including, but not limited to, the amounts of any judgment, interest, court costs, legal fees, costs and CONSULTANT's and the Other Indemnified Parties' fees calculated on the basis of normal hourly rates related to preparing for and appearing as a witness in any deposition, hearing or other proceeding, costs related to providing, reproducing and sending documents and materials and all other fees and expenses incurred by CONSULTANT or the Other Indemnified Parties in defending against or participating in any proceedings related to the Project. With regard to CONSULTANT's and the Other indemnified Parties' fees related to preparing for and appearing as a witness in any deposition, hearing or other proceeding; said fees are subject to prior approval of CITY, which shall not be unreasonably withheld, and shall be billed at their normal hourly rates, which rates shall be subject to increase on each January 1. This provision is not intended to create any cause of action in favor of any third party against CITY, CONSULTANT or the Other Indemnified Parties, or to enlarge in any way CITY's liability, but is intended solely to provide for indemnification of CONSULTANT and the Other Indemnified Parties for liability, legal expenses and all other fees and expenses related to any challenge or other proceeding related to the Project, including the case of Open Space Legal Defense Fund, *et al.* v. City of Whittier, *et. al.*, in which CONSULTANT or the Other Indemnified Parties are named as a defendant or are otherwise required to participate. Notwithstanding the foregoing, CITY shall not be obligated to pay any legal fees, if any, incurred by CONSULTANT or the Other Indemnified Parties in connection with CONSULTANT's special motion to strike pursuant to Section 425.16 of the California Code of Civil Procedure (hereinafter referred to as a "SLAPP Motion to Strike"), or any appeal relating thereto, in the case of Open Space Legal Defense Fund, *et al.* v. City of Whittier, *et. al.*

The indemnity CITY is providing CONSULTANT with respect to all claims, demands, causes of action brought to challenge the Project, or any other claim, demand, action, deposition, hearing or other proceeding related to the Project, shall in no way affect CONSULTANT's indemnity of CITY as set forth in the first paragraph of this Section 11.

CITY shall be responsible for retaining legal counsel in defending or representing itself, CONSULTANT and the Other Indemnified Parties in all claims, demands, causes of action brought to challenge the Project, including the case of Open Space Legal Defense Fund, *et al.* v. City of Whittier, *et. al.*, or any other claim, demand, action, deposition, hearing or other proceeding related to the Project; provided, however, that CONSULTANT shall be responsible for retaining legal counsel for CONSULTANT's SLAPP Motion to Strike, or any appeal relating thereto, in the case of Open Space Legal Defense Fund, *et al.* v. City of Whittier, *et. al.* In the event that (i) counsel retained by CITY determines that having common counsel would present such counsel with a conflict of interest, which the Parties do not agree to waive, (ii) CONSULTANT or the Other Indemnified Parties reasonably conclude that there may be legal defenses available to them that are different from or in addition to those available to CITY, or (iii) CITY fails to assume the defense of the action or proceeding on behalf of CONSULTANT and the Other Indemnified Parties, then CONSULTANT and the Other Indemnified Parties shall have the right to retain separate counsel to represent or defend any of them in any such action or proceeding, all costs for which shall be CITY's sole responsibility in accordance with the immediately preceding paragraph.

12. INSURANCE

Throughout the term of this Agreement, CONSULTANT shall procure and maintain, at its own cost, the insurance as described in Exhibit "C", "Insurance Requirements".

13. MISCELLANEOUS

A. Ownership of Documents

All deliverables described in the scope of services shall be the property of CITY and shall be delivered to CITY upon completion or termination of this Agreement. All hard copy documents and information in electronic files that are assembled or prepared by CONSULTANT shall be made available to CITY upon request to review or to copy, and CITY shall reimburse CONSULTANT for actual cost of reproduction of documents not included as deliverables in the scope of services. Copies and said documents and electronic

information may be retained by CONSULTANT, but shall not be made available by CONSULTANT to any individual or organization without the prior written approval of CITY, except as required by law.

B. Notices

Any notices to be given under this Agreement shall be given by enclosing the same in the sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, addressed as follows:

CITY:

CONSULTANT:

CITY OF WHITTIER
13230 Penn Street
Whittier, CA 90602
Attn:

FELDMAN & ASSOCIATES
1158 26th St., #194
Santa Monica, CA 90403
Esther Feldman

C. Enforcement of Agreement

This Agreement shall be construed and interpreted as to both validity, and performance of the parties, in accordance with the laws of the State of California. Legal actions concerning any dispute, claim or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Los Angeles, State of California, or any other appropriate court in such county, and CONSULTANT covenants and agrees to submit to the personal jurisdiction of such court in the event of such action.

D. Disputes

In the event of any dispute arising under this Agreement, the injured Party shall notify the injuring Party in writing of its contentions by submitting a claim therefor.

The injured Party shall continue performing its obligations hereunder so long as the injuring Party cures any default within ninety (90) days after service of the notice, or if the cure of the default is commenced within thirty (30) days after service of said notice and is cured within a reasonable time after commencement; provided that, if the default is an immediate danger to the health, safety and general welfare, the CITY may take immediate action. Compliance with the provisions of this Section shall be a condition precedent to any legal action, and such compliance shall not be a waiver of any Party's right to take legal action in the event that the dispute is not cured.

E. Waiver

No delay or omission in the exercise of any right or remedy of a nondefaulting Party on any default shall impair such right or remedy or be construed as a waiver. CITY's consent or approval of any act by CONSULTANT requiring CITY's consent to or approval of any subsequent act of CONSULTANT or any waiver by either Party of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of this Agreement.

F. Rights and Remedies are Cumulative

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

G. Attorney's Fees

If either Party commences an action against the other Party arising out of or in connection with this Agreement, the prevailing Party shall be entitled to recover reasonable attorney's fees and costs of suit from the losing Party.

H. Integration

This Agreement, together with attached Exhibits identified herein supersede any and all other agreements, either oral or in writing, between the parties with respect to the subject matter herein. Each party to this Agreement acknowledges that no representation by any party, which is not embodied herein, nor any other agreement; statement or promise not contained in this Agreement shall be valid and binding. Any modification of the Agreement shall be effective only if it is in writing and signed by all parties.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed with all the formalities required by law on the respective dates set forth opposite their signatures.

CITY OF WHITTIER

By _____
Jeffrey W. Collier, City Manager /Date

ATTEST:

By _____
Kathryn A. Marshall, City Clerk /Date

APPROVED AS TO FORM:

By _____
City Attorney /Date

CONSULTANT:

By _____
Esther Feldman /Date

EXHIBIT "A"
SCOPE OF SERVICES

CONSULTANT shall provide general consulting services to the City related to securing approvals needed from the County of Los Angeles related to the City's mineral extraction project in the Puente Hills. Services shall include, but not be limited to, presentation of reports and findings on the City's proposal as provided by the City; meetings and communications with offices of the Los Angeles County Board of Supervisors and County departments as necessary to present the City's reports and findings and to assist the City in negotiating such amendment; attendance at and presentations before the L.A. County Board of Supervisors; meetings and communications with other entities and public agencies as necessary; and meetings and consultations with the City of Whittier.

The services rendered under this Agreement shall be conducted within six months from the date of execution of this Agreement, unless extended by mutual agreement for an additional six month period.

EXHIBIT "B"
SCHEDULE OF COMPENSATION

I. **BILLING.** At the end of each calendar month covered by this retainer Agreement, CONSULTANT shall submit an invoice to the City at the following address:

CITY OF WHITTIER
13230 Penn Street
Whittier, CA 90602
Attn: City Manager

The invoice submitted pursuant to this paragraph shall show the:

- 1) Purchase order number;
 - 2) Project name/description;
 - 3) Monthly retainer amount;
 - 4) Reimbursable expenses
 - a. copies
 - b. printing
 - c. communications
 - d. travel
 - e. lobby registration fees
 - 5) Other such information as the City may reasonably require.
- II. **METHOD OF PAYMENT.** Payment to CONSULTANT for the compensation specified in Section I, above, shall be made after the City Manager or designee determines that the billing submitted pursuant to Section II, above, accurately reflects work satisfactorily performed in accordance with the Scope of Services in Exhibit A. City shall pay Contractor within thirty (30) days therefrom.

EXHIBIT "C"
INSURANCE REQUIREMENTS

Automobile Liability

A. Any vehicle coverage within the State mandated limits.

The CONSULTANT shall provide thirty (30) days advance notice to CITY in the event of material changes or cancellation of any coverage. Certificates of insurance and additional insured endorsements shall be furnished to CITY thirty (30) days after the effective date of this Agreement, and no payments for services provided by CONSULTANT under this agreement shall be made by CITY until it is in receipt of said certificates. Refusal to submit such certificates shall constitute a material breach of this Agreement entitling CITY to any and all remedies at law or in equity, including termination of this Agreement. If proof of insurance required under this Agreement is not delivered as required or if such insurance is canceled and not adequately replaced, CITY shall have the right but not the duty to obtain replacement insurance and to charge the CONSULTANT for any premium due for such coverage. CITY has the option to deduct any such premium from the sums due to the CONSULTANT.

Insurance is to be placed with insurers authorized and admitted to write insurance in California and with a current A.M. Best's rating of A-:VII or better. Acceptance of insurance from a carrier with a rating lower than A-:VII is subject to approval by CITY's Risk Manager. CONSULTANT shall immediately advise CITY of any litigation that may affect these insurance policies.

