

MEETING DATE: June 28, 2018

TITLE: Authorize the District Administrator to Enter into Professional Services Contract for Engineering

RESOLUTION NUMBER: 18-063

PREPARED BY: Cathy Reynolds

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TELEPHONE: 952-641-4503

REVIEWED BY: Administrator Counsel Program Mgr. (Name): _____
 Board Committee Engineer Other:

WORKSHOP ACTION:

<input type="checkbox"/> Advance to Board mtg. Consent Agenda.	<input type="checkbox"/> Advance to Board meeting for discussion prior to action.
<input type="checkbox"/> Refer to a future workshop (date): _____	<input type="checkbox"/> Refer to taskforce or committee (date): _____
<input type="checkbox"/> Return to staff for additional work.	<input type="checkbox"/> No further action requested.
<input checked="" type="checkbox"/> Other (specify): Final Action on June 28, 2018	

PURPOSE or ACTION REQUESTED:

It is requested that the Board authorize the District Administrator to enter into a contract for engineering services.

PROJECT/PROGRAM COST:

The costs for the professional services contracts are in the budget and the new contracts are not expected to have a significant change on the costs of the services.

PAST BOARD ACTIONS:

The Board authorized the release of the RFQ's at the March 22, 2018 board meeting. At the May 24, 2018 meeting the Board approved the selection of vendors and authorized the District Administrator to enter into contract negotiations.

SUMMARY:

Pursuant to Minnesota Statute 103B.227 a watershed district is required to solicit interest proposals for legal, professional, or technical consultant services at least every two years. MCWD professional services contracts were due for renewal and at the March 22, 2018 Meeting the Board of Managers authorized the release of requests for qualifications (RFQ) for the following services:

- Accounting
- Legal Services
- Engineering Services
- Government Relations
- Information Technology Managed Services

Notice of the RFQs was posted in the Star Tribune on April 4 and 7, 2018. The RFQs were also posted on the District website and distributed to companies in the metro area. Responses were due to the District by April 30, 2018.

At the May 24, 2018 meeting the Board of Managers approved the selection of vendors based on responses to the RFQ's and authorized the District Administrator to enter into contract negotiations with the selected vendors.

The District Administrator has completed contract negotiations for the following professional services and is recommending to the Board that they approve the contracts and authorize the District Administrator to enter into the contracts.

Engineering Services:

Wenck

ENGINEERING SERVICES AGREEMENT

Between

Minnehaha Creek Watershed District and Wenck Associates, Inc.

WHEREAS, by vote of the Board of Managers on May 24, 2018, the Minnehaha Creek Watershed District (hereinafter MCWD) selected Wenck Associates, Inc. (hereinafter ENGINEER) to provide engineering services to the MCWD as described herein:

NOW, THEREFORE, this Agreement is entered into by the Minnehaha Creek Watershed District, a public body with powers set forth at Minnesota Statutes chapters 103B and 103D (MCWD), and Wenck Associates, Inc., a private Minnesota corporation (ENGINEER). In consideration of the terms and conditions set forth herein, including the obligations of mutual consideration, the sufficiency of which is hereby acknowledged, MCWD and ENGINEER agree to ENGINEER's work under the Agreement (hereinafter, the Services) as follows:

1.0 Scope of Work

1.1 General Professional Services on Retainer

ENGINEER will prepare for and attend regular Board meetings and workshops of the MCWD as required, render advice and opinions therein, and review agenda materials in connection with such meetings. Further, ENGINEER will be available for consultation on general watershed issues unrelated to specific projects, project scoping or other matters for the MCWD. Such general consultations that are under 20 minutes in duration are a part of general retainer services and compensated pursuant to section 2.0 below.

1.2 Services By Task Order

ENGINEER will perform work described in Task Orders that may be authorized by the MCWD from time to time. A Task Order issued by the MCWD will be incorporated into this Agreement and binding on ENGINEER as a term hereof. At its discretion, the MCWD in writing may suspend work immediately or amend the Task Order to delete any task or part thereof. Authorized work by ENGINEER on a task deleted or modified by the MCWD will be compensated in accordance with section 2.0 below. Unless the Task Order specifies a lump sum or other basis of payment, the MCWD will compensate ENGINEER on an hourly basis and reimburse for direct costs in accordance with the hourly rates stated in section 2.0. Compensation also will be subject to any not-to-exceed and any other terms specified in the Task Order.

2.0 Rates for Engineering Services; Expenses

ENGINEER will provide Services in accordance with the Agreement at the following rates.

2.1 Retainer

ENGINEER agrees to provide the general professional services on retainer identified in paragraph 1.1 for the amount of **\$4,700 per month in 2018** and **\$4,900 per month in 2019** to be paid on a monthly basis. MCWD and ENGINEER agree to review and evaluate the retainer arrangement annually.

2.2 Rates for Non-Retainer Services

ENGINEER will provide non-retainer Services at the following hourly rates:

	<u>2018</u>	<u>2019</u>
District Engineer	\$193	\$197
Principal Engineer/Scientist	\$170-\$190	\$170-\$190
Sr. Engineer/Scientist	\$115-\$165	\$115-\$165
Engineer/Scientist	\$100-\$110	\$100-\$110
Asst. Engineer/Asst. Scientist	\$90-\$100	\$90-\$100
Support Staff	\$80	\$80

Special MCWD meetings or committee meetings will be billed on an hourly basis to the project or projects that are the subject of the meeting.

2.3 Reimbursable Expenses

The MCWD will reimburse ENGINEER for reasonable and necessary expenses incurred to perform the Services, or advanced by ENGINEER on behalf of the MCWD, at the following rates:

Photocopying	\$.25 per page
Facsimile transmission	No Charge
Courier charges	Actual cost
Travel	Actual cost (IRS rate)
Postage	Actual cost
Third-party vendor charges	Actual cost

2.4 Record of Fees and Costs

ENGINEER will maintain all records pertaining to fees or costs incurred in connection with the Services for six years from the date of completion of the Services. ENGINEER agrees that any authorized MCWD representative or the state auditor may have access to and the right to examine, audit and copy any such records during normal business hours.

3.0 Conflict of Interest

During the term of the Agreement, ENGINEER may not represent another governmental jurisdiction located fully or partially within the MCWD's jurisdiction without prior written approval of the MCWD Administrator.

4.0 Independent Contractor

ENGINEER is an independent contractor under this Agreement. ENGINEER will select the means, method and manner of performing the Services. Nothing herein contained is intended or should be construed to constitute ENGINEER as the agent, representative or employee of the MCWD in any manner. Personnel performing the Services on behalf of ENGINEER or a subcontractor will not be considered employees of the MCWD and will not be entitled to any compensation, rights or benefits of any kind from the MCWD.

5.0 Subcontract and Assignment

ENGINEER will not assign, subcontract or transfer any obligation or interest in this Agreement or any of the Services without the written consent of the MCWD and pursuant to any conditions included in that consent. MCWD consent to any subcontracting does not relieve ENGINEER of its responsibility to perform the Services or any part thereof, nor in any respect its warranty, insurance, indemnification, duty to defend or agreement to hold harmless with respect to the Services. ENGINEER is responsible to the MCWD for the conformance of subcontractors, if any, with sections 10, 11, 12 and 13 of this Agreement in the same manner as those sections bind ENGINEER. ENGINEER will append this Agreement as an exhibit to any assignment, subcontract or transfer agreement.

6.0 Standard of Care; Indemnification

In performing the services, ENGINEER will use that degree of care and skill ordinarily exercised by reputable members of ENGINEER's profession practicing under similar circumstances in the same locality at the same time. ENGINEER will indemnify, defend and hold harmless the MCWD, its officers, board members, employees and agents from any and all actions, costs, damages and liabilities of any nature to the degree they are the result of ENGINEER's or a subcontractor's professional negligence or other action or inaction by ENGINEER or a subcontractor that is the basis for ENGINEER's or the subcontractor's liability in law or equity, including but not limited to ordinary negligence.

The MCWD will indemnify, defend and hold harmless ENGINEER, its officers, employees and agents, from any and all actions, costs, damages and liabilities of any nature to the degree they are the result of any action or inaction by the MCWD that is the basis for the MCWD's liability in law or equity.

Any ENGINEER warranty of care under this Agreement does not extend to any party other than the MCWD or to any use of the Services by the MCWD other than for the purpose(s) for which the Services were performed.

7.0 Termination; Continuation of Obligations

This Agreement is effective when fully executed by the parties and will remain in force until December 31, 2019 unless earlier terminated as set forth herein.

The MCWD may terminate this Agreement at its convenience, by a written termination notice stating specifically what prior authorized or additional tasks or services it requires ENGINEER to complete. ENGINEER will receive full compensation for all authorized work performed, except that ENGINEER will not be compensated for any part performance of a specified task or service if termination is due to ENGINEER's breach of this Agreement.

Insurance obligations; warranties; obligations to defend, indemnify and hold harmless; and information/data requirements will survive the completion of the Services and the term of this Agreement.

8.0 Waiver

The failure of either party to insist on the strict performance by the other party of any provision or obligation under this Agreement, or to exercise any option, remedy or right herein, will not waive or relinquish such party's rights in the future to insist on strict performance of any provision,

condition or obligation, all of which will remain in full force and affect. The waiver of either party on one or more occasion of any provision or obligation of this Agreement will not be construed as a waiver of any subsequent breach of the same provision or obligation, and the consent or approval by either party to or of any act by the other requiring consent or approval will not render unnecessary such party's consent or approval to any subsequent similar act by the other.

Notwithstanding any other term of this Agreement, the MCWD waives no immunity in tort. This agreement creates no right in and waives no immunity, defense or liability limit with respect to any third party.

9.0 Insurance

At all times during the term of this Agreement, ENGINEER will have and keep in force the following insurance coverages:

- A. General liability: \$1.5 million each occurrence and aggregate, covering completed operations and contractual liability, on an occurrence basis.
- B. Automobile liability: \$1.5 million combined single limit each occurrence coverage for bodily injury and property damage covering all vehicles, on an occurrence basis.
- C. Workers' compensation: in accordance with legal requirements applicable to ENGINEER.
- D. Professional liability: \$1.5 million each claim and aggregate; coverage may be on a claims-made basis, in which case ENGINEER must maintain the policy for, and/or obtain extended reporting period coverage extending, at least three (3) years from completion of the Services.

ENGINEER will maintain the MCWD as an additional insured with primary coverage for general liability on a non-contributory basis, for both ENGINEER's work and completed operations. Before beginning the Services hereunder, annually at least one week before the expiration of any required policy and otherwise on MCWD request, ENGINEER will file a certificate of insurance clearly documenting conformance with these requirements and a copy of the additional insured endorsement(s). The certificate will name the MCWD as a holder and will state that the MCWD will receive written notice before cancellation, nonrenewal or a change in policy limit of any described policy under the same terms as ENGINEER.

10.0 Compliance with Laws

ENGINEER will comply with the laws and requirements of all federal, state, local and other governmental units in connection with performing the Services and will procure all licenses, permits and other rights necessary to perform the Services.

In performing the Services, ENGINEER will ensure that no person is excluded from full employment rights or participation in or the benefits of any program, service or activity on the ground of race, color, creed, religion, age, sex, disability, marital status, sexual orientation, public assistance status or national origin; and no person who is protected by applicable federal or state laws, rules or regulations against discrimination otherwise will be subjected to discrimination.

11.0 Materials

All materials obtained or generated by ENGINEER in performing the Services, including documents in hard and electronic copy, software, and all other forms in which the materials are contained, documented or memorialized, are the property of the MCWD. Should any of the materials

be subject to copyright, ENGINEER hereby assigns and transfers to the MCWD all right, title and interest in: (a) its copyright, if any, in the materials; any registrations and copyright applications relating to the materials; and any copyright renewals and extensions; (b) all works based on, derived from or incorporating the materials; and (c) all income, royalties, damages, claims and payments now or hereafter due or payable with respect thereto, and all causes of action in law or equity for past, present or future infringement based on the copyrights. ENGINEER agrees to execute all papers and to perform such other proper acts as the MCWD may deem necessary to secure for the MCWD or its assignee the rights herein assigned.

The MCWD may immediately inspect, copy or take possession of any materials on written request to ENGINEER. At such time, or on termination of the Agreement, ENGINEER may maintain a copy of some or all of the materials except for any materials designated by the MCWD as confidential or non-public under applicable law, a copy of which may be maintained by ENGINEER only pursuant to written agreement with the MCWD specifying terms.

The preceding terms of this section 11.0 do not apply to ENGINEER's instruments of professional service which, as between ENGINEER and the MCWD, are defined as the materials, methods and models used by ENGINEER to perform the Services but that have not been created: (a) as an element of the Services or prior MCWD services; and (b) pursuant to compensation by the MCWD.

Nothing in this agreement is an assumption by ENGINEER of any warranty or duty of care with respect to any party other than MCWD. Reuse of ENGINEER's materials by the MCWD outside of the mutually intended scope of use without written verification or adaptation by ENGINEER will be without ENGINEER's duty of care and MCWD will hold ENGINEER harmless with respect to MCWD claims, damages, losses and expenses arising therefrom.

12.0 Data Practices; Confidentiality

If ENGINEER receives a request for data pursuant to the Data Practices Act, Minnesota Statutes chapter 13 (DPA), that may encompass data (as that term is defined in the DPA) ENGINEER possesses or has created as a result of this agreement, it will inform the MCWD immediately and transmit a copy of the request. If the request is addressed to the MCWD, ENGINEER will not provide any information or documents, but will direct the inquiry to the MCWD. If the request is addressed to ENGINEER, ENGINEER will be responsible to determine whether it is legally required to respond to the request and otherwise what its legal obligations are, but will notify and consult with the MCWD and its legal counsel before replying. Nothing in the preceding sentence supersedes ENGINEER's obligations under this agreement with respect to protection of MCWD data, property rights in data or confidentiality. Nothing in this section constitutes a determination that ENGINEER is performing a governmental function within the meaning of Minnesota Statutes section 13.05, subdivision 11, or otherwise expands the applicability of the DPA beyond its scope under governing law.

ENGINEER agrees that it will not disclose and will hold in confidence any and all proprietary materials owned or possessed by the MCWD and so denominated by the MCWD. ENGINEER will not use any such materials for any purpose other than performance of the Services without MCWD written consent. This restriction does not apply to materials already possessed by ENGINEER or that ENGINEER received on a non-confidential basis from the MCWD or another party. Consistent with the terms of this section 12.0 regarding use and protection of confidential and proprietary information, ENGINEER retains a nonexclusive license to use the materials and may publish or use the materials in its professional activities.

13.0 MCWD Property

All property furnished to or for the use of ENGINEER or a subcontractor by the MCWD and not fully used in the performance of the Services, including but not limited to equipment, supplies, materials and data, both hard copy and electronic, will remain the property of the MCWD and returned to the MCWD at the conclusion of the performance of the Services, or sooner if requested by the MCWD. ENGINEER further agrees that any proprietary materials are the exclusive property of the MCWD and will assert no right, title or interest in the materials. ENGINEER will not disseminate, transfer or dispose of any proprietary materials to any other person or entity unless specifically authorized in writing by the MCWD. Any property including but not limited to materials supplied to ENGINEER by the MCWD or deriving from the MCWD is supplied to and accepted by ENGINEER as without representation or warranty including but not limited to a warranty of fitness, merchantability, accuracy or completeness.

14.0 Notices

Any written communication required under this Agreement to be provided in writing will be directed to the other party as follows:

To MCWD:

Administrator
Minnehaha Creek Watershed District
15320 Minnetonka Boulevard
Minnetonka, MN 55345

To ENGINEER:

Chris Meehan
Wenck Associates, Inc.
1800 Pioneer Creek Center
Maple Plain, MN 55359-0249

Either of the above individuals may in writing designate another individual to receive communications under this Agreement.

15.0 Choice of Law, Venue and Jurisdiction

This Agreement will be construed under and governed by the laws of the State of Minnesota.

16.0 Whole Agreement

The entire agreement between the two parties is contained herein and this Agreement supersedes all oral agreements and negotiations relating to the subject matter hereof. Any modification of this Agreement is valid only when reduced to writing as an amendment to the Agreement and signed by the parties hereto. The MCWD may amend this Agreement only by action of the Board of Managers acting as a body.

IN WITNESS WHEREOF, intending to be legally bound, the parties hereto execute and deliver this Agreement.

WENCK ASSOCIATES, INC., ENGINEER

By: _____ Date: _____

Title: _____

MINNEHAHA CREEK WATERSHED DISTRICT

By: _____ Date: _____

Title: _____