

**City of Carson City
Agenda Report**

Date Submitted: February 18, 2011 **Agenda Date Requested:** Mar. 3, 2011
Time Requested: Consent Agenda

To: Mayor and Board of Supervisors

From: Randal Munn, Chief Deputy District Attorney

Subject Title: Action to approve pursuant to Section 3.070(3) of the City Charter an independent contractor agreement between the District Attorney and the law firm of Armstrong Teasdale, LLP., for Special Deputy District Attorney services to represent the Public Works Department in contract matters primarily involving a cost-overrun claim by Peek Construction Company dba E. Camino Construction in the North-South Water Transmission Main Project-Phase I. (*Randal Munn and Andrew Burnham*)

Staff Summary: Peek Construction Company (PCC), dba E. Camino Construction, was awarded a \$1.9 million contract in early 2010 to construct the North/South Transmission Main Phase I project which was to be completed September 1, 2010. The project achieved substantial completion on January 7, 2011. During the construction of the project PCC encountered groundwater along Hells Bells Road and dewatering methods were employed by PCC to excavate the trench area and install the required waterline. All bidders were informed to expect to encounter water. PCC is demanding bid-cost overrun compensation for the cost of dewatering and other alleged damages of \$1.7 million, which requires an aggressive defense by the City.

Type of Action Requested:

- | | |
|--|---|
| <input type="checkbox"/> Resolution | <input type="checkbox"/> Ordinance- First Reading |
| <input checked="" type="checkbox"/> Formal Action/Motion | <input type="checkbox"/> Other (Specify) |

Does This Action Require A Business Impact Statement: () Yes (X) No

Recommended Board Action: I move to approve pursuant to Section 3.070(3) of the City Charter the independent contractor agreement between the District Attorney and the law firm of Armstrong Teasdale, LLP., as a Special Deputy District Attorney to represent the Public Works Department in contract matters primarily involving a cost-overrun claim by Peek Construction Company dba E. Camino Construction in the North-South Water Transmission Main Project-Phase I.

Explanation for Recommended Board Action: The City Charter grants authority to the District Attorney to contract for Special Deputy District Attorneys "subject to the approval of Board." In this case Public Works has agreed to pay for the services from the Water Fund.

Applicable Statute, Code, Policy, Rule or Regulation: Professional Legal Services contracts are exempt from competitive public bidding. NRS 332.115(1)(b).

Fiscal Impact: Hourly contract for professional legal services retroactive to February 14, 2011 for not to exceed maximum of \$100,000.00.


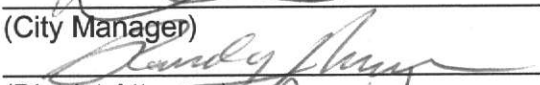
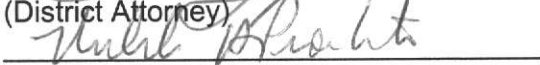

Explanation of Impact: At this time the District Attorney is understaffed and the expertise to efficiently handle this complex public works contract matter is not available in-house.

Funding Source: Water Fund

Alternatives: 1) Refer back to District Attorney's office for further review
2) Do not approve contract

Supporting Material:
1) Contract

Prepared By: Randal Munn, Chief Deputy District Attorney, Civil Division

Reviewed By:  Date: 2-22-11
(Public Works)
 Date: 2/22/11
(City Manager)
 Date: 2/22/2011
(District Attorney)
 Date: 2/22/11
(Finance Director)

Board Action Taken:

Motion: _____ 1) _____ Aye/Nay
2) _____ _____

(Vote Recorded By)

PROFESSIONAL SERVICES AGREEMENT

This agreement between **Carson City, a Consolidated Municipality, acting by and through the Carson City District Attorney**, 885 East Musser Street, Suite #2030, Carson City, Nevada, 89701 (775-887-2070) and the law firm of **Armstrong Teasdale, LLP**, 50 W. Liberty St. Suite 950, Reno, Nevada (775-322-7400; Fax 775-322-9049) includes the terms and conditions set forth in the Armstrong Teasdale, LLP legal services engagement letter dated February 17, 2011, which is attached and incorporated herein, and is entered into the date set forth below.

WITNESSETH:

WHEREAS, the Carson City Charter Section 3.070(3) provides that the District Attorney may, subject to the approval of the Board of Supervisors, contract for the services of a special deputy district attorney; and

WHEREAS, the District Attorney's office is currently understaffed and is in need of experienced legal counsel in matters of public works construction law in the pending claim by Peek Construction Company against Carson City Public Works Department regarding alleged bid cost overruns in the construction of the North-South Water Transmission Main Project-Phase I (Contract No. CC-2010-100), which is under threat of litigation, but may be settled by negotiation, mediation, or arbitration; and

WHEREAS, the District Attorney believes the legal services of Armstrong Teasdale, and Richard G. Campbell, Jr., are desired to assist the District Attorney and/or the Carson City Public Works Department for the purpose of defending potential complex litigation; and

WHEREAS, it is deemed that the services of Armstrong Teasdale, LLP and Richard G. Campbell, Jr., herein specified are both necessary and desirable and in the best interests of Carson City and the District Attorney; and

WHEREAS, Armstrong Teasdale, LLP and Richard G. Campbell, Jr., represent that they are duly qualified, willing and able to render the services as hereinafter described; and

NOW, THEREFORE, based upon the foregoing premises and upon the following covenants, the parties mutually agree as follows:

1. **Scope of Representation**. The District Attorney agrees to retain the law firm of Armstrong Teasdale, LLP, ("Contractor") to serve as legal counsel to the District Attorney as a Special Deputy District Attorney in the matter of the claims of Peek Construction Company described herein, and other matters as are mutually agreed to. Contractor shall serve in this capacity at will and at the pleasure of the District Attorney and shall report regularly to the District Attorney and obtain the approval of the District Attorney on all related matters. Contractor shall provide service to the City in the capacity of Special Deputy District Attorney until this appointment is revoked or terminated as provided herein. Contractor agrees to support, protect and defend the Constitution and Government of the United States of America and the Constitution and Government of the State of Nevada against all enemies, whether foreign or domestic, and bear true faith, allegiance and loyalty to the same, any ordinance, resolution or law of the State notwithstanding, and will faithfully perform all the duties of the office of Special Deputy District Attorney. District Attorney and Contractor agree that Contractor shall coordinate with the Carson City Public Works Department and the District Attorney to allocate workloads and responsibilities as appropriate to minimize the

accrual of legal services expenses to the City. Any substitution or additional affiliated counsel must be approved in advance by District Attorney.

2. **Independent Contractor Status.** The officers, agents and employees of Contractor, in performing the services required by this agreement, shall be independent contractors and shall not be deemed officers, agents or employees of the District Attorney or Carson City.

3. **Start Date & Fee Structure.** Effective retroactively to February 14, 2011, the date of commencement of work authorized by the District Attorney, upon approval by the Carson City Board of Supervisors, for an *hourly fee* rate of:

\$325.00 per hour for the services of **Richard G. Campbell Jr., Esq.**

\$325.00 to 400.00 per hour for the services of **other shareholder of equal experience and seniority.**

\$225.00 per hour for the services of **associate attorneys;**

and **\$100.00 per hour** for the services of **legal assistants/paralegals,**

and other prior authorized services under this contract for civil case defense.

Contractor agrees that any monies awarded by the Court or Administrative Law Judge or Arbitrator or paid by any opposing party as attorney's fees award and/or sanctions shall apply to the Contractor's fee as provided in this agreement. Contractor shall, with the District Attorney's full cooperation, and upon mutual agreement, seek payment of all allowable fees and costs from any opposing party or from the Court or Administrative Law Judge or arbitrator by award.

The amount of this Agreement shall not exceed \$100,000.00 – (the "Maximum Agreement Amount"). It is specifically agreed that if Contractor's invoices for professional time and expenses approach the Maximum Agreement Amount, Contractor will notify the District Attorney of this fact and the parties may

elect to amend this Agreement for additional professional services. However, Contractor is not obligated to provide any further professional services under this Agreement after the Maximum Agreement Amount has been reached unless an amendment to this Agreement has been agreed upon by the Contractor and District Attorney and approved by the Carson City Board of Supervisors. If the above-described matter/litigation is not completed when the Maximum Agreement Amount is reached and an amended Agreement is not entered into between the Contractor and the parties, this Agreement will terminate and Contractor may withdraw as counsel of record in the litigation in which Contractor is counsel of record without any further obligation. In the event the Contractor withdraws as counsel of record under these circumstances, Contractor will be entitled to payment for all services rendered and the District Attorney will consent to this withdrawal of Contractor from the pending matter or litigation.

4. **Expenses.** Expenses and disbursements incurred consistent with paragraph Nos. 5 and 6 shall only include filing fees, witness fees, expert witness costs, investigator costs and time, messenger service costs, mediation expenses, computer research fees, and all out-of-pocket expenses incurred on the City's behalf.

5. **Repayment of Expenses.** Contractor will advance the expenses and disbursements of any litigation, including court or tribunal costs, expenses of investigation, and the costs of obtaining, preserving and presenting evidence, including expert evidence.

6. **Conditional Payment of Monthly Statements Provided by Contractor.** Contractor shall submit monthly statements to the District Attorney, itemizing all fees and costs incurred in performance of this contract for which reimbursement is claimed. The District Attorney shall review and approve as

appropriate and forward to the Public Works Department for its Direct Payment to the Contractor. Payment for all fees and costs in the matter are subject to repayment to the City based upon the following conditions. Certain disbursements will not be paid unless agreed to in advance. These include:

- a. Photocopy expenses of more than 15 cents per page;
- b. Photocopy costs in excess of \$2,000 for a single job;

The City will not reimburse expenses for the following:

- 1) telephone expenses or office supply costs;
- 2) The costs of first-class travel (travel arrangements should be made in advance to take advantage of cost-effective discounts or special rates);

To the extent it is applicable, all expenses, including travel expenses, shall be reimbursed in accordance with the provisions of the City's policies regarding officers and employees.

7. **Recovery of Attorneys' Fees.** In the event that a civil action is instituted to collect any payment due under this contract or to obtain performance under this contract, the prevailing party shall recover, as the court deems appropriate, reasonable attorneys' fees and all costs and disbursement incurred in such action.

8. **Personal Services Contract.** This agreement calls for the personal services of Contractor. Contractor shall make no payments to, or share compensation with, any attorneys other than affiliated counsel or members of Contractor's own firm without prior written approval by the District Attorney.

9. **Inspection of Records.** The books, records, documents and accounting procedures of Contractor relevant to this agreement shall be subject

to inspection, examination and audit by the City Finance Department, the District Attorney, and by City auditors.

10. **Status Reports.** Contractor shall provide occasional matter/litigation status reports as requested by the District Attorney, as well as copies of all memoranda, pleadings, briefs, reports, studies, photographs, negatives or other documents or drawings prepared by Contractor in the performance of his obligations under this agreement. These copies shall be the exclusive property of Carson City.

11. **Assignment.** Contractor shall neither assign, transfer nor delegate any rights, obligations or duties under this agreement without the prior written consent of the District Attorney and the Carson City Board of Supervisors.

12. **Contractor's Recovery of Fee.** In the event resolution of the litigation occurs through settlement, Contractor agrees, if appropriate, to seek to have Contractor's fee paid by the opposing party as part of the settlement agreement. In the event resolution of the litigation occurs through arbitration award or jury award or other court order, Contractor agrees, if appropriate, to seek a court order requiring the opposing party to pay Contractor's fee.

13. **Termination.** This agreement shall terminate upon the occurrence of any of the following:

If the District Attorney reasonably determines it is in the best interest of the City, upon thirty (30) days written notice from either party, or

Two years after the date the contract is approved by the Carson City Board of Supervisors. In the event it is determined that this agreement potentially jeopardizes any state or federal grant funds received by the City, if any, the City may immediately terminate this agreement upon providing written notice to the Contractor.

14. **Work Papers.** In the event of termination, all records, documents and copies of work papers, research and other materials prepared by the Contractor prior to the date of termination shall be provided to the District Attorney.

15. **Effective Date.** Except as otherwise provided herein, this Agreement shall not become effective unless and until approved by the Carson City Board of Supervisors.


16. **Governing Law.** This Agreement shall be subject to and governed by the laws of the State of Nevada, and any recourse to judicial action shall be in the First Judicial District Court of the State of Nevada.

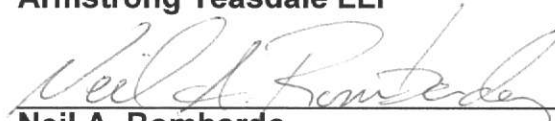
17. **Contractor's Certification.** In the event federal funds are used for payment of all or part of this contract, Contractor certifies, by signing this contract, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction, by any federal department or agency. This certification is made pursuant to the regulations implementing Executive Order 12549, Debarment and Suspension, 28 CFR Par 67, Section 67.510, as published as Part VII of the May 26, 1988, Federal Register (pages 19160-19211).

18. **Evidence of Insurance.** Copies of malpractice insurance will be attached to the agreement with proof of policy of attorney liability insurance for errors and omissions that is issued by an admitted insurance company authorized to transact surplus lines in the State of Nevada in the amount of not less than \$1,000,000, or as determined by the Risk Manager of Carson City, Contractor further agrees to provide proof of workers' compensation insurance as required by Nevada Revised Statutes Chapter 616A through 616D inclusive. If

the Contractor qualifies as a sole proprietor as defined in NRS Chapter 616A.310 and has elected to not purchase industrial insurance, the sole proprietor must submit an executed "Affidavit of Rejection of Coverage under NRS 616B.627 and NRS 617.210" form.

19. **Entire Contract and Modification.** This contract constitutes the entire agreement between the parties and may only be modified by a written amendment signed by the parties and approved by the Carson City Board of Supervisors.

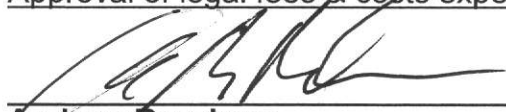

Richard G. Campbell Jr. 2/17/11
Armstrong Teasdale LLP Date


Neil A. Rombardo 2/18/2011
District Attorney - Carson City Date

Approved as to form by:


Deputy District Attorney 2/18/2011
Date

Approval of legal fees & costs expenditures:


Andrew Burnham 2/18/11
Public Works Director Date

Approved by the Carson City Board of Supervisors:

Robert Crowell, Mayor

Date

February 17, 2011

VIA US MAIL

Neil A. Rombardo
District Attorney
Carson City District Attorney's Office
885 East Musser Street, Suite 2030
Carson City, Nevada 89701

Re: Professional Services Agreement Pertaining to Pending Claim by Peek Construction Company

Dear Mr. Rombardo:

Thank you for selecting this firm to represent Carson City, a Consolidated Municipality, acting by and through the Carson City District Attorney in connection with the pending claim by Peek Construction Company against Carson City Public Works Department regarding alleged bid cost overruns in the construction of the North-South Water Transmission Main Project-Phase I (Contract No. CC-2010-100). This letter will confirm our understanding with you regarding our engagement and describe the basis on which our firm will provide legal services to you. The terms of our representation also include the Professional Services Agreement attached as Attachment A which is incorporated by reference herein.

Client. Our client in this matter will be Carson City (the "City").

Scope of Engagement. We have been engaged to represent the City solely in connection with the pending claim referenced above. We have agreed that our engagement is limited to performance of services related to this action. Because we are not your general counsel, our acceptance of this engagement does not involve an undertaking to represent you or your interests in any other matter. We may agree with you to limit or expand the scope of our representation from time to time, provided that any such change is confirmed in writing.

Fees. While we anticipate most of our work for you will be performed by me, we may utilize other attorneys of our firm as appropriate. We recognize that cost efficiency is very important to you, and we will make certain that our work to you is completed in a cost-effective manner.

The principal basis for computing our fees will be the amount of time spent on the matter by various lawyers and legal assistants multiplied by their individual hourly billing rates. Our billing rates are as set forth in the Professional Services Agreement attached hereto and referenced as Attachment A.

Costs. We will include on our statements separate charges for performing services such as photocopying, messenger and delivery service, computerized research, travel, and long-distance telephone and fax charges, and search and filing fees. Such expenses may also include filing fees, deposition costs, process servers, court reporters, and witness fees. You also agree to pay the charges related to copying or digital reproduction of documents for retention in our files. You authorize us to retain any investigators, consultants, or experts necessary in our judgment to represent your

interests in the litigation. Their fees and expenses generally will not be paid by us, but will be billed directly to you. Additionally, for efficiency, we may use the services of an affiliate of our firm, Lawgical Choice, to perform technical support such as document scanning, bulk printing, electronic file processing, electronic closing books, CD and DVD copying, document coding, electronic bates numbering, trial support, conversion of electronic files, or production of electronic files and you agree to pay the charges for such services.

Estimates. As we have discussed, the fees and costs relating to this litigation are not predictable. Accordingly, we have made no commitment to you concerning the maximum fees and costs that will be necessary to resolve or complete this matter. Any estimate of fees and costs that we may have discussed represents only an estimate of such fees and costs. It is also expressly understood that the City's obligation to pay the firm's fees and costs is in no way contingent upon the ultimate outcome of the matter.

Payment of Statements. Statements normally will be rendered monthly for work performed and expenses recorded on our books during the previous month. Payment is due promptly upon receipt of our statement. If any statement remains unpaid for more than 90 days, we may suspend performing services for you until arrangements satisfactory to us have been made for payment of outstanding statements and the payment of future fees and expenses. You also agree to pay all costs of collection of delinquent invoices, including attorneys' fees and expenses, regardless of whether those fees are attributable to Armstrong Teasdale attorneys or outside attorneys engaged for the purpose of collection.

Trial Advance. Once a trial or hearing date is set, we will require you to pay all amounts then owing to us and to deposit with us the fees we estimate will be incurred in preparing for and completing the trial or arbitration, as well as jury fees and arbitration fees likely to be assessed. If you fail to timely pay any additional deposit requested, we will have the right to withdraw from the representation and to cease performing further work. If permission of the court or arbitration panel is required, you agree not to oppose any motion to withdraw.

Client Responsibilities. You agree to pay our statements for services and expenses as provided below. In addition, you agree to be candid and cooperative with us and to keep us informed with complete and accurate factual information, documents and other communications relevant to the subject matter of our representation or otherwise reasonably requested by us. In particular, you agree to make City officers and employees available to attend trial, hearings, depositions and discovery conferences, and other proceedings, and to commit the appropriate personnel and sufficient resources to meet the City's discovery obligations.

Because it is important that we be able to contact you at all times to consult with you regarding your representation, you agree to inform us, in writing, of any changes in the name, address, telephone number, contact person, e-mail address, state of incorporation, or other relevant changes regarding you or your business. Whenever we need your instructions or authorization in order to proceed with legal work on your behalf, we will contact you at the latest business address we have received from you. If you affiliate with, acquire, are acquired by, or merge with another company, you agree to provide us with sufficient notice to permit us to withdraw as your lawyer if we determine that such affiliation, acquisition, or merger creates a conflict of interest between any of our clients and the other party to such affiliation, acquisition or merger, or if we determine that it is not in the best interests of the firm to represent the new entity.

Advice about Possible Outcomes. Either at the commencement or during the course of our representation, we may express opinions or beliefs concerning the litigation or various courses of action and the results that might be anticipated. Any such statement made by any lawyer of our firm is intended to be an expression of opinion only, based on information available to us at the time, and should not be construed by you as a promise or guarantee.

Termination of Engagement. The City may at any time terminate our services and representation upon written notice to the firm. Such termination shall not, however, relieve the City of the obligation to pay for all services already

rendered, including work in progress and remaining incomplete at the time of termination, and to pay for all expenses incurred on behalf of the City through the date of termination.

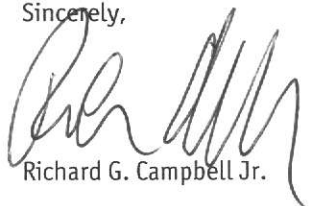
We reserve the right to withdraw from our representation as required or permitted by the applicable rules of professional conduct upon written notice to the City. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect the City's interests in the above litigation, and the City agrees to take all steps necessary to free us of any obligation to perform further, including the execution of any documents necessary to perfect our withdrawal. We will be entitled to be paid for all services rendered and costs or expenses incurred on behalf of the City through the date of withdrawal. If permission for withdrawal is required by a court or arbitration panel, we will promptly request such permission, and the City agrees not to oppose our request.

Conclusion of Representation; Retention and Disposition of Documents. Unless previously terminated, our representation of the City in this matter will terminate upon our sending you our final statement for services rendered in the matter. At your request, your papers and property will be returned to you upon receipt of payment for outstanding fees and costs. Our own files pertaining to the matter will be retained by the firm. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and accounting records; and internal lawyers work product such as drafts, notes, internal memoranda, and legal and factual research, including investigative reports, prepared by or for the internal use of lawyers. All such documents retained by the firm will be transferred to the person responsible for administering our records retention program. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such documents or other materials retained by us within a reasonable time after the termination of the engagement, and you agree that unless you have otherwise notified us in writing, we will have the right to dispose of files relating to your matter after the matter has been concluded for five years.

Post-Engagement Matters. You are engaging the firm to provide legal services in connection with specific litigation. After the litigation concludes, changes may occur in the applicable laws or regulations that could have an impact upon your future rights and liabilities. Unless you engage us after completion of the litigation to provide additional advice on issues arising from the litigation, the firm has no continuing obligation to advise you with respect to future legal developments.

Please review this letter carefully. If it meets with your approval, sign the enclosed copy of the letter in the space provided below and return it to me with retainer so that we may begin work. Please call me if you have any questions.

Sincerely,



Richard G. Campbell Jr.

RC/er
Enclosure

AGREED TO AND ACCEPTED:

Carson City, a Consolidated Municipality

By: Neil A. Rombardo

Title: Carson City PA.

Date: 2/18/2011