

**CITY OF BURIEN
AGENDA BILL**

Agenda Subject: Discussion and Possible Motion to Approve Consultant Contract for First Avenue South Project		Meeting Date: March 23, 2009
Department: Legal	Attachment: Contract	Fund Source: Transportation CIP Activity Cost: \$80,000 Amount Budgeted: Unencumbered Budget Authority:
Contact: Chris Bacha		
Telephone: (206) 248-5535		
Adopted Work Plan Priority: Yes No X	Work Plan Item Description:	
PURPOSE/REQUIRED ACTION:		
To discuss and possibly take action to approve a consultant services agreement with David Evans and Associates for forensic analysis of First Avenue South Construction Project Phase I.		
BACKGROUND (Include prior Council action & discussion):		
In April of 2006, the City entered into a contract with Frank Colluccio Construction Company to undertake the first phase of the improvements to First Avenue South. Substantial completion of this project has been achieved; however, there are outstanding issues that have been raised through claims filed by the contractor. The Interim City Attorney has requested that the City retain the services of a consulting engineering firm to assist the Interim City Attorney in review of these claims.		
OPTIONS (Including fiscal impacts):		
Administrative Recommendation: Approve the consultant services agreement.		
Committee Recommendation:		
Advisory Board Recommendation:		
Suggested Motion: Move to approve the consultant services agreement with David Evans and Associates in the maximum amount of \$80,000.		
Submitted by: Administration _____ City Manager _____		
Today's Date: March 18, 2009	File Code: R:/CC/AgendaBill2009/032309ad-1 Consultant Services First Ave	

PROFESSIONAL SERVICES CONTRACT
David Evans and Associates, INC.

FIRST AVENUE FORENSIC ANALYSIS

THIS CONTRACT, made and entered into this 18th day of March, 2009, by and between the **CITY OF BURIEN**, a municipal corporation of the State of Washington (hereinafter referred to as the "CITY"), and **David Evans and Associates, Inc.**, a Washington Corporation (hereinafter referred to as "CONTRACTOR");

WHEREAS, the City has previously entered into a contract for work performed to complete certain utility relocation and other improvements along first avenue in the City of Burien; and

WHEREAS, certain claims have been filed by the contractor in association with this work which claims are under review by the City Attorney; and

WHEREAS, the City Attorney requires the professional services of the Contractor to assist in the City Attorney's review of said claims and in anticipation of potential litigation;

In consideration of the mutual promises and obligations hereinafter set forth, the Parties hereto agree as follows:

1. Scope of Services/Work

- A. The CONTRACTOR agrees to diligently and completely perform the services and/or deliverables described in Exhibit A attached hereto and incorporated herein.
- B. Changes To Scope of Work. The CITY shall have the right to make changes within the general scope of services and/or deliverables upon execution in writing of a change order or amendment hereto. If the changes will result in additional work effort by CONTRACTOR, the CITY will agree to reasonably compensate the CONTRACTOR for such additional effort up to the maximum amount specified herein or as otherwise provided by City Code.

2. Term

- A. All services shall be satisfactorily completed on or before **May 30, 2009** and this Contract shall expire on said date unless mutually extended in writing by the Parties.
- B. Neither party shall be considered to be in default in the performance of this Contract to the extent such performance is prevented or delayed by any cause which is beyond the reasonable control of the affected party and, in such event, the time for performance shall be extended for a period equal to any time lost as

a result thereof. In the event CONTRACTOR is unable to proceed due to a delay solely attributable to CITY, CONTRACTOR shall advise CITY of such delay in writing as soon as is practicable.

- C. Should this Contract be signed after the date Contract performance has begun, all terms and conditions herein shall operate retroactively to the date Contract performance began.

3. Compensation and Payment

- A. The CITY shall compensate the CONTRACTOR for the services and deliverables performed under this Contract in accordance with Exhibit A.
- B. The total price to be paid by CITY for CONTRACTOR'S full and complete performance of the Scope of Work hereunder shall not exceed **\$80,000** without the written consent of the CITY; provided that, the work completed under this Contract shall not exceed **\$25,000** unless and until the City Council has approved this Contract. The above "total price" shall be the total compensation for CONTRACTOR'S performance hereunder including, but not limited to, all work, deliverables, materials, supplies, equipment, subcontractor's fees, and all reimbursable travel and miscellaneous or incidental expenses to be incurred by CONTRACTOR.
- C. The CONTRACTOR shall submit monthly invoices in a format comparable to the invoice attached hereto and identified as Exhibit B, for services completed and/or deliverables furnished during the previous month. Upon CITY'S request, CONTRACTOR shall submit necessary and appropriate documentation, as determined by the CITY, for all invoiced services and deliverables.
- D. Payment shall be made through the CITY'S ordinary payment process, and shall be considered timely if made within 30 days of receipt of a properly completed invoice.
- E. The CITY may withhold payment to the CONTRACTOR for any services or deliverables not performed as required hereunder until such time as the CONTRACTOR modifies such services or deliverables to the satisfaction of the CITY.
- F. All payments shall be subject to adjustment for any amounts, upon audit or otherwise, determined to have been improperly invoiced.
- G. In the event the CONTRACTOR incurs cost in excess of the sum authorized for service under this Contract, the CONTRACTOR shall pay such excess from its own funds, and the CITY shall not be required to pay any part of such excess, and the CONTRACTOR shall have no claim against the CITY on account thereof.

4. Independent Contractor Status

- A.** The services and deliverables shall be furnished by the CONTRACTOR as an independent Contractor, and nothing herein contained shall be construed to create a relationship of employer/employee or master/servant. No payroll or employment taxes of any kind shall be withheld or paid by the CITY with respect to payments to CONTRACTOR. The payroll or employment taxes that are the subject of this paragraph include, but are not limited to, FICA, FUTA, federal income tax, state personal income tax, state disability insurance tax and state unemployment insurance tax. By reason of CONTRACTOR's status as an independent Contractor hereunder, no workers' compensation insurance has been or will be obtained by the CITY on account of CONTRACTOR. CONTRACTOR may be required to provide the CITY proof of payment of these said taxes and benefits. If the CITY is assessed or deemed liable in any manner for those charges or taxes, the CONTRACTOR agrees to hold the CITY harmless from those costs, including attorney's fees.
- B.** The CONTRACTOR shall provide at its sole expense all materials, office space, and other necessities to perform its duties under this Contract, unless otherwise specified in writing herein.

5. Professional Services Warranty

- A.** In the performance of services under this Contract, the CONTRACTOR and its employees agree to exercise the degree of skill and care required by customarily accepted good practices and procedures followed by professionals/consultants rendering the same or similar type of service. All obligations and services of the CONTRACTOR hereunder shall be performed diligently and completely according to such professional standards.
- B.** If the CONTRACTOR intends to rely on information or data supplied by the CITY, other CITY contractor's or other generally reputable sources without independent verification, such intent shall be brought to the attention of the CITY.

6. Contract Administration and Right to Audit

- A.** The Interim City Attorney shall have primary responsibility for contract administration and approval of services to be performed by the CONTRACTOR, and shall coordinate all communications between the CONTRACTOR and the CITY.
- B.** The CONTRACTOR shall, at such times and in such form as the CITY may reasonably require, furnish the CITY with periodic status reports pertaining to the services undertaken pursuant to this Contract.

- C. Upon CITY's request, the Contractor shall make available to CITY all accounts, records, and documents related to the Scope of Work for CITY's inspection, auditing, or evaluation during normal business hours as reasonably needed by CITY to assess performance, compliance, and/or quality assurance under this Contract.

7. Records Retention

The CONTRACTOR shall establish and maintain records in accordance with requirements prescribed by the CITY, with respect to all matters covered by this Contract. Except as otherwise authorized by the CITY, the CONTRACTOR shall retain such records for a period of six (6) years after receipt of the final payment under this Contract or termination of this Contract.

8. Notices

Except for routine operational communications, which may be delivered personally or transmitted by electronic mail or facsimile, all notices required hereunder shall be in writing and shall be deemed to have been duly given if delivered personally or mailed first-class mail, postage prepaid, to the parties at the following addresses:

CITY	CONTRACTOR
Chris Bacha, Kenyon Disend, PLLC Interim City Attorney 15811 Ambaum Blvd SW, Suite C Burien, Washington 98166 (206) 248-5535	Steve Shanafelt 3700 Pacific Hwy East, Suite 311 Tacoma, WA 98424 (253) 922-9780
Chris@kenyondisend.com	stsh@deainc.com

9. Termination and Suspension

- A. The CITY may terminate this Contract at any time, with or without cause, by giving ten (10) business days written notice to CONTRACTOR. In the event of termination, all finished and unfinished work prepared by the CONTRACTOR pursuant to this Contract shall be provided to the CITY. In the event CITY terminates this Contract due to the CITY's own reasons and without cause due to the CONTRACTOR's actions or omissions, the CITY shall pay the CONTRACTOR the amount due for actual work and services necessarily performed under this Contract up to the effective date of termination, not to exceed the total compensation set forth herein.
- B. The CITY may suspend this Contract, at its sole discretion, upon seven (7) business days written notice to the CONTRACTOR. Such notice shall indicate the anticipated period of suspension. Any reimbursement for expenses incurred due to the suspension shall be limited to the CONTRACTOR'S reasonable

expenses and shall be subject to verification. The CONTRACTOR shall resume performance of services under this Contract without delay when the suspension period ends.

- C. Termination or suspension of this Contract by CITY shall not constitute a waiver of any claims or remaining rights the CITY may have against CONTRACTOR relative to performance hereunder.

10. Taxes, Licenses and Permits

- A. The CONTRACTOR acknowledges that it is responsible for the payment of all charges and taxes applicable to the services performed under this Contract, and the CONTRACTOR agrees to comply with all applicable laws regarding the reporting of income, maintenance of records, and all other requirements and obligations imposed pursuant to applicable law. If the CITY is assessed, made liable, or responsible in any manner for such charges or taxes, the CONTRACTOR agrees to hold the CITY harmless from such costs, including attorney's fees.
- B. In the event the CONTRACTOR fails to pay any taxes, assessments, penalties, or fees imposed by any governmental body, including a court of law, then the CONTRACTOR authorizes the CITY to deduct and withhold or pay over to the appropriate governmental body those unpaid amounts upon demand by the governmental body. It is agreed that this provision shall apply to taxes and fees imposed by City ordinance. Any such payments shall be deducted from the CONTRACTOR's total compensation.
- C. The CONTRACTOR, at its expense, shall obtain and keep in force any and all necessary licenses and permits. The CONTRACTOR shall obtain a business license as required by Tacoma Municipal Code Subtitle 6B.20 and shall pay business and occupation taxes as required by Tacoma Municipal Code Subtitle 6A.30.

11. Indemnification

- A. The CONTRACTOR shall indemnify, defend, and hold harmless the CITY, its officials, officers, agents, employees, and volunteers, from any and all claims, demands, damages, lawsuits, liabilities, losses, liens, expenses and costs arising out of the subject matter of this Contract and caused by the CONTRACTOR'S negligence and/or willful misconduct; provided that this provision shall not apply to the extent that damage or injury results from the fault of the CITY, or its officers, agents, or employees. The term "fault" as used herein shall have the same meaning as set forth in RCW 4.22.015, as that statute may hereafter be amended.
- B. The CONTRACTOR specifically assumes potential liability for actions brought by the CONTRACTOR'S own employees against the CITY, except the extent

resulting from City's negligence, gross negligence or willful misconduct and, solely for the purpose of this indemnification and defense, the CONTRACTOR specifically waives any immunity under the state industrial insurance law, Title 51 RCW. THE CONTRACTOR RECOGNIZES THAT THIS WAIVER WAS THE SUBJECT OF MUTUAL NEGOTIATION.

- C. This indemnification shall extend to and include attorneys' fees and the cost of establishing the right of indemnification hereunder in favor of the CITY. This indemnification shall survive the termination of this Contract.

12. Insurance

During the course and performance of the services herein specified, CONTRACTOR will maintain the following insurance coverage:

- A. Workers' Compensation and employer's liability --statutory limits.
- B. Commercial General Liability --\$1,000,000 single limit combined for personal injury, property damage; \$2,000,000 aggregate.
- C. Automobile public liability and property damage--\$1,000,000 single limit combined for bodily injury and property damage.
- D. Professional liability or errors and omissions --\$1,000,000 combined single limit for errors and omissions resulting in monetary loss normally covered by professional liability insurance.

Certificates of the above insurance coverage shall be delivered, within ten (10) days, to the CITY by CONTRACTOR'S insurance carrier or agent certifying the above insurance coverage items are in effect and will not be cancelled or materially changed without 30 days' written notice given to the CITY. The commercial general liability policy shall be on an occurrence basis and shall include an endorsement naming the CITY as an additional insured and stating that coverage under such policy is primary over and non-contributory with any insurance the CITY may maintain.

13. Nondiscrimination

The CONTRACTOR agrees to take all steps necessary to comply with all federal, state, and City laws and policies regarding non-discrimination and equal employment opportunities. The CONTRACTOR shall not discriminate in any employment action because of race, religion, creed, color, national origin or ancestry, sex, gender identity, sexual orientation, age, marital status, familial status, veteran or military status, the presence of any sensory, mental or physical disability or the use of a trained dog guide or service animal by a disabled person. In the event of non-compliance by the CONTRACTOR with any of the non-discrimination provisions of this Contract, the CITY shall be deemed to have cause to terminate this Contract, in whole or in part.

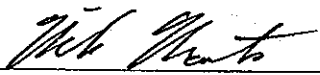
shall not affect any other provisions hereof and all other provisions shall remain fully enforceable. The provisions of this Contract, which by their sense and context are reasonably intended to survive the completion, expiration or cancellation of this Contract, shall survive termination of this Contract.

- F. Entire Agreement. This Contract and the attached Exhibits, as modified herein, contain the entire agreement between the parties as to the services to be rendered hereunder. All previous and contemporaneous agreements, representations or promises and conditions relating to the subject matter of this Contract are superseded hereby. The Parties hereto mutually acknowledge, understand and agree that the terms and conditions set forth herein shall control and prevail over any conflicting terms and conditions stated in any attachments hereto.
- G. Modification. No modification or amendment of this Agreement shall be effective unless set forth in writing and signed by the Parties.
- H. Authority to enter into this Contract. The undersigned Contractor representative, by his/her signature below, represents and warrants that he/she is duly authorized to execute this legally binding Contract for and on behalf of Contractor.

IN WITNESS WHEREOF the parties hereto have accepted and executed this Contract as of the day and year first written above.

CITY OF ~~TACOMA~~ ^{BURien}

David Evans and Associates, INC.



Mike Martin, City Manager

Authorized Representative

Print Name: Steven G. Shanafelt

Title: Managing Professional Engineer

Tax Id 930661195:

Attest:

Monica Lusk , City Clerk

Approved as to Form and Legality:


Assistant City Attorney

EXHIBIT A
(Scope of Work)

AGREEMENT FOR FORENSIC ENGINEERING SERVICES

CLIENT: City of Burien DATE: March 13, 2009

ADDRESS: 15811 Ambaum Blvd SW, Suite C
Burien, WA 98166
(206) 241-4647

The signing of this Authorization (Agreement) by CLIENT and David Evans and Associates, Inc. (DEA) authorizes DEA to carry out and complete the services as described below in consideration of the mutual covenants set forth below.

1. **PROJECT:** The services described below are to be provided by DEA in connection with a Project identified as Burien 1st Avenue South project

2. **SCOPE OF SERVICES:** DEA will perform the following services:

DEA will provide pre and post litigation services, as required by Burien, concerning contractor claims, cost mitigation and schedule analysis for the Burien 1st Avenue South project. Pre-litigation services will be forensic engineering of the project. Post-litigation services will include litigation preparation and expert witness services.

Initially, these services will include consulting with CLIENT about this matter and performing a document review of relevant project materials, including, but not limited to; plans, specifications, construction records, correspondence and e-mails between the project design team, construction management team, city staff, contractor, Seattle City Light and other utilities involved in the project. DEA will, in particular, review all documents that relate to the establishment of the Seattle City Light relationship with the City of Burien and the expected performance of the parties as it relates to the implementation of this project. DEA will also review existing schedules and develop a new schedule based upon the current circumstance. DEA will produce oral and/or written reports, as directed by Burien, that include a project timeline and "tell the project story" leading to contractor claims and Burien's potential for counter claims and /or other related cost mitigation.

DEA will at all time act as an agent of the CLIENT and as a consequence, the substance of all discussions as well as the product of the investigation including the documents that DEA reviews will not be shared with anyone outside of the "Legal Team". DEA will initially provide a verbal assessment of the findings. After presentation to the Legal Team DEA will formalize the investigation into a draft detailed report for Legal Team review.

3. **FEE FOR SERVICES:** DEA's fee for services identified above shall be as indicated below following the checked boxes:

- A retainer amount of \$_____, payable at the time this Authorization is executed: The retainer amount shall apply to the fees due under this Agreement at the completion of the services provided by DEA. Monthly payments shall be made in accordance with provision S-3 (Payments/Remedies for Nonpayment). Further, in the event anticipated monthly fees exceed the retainer amount, CLIENT agrees to increase the retainer amount to cover such increases if DEA should so request on any invoice.
- A fixed fee of \$_____.
- A fee amount based on the rates for personnel and expenses as indicated on the attachment FEE FOR SERVICES in an amount not to exceed \$80,000 including expenses. Any individual expense items incurred over \$500 to be pre-approved by the Client.
- Other: _____.

4. **ATTACHMENTS:** The following documents, as indicated by the checked boxes, are attached to this Agreement and are incorporated herein and by this reference made part hereof:

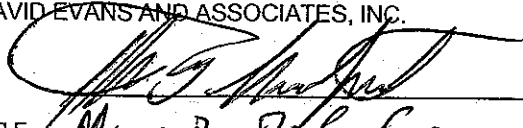
- STANDARD PROVISIONS FEE FOR SERVICES
- Attachment A – Scope of Services (continued) Other: _____

CLIENT and DEA acknowledge that they are in agreement with the terms and conditions as set forth in this Authorization.

ACCEPTED FOR CLIENT:
City of Burien

BY _____
TITLE _____
DATE _____

ACCEPTED FOR DEA:
DAVID EVANS AND ASSOCIATES, INC.

BY  _____
TITLE Managing Prof. Eng
DATE 3/18/09

ATTACHMENT B

FEE FOR PRE-LITIGATION and LITIGATION PREPARATION SERVICES

CLIENT agrees to pay DEA an amount for the time of all personnel engaged directly under this Agreement based on DEA's Rates for Personnel plus an amount for incurred expenses based on DEA's Rates for Expenses. These rates are subject to adjustment for expert witness services and on January 1 of each year. DEA will provide Client with thirty (30) days notice in the event of a rate change.

The Rates for DEA Personnel used as a basis for payment are as set forth below:

Principal Engineer	\$225.00 per hour
Managing Professional Engineer	\$186.00 per hour
Project Engineer	\$140.00 per hour
Technician	\$110.00 per hour
Office Administrator	\$100.00 per hour
Office/Clerical	\$70.00 per hour
Other Professional or Support Personnel	At commensurate rates

The Rates for Expenses used as a basis for payments are as set forth below:

A. OUTSIDE EXPENSES:

Outside expenses incurred under this agreement for which DEA must pay shall be charged at actual cost plus a markup of 10%. These expenses may include, but shall not be limited to, costs for transportation and subsistence incidental thereto; mapping, photographic or reproduction services; surveying and drafting supplies; equipment rental; fees for permits, filings, applications, bonds and special insurance coverages; long distance telephone charges; services provided by professional firms, outside consultants, and testing firms; postage and freight; etc.

The Rates for GCSI, construction claims sub-consultant, used as a basis for payment are as set forth below:

Construction Claims Consultant	\$175.00 per hour
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All rates for personnel and rates for expenses are subject to an amount not to exceed \$80,000, for pre-litigation services. Any individual expense items incurred over \$500 are subject to be pre-approved by CLIENT

EXHIBIT B

Billing Voucher

To: City of Burien
15811 Ambaum Blvd SW, Suite C
Burien, Washington 98166
Phone: (206) 241-4647
FAX: (206) 248-5539

Attorney: _____ Telephone: _____

Mailing Address: _____

Specific Program: _____

Contract period: _____ Reporting Period: _____

Amount requested this invoice: \$ _____

Invoice Number: _____ Date of Invoice _____

Authorized signature

BUDGET SUMMARY:

Total contract amount	\$ _____
Previous payments	\$ _____
Current request	\$ _____
Total requested this contract to date	\$ _____
Balance remaining	\$ _____

Note: If applicable, submit a separate voucher for each program which is funded by your City of Burien contract.

For Department Use Only

Approved for Payment:

Date: _____