

CITY OF MARYSVILLE AGENDA BILL

EXECUTIVE SUMMARY FOR ACTION

CITY COUNCIL MEETING DATE: 12/9/13

AGENDA ITEM: Professional Services Agreement between City of Marysville and Feldman & Lee, P.S.	
PREPARED BY: Gloria Hirashima, Chief Administrative Officer	DIRECTOR APPROVAL:
DEPARTMENT: Executive	
ATTACHMENTS: Proposed Agreement for Public Defense Service	
BUDGET CODE:	AMOUNT:

SUMMARY:

The proposed agreement establishes a professional services agreement between the City and Feldman & Lee, P.S. for public defender services for all indigent criminal defendants charged under the city of Marysville Municipal Court who qualify for appointed counsel. Feldman & Lee have related matters. Marysville has utilized the services of Feldman & Lee, P.S. since 2010. The firm is contracted to provide qualified personnel and facilities necessary for the work and services identified within the contract. The work must be performed City's specifications, guidelines and/or rules specified by the State Office of Public Defense, and/or the Washington State Supreme Court.

The contract provides for a three year term, through December 31, 2016. Section 3.16 provides for a reopener at such time that caseload limits are implemented by the Washington State Supreme Court. The caseload limits standards implementation has been delayed until January 1, 2015, pending a statewide attorney time study and development of a model misdemeanor case weighting policy that is consistent with the indigent defense standards adopted by the Supreme Court.

The proposed fee is \$20,000 per month. This is consistent with the contract extension approved in July, 2013 by the Council, which expires on December 31, 2013.

RECOMMENDED ACTION:
Staff recommends that City Council approve the public defense service agreement with Feldman & Lee, P.S.

CITY OF MARYSVILLE
CONTRACT FOR PUBLIC DEFENSE SERVICE

1. PARTIES.

This Professional Services Agreement, ("Agreement"), is entered into as of the Effective Date specified below (§ 3.3) between the City of Marysville, a Washington municipal corporation having its principal place of business at 1049 State Avenue, Marysville, Washington 98270 ("City"), and Feldman & Lee, P.S., a corporation organized under the laws of the State of Washington, located and doing business at 19303 44th Avenue, West, Lynnwood, WA 98036, hereafter ("The Attorney").

2. RECITALS.

2.1 City desires to obtain professional services for work related to public defender services for all indigent criminal defendants charged under ordinances of the City of Marysville Municipal Court who qualify for appointed counsel.

2.2 The Attorney represents that it is available and able to provide sufficient qualified personnel and facilities necessary for the work and services contemplated herein, and can accomplish the work and services for the required time period and in accordance with City's specifications, professional standards and in accordance with standards, guidelines and/or rules as established by the State Office of Public Defense and/or the Washington State Supreme Court.

2.3 The Attorney agrees to perform the work and services specified herein in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual benefits and promises set forth herein, it is agreed by and between the parties as follows:

3. TERMS AND CONDITIONS.

3.1 Services, Scope of Work, Performance Criteria.

City hereby retains the Attorney, and the Attorney agrees to perform the following work and services in accordance with this Agreement. An important objective of this Agreement is to achieve compliance with the Standards established by the State Supreme Court for representation of indigent defendants as they now read or are hereafter are amended or supplemented.

3.1.1 Determination of indigence for eligibility for appointed counsel under this Contract shall be determined by the Court. The Court or persons directed by the Court shall be responsible for handling the screening process. Should the Attorney determine a defendant is not eligible for assigned counsel; the Attorney shall withdraw from the case and so advise the Court and the City of the withdrawal and the reason therefore.

3.1.2 The Attorney shall provide to the City Police Department the telephone number or numbers at which an attorney may be reached for "critical stage" advice to defendants during the course of police investigations and/or arrest twenty-four (24) hours each day.

3.1.3 Consistent with Standards for Indigent Defense as adopted by the State Supreme Court as they now read or are hereafter amended or supplemented, Defendant shall have reasonable access to the Attorney assigned to him/her. Qualifying criminal defendants shall be provided local telephone access to the Attorney. The Attorney will maintain office space within the City of Marysville and make such office open and available at times necessary to meet with defendants. Individuals in custody in the State of Washington shall be provided access by calling the Attorney collect or through a process established at the Marysville Jail. If the Attorney is appointed to represent an incarcerated defendant who remains in custody prior to trial, the Attorney agrees to conduct interview with such defendant either in person or by phone, as deemed necessary by the Attorney.

3.1.4 David Lee shall be the "lead attorney" assigned to appear in court, manage, supervise and otherwise provide the services under this contract. A different "lead attorney" shall not be assigned to this contract except by mutual agreement.

3.1.5 In addition to David Lee, the Attorney shall provide a minimum of two (2) full time equivalent (fte) attorneys to assist in providing public defender services to indigent defendants in City of Marysville cases filed in Marysville Municipal Court. Attorneys must be licensed to practice law in the State of Washington.

3.1.6 Even though the Attorney is an independent contractor with the authority to control and direct the performance and details of the Services, the Services must meet the approval of City and shall be subject to City's general right of inspection and supervision to secure the satisfactory completion of this Agreement.

3.1.7 The Attorney represents that it has or will obtain all personnel necessary to perform the required Services and that such personnel shall be qualified, experienced, and licensed as may be necessary or required by applicable laws and regulations to perform the Services. All Services shall be performed by the Attorney, its employees, or by Attorney's representatives who meet or exceed the minimum experience requirements set forth in 3.1.5. The Attorney shall ensure that all contractual duties, requirements and obligations that the Attorney owes to City shall also be owed to City by Attorney's employees and representatives retained to perform the Services.

3.1.8 The Attorney shall be responsible for the professional quality, technical adequacy, accuracy, timely completion, and coordination of the Services pursuant to this Agreement. The Attorney shall perform the Services so that the Services conform to the highest professional standards. The Attorney shall be responsible for the professional standards, performance, and actions of all persons and firms performing the Services.

3.1.9 The Attorney shall represent, through trial, sentencing, post-sentence review and any appeals up to and including the Superior Court, indigent criminal defendants charged under ordinances of the City of Marysville and State of Washington who the City or Court shall

qualify for indigent defense representation. Services also include appearance at the Marysville Municipal Court and/or jail for all criminal case calendars, unless excused by the Court.

3.1.10 The Attorney will provide criminal defense services and shall attend all hearings and trials involving defendants on whose behalf the Public Defender has been appointed, and will be available to talk with or meet, in person with indigent defendants, at the Public Defender's office and/or the Marysville Municipal Court and jail facilities.

3.1.11 The Attorney will be available to appear in Court/Jail before such individual has been in custody for 24 hours.

3.1.12 The Attorney may withdraw upon completion of the case as allowed by the Rules of Professional Conduct.

3.1.13 The Attorney shall provide to the City Police Department the telephone number or numbers at which an attorney may be reached for "critical stage" advice to defendants during the course of police investigations and/or arrest twenty-four (24) hours each day.

3.1.14 The Attorney shall file quarterly reports with the City to include each client who has been appointed to the Public Defender, the charges, cause number and disposition, bench or jury trial and whether an appeal was filed. The report is due to the City Chief Administrative Officer on or before the thirteenth day after the end of each quarter as to clients represented in the previous quarter.

3.1.15 All attorneys providing services under this contract shall be licensed to practice law before the courts of record for the State of Washington. The Attorney must immediately report to the City any change affecting the maintenance of membership in good standing of the Washington State Bar Association. No legal intern shall be used for this contract unless agreed to in advance by the City.

3.1.16 The Attorney shall serve as attorney for the day at arraignment or probation hearings

3.1.17 Public defender will review all cases prior to scheduled court date and work with City Prosecutor for possible resolution.

3.1.18 Public defender will arrive at least 15 minutes prior to the start of all scheduled calendars.

3.2 **Payment.**

City hereby retains the Attorney, and the Attorney agrees to the terms of this Agreement and in consideration the City agrees to pay attorney as follows:

3.2.1 Except as otherwise provided herein, City shall pay the Attorney for Services rendered under this Contract the sum of \$20,000 per month for all services set forth in this contract.

3.2.2 The fee set forth in 3.2.1 shall include those matters identified in Section 3.1 above. The fee set forth in 3.2.1 above shall also include services for each stage of appeal in the event

of an appeal from a final order of the Marysville Municipal Court to the Snohomish County Superior court.

3.2.3 In addition to the payments referenced in 3.2.1 above, the City shall pay the Attorney for documented special reasonable and necessary costs approved by the Court associated with defense of cases requiring unique services such as an investigator, polygraph or handwriting specialist, etc.

3.2.4 The Attorney shall submit monthly invoices (but not more frequently than monthly) to City upon completion of the Services under the terms of payments as described in this contract. City shall pay the Attorney within forty-five (45) days of the receipt of a correct invoice in accordance with City's usual payment procedures. If City objects to all or any portion of any invoice, it shall so notify the Attorney within twenty (20) days from the date of receipt but shall pay the undisputed portion of the invoice. The parties shall immediately make every effort to settle the disputed portion of any invoice.

3.2.5 Acceptance of any payment by the Attorney shall constitute a release of all payment claims against City arising under this Agreement as to such portion of the Services. No payment to the Attorney, whether periodic or final, shall constitute a waiver or release by City of any claim, right or remedy it may have against the Attorney regarding performance of the Services as required by this Agreement.

3.3 **Time of Performance.**

Unless terminated earlier pursuant to Section 3.7 or 3.17 below, the Attorney agrees that the Services shall be provided from January 1, 2014 at 12:01 a.m. through December 31, 2016 at 12:00 p.m.

3.4 **Relationship of Parties.**

The Attorney is an independent contractor under this Agreement, and the parties intend that an independent contractor-client relationship is the only City of Marysville relationship created by this Agreement. No employee, agent, representative or by Attorney's representatives of Attorney shall be or shall be deemed to be the employee, agent representative or sub consultants of City. Attorney has no authority, and will not represent itself to have authority, to legally bind City or otherwise act for, or on City's behalf. None of the compensation or other benefits provided by City to its employees shall be available to the Attorney's employees, agents, representatives or by Attorney's representatives. The Attorney shall be solely responsible for all compensation, taxes, withholding, and other benefits due to its employees, agents, representatives, subcontractors and by Attorney's representatives. The Attorney shall be solely responsible for its acts and omissions and for the acts and omissions of The Attorney's agents, employees, representatives, subcontractors and by Attorney's representatives during performance of this Agreement. On or before the Effective Date, the Attorney shall file, maintain and/or open all necessary records with the Internal Revenue Service and the State of Washington, and as may be required by RCW 51.08.195, to establish the Attorney's status as an independent contractor.

3.5 **Services Performed at the Attorney's Risk.**

The Attorney shall take all precautions reasonably necessary to perform the Services and shall be responsible for the safety of its employees, agents and his representatives in the performance of the Services.

3.6 **Termination of Agreement.**

3.6.1 **Termination by City for the Attorney's Default.**

City may terminate this Agreement, in whole or in part and at any time, in writing if the Attorney substantially fails to fulfill any or all of its material obligations through no fault of City. If City terminates all or part of this Agreement for default, City shall determine the amount of Services satisfactorily performed to the date of termination and the amount owing to the Attorney using the criteria set forth below; provided that

A. No amount shall be allowed for anticipated profit on unperformed Services or other work, and

B. Any payment due to the Attorney at the time of termination may be adjusted to the extent of any additional costs City incurs or will incur because of the Attorney's default. In such event, City shall consider the actual costs incurred by the Attorney in performing the Services to the date of termination, the amount of Services originally required which was satisfactorily completed to the date of termination, whether the Services or deliverables were in a form or of a type which is usable and suitable to City at the date of termination, the cost to City of either completing the Services itself or employing another firm to complete the Services in addition to the inconvenience and time which may be required to do so, and other factors which affect the value to City of the Services performed to the date of termination. Under no circumstances shall payments made under this provision exceed the Schedule of Charges. This provision shall not preclude City from filing claims and/or commencing litigation to secure compensation for damages incurred beyond that covered by withheld payments.

3.6.2 **Termination by City for Convenience.**

City may terminate this Agreement, in whole or in part and at any time with 90 days notice for the convenience of City. City shall terminate by delivery to the Attorney a notice of termination specifying the extent of the termination and the effective date of termination. If City terminates this Agreement for convenience, City shall pay the Attorney the amount otherwise due in accordance with this Agreement for Services satisfactorily performed to the date of termination.

3.6.3 **Termination by the Attorney.**

The Attorney may terminate this Agreement in the case of a material breach and upon failure of City to remedy said breach within twenty (20) days of written notice by the Attorney of such breach. The Attorney may also terminate the Agreement if key personnel and/or facilities are lost due to an act of God or other catastrophe creating a situation under which The Attorney is physically unable to perform. The Attorney's notice of termination shall be in writing.

3.7 **Discrimination.**

When hiring of employees to perform Services, the Attorney, its representatives, or any person acting on behalf of the Attorney or his representatives shall not, by reason of race, religion, color, age, sex, national origin or the presence of any sensory, mental or physical handicap, veteran status, or sexual orientation, discriminate against any person who is qualified and available to perform the Services to which the employment relates.

3.8 **“Indemnity Obligations” - Indemnification and Compliance with Law.**

3.8.1 The indemnification and defense obligations specified in this Section 3.9 ("Indemnity Obligations") have been mutually negotiated and shall survive the expiration, abandonment, or termination of this Agreement. The Indemnity Obligations shall extend to claims that are not reduced to a suit and to any claims that may be compromised prior to the culmination of any litigation or the institution of any litigation. Inspection, acceptance or payment by City of or for any Services performed by the Attorney shall not be grounds for avoidance of any Indemnity Obligations.

3.8.2 To the maximum extent permitted by law, the Attorney, for itself, its employees, subcontractors, assignees and agents (collectively "The Attorney" for purposes of this Section 3.9), agrees to indemnify and hold harmless City and its elected and appointed officers, employees and agents (collectively "City" for purposes of this Section 3.9) from and against any and all suits, claims, actions, losses, costs, attorney fees and expenses, liabilities, penalties, judgments, settlements, and damages of whatsoever kind or nature (collectively "Claims") arising out of, in connection with, or incident to the Attorney's errors, acts or omissions occurring in the performance of the Services and the Attorney's obligations under this Agreement, except and to the extent judicially determined to have been caused by the sole negligence of City. The Attorney's Indemnity Obligations include the obligation to

- A. Satisfy any judgment or other final decision of a court or other tribunal,
- B. Pay any reasonable settlement negotiated by City with respect to the Claims, and
- C. Pay all Claims against City by an employee or former employee of the Attorney or its Attorneys.

3.8.3 The Attorney further agrees to waive, and that this indemnification constitutes the Attorney's waiver of, immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification, and that this waiver has been mutually negotiated.

3.8.4 The Attorney further agrees to defend all Claims against City which, if proven, could result in liability to City for loss or damage caused by all such errors, acts, or omissions of The Attorney. The Attorney's obligation to defend shall include prompt payment of all reasonable attorney fees, costs and expenses incurred in the defense of such claims, including those incurred by City.

3.8.5 The Attorney shall comply, and shall ensure its attorneys, assignees and subcontractors comply, with the terms of this Agreement and with all applicable city, state or federal laws, rules or regulations.

3.9 **Insurance.**

Unless otherwise stated herein, the following Insurance requirements shall apply.

3.9.1 Insurance.

The Attorney shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Attorney, its agents, representatives, or employees.

3.9.2 No Limitation.

The Attorney's maintenance of insurance as required by the agreement shall not be construed to limit the liability of the Attorney to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity.

3.9.3 Minimum Scope of Insurance.

The Attorney shall obtain insurance of the types described below:

A. **Commercial General Liability insurance** shall be written on ISO occurrence form CG 00 Oland shall cover liability arising from premises, operations, independent contractors and personal injury and advertising injury. The City shall be named as an insured under the Attorney's Commercial General Liability insurance policy with respect to the work performed for the City.

B. **Workers' Compensation** coverage as required by the Industrial Insurance laws of the State of Washington.

C. **Professional Liability Proof of Professional Liability Insurance.** The Attorney shall indemnify and hold the City, its elected officials, officers and employees harmless from any and all claims, losses or liability, including attorney's fees, whatsoever arising out of the Attorney's performance of obligations pursuant to this Contract, including claims arising by reason of accident, injury or death caused to persons or property of any kind occurring by the fault or neglect of the Attorney, his agents, associates or employees, or occurring without the fault or neglect of the city. With respect to the performance of this agreement and as to claims against the City, its officers, agents and employees, the Attorney expressly waives its immunity under Title 51 of the Revised Code of Washington, the Industrial Insurance Act, for injuries to its employees and agrees that the obligation to indemnify, defend and hold harmless provided for in this paragraph extends to any claim brought by or on behalf of any employee of the Attorney. This waiver is mutually negotiated by the parties. This paragraph shall not apply to any damage resulting from the sole negligence of the City, its agents, and employees. To the extent of any of the damages referred by this paragraph were caused by or resulted from the concurrent negligence of the City, its agents, and employees, this obligation to indemnify, defend and hold harmless is valid and enforceable only to the extent of negligence of the Attorney, its officers, agents , employees, subcontractors and assignees.

3.9.4 Minimum Amounts of Insurance.

The Attorney shall maintain the following insurance limits:

A. **Commercial General Liability insurance** shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate.

B. **Professional Liability insurance** shall be written with limits no less than \$1,000,000 per claim and \$2,000,000 policy aggregate limit.

3.9.5 Other Insurance Provisions.

The insurance policies are to contain, or be endorsed to contain, the following provisions for Automobile Liability, Professional Liability and Commercial General Liability insurance:

A. The Attorney's insurance coverage shall be primary insurance as respect the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of the Attorney's insurance and shall not contribute with it.

B. The Attorney's insurance shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.

3.9.6 Acceptability of Insurers.

Insurance is to be placed with insurers with a current A.M. Best rating of not less than A:VII.

3.9.7 Verification of Coverage.

The Attorney shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of the Attorney before commencement of the work.

3.10 **Disputes and Remedies.**

3.10.1 Choice of Law; Venue.

This Agreement shall be interpreted in accordance with the laws of the State of Washington. The Superior Court of Snohomish County, Washington, shall have exclusive jurisdiction and venue over any legal action arising under this Agreement.

3.10.2 Dispute Resolution.

All claims, counterclaims, disputes, and other matters in question between City and the Attorney arising out of or relating to this Agreement shall be referred to the City (CAO) or a designee for determination, together with all pertinent facts, data, contentions, and so forth. The City Mayor or Chief Administrative Officer (CAO) shall consult with the Attorney's representative and make a determination within thirty (30) calendar days of such referral. Should the claims, counterclaims, or disputes not be resolved by the City (CAO)'s decision, the parties shall refer the matter to professional mediation in Snohomish County, Washington, which shall be conducted within thirty (30) calendar days of the City (CAO)'s decision. The cost of mediation shall be shared equally. No civil action on any claim, counterclaim, or dispute may be commenced until thirty (30) days following such mediation. In the event of litigation between the Attorney and City to enforce the rights under this Agreement, reasonable attorney fees and expenses shall be allowed to the prevailing party.

3.11. **Remedies.**

City's rights and remedies in this Agreement are in addition to all other rights and remedies provided by law. City may exercise such rights and remedies in any order and at any time as it determines necessary or appropriate.

3.12 **Notice.**

All communications regarding this Agreement shall be sent to the parties at the addresses listed below, or at such other address as given pursuant to this Section, and shall be effective on the next business day if sent by registered or certified mail or deposited with an overnight delivery service.

CITY OF MARYSVILLE
Attention: Chief Administrative Officer
1049 State Avenue
Marysville, WA 98270

ATTORNEY
James A. Feldman
19303 44th Avenue, West
Lynnwood, WA 98036

3.13 **Entire Agreement.**

The written terms and provisions of this Agreement, together with all referenced Exhibits, which are incorporated herein by this reference, supersede all prior verbal statements of any officer or other representative of the City, and such statements shall not be effective or be construed as entering into or forming a part of, or altering in any manner whatsoever, this Agreement. The entire agreement between the parties with respect to the subject matter hereunder is contained in this Agreement and the referenced Exhibits.

3.14 **Priority of Documents.**

In the event that the language and provisions of this Agreement are contrary to or conflict with any language or provisions set forth in any exhibit to this Agreement, the language and provisions of this Agreement shall control, and the contrary or conflicting language or provisions of the Exhibit(s) shall be disregarded and shall be considered void.

3.15 **Modification.**

No waiver, alteration, or modification of any of the provisions of this Agreement shall be binding unless in writing and signed by a duly authorized representative of City and the Attorney.

3.16 **Reopen Upon Implementation of Caseload Limits Under Standard 3.4.**

Pursuant to Order No. 25700-A-1016 of the State Supreme Court, implementation of caseload limits set forth in Standard 3.4 of the Standards for Indigent Defense have been delayed until January 1, 2015. The Washington State Office of Public Defense has been directed to conduct a "statewide attorney time study" and develop a model misdemeanor case weighting policy that is consistent with the indigent defense standards adopted by the Court. At such time as caseload limits have been implemented, the provisions of this contract which are impacted by such implementation may be re-opened by either party for renegotiation. In the event revisions to this contract cannot be agreed to within ninety (90) days of the effective date of caseload limits under Standard 3.4, and notwithstanding the provisions of Section 3.7 above, either party may terminate this contract for convenience by giving not less than ninety (90) days written notice.

