


CITY OF MARYSVILLE

EXECUTIVE SUMMARY FOR ACTION

CITY COUNCIL MEETING DATE: April 28, 2014

AGENDA ITEM: Professional Services Agreement between City of Marysville and River Oaks Communications Corporation for Cable Consultant Services	AGENDA SECTION:	
PREPARED BY: Doug Buell, Community Information Officer DEPARTMENT: Executive	AGENDA NUMBER:	
ATTACHMENTS: 1. Professional Services Agreement 2. Exhibit A – Scope of Work/	APPROVED BY: 	
	MAYOR	CAO
BUDGET CODE: 00100110.541000	AMOUNT: \$66,250	

Summary:

The City of Marysville has existing, non-exclusive television cable franchise agreements that expire in October 2014 with Comcast of California/Colorado/Texas/Washington, Inc. and Comcast of Washington IV, Inc., and WaveDivision I, LLC.

The consultant will be expected to:

1. Provide technical review of existing cable systems to determine compliance with the franchise agreements, applicable codes and best practices, assess system repair and capacity.
2. Provide guidance in surveying the community regarding the services provided by Comcast and Wave Broadband, compliance with the franchise agreements, and identification of current and future community needs.
3. Provide expertise and assistance to the City in preparation for and throughout franchise renewal negotiations including financial analysis, legal review and drafting of the franchise agreements and/or ordinances.

RECOMMENDED ACTION:

Approve proposed professional services agreement.

COUNCIL ACTION:

**PROFESSIONAL SERVICES AGREEMENT BETWEEN
CITY OF MARYSVILLE
AND RIVER OAKS COMMUNICATIONS CORPORATION
FOR CABLE TV FRANCHISE CONSULTANT SERVICES**

THIS AGREEMENT (“Agreement”) is made and entered into by and between the City of Marysville, a Washington State municipal corporation (“City”), and River Oaks Communications Corporation, a Colorado corporation hereinafter referred to as (“Consultant”).

NOW, THEREFORE, in consideration of the terms, conditions, covenants and performances contained herein, the parties hereto agree as follows:

ARTICLE I. PURPOSE

The purpose of this Agreement is to provide the City with consultant services as described in Article II regarding renewal of non-exclusive television cable franchise agreements with Comcast of California/Colorado/Texas/Washington, Inc. and Comcast of Washington IV, Inc., and WaveDivision I, LLC, which expire in October 2014. The general terms and conditions of the relationship between the City and the Consultant are specified in this Agreement.

ARTICLE II. SCOPE OF SERVICES

The Scope of Services is attached hereto as **Exhibit “A”** and incorporated herein by this reference (“Scope of Services”). All services and materials necessary to accomplish the tasks outlined in the Scope of Services shall be provided by the Consultant unless noted otherwise in the Scope of Services or this Agreement. All such services shall be provided in accordance with the standards of the Consultant’s profession.

ARTICLE III. OBLIGATIONS OF THE CONSULTANT

III.1 MINOR CHANGES IN SCOPE. The Consultant shall accept minor changes, amendments, or revision in the detail of the Scope of Services as may be required by the City when such changes will not have any impact on the service costs or proposed delivery schedule. Extra work, if any, involving substantial changes and/or changes in cost or schedules will be addressed as follows:

Extra Work. The City may desire to have the Consultant perform work or render services in connection with each project in addition to or other than work provided for by the expressed intent of the Scope of Services in the scope of services. Such work will be considered as extra work and will be specified in a written supplement to the scope of services, to be signed by both parties, which will set forth the nature and the scope thereof. All proposals for extra work or services shall be prepared by the Consultant at no cost to the City. Work under a supplemental agreement shall not proceed until executed in writing by the parties.

III.2 WORK PRODUCT AND DOCUMENTS. The work product and all documents produced under this Agreement shall be furnished by the Consultant to the City, and upon completion of the work shall become the property of the City, except that the Consultant may retain one copy of the work product and documents for its records. The Consultant will be responsible for the accuracy of the work, even though the work has been accepted by the City.

In the event that the Consultant shall default on this Agreement or in the event that this Agreement shall be terminated prior to its completion as herein provided, all work product of the Consultant, along with a summary of work as of the date of default or termination, shall become the property of the City. Upon request, the Consultant shall tender the work product and summary to the City. Tender of said work product shall be a prerequisite to final payment under this Agreement. The summary of work done shall be prepared at no additional cost to the City.

Consultant will not be held liable for reuse of documents produced under this Agreement or modifications thereof for any purpose other than those authorized under this Agreement without the written authorization of Consultant.

III.3 TERM. The term of this Agreement shall commence on May 1, and shall terminate at midnight, July 10. The parties may extend the term of this Agreement by written mutual agreement.

III.4 NONASSIGNABLE. The services to be provided by the Consultant shall not be assigned or subcontracted without the express written consent of the City.

III.5 EMPLOYMENT. Any and all employees of the Consultant, while engaged in the performance of any work or services required by the Consultant under this Agreement, shall be considered employees of the Consultant only and not of the City, and any and all claims that may or might arise under the Workman's Compensation Act on behalf of any said employees while so engaged, and any and all claims made by any third party as a consequence of any negligent act or omission on the part of the Consultant or its employees while so engaged in any of the work or services provided herein shall be the sole obligation of the Consultant.

III.6 INDEMNITY. Indemnification/Hold Harmless Consultant shall defend, indemnify and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or resulting from the acts, errors or omissions of the Consultant in performance of this Agreement, except for injuries and damages caused by the sole negligence of the City. Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Consultant and the City, its officers, officials, employees, and volunteers, the Consultant's liability, including the duty and cost to defend, hereunder shall be only to the extent of the Consultant's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Consultant's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the

purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

III.7 INSURANCE.

a. **Minimum Limits of Insurance.** The Consultant 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 and services hereunder by the Consultant, its agents, representatives, employees or subcontractors. The Consultant shall, before commencing work under this agreement, file with the City certificates of insurance coverage and the policy endorsement to be kept in force continuously during this Agreement, in a form acceptable to the City. Said certificates and policy endorsement shall name the City, its officers, elected officials, agents and/or employees as an additional named insured with respect to all coverages except professional liability insurance and workers' compensation. The minimum insurance requirements shall be as follows:

(1) Comprehensive General Liability. \$1,000,000 combined single limit per occurrence for bodily injury personal injury and property damage; \$2,000,000 general aggregate.

(2) Automobile Liability. \$300,000 combined single limit per accident for bodily injury and property damage.

(3) Workers' Compensation. Workers' compensation limits as required by the Workers' Compensation Act of Washington.

(4) Consultant's Errors and Omissions Liability. \$1,000,000 per occurrence and as an annual aggregate.

b. **Notice of Cancellation.** In the event that the Consultant receives notice (written, electronic or otherwise) that any of the above required insurance coverage is being cancelled and/or terminated, the Consultant shall immediately (within forty-eight (48) hours) provide written notification of such cancellation/termination to the City.

c. **Acceptability of Insurers.** Insurance to be provided by Consultant shall be with a Bests rating of no less than A:VII, or if not rated by Bests, with minimum surpluses the equivalent of Bests' VII rating.

d. **Verification of Coverage.** In signing this agreement, the Consultant is acknowledging and representing that required insurance is active and current. Further, throughout the term of this Agreement, the Consultant shall provide the City with proof of insurance upon request by the City.

e. **Insurance shall be Primary.** The Consultant'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 Consultant's insurance and shall not contribute with it.

f. **No Limitation.** Consultant's maintenance of insurance as required by this Agreement shall not be construed to limit the liability of the Consultant to the coverage provided by such insurance or otherwise limit the recourse to any remedy available at law or in equity.

g. **Claims-made Basis.** Unless approved by the City all insurance policies shall be written on an "Occurrence" policy as opposed to a "Claims-made" policy. The City may require an extended reporting endorsement on any approved "Claims-made" policy.

III.8 DISCRIMINATION PROHIBITED AND COMPLIANCE WITH EQUAL OPPORTUNITY LEGISLATION. The Consultant agrees to comply with equal opportunity employment and not to discriminate against client, employee, or applicant for employment or for services because of race, creed, color, religion, national origin, marital status, sex, sexual orientation, age or handicap except for a bona fide occupational qualification with regard, but not limited to, the following: employment upgrading; demotion or transfer; recruitment or any recruitment advertising; layoff or terminations; rates of pay or other forms of compensation; selection for training, rendition of services. The Consultant further agrees to maintain (as appropriate) notices, posted in conspicuous places, setting forth the provisions of this nondiscrimination clause. The Consultant understands and agrees that if it violates this nondiscrimination provision, this Agreement may be terminated by the City, and further that the Consultant will be barred from performing any services for the City now or in the future, unless a showing is made satisfactory to the City that discriminatory practices have been terminated and that recurrence of such action is unlikely.

III.9 UNFAIR EMPLOYMENT PRACTICES. During the performance of this Agreement, the Consultant agrees to comply with RCW 49.60.180, prohibiting unfair employment practices.

III.10 LEGAL RELATIONS. The Consultant shall comply with all federal, state and local laws and ordinances applicable to work to be done under this Agreement. The Consultant represents that the firm and all employees assigned to work on any City project are in full compliance with the statutes of the State of Washington governing activities to be performed and that all personnel to be assigned to the work required under this Agreement are fully qualified and properly licensed to perform the work to which they will be assigned. This Agreement shall be interpreted and construed in accordance with the laws of Washington. Venue for any litigation commenced relating to this Agreement shall be in Snohomish County Superior Court.

III.11 INDEPENDENT CONTRACTOR.

a. The Consultant and the City understand and expressly agree that the Consultant is an independent contractor in the performance of each and every part of this Agreement. The Consultant expressly represents, warrants and agrees that his status as an independent contractor in the performance of the work and services required under this Agreement is consistent with and meets the six-part independent contractor test set forth in RCW 51.08.195 or as hereafter amended. The Consultant, as an independent contractor, assumes the entire responsibility for carrying out and accomplishing the services required under this Agreement. The Consultant shall make no claim of City employment nor shall claim any related employment benefits, social security, and/or retirement benefits.

b. The Consultant shall be solely responsible for paying all taxes, deductions, and assessments, including but not limited to federal income tax, FICA, social security tax, assessments for unemployment and industrial injury, and other deductions from income which may be required by law or assessed against either party as a result of this Agreement. In the event the City is assessed a tax or assessment as a result of this Agreement, the Consultant shall pay the same before it becomes due.

c. The City may, during the term of this Agreement, engage other independent contractors to perform the same or similar work that the Consultant performs hereunder.

d. Prior to commencement of work, the Consultant shall obtain a business license from the City.

III.12 CONFLICTS OF INTEREST. The Consultant agrees to and shall notify the City of any potential conflicts of interest in Consultant's client base and shall obtain written permission from the City prior to providing services to third parties where a conflict or potential conflict of interest is apparent. If the City determines in its sole discretion that a conflict is irreconcilable, the City reserves the right to terminate this Agreement.

III.13 CITY CONFIDENCES. The Consultant agrees to and will keep in strict confidence, and will not disclose, communicate or advertise to third parties without specific prior written consent from the City in each instance, the confidences of the City or any information regarding the City or services provided to the City.

III.14 SUBCONTRACTORS/SUBCONSULTANTS.

a. The Consultant shall is responsible for all work performed by subcontractors/subconsultants pursuant to the terms of this Agreement.

b. The Consultant must verify that any subcontractors/subconsultants they directly hire meet the responsibility criteria for the project. Verification that a subcontractor/subconsultant has proper license and bonding, if required by statute, must be included in the verification process. The Consultant may use the following Subcontractor/Subconsultant as set forth in Exhibit A:

CBG Communications, Inc.
1597 Race Street
St. Paul, MN 55102

c. The Consultant may not substitute or add subcontractors/subconsultants without the written approval of the City.

d. All Subcontractors/Subconsultants shall have the same insurance coverages and limits as set forth in this Agreement and the Consultant shall provide verification of said insurance coverage.

ARTICLE IV. OBLIGATIONS OF THE CITY

IV.1 PAYMENTS.

a. The Consultant shall be paid by the City for services rendered under this Agreement as described in the Scope of Services and as provided in this section. In no event shall the compensation paid to Consultant under this Agreement exceed \$66,250 without the written agreement of the Consultant and the City. Such payment shall be full compensation for work performed and services rendered and for all labor, materials, supplies, equipment and incidentals necessary to complete the work. In the event the City elects to expand the scope of services from that set forth in Exhibit A, the City shall pay Consultant a mutually agreed amount.

b. The Consultant shall submit a monthly invoice to the City for services performed in the previous calendar month in a format acceptable to the Cities. The Consultant shall maintain time and expense records and provide them to the Cities upon request.

c. The City will pay timely submitted and approved invoices received before the 20th of each month within thirty (30) days of receipt.

IV.2 CITY APPROVAL. Notwithstanding the Consultant's status as an independent contractor, results of the work performed pursuant to this Agreement must meet the approval of the City, which shall not be unreasonably withheld if work has been completed in compliance with the Scope of Services and City requirements.

IV.3 MAINTENANCE/INSPECTION OF RECORDS. The Consultant shall maintain all books, records, documents and other evidence pertaining to the costs and expenses allowable under this Agreement in accordance with generally accepted accounting practices. All

such books and records required to be maintained by this Agreement shall be subject to inspection and audit by representatives of the City and/or the Washington State Auditor at all reasonable times, and the Consultant shall afford the proper facilities for such inspection and audit. Representatives of the City and/or the Washington State Auditor may copy such books, accounts and records where necessary to conduct or document an audit. The Consultant shall preserve and make available all such books of account and records for a period of three (3) years after final payment under this Agreement. In the event that any audit or inspection identifies any discrepancy in such financial records, the Consultant shall provide the City with appropriate clarification and/or financial adjustments within thirty (30) calendar days of notification of the discrepancy.

ARTICLE V. GENERAL

V.1 **NOTICES.** Notices to the City shall be sent to the following address:

c/o Douglas Buell, Public Information Officer
1049 State Ave.
Marysville, WA 98270

Notices to the Consultant shall be sent to the following address:

Robert M. Duchon, Vice President
River Oaks Communications Corporation
6860 South Yosemite Court, Suite 2000
Centennial , CO 80112

Receipt of any notice shall be deemed effective three (3) days after deposit of written notice in the U.S. mail with proper postage and address.

V.2 **TERMINATION.** The right is reserved by the City to terminate this Agreement in whole or in part at any time upon ten (10) calendar days' written notice to the Consultant.

If this Agreement is terminated in its entirety by the City for its convenience, the City shall pay the Consultant for satisfactory services performed through the date of termination in accordance with payment provisions of Section VI.1.

V.3 **DISPUTES.** The parties agree that, following reasonable attempts at negotiation and compromise, any unresolved dispute arising under this Agreement may be resolved by a mutually agreed-upon alternative dispute resolution of arbitration or mediation.

V.4 **EXTENT OF AGREEMENT/MODIFICATION.** This Agreement, together with attachments or addenda, represents the entire and integrated Agreement between the parties and supersedes all prior negotiations, representations, or agreements, either written or oral. This Agreement may be amended, modified or added to only by written instrument properly signed by both parties.

V.5 SEVERABILITY

a. If a court of competent jurisdiction holds any part, term or provision of this Agreement to be illegal or invalid, in whole or in part, the validity of the remaining provisions shall not be affected, and the parties' rights and obligations shall be construed and enforced as if the Agreement did not contain the particular provision held to be invalid.

b. If any provision of this Agreement is in direct conflict with any statutory provision of the State of Washington, that provision which may conflict shall be deemed inoperative and null and void insofar as it may conflict, and shall be deemed modified to conform to such statutory provision.

V.6 NONWAIVER. A waiver by either party hereto of a breach by the other party hereto of any covenant or condition of this Agreement shall not impair the right of the party not in default to avail itself of any subsequent breach thereof. Leniency, delay or failure of either party to insist upon strict performance of any agreement, covenant or condition of this Agreement, or to exercise any right herein given in any one or more instances, shall not be construed as a waiver or relinquishment of any such agreement, covenant, condition or right.

V.7 FAIR MEANING. The terms of this Agreement shall be given their fair meaning and shall not be construed in favor of or against either party hereto because of authorship. This Agreement shall be deemed to have been drafted by both of the parties.

V.8 GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

V.9 VENUE. The venue for any action to enforce or interpret this Agreement shall lie in the Superior Court of Washington for Snohomish County, Washington.

V.10 COUNTERPARTS. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same Agreement.

V.11 AUTHORITY TO BIND PARTIES AND ENTER INTO AGREEMENT. The undersigned represent that they have full authority to enter into this Agreement and to bind the parties for and on behalf of the legal entities set forth below.

DATED this _____ day of _____, 2014.

CITY OF MARYSVILLE

By _____
JON NEHRING, Mayor

By _____
ROBERT M. DUCHEN, Vice President

Approved as to form:

GRANT K. WEED, City Attorney

EXHIBIT A SCOPE OF WORK

Scope of Services to be provided by River Oaks:

1. Review the Section 626 renewal letter and Cable Television Franchise per Ordinance No. 2492 between the City and Comcast of California/Colorado/Texas/Washington, Inc. and Comcast of Washington IV, Inc.
2. Review the Institutional Network Maintenance Agreement with Comcast. Analyze Comcast's request for the I-Net to become a Managed Network.
3. Review Chapter 5.71 - Cable Operator Customer Service Standards.
4. Review the Section 626 renewal letter and Cable Television Franchise between the City and WaveDivision I, LLC per Ordinance No. 2657. Also review any Wave transfer of ownership documents filed with the City.
5. Review any other existing Cable Television Franchises in the City for comparison and level playing field purposes.
6. Draft and negotiate with Comcast a Franchise renewal document (including competitive equity language) under the Informal Renewal Process. Analyze Comcast's request for elimination of the PEG/I-Net fee. Consider broadening the current Gross Revenues definition in the Franchise per a request from the City Finance Department.
7. Draft and negotiate with Wave a Franchise renewal document under the Informal Renewal Process. Review the Gross Revenues definition in that Franchise.
8. Participate in Conference Calls/Phone Meetings with the City and Comcast.
9. Participate in Conference Calls/Phone Meetings with the City and Wave.
10. Prepare a Compliance letter to Comcast after reviewing the Comcast Franchise and Chapter 5.70 - Cable System Regulations to identify some of the salient questions. This will be focused on the most important components and will not be a detailed comprehensive Past Performance Review.
11. Prepare a Compliance letter to Wave after reviewing the Wave Franchise and Chapter 5.70 to identify some of the salient questions. This will be focused on the most important components and will not be a detailed comprehensive Past Performance Review.
12. Review the Cable Acts, Telecommunications Act, FCC Orders and Code of Federal Regulations in connection with the above.
13. Attend Meetings with the City and Comcast as requested by the City.
14. Attend Meetings with the City and Wave as requested by the City.
15. Solely for Franchise and I-Net negotiation purposes, conduct a targeted Community Needs and Interests Assessment (Focus Groups and Surveys) of Key Stakeholders in the City, including City Departments, Police, Fire, Schools and Libraries. Assist the City in developing a Website Survey to gather the views and opinions of cable subscribers regarding Comcast and Wave.

It shall be the City's decision whether to renew or not renew the Comcast or Wave Cable Franchises.

BILLING/RATE INFORMATION

River Oaks shall be compensated at the rate of \$265/hour and reimbursed for its expenses as follows:

Reimbursable direct costs:

- Federal Express
- Postage
- Long Distance Telephone Charges
- Outside Clerical
- Faxes and Copies
- Travel upon request (Air, Car Rental, Lodging and Meals)

It is estimated that there will be 2-4 trips to the City. Subject to Comcast's and Wave's availability, we will attempt to meet with each company during a trip. River Oaks' consultant fees shall be a maximum of **\$66,250 (includes expenses in the amount of \$7,500 and all costs and expenses associated with subconsultant services)**. It is anticipated this work will be completed by June 30, 2014, subject to the cooperation of Comcast and Wave.

If it becomes necessary to retain a technical firm as a subcontractor with respect to the I-Net related issues, this would be billed at \$175-\$195 per hour, plus expenses. All costs and expenses associated with such subconsultant will be paid by River Oaks and shall be included within the **not to exceed amount of \$66,250 set forth in section IV.1 of the Agreement.. and up to a maximum for the subcontractor's I-Net related work of \$17,575 plus expenses of \$2,000.** We anticipate using CBG Communications, Inc., given their institutional knowledge and prior I-Net work with us for the City.