

MEMORANDUM

TO: Governing Board Members

FROM: Sandra Close Turnquest, Deputy Executive Director, Corporate Resources

DATE: November 10, 2010

SUBJECT: Determination of Suspension or Debarment of ChemWare

Background: The District entered into Contract No. 4600001023 with ChemWare on August 6, 2007 for the development of custom database software to store and manage ecological and biological data (otherwise known as "EcoDB"). Software with the ability to organize, archive and integrate raw and simulated data for the variety of ecological and biological data currently used by the District does not exist. This award was made on the premise that ChemWare would be using its established and proprietary Laboratory Information Management System Software (known as "LIMS") as the platform for development of EcoDB. The District's laboratory has been using LIMS successfully for several years under a separate license and maintenance contract with ChemWare awarded in 2005 as the result of an RFP process.

The EcoDB contract was issued in the fixed amount of \$624,639 and had an initial 54 week term for delivery of the end product by August 19, 2008. Subsequent problems with the deliverables led to three amendments extending the term of the contract by a cumulative total of 3 years through August 15, 2009 at no additional cost to the District, but requiring additional time and use of resources by ChemWare. The purpose of the time extensions was to give ChemWare ample time to rectify the problems and deliver a functional system.

On June 13, 2009, the District sent by certified mail a Cure Notice providing 30 days notice to ChemWare to cure the material breach of the terms and conditions of the contract for failure to deliver a fully functioning software product. The fact that the District had already paid approximately \$500,000 for a product initially delivered in June 2008 that was still not fully functional was highlighted in the Cure Notice. With 24 remaining critical items still preventing the delivery of a functioning database, ChemWare failed to cure within the 30 day time frame and the District subsequently issued a Termination Notice for Default on August 14, 2009 via certified mail.

ChemWare denied that it was in breach and proceeded to file a lawsuit against the District. Although ChemWare claimed it provided everything required by the contractual scope of work, the District disagreed and concluded that the system was too cumbersome to be accepted by the scientific user group. This led to a final good faith effort by the parties to see if the critical items could be addressed through a day long demonstration conducted on April 30, 2010 by ChemWare staff and attended by District users and scientists. Following the demonstration, the unanimous conclusion of all District representatives present was that the system did not meet the minimum functionality requirements and had no future potential.

Despite the dispute over the EcoDB Contract, ChemWare continues to support the laboratory software system known as LIMS to the District's satisfaction. Therefore both parties felt they should pursue an amicable settlement of the dispute over the ECODB Contract.

The parties then entered into negotiations which resulted in a settlement agreement with the following salient components: (1) ChemWare will provide a credit equal to two years' worth of maintenance support on the LIMS system in the amount of \$133,136 to be applied in equal increments towards annual maintenance fees owed by the District over the next 5 years; (2) ChemWare will not receive final payment for the \$123,243.84 balance under the contract; (3) ChemWare will dismiss the lawsuit against the District with prejudice and each party will bear their own fees and costs, with the Court retaining jurisdiction to enforce the terms of the settlement; (4) Should ChemWare terminate the maintenance agreement for any reason, they will still be obligated to pay the full amount of the credit consisting of the unpaid balance plus 18% interest or the maximum rate allowed under law, whichever is greater.

In the event a Termination of Default is issued, the District's Suspension Rule requires the District's Governing Board to determine whether the contractor should be suspended, and if so, whether it should be temporarily suspended and for what period of time, or permanently suspended from doing business with the District. In making such a determination, the rule requires the Governing Board to consider certain factors as shown on the Suspension Factor Checklist attached to this memo.

The staff recommendation is not to suspend in light of the mutually agreeable outcome of the settlement agreement negotiations.

How this helps meet the District's 10-year Strategic Plan: The Suspension and Debarment Rule supports the District's Mission Support by establishing a process for suspending a contractor from working with the District, either temporarily or permanently, whenever a contractor materially breaches its contract with the District. Having the rule in place encourages good business practices by requiring contractors to materially perform in accordance with the terms and conditions of District contracts.

Funding Source: Not applicable in this case.

This Board item impacts what areas of the District, both resource areas and geography: Had ChemWare been able to successfully deliver an operational Ecological Database, District scientists would have had a common system for inputting, storing and reporting scientific data in an organized and dependable manner. The unspent balance of funding along with the maintenance credit can be used towards development of different methodology for obtaining such a system in the future.

What concerns could this Board item raise? The Board should be concerned with enforcing the District's Suspension Rule, in addition to maintaining the public's confidence in the District's contracting process.

Why should the Governing Board approve this item? The staff recommendation is not to suspend or debar ChemWare. In lieu of suspension, the staff recommendation is to approve the Settlement Agreement. This settlement resolves all claims for compensation from the District, avoiding uncertainties associated with trial and the District's expenditure of additional funds to pay any legal costs associated with litigation.

If you have any questions, please do not hesitate to call me at ext. 6351.

SCT/mlm
Attachments