



Legislation Text

File #: 21-266, **Version:** 1

STRATEGIC PRIORITY: Government Performance and Financial Management

AGENDA DATE: February 24, 2021

COUNCIL DISTRICT(S): N/A

DEPARTMENT: City Attorney's Office

EXECUTIVE: Christopher J. Caso

SUBJECT

Authorize a professional services contract with McKool Smith, P.C., Ashcroft Sutton Reyes LLC, and Korein Tillery LLC for legal services to represent the City of Dallas in the lawsuit to be filed and styled City of Dallas et al. v. Netflix, Inc., et al., contingent upon approval of the contract by the Office of the Attorney General of Texas pursuant to Section 2254 of the Texas Government Code - Financing: No cost consideration (see Fiscal Information)

BACKGROUND

The City intends to pursue claims for monetary damages, declaratory relief, and other legal remedies ("Damages") against Netflix, Inc., Hulu LLC, Disney DTC LLC, and other video service providers (VSPs) as determined for non-payment of franchise fees as set forth under the Texas Video Services Providers Act, Tex. Util. Code Sec. 66 (the "Litigation"). The City's desired outcome in pursuing the Litigation is to recover from the VSPs Damages owed to the City for failure to pay franchise fees and obtain an order requiring the VSPs to pay the franchise fees going forward, in addition to other relief allowed under the law.

The VSPs deliver video programming to their customers via broadband internet. The internet connections rely on wireline facilities located at least partially in the public right of way. The VSPs do not pay franchise fees to the City as required in section 66.005 of the Texas Utilities Code.

The City wishes to engage the following three law firms ("Firms") to provide legal services to represent the City in the Litigation: McKool Smith, P.C., Ashcroft Sutton Reyes LLC, and Korein Tillery LLC. The Firms are currently representing other local governments in similar lawsuits in other jurisdictions.

The relationship with the three Firms would span from the time of engaging them in the Litigation until it is completed. The City has had no prior relationship with the Korein Tillery firm or the Ashcroft Sutton Reyes firm. The City has previously retained McKool Smith and its principal Steven Wolens on an hourly basis in litigation related to the Dallas Police and Fire Pension plan in the matter

Eddington, et al. v. Dallas Police and Fire Pension System, et al., No. 17-0058. This engagement was completed. The City was also a member of a class of cities represented by McKool Smith and Mr. Wolens in an effort to recover municipal hotel occupancy taxes. In both instances, the City was very pleased with the representation provided by McKool Smith and Mr. Wolens.

Pursuant to Texas Government Code Chapter 2254, subchapter C, a special public notice needs to be added to the council agenda that contains City Council consideration of a contingency fee contract. The City must also comply with the other requirements for approval of a contingency fee contract as set forth in Chapter 2254. The contract is also contingent upon approval by the Office of the Attorney General of Texas.

PRIOR ACTION/REVIEW (COUNCIL, BOARDS, COMMISSIONS)

City Council was briefed by confidential memorandum regarding this matter on December 18, 2020, and January 29, 2021.

FISCAL INFORMATION

No cost consideration for the City.

The fees for legal services provided by the Firms in connection with the Litigation are contingent upon the recovery by the City of Damages in the Litigation and will be paid out of such recovery, if any, as set forth in Attachment A to the Resolution, as follows:

If the City obtains a recovery and collection on behalf of the City before a trial or appeal, the Firms will receive attorneys' fees in the amount of Thirty Percent (30%) of the Gross Recovery. If recovery for the City occurs after the beginning of trial (at the beginning of opening argument) or 2) upon appeal of any judgment, the Firms will instead receive attorneys' fees in the amount of the Thirty-Three and One-Third (33 1/3 %).

The Firms will advance all costs associated with the Litigation. The City agrees to reimburse the Firms for all reasonable costs out of its share of the gross recovery, after the payment of fees.