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**Title:** CONSIDER AUTHORIZING THE CITY MANAGER TO EXECUTE SUBSCRIBER SERVICE AGREEMENT WITH THE COOPERATIVE ORGANIZATION FOR THE DEVELOPMENT OF EMPLOYEE SELECTION PROCEDURES (CODESP) FOR PROVISION OF ONLINE EMPLOYMENT SELECTION AND TESTING MATERIALS WITH INDEMNIFICATION AS REQUESTED BY VENDOR (CITY COUNCIL)

**Sponsors:**

**Indexes:**

**Code sections:**

**Attachments:** 1. 2017 CODESP Subscriber Agreement.pdf, 2. 2018-19 Invoice.pdf, 3. 2019 CODESP Subscriber Agreement.pdf

Date	Ver.	Action By	Action	Result
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**Report to Mayor and City Council**

Tuesday, September 03, 2019

Consent

**SUBJECT:**

**CONSIDER AUTHORIZING THE CITY MANAGER TO EXECUTE SUBSCRIBER SERVICE AGREEMENT WITH THE COOPERATIVE ORGANIZATION FOR THE DEVELOPMENT OF EMPLOYEE SELECTION PROCEDURES (CODESP) FOR PROVISION OF ONLINE EMPLOYMENT SELECTION AND TESTING MATERIALS WITH INDEMNIFICATION AS REQUESTED BY VENDOR (CITY COUNCIL)**

**I. SUMMARY**

The City utilizes the Cooperative Organization for the Development of Employee Selection Procedures, a joint powers association (“CODESP”), to obtain online access to testing and selection materials produced by CODESP and related services, which aid the City’s Human Resources Division in evaluating and selecting candidates for City employment.

The service agreement between the parties must be renewed for the City to maintain access to CODESP’s materials. However, the contract sum is within the City Manager’s purchasing authority, so the City Council is NOT being asked to approve renewal of the agreement. The City Council is being asked to authorize the City Manager to approve the

contract with the indemnification language as requested by the vendor.

The City Attorney's policy is that, in the context of agreements for a consultant to provide services to the City, as is the case here, the consultant must indemnify the City, and the City will not indemnify the Consultant absent Council approval. Despite being informed of this policy, CODESP is requesting that the City indemnify it (CODESP is willing to indemnify the City as well, resulting in a proposed mutual indemnification provision). Agreeing to CODESP's position thus requires Council approval.

## **II. RECOMMENDATION**

TAKE the following action:

1. AUTHORIZE the City Manager to execute the Subscriber Service Agreement with the indemnification language as requested by the vendor.

## **III. ALTERNATIVES**

TAKE another action deemed appropriate by the City Council.

## **IV. BACKGROUND**

The City has been using CODESP since 2017 per the attached agreement. The City maintains an annual subscription with CODESP whereby the City gains online access to employment testing and selection materials and other materials that aid the City's human resources department in evaluating and selecting candidates for City employment.

The City's subscription now requires renewal in order for the City to maintain access to CODESP's services and materials. The annual subscription fee for the one-year renewal period is \$2,600. There are no other costs involved.

To renew its subscription, the City must agree to CODESP's form "Subscription Service Agreement." Because of the low annual subscription fee, the aggregate is within the City Manager's purchasing authority of \$25,000.

However, CODESP requires inclusion of a provision whereby the City agrees to defend, indemnify and hold harmless CODESP from and against *any and all liability, loss, expense, or claim for injury or damages arising out of the City's use of materials or services provided by CODESP*, unless due to CODESP's sole negligence or willful misconduct.

### **Indemnification; City Attorney Policy**

The City Attorney's office sought removal of the indemnification provision pursuant to the City Attorney's policy that absent Council approval, the City Attorney's office will not

approve as to form any agreement whereby the City agrees to indemnify any service provider.

The reason for the policy is that no matter how small the contract sum, agreeing to indemnify a service provider could result in massive liability to the City in a worst case scenario, such as when the services or materials provided to the City by the service provider result in a third party claim against the service provider for significant monetary damages which are not exclusively attributable to the negligence or willful misconduct of the service provider as opposed to the City. In that circumstance, the City would be responsible for payment of any damages awarded, as well as the attorneys' fees incurred in defending the service provider. Due to the seriousness of the legal obligations that such an indemnification provision can entail, only the Council is properly authorized to bind the City to such a provision.

In a traditional City-service provider relationship, a service provider enters onto City property or makes use of City facilities to provide the agreed-upon services to the City. Under such circumstances, fairness dictates that the service provider should indemnify the City for any accidents or harm it may cause to third parties while performing those services, such as members of the public that trip and fall over an obstruction placed by the service provider. Conversely, the City is not engaging in any activity which would create a potential risk to the service provider warranting indemnification in favor of the service provider. Accordingly, service providers are generally amenable to indemnifying the City without requesting indemnification in their favor from the City.

CODESP is providing online testing and other materials for the City to use in evaluating and selecting candidates for City employment. CODESP, in insisting that the City indemnify it for liabilities that may arise from the City's use of such materials or other services provided by CODESP under the Agreement, has asserted that while it never anticipates any of its agency-customers misusing its materials in a manner that could lead to an employment discrimination lawsuit, there is always a small possibility that an agency could neglect to locally validate the testing materials, and CODESP could be named along with the agency as a defendant in a lawsuit arising from that act or omission. That is the risk CODESP is trying to avoid in insisting upon indemnification from the City.

The City Attorney's office is of the opinion that CODESP's position is understandable. CODESP provides base, template testing materials that are intended for public agencies to adapt to their own hiring processes in a manner that comports with applicable law. There is a hypothetical possibility that the City, or any other public agency that uses CODESP's base materials, could fail to properly adapt those materials into its own hiring process as necessary to ensure compliance with applicable local or other laws, or that an agency could simply use the materials in the process of engaging in discriminatory or otherwise illegal hiring practices that are otherwise independent of and unrelated to the content of the base materials.

In either event, the illegality could result in a lawsuit against the agency and the plaintiff could decide to include CODESP as a defendant along with the agency based solely on the fact that CODESP's materials were used in the hiring process in some way, even if CODESP's materials were not illegal in and of themselves. If the liability was the result of CODESP's sole negligence or willful misconduct, it would not be within the scope of the

proposed indemnification in favor of CODESP, but otherwise (such as if the parties shared fault or the fault was solely the City's), the indemnification would apply to protect CODESP.

Thus, while the provision is not favorable to the City's legal interests, it is not irrational for CODESP to request it given the unique circumstances. As such, the Council, upon comprehending the risks involved, may wish to approve the indemnification obligation as necessary to facilitate renewal of the City's subscription to CODESP. Staff believes the likelihood of an event that would trigger the provision in question to be low. The City Council is being asked to authorize the City Manager to approve the contract with the indemnification language as requested by the vendor.

## **V. FISCAL IMPACT**

None.

## **VI. EXHIBITS**

1. 2017 CODESP Subscriber Service Agreement (pages 5 - 7)
2. 2018-19 Invoice (page 8)
3. 2019 CODESP Subscriber Service Agreement (pages 9 - 12)

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