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Title: CONSIDER APPROVAL OF AGREEMENT WITH EVERBRIDGE, INC. FOR ACCESS TO MASS NOTIFICATION SOFTWARE SERVICES FOR PUBLIC SAFETY NOTIFICATIONS TO RESIDENTS (CITY COUNCIL)

Sponsors:

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Attachments: 1. Everbridge Quote, 2. Everbridge - City of Carson MSA

Date	Ver.	Action By	Action	Result
5/5/2020	1	City Council		

Report to Mayor and City Council

Tuesday, May 05, 2020

Consent

SUBJECT:

CONSIDER APPROVAL OF AGREEMENT WITH EVERBRIDGE, INC. FOR ACCESS TO MASS NOTIFICATION SOFTWARE SERVICES FOR PUBLIC SAFETY NOTIFICATIONS TO RESIDENTS (CITY COUNCIL)

I. SUMMARY

The proposed agreement (Exhibits 1-2) is a three-year service contract with Everbridge, Inc. ("Everbridge") whereby the City would gain access to Everbridge's Mass Notification Pro software service, enabling the City to send mass notifications to its residents regarding public safety emergencies and matters pertinent to residents' public health and safety. The Agreement could be renewed upon the conclusion of the three-year term, subject to City Council approval at that time. The contract sum totals \$127,089.24 over the three-year term, which amount will be paid directly to Everbridge by Marathon and Phillips 66 refineries.

II. RECOMMENDATION

TAKE the following actions:

1. APPROVE the proposed agreement with Everbridge, Inc. (Exhibits 1-2) for license of the Mass Notification Pro Software and related services for a not-to-exceed contract sum of \$127,089.24 over a three-year term (“Agreement”); and
2. AUTHORIZE the Mayor to execute the Agreement upon approval as to form by the City Attorney.
3. AUTHORIZE the City Manager to execute a subsequent letter agreement to be negotiated and entered into with Marathon and Phillips 66 refineries, providing for the refineries to fund the full contract sum of the Agreement, upon approval as to form by the City Attorney.

III. ALTERNATIVES

TAKE another action the Council deems appropriate.

IV. BACKGROUND

Everbridge is a global software company that provides enterprise software applications that automate and accelerate operational response to critical events by enabling communications to residents and local businesses with up-to-date information when there is an incident. One such application is Mass Notification Pro, a mass notification and incident communications application that is the subject of the proposed Agreement.

If the City Council approves the proposed agreement to obtain a license to access this software service, Everbridge would provide connections to all residences and local businesses for whom a cell phone number has been obtained. This will enable the City to send out mass notifications in the event of an emergency or other situation posing a threat to public health and safety. The City Manager or designee will be the Administrator of the program to communicate mass notifications in the event of an emergency. The pricing as quoted to the City reflects the City’s population of approximately 98,000 (37,838 households), training for the City’s administrator and 24x7x365 customer support.

Marathon and Phillips 66 refinery companies (collectively, the “Refineries”) have agreed to fund the contract sum. The City Attorney’s Office is preparing a letter agreement with the Refineries to memorialize this obligation, and the proposed Agreement with Everbridge contains a provision that in the event the Refineries fail or refuse to provide the necessary funding for any reason by the time the first payment comes due, the Agreement will be deemed null and void unless City informs Everbridge by that date that it wishes to continue the Agreement using its own funding. The letter agreement will soon be completed, at

which point staff requests that the City Manager be authorized to execute it to allow for immediate funding by the Refineries and commencement of the Agreement.

Purchasing Ordinance Compliance

The contract sum is \$127,089.24, consisting of the annual amount of \$41,262.74 for each year of the three-year term, plus one-time setup and implementation fees of \$3,301.02.

The Agreement is not subject to the bidding requirements of the purchasing ordinance, because the purchasing ordinance exempts “intellectual property use licenses” from its bidding requirements, and the Agreement provides for City to license the use of the Mass Notification Pro software, which constitutes the intellectual property of Everbridge. Additionally, the City will not be paying the contract sum; instead, the contract payments will be made by the refineries, as referenced above.

Legal Issues

The Agreement was prepared using Everbridge’s standard form Mass Service Agreement, subject to modifications negotiated by the City Attorney’s office. Any time the City’s standard contract form is not used, there are likely to be certain protections provided for in the City’s standard form that will not be included in the subject agreement. On the other hand, the City’s standard form is not particularly designed for use in the software license context, and the use of licensors’ forms is becoming more commonplace as the need to expeditiously complete agreements becomes paramount.

The City Attorney’s office has negotiated a number of similar software license agreements in recent years and has become familiar with industry standards and what the City can reasonably agree to from a legal risk standpoint. Most issues were satisfactorily resolved; for example, the City Attorney was able to negotiate removal of late fees, automatic term renewals, rate increases, and City indemnification obligations from the Agreement. However, a few key issues remain that we want to bring to the City Council’s attention, but do not believe should prevent us from entering into the Agreement:

- **Termination.** The City generally requires the right to terminate City contracts “for convenience,” i.e. for any reason or no reason, at any time upon 30 days’ notice to consultant. Everbridge has refused to agree to such a provision due to its need to have certainty regarding its projected revenues as a public company and has instead only agreed to termination for cause (e.g., in the event of a breach by Everbridge).
- **Payment of Invoices.** The City’s standard form contract provides that while the City will use best efforts to pay invoices within 45 days of receipt thereof, the City does not guarantee payment within this time frame. Everbridge was not willing to agree to the open-ended aspect of the provision but did agree to inclusion of a 5-day grace period in addition to the 45-day base timeframe.
- **Acceptable Use Policy.** By entering into the Agreement, City agrees to Everbridge’s “Acceptable Use Policy,” available on its website. The City does not normally agree to outside documents/terms which are not expressly included in the subject contract. However, the Acceptable Use Policy is reasonable and generally prohibits users of the software from engaging in bad faith activity with respect to use of the software, such as

using it to send junk mail or spam, using viruses or other software, devices or routines that could interfere with the proper working of the Service or could be technologically harmful, or attempting to gain unauthorized accessing or copying of software or materials. On the other hand, the City is strictly liable for such violations committed by its users - there is no requirement that City must knowingly or intentionally commit such conduct for the violations to be triggered. Violations could result in Everbridge suspending or terminating the service. Everbridge reserves the right to modify the Acceptable Use Policy at any time, and continued use by the City constitutes agreement to any such modifications. Everbridge declined requested changes to the Policy on the basis that it is kept uniform across all Everbridge customers/products and thus non-negotiable.

- **Limitation of Liability.** The Agreement contains a mutual limitation of liability provision, providing that neither party shall have any liability to the other party for special, consequential or punitive damages, including damages for loss or which would include damages for interruption of city business, resulting from the Agreement. The provision also states that except for Everbridge's indemnification obligations and any breach by City of Section 3 (City responsible for use of software in compliance with applicable laws and the Acceptable Use Policy and with any required consents of contacts who receive communications) or Section 6 (City to adhere to restrictions to protect Everbridge's proprietary rights in the software), neither party's aggregate liability under the Agreement may exceed the amount paid or due by City to Everbridge during the prior 12 months. While not ideal for the City, this is a fairly industry standard provision.
- **Disclaimer of Warranties.** Everbridge warrants that it will provide its solution in compliance with the functionality and specifications provided in the solution documentation, that it will provide 24x7x365 customer support for the solution in accordance with its support services guidelines, and that all professional services will be performed consistent with industry standards. Everbridge expressly disclaims all other warranties, such as warranties of merchantability or fitness for a particular purpose, and Everbridge does not warrant that the solution will operate error-free or without interruption. Everbridge disclaims all liability for death, injury or property damage related to failure of the solution to deliver an electronic communication. Overall, the City Attorney's office is of the opinion that these warranties and disclaimers are reasonable and consistent with industry standard.

V. FISCAL IMPACT

None. Marathon and Phillips 66 refineries will fund the contract sum.

VI. EXHIBITS

1. Everbridge Quote (pgs 5 - 8)
2. Everbridge Master Service Agreement (pgs 9 - 18)

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