

RESOLUTION NO. 2022-03-XXX (R)

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, APPROVING THE PURSUIT OF LEGAL REMEDIES AGAINST VIDEO SERVICE PROVIDERS FOR NON PAYMENT OF FRANCHISE FEES AND THE ENGAGEMENT OF MCKOOL SMITH, P.C., ASHCROFT SUTTON REYES LLC, AND KOREIN TILLERY LLC FOR LEGAL SERVICES UNDER A CONTINGENT FEE CONTRACT CONTINGENT UPON APPROVAL OF THE CONTRACT BY THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS PURSUANT TO SECTION 2254 OF THE TEXAS GOVERNMENT CODE AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, 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 required in the Texas Video Service Providers Act, Texas Utilities Code Sec. 66 (the “Litigation”); and

WHEREAS, the City’s desired outcome in 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; and

WHEREAS, the VSPs deliver video programming to their customers via broadband internet through wireline facilities located at least partially in the public right of way; and

WHEREAS, the VSPs do not pay franchise fees to the City as required in section 66.005 of the Texas Utilities Code; and

WHEREAS, the City has a substantial need of the legal services of counsel to represent it in the Litigation; and

WHEREAS, the City requires legal counsel that specialize in complex litigation and are highly knowledgeable and experienced in the legal issues surrounding the non-payment of franchise fees by the VSPs; and

WHEREAS, the City now desires to enter into a contingent fee contract (“Contract”) for legal services with McKool Smith, P.C., Ashcroft Sutton Reyes LLC, and Korein Tillery LLC (“Counselors”) to represent the City in the Litigation; and

WHEREAS, Subchapter C of Chapter 2254 of the Texas Government Code (“Chapter 2254”) requires that a political subdivision of the State of Texas, including the City, may enter into a contingent fee contract for legal services only after: (i) the governing body of the political subdivision has provided written notice to the public stating certain provisions enumerated within Chapter 2254; (ii) the governing body of the political subdivision approved such contract in an open meeting called, in part or in whole, for the purposes of considering such contract; and (iii) the governing body of the political subdivision stated in writing certain findings made by the governing body upon the approval of such contract; and

WHEREAS, before the contingent fee contract for legal services is effective and enforceable, the City must receive approval of the Contract by the Office of the Attorney General of Texas or the Contract is otherwise allowed under Tex. Gov’t Code Ch.2254, as amended; and

WHEREAS, the City has caused notice of this resolution, this meeting, and certain provisions enumerated within Chapter 2254 to be provided to the public in accordance with the Texas Open Meetings Act and Chapter 2254; and

WHEREAS, the meeting at which this resolution is being considered is an open meeting called, in part or in whole, for the purpose of considering: (i) the City's need for legal counsel to represent it in the Litigation; (ii) terms of the Contract; (iii) the competence, qualifications, and experience of the Counselors; and (iv) the reasons that the Contract is in the best interest of the City and complies with Chapter 2254; and

WHEREAS, the City Council hereby finds and determines that the adoption of this resolution is in the best interests of the residents of the City.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, THAT:

Section 1. That the recitals contained in the preamble hereof are hereby found to be true, and such recitals are hereby made a part of this resolution for all purposes and are adopted as a part of the judgment and findings of the City Council.

Section 2. That the City Council hereby finds that: (i) there is a substantial need for the legal services to be provided in the Litigation; (ii) the legal services to be provided in the Litigation cannot adequately be performed by the attorneys and supporting personnel currently employed by the City; (iii) the legal services to be provided in the Litigation cannot reasonably be obtained from attorneys in private practice under a contract providing only for the payment of hourly fees, without regard to the outcome of the matter, because of the nature of the Litigation and without imposing an unnecessary cost and burden on the City's finances; and (iv) the relationship between the City or the City Council and the Counselors is not improper and would not appear improper to a reasonable person.

Section 3. That based on the findings by the City Council described above, the City Council hereby authorizes the City Manager to execute a legal services contract with McKool Smith, P.C., Ashcroft Sutton Reyes LLC, and Korein Tillery LLC, approved as to form by the City Attorney, effective only upon approval by the Office of the Attorney General of Texas or as otherwise allowed under Tex. Gov't Code Ch.2254, as amended.

Section 4. That it is officially found, determined, and declared that the meeting at which this resolution is adopted was open to the public and public notice of the time, place, and subject matter of the public business to be considered at such meeting, including this resolution, was given, all as required by Chapter 551 as amended, Texas Government Code.

Section 5. That the City will pay the Counselors a contingency fee and expenses in accordance with the rates in Attachment A to this resolution and contingent upon the recovery, if any, by the City in the Litigation.

Section 6. That this Resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of McKinney, and it is accordingly so resolved.

DULY PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS ON THE 1ST DAY OF MARCH, 2022.

CITY OF MCKINNEY, TEXAS

GEORGE C. FULLER, Mayor

ATTEST:

EMPRESS DRANE, City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER, City Attorney

ATTACHMENT A

The fees for legal services provided by the Counselors 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 follows:

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

The Counselors will advance all costs associated with the Litigation. The City agrees to reimburse the Counselors for all reasonable costs out of its share of the gross recovery.