


MEMORANDUM

TO: DEIRDRE JACOBS, ASST. CITY MANAGER

FROM: LINA BUSBY, ASST. CITY ATTORNEY 

CC: DAWN S. WYNN, CITY ATTORNEY
JONATHAN E. EVANS, CITY MANAGER
RANDY SHERMAN, DIRECTOR FINANCE & ADMIN. SERVICES
CLAUDENE S. ANTHONY, CITY CLERK

DATE: NOVEMBER 12, 2019

RE: SIGNATURE REQUESTED FOR ACKNOWLEDGEMENT OF
MANUFACTURER WARRANTY WITH MUELLER SYSTEMS,
SUBCONTRACTOR OF FERGUSON

The Department of Finance advised the Utility Special District (USD) that the attached Exhibit "C" titled, Manufacturer Warranty Information, Mueller Systems Master Agreement, to the Ferguson Enterprises, Inc., contracts for Advanced Metering Infrastructure installation services, signed on March 22, 2018, is required to be signed (as it was an "oversight").

The Agreement between the City and Ferguson included this Exhibit "C" which has a signatory block that Ferguson requests be completed. As referenced in Article 1- Services, Installation, F. Completion, it states: "date for final completion of the Project is nine months from Contract Date set forth above ("Completion date"), unless otherwise agreed to in writing or as provided herein. The CONTRACTOR shall perform all work in conformance with the Contract Documents so as to complete the Project by the Completion Date. All materials and equipment provided shall be new, free from liens and covered by manufacturer warranties against defects. A copy of the manufacturer's warranty is attached hereto as Exhibit "C". "

First, the Agreements with Ferguson reference the Warranty as an "Exhibit" but do not explicitly require the City's signature. The Warranty itself has an unsigned signatory block for the City, agreeing to the terms and conditions of the warranty. One of those terms and conditions is Section 6- FEES and PAYMENT. "Customer shall pay the Software fees set forth in Appendix D of this Agreement." The software fees set forth in the Appendix D exceed \$50,000. Moreover, it is unclear if these costs have already been paid through the cumulative amount of the Ferguson Contracts that were approved via Resolution 08-18UD, or were contemplated as a separate expenditure.

Second, after you find out whether these fees were included in the Request for Proposals, you have two options: (1) ask to have the Chairperson sign the Warranty in order to bind the District, or (2) take the item back to the District Board for approval. Given that the District Board approved the Ferguson contracts with this Warranty attached, there is an argument that the Board has already approved this item and the Chairperson would be justified in

signing it. The item was approved on March 26, 2018, with the Warranty as an attachment to each Ferguson contract. I would also recommend that you cross out the entire section 6-Fees and Payments, and require Mueller to initial that change, in addition to signing off in the signatory block, before the Chairperson signs.

However, if there is any doubt that the Board did not properly consider this Warranty in its approval of the Ferguson contracts, and the software payment was not included in the total payment to Ferguson, it is my legal opinion to take it back to the Board.

Finally, please note that the USD Charter, Section 3.04 provides that the Chairperson and the Vice-Chairperson shall take such actions, have all such powers and sign all documents on behalf of the District and in furtherance of the purposes of this Charter as may be approved by resolution of the Board adopted at a duly called meeting. The USD Director would not be authorized to sign this Warranty on behalf of the Board unless the Board explicitly authorized the Director to do so in its resolution.