

1 [Approve Limit on Indemnification Liability of Prospective Consultant.]

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3 **Resolution approving proposed limit on indemnification liability of prospective**
4 **construction management consultant for the proposed Calaveras Dam Replacement**
5 **Project, pursuant to Administrative Code Section 6.42(C).**

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7 WHEREAS, As part of the Water System Improvement Program, the San Francisco
8 Public Utilities Commission ("SFPUC") has proposed the Calaveras Dam Replacement
9 Project ("CDRP") that, if approved and constructed, would replace the existing dam with a
10 new earth and rock fill embankment dam to re-establish water delivery reliability and meet
11 current seismic safety design requirements; and

12 WHEREAS, The design of the proposed replacement dam is conservative and is
13 expected to provide safe operation for many decades; and

14 WHEREAS, As with other similar dam construction projects, construction of the
15 proposed CDRP involves inherent risks associated with the potential consequences of failure
16 of the existing dam if an extreme event were to occur during construction (e.g., probable
17 maximum flood and/or maximum credible earthquake); and

18 WHEREAS, In addition to the inherent risks associated with the construction of earth
19 and rock fill embankment dams described above, the proposed CDRP involves the presence
20 of naturally occurring asbestos (NOA), a risk not typically encountered in most large dam
21 construction projects; and

22 WHEREAS, The planning and design process for the proposed CDRP has
23 incorporated numerous requirements into the construction plans and specifications to
24 effectively mitigate the risks; and

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1 WHEREAS, as with other similar large dam construction projects, some inherent risk
2 remains; and

3 WHEREAS, to help manage risk during construction, the SFPUC has determined that it
4 is necessary to procure the services of a qualified construction management consultant to
5 provide specialized construction management services, during both the pre-construction
6 phase, as well as during the proposed construction phase, to supplement SFPUC staff for the
7 proposed CDRP; and

8 WHEREAS, On February 22, 2010, the SFPUC advertised a request for proposals
9 ("RFP") seeking proposals from qualified construction management consultants for the
10 proposed CDRP, a copy of which is on file with the Clerk of the Board of Supervisors in File
11 No. _____, which is hereby declared to be a part of this Resolution as if set forth fully herein;
12 and

13 WHEREAS, The RFP states that SFPUC anticipates awarding to the selected
14 construction management consultant a professional services agreement for a total amount not
15 to exceed thirty-eight million dollars (\$38,000,000); provided that work under any contract
16 award would be limited to the pre-construction phase, pending a determination by the San
17 Francisco Public Utilities Commission and this Board as to whether to approve the Project and
18 adopt findings pursuant to the California Environmental Quality Act (CEQA); and

19 WHEREAS, The deadline for submitting proposals in response to the RFP is April 8,
20 2010; and

21 WHEREAS, Article III of Chapter 6 of the Administrative Code governs professional
22 services contracting for public work projects, including contracts for construction management
23 services; and

24 WHEREAS, Section 6.42(C) of the Administrative Code provides that all professional
25 services contracts awarded under Chapter 6, including contracts for construction

1 management services, must require the consultant to fully indemnify the City to the maximum
2 extent provided by law, such that each consultant must save, keep, bear harmless and fully
3 indemnify the City and County and any of its officers or agents from any and all liability,
4 damages, claims, judgments or demands for damages, costs or expenses in law or equity that
5 may at any time arise; and

6 WHEREAS, Section 6.42(C) further provides that the indemnification requirement may
7 not be waived or abrogated in any way for any contract without the recommendation of the
8 City's Risk Manager and the express permission and approval of the Board of Supervisors;
9 and

10 WHEREAS, As part of the standard project development process, SFPUC staff
11 conducted outreach with the construction management consulting community to determine
12 the level of interest in performing construction management services for the proposed CDRP;
13 and

14 WHEREAS, During SFPUC's outreach efforts, several potentially qualified construction
15 management consultants informed SFPUC staff that, in light of the risks associated with the
16 proposed CDRP, the consultants would not agree to perform construction management
17 services for the proposed CDRP unless the City agreed to a reasonable limitation on
18 consultant's indemnification liability; and

19 WHEREAS, SFPUC staff has confirmed that other public entities, including the San
20 Diego County Water Authority and the American Power Company, have provided limits on
21 indemnification liability for consultants performing construction management services for large
22 dam construction projects; and

23 WHEREAS, Based on the feedback from prospective consultants and the practices of
24 other public entities that have successfully completed similar dam projects, the SFPUC, in
25 consultation with the City's Risk Manager and the City Attorney's Office, developed the

1 proposed limit on consultant's indemnification liability set forth in Paragraph 16(b)(4) of
2 Appendix C to the RFP; and

3 WHEREAS, The proposed limit caps consultant's cumulative indemnification liability at
4 seventy-five million dollars (\$75,000,000), and excludes specific types of damages or liabilities
5 from the liability limit, including (i) damages caused by Contractor's gross negligence, reckless
6 conduct, willful acts or omissions, fraud, or illegal or unlawful acts; (ii) statutory damages
7 specified in this Agreement; (iii) Contractor's obligation to indemnify and defend the City for
8 intellectual property infringement; (iv) wrongful death caused by Contractor; and (v) punitive or
9 treble damages. None of the foregoing are capped; and

10 WHEREAS, On March 9, 2010, under Resolution No. _____, the San Francisco Public
11 Utilities Commission authorized the General Manager of the SFPUC to seek this Board's
12 approval of the proposed liability limit pursuant to Administrative Code Section 6.42(C); now,
13 therefore, be it

14 RESOLVED, That this Board of Supervisors hereby approves the proposed limit on
15 consultant's indemnification liability for the proposed CDRP construction management
16 contract, pursuant to Administrative Code Section 6.42(C), in substantially the form on file with
17 the Clerk of the Board, and in such final form as approved by the General Manager and City
18 Attorney.

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21 Recommended:

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Matt Hansen
Director, Risk Management Division

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