

FOR BOARD ACTION

Agenda Item # 6

Meeting Date:

11/24/09

SUBJECT: Demand Side Management and Energy Conservation Sales

PREPARED BY: Patty Hanson, Manager of Marketing and External Affairs

ITEM DESCRIPTION:

On March 28, 2006, the Board approved a two-year contract agreement for Morgan Marketing Partners (MMP) to provide demand side management (DSM) and energy conservation sales to ensure RPU would meet aggressive DSM goals as outlined in the study, *Report on the Electric Utility Baseline Strategy for 2005-2030 Electric Infrastructure*. In late 2007, the Board approved a 2-year extension for 2008-2009. This last extension expires December 31, 2009.

MMP, via Franklin Energy Services, LLC resources, are providing direct selling of energy conservation solutions to our residential and commercial markets. We are leveraging required CIP spending (part of our 2010 budget) to meet required CIP energy saving goals. In 2010, Rochester Public Utilities (RPU) is required to achieve savings of 19,649,530 kWh.

We would like to extend this contract agreement with two notable differences: 1) Franklin Energy Services, LLC will assume the Contract for Professional Project Services from MMP and 2) for performance of the services specified for the time period starting January 1, 2010, the contract agreement will proceed annually.

Franklin Energy Services, LLC will continue providing direct energy conservation sales at a cost of \$210,672 for 2010 with future annual levels to be determined by RPU.

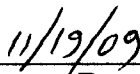
A copy of the 2006-2007 MMP contract agreement is included, along with the proposal (Amendment 5) to extend as a professional services contract, for the Board's review. The City Attorney has reviewed the Amendment.

UTILITY BOARD ACTION REQUESTED:

The Board is requested to approve Amendment 5 as an addition to the existing agreement which does not change the foundation or other articles of the agreement between said parties with the exception that Franklin Energy Services, LLC assumes the Contract for Professional Project Services from MMP and the contract will proceed annually (subject to Board and Common Council approval of the annual electric utility budget), and request the Mayor and the City Clerk to execute the Agreement for Franklin Energy Services, LLC to continue providing DSM services.



General Manager



Date

ROCHESTER PUBLIC UTILITIES



MORGAN MARKETING PARTNERS

Strategic Marketing Consulting

CONTRACT FOR PROJECT SERVICES

This Agreement is made and entered into May 1, 2006, by and between Morgan Marketing Partners (hereinafter referred to as MMP or Contractor) whose business address is 6205 Davenport Drive, Madison, Wisconsin, 53711 and the City of Rochester, a Minnesota municipal corporation, acting by and through its Utility Board (hereinafter referred to as RPU or Company) whose business address is 4000 East River Road, Rochester, MN 55906.

Whereas, Rochester Public Utilities (RPU), a department of the City of Rochester, is in the business of providing comprehensive energy efficiency programs to the citizens of Rochester, MN; and

Whereas, as part of its duties under these programs, RPU needs to work with experienced, knowledgeable, independent contractors to provide the specialized services described below and Contractor has represented him/her/itself as in the business of providing such services, and

Whereas, the parties desire to formalize the terms under which Contractor will provide such services to RPU.

Now, therefore, in consideration of the mutual promises in this agreement, the parties agree as follows:

ARTICLE I: SCOPE OF PROJECT SERVICES

RPU desires to have Contractor perform, and Contractor agrees to perform, the Project Services associated with the energy efficiency programs outlined in Exhibit A (attached).

ARTICLE II: PERIOD OF PERFORMANCE/TERMINATION

The effective period of this agreement shall be from May 1, 2006 through December 31, 2007, with the option for extensions beyond that period, for the activities outlined in the attached Scope of Project Service (Exhibit A). RPU may terminate this Agreement if, through any cause, Contractor fails to perform the Project Services in a timely and proper manner, or violates any of the provisions of this Agreement. RPU shall give Contractor thirty (30) days written notice of its intent to terminate for cause. RPU will allow the Contractor this time to cure any default or violation. Upon termination, RPU's liability shall be limited to any undisputed costs incurred in


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performing the Services as of the date of termination. This agreement may be extended beyond the termination date by mutual agreement.

ARTICLE III: COMPENSATION FOR PROJECT SERVICES

Compensation for the Project Services shall be in accord with Exhibit B attached and incorporated as an addendum to this agreement. Contractor shall submit quarterly invoices to RPU for the upcoming quarter on a flat fee basis. This invoice will be separate from the monthly report of Project Services performed. RPU shall make payment to Contractor for approved invoices within 30 days of invoice receipt. Contractor will submit a true up invoice within 45 days of project completion if required.

ARTICLE IV: REPRESENTATIONS/WARRANTY

Contractor represents and warrants to RPU that the Project Services provided under this Agreement shall be performed with the degree of skill and care that is required by current, sound professional and commercial procedures and practices, and in conformance with generally accepted professional and commercial standards prevailing at the time the work is performed. RPU reserves the right to review Contractor's work so as to ensure that the Project Services are performed in a manner consistent with program guidelines and appropriate for the purposes of this Agreement.

ARTICLE V: RELATIONSHIP OF PARTIES

The parties intend to create by this Agreement an independent contractor relationship and not an employee/employer relationship. Neither Contractor nor any of its agents, servants or employees are to be considered agents, servants or employees of RPU at any time or under any circumstances, nor is Contractor or its employees entitled to any employee benefits from RPU, nor to any compensation from RPU except as specified in the attached Exhibit B. MMP will be responsible for all employment costs including (but not limited to) FICA, Wages, Tax withholding, MN Workers' Comp. RPU has direction and control only as to the end result to be accomplished and Contractor has direction and control over the means and method of accomplishing that end result. Contractor warrants that it holds a federal employer identification number with the IRS and has filed business or self-employment income tax returns with the IRS based on work or service in the previous year. Contractor is not an agent of RPU and is not authorized to contractually bind RPU, unless so authorized by RPU in writing. Contractor will have the authority to provide/quote incentive levels to customers on individual projects within the guidelines of the program. Contractor is free to engage in any and all other professional and commercial activities without any prior notice to RPU, provided such activities do not directly conflict with Contractor's legal and contractual obligations to RPU.



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ARTICLE VI: INDEMNIFICATION

Contractor hereby agrees to indemnify, defend and hold RPU, its directors, employees and agents harmless from and against all claims, liabilities, damages, losses, costs or expenses (including, but not limited to, reasonable attorneys' fees) arising out of the acts or omissions of Contractor, its employees, subcontractors and other agents of Contractor or its subcontractors. This indemnification includes, but is not limited to, the following:

- Personal injury suffered by a third party, or any employee of RPU, Contractor and any subcontractor of Contractor.
- Property damage incurred by any third party or by RPU, Contractor, and any subcontractor of Contractor.
- Any negligent, intentional or wrongful acts or omission of Contractor, and any subcontractor of Contractor.
- A breach of this Agreement by Contractor
- A failure of Contractor to comply with any applicable laws, including but not limited to environmental protection laws.
- Any failure of Contractor to pay federal, state and local taxes, including but not limited to employee withholding, or any failure to provide workers' compensation coverage to Contractor's employees.

If Contractor negligently fails to perform the Project Services covered in this Agreement within the established time line, Contractor may be liable to RPU for damages incurred by RPU to the extent those damages are caused by the Contractor's negligent failure of performance, including but not limited to all costs reasonably incurred by RPU to complete the Project Services.

If RPU negligently fails to perform those acts covered in this Agreement, within the established time line, RPU may be liable to Contractor for damages incurred by Contractor to the extent those damages are caused by RPU's negligent failure of performance, including but not limited to all costs reasonably incurred by Contractor to complete the Project Services.

ARTICLE VII: PERMITS, LAWS, REGULATIONS AND PUBLIC ORDINANCES

Contractor shall secure and pay for all required permits and licenses, and shall comply with all Federal, State, and Local statutes, regulations and public ordinances governing work (including the Occupational Safety and Health Act of 1970 and all amendments thereto), and shall indemnify, defend and save RPU harmless from any and all liability, fine, damage, cost, and expense arising from Contractor's failure to do so. The validity, performance, and construction of this agreement shall be governed by the laws of the State of Wisconsin.



MP

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ARTICLE VIII: Confidentiality

Morgan Marketing Partners will hold all General Nonpublic Data in confidence and return any information that the client so specifies. "General Nonpublic Data" includes that data defined by the Minnesota Government Data Practices Act, Minn. Stat. Section 13.37 or such other information designated in advance as confidential and clearly marked as such.

ARTICLE VIII: ENTIRE AGREEMENT

This agreement constitutes the entire understanding of the parties concerning its subject matter and supersedes all prior agreements, whether oral or written. No modification shall be binding on either party unless reduced to writing and signed by both parties. This agreement is entered into and becomes effective on the date first written above. It is understood that the signatures below legally bind the parties to this contract and that without both parties' signatures, this contract shall be void.

ARTICLE IX: MINNESOTA LAW TO GOVERN

This agreement shall be governed by and construed in accordance with the laws of the City of Rochester and the State of Minnesota.

Morgan Marketing Partners

By: *Rick Morgan*
Name: Rick Morgan Title: President

Date: 4/27/06

City of Rochester

By: *Sean F. Beane*
Its Mayor

Attest: *Andy Key Steward*
Its City Clerk

Date: 5/9/06

Dwight M. Goslin



MMP

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EXHIBIT A

Scope of Project Services

This document outlines the Scope of Project Services for the Contractor in conjunction with the implementation of Rochester Public Utilities DSM programs.

Planning/Management Assistance

The planning and management assistance will occur early in the project to refine the offers, marketing, targets, incentives, etc. Rick Morgan will provide this assistance along with Paul Schueller, President of Franklin Energy. Mr. Schueller will be providing this limited assistance at no cost to RPU. They will work with RPU to seek their input and experience, review the offerings and review the customer data to assure that the programs are cost effective and can meet the targets. Mr. Morgan will then continue as project manager and primary RPU liaison.

Implementation Services

As indicated in the RFP, implementation support locally will be critical to the success of this effort. MMP will assign a local program staff person to meet the program's customer service needs. This individual will report directly to the RPU office on a majority of days and take work direction from RPU staff. The assigned individual needs to mesh well with RPU staff, contractors and customers in order to maximize their effectiveness. If a quality working relationship doesn't develop we will change staffing to meet RPU's needs in a timely and professional manner.

Responsibilities of this person will include but not be limited to the following:

- Commercial Customer interaction on efficiency needs.
- Working with Trade Allies to promote and install efficiency
- Solicit program participation of RPU customers
- Assist customers with implementation of efficiency installations through local contractors and Energy Solutions
- Site Verification on a sampling of projects
- Assist with meetings promoting the programs
- Other work as directed by RPU or MMP

The local person will also have access to the 25 Franklin Energy engineers and technical field staff. These individuals have gained specialized expertise by end use technology (i.e. lighting,



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drives, compressed air etc.) and by sector (food service, food processing, hospitality, etc). This allows local program staff to cost effectively access these individuals.

Administrative Services

To address the administrative and processing needs of the program, MMP will provide an administrative person at RPU facilities to support the program. This individual will report directly to the RPU office on a majority of days and take work direction from RPU staff. The assigned individual needs to mesh well with RPU staff, contractors and customers in order to maximize their effectiveness. If a quality working relationship doesn't develop we will change staffing to meet RPU's needs in a timely and professional manner.

Responsibilities of this person will include but not be limited to the following:

- Commercial Customer phone interaction on efficiency needs.
- Working with Trade Allies to promote and install efficiency
- Solicit program participation of RPU customers
- Customer information fulfillment
- Verifying customer qualifications
- Scheduling site visits
- Assist customers with incentive processing
- Application processing, tracking and reports of program activity
- Assist with meetings promoting the programs
- Other work as directed by RPU or MMP

Program Marketing & Delivery Plan

MMP will be responsible for program marketing utilizing the existing RPU customer communications vehicles such as bill stuffers, direct mail, customer newsletters and advertising. MMP will be responsible for outreach to the community through trade allies and association meetings and other relationships. MMP will also work with RPU staff to gain their trust and referrals to the program. Outreach plans will be developed in conjunction with RPU marketing and communications staff. MMP is not responsible for the cost of printing, mailing or advertising for the program.



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Sales Goals & Lead Qualification

In order to generate the quality and type of projects outlined in Table 7 of the Aggressive DSM Plan MMP will generate leads, beyond the projects that close, from each of the three main sources (RPU staff, contractors and customer marketing) previously identified. MMP will track incoming leads by their source. In addition MMP will track who is assigned to the lead, if the lead results in a site visit and/or program participation.

Project/Lead Tracking

The contractor will develop an Access database to track referrals, site visits, proposed and implemented projects. The data will be made available to RPU when they request it. The system developed will be designed to track leads, customer contacts, incentives, savings claimed and other details associated with implemented projects. The system will not be the mechanism used for making customer incentive payments. That will be through the existing program system.

Expected Results

The MMP team goal is to deliver the commercial program goals at an aggregate level of approximately 7,880 MWh in 2006 and 11,775 MWh in 2007. These goals will necessitate higher participation rates than historic program results which is also a goal discussed in the Aggressive DSM Report. Based on the earlier research conducted by MMP, the mix of project type, size and quantity seem reasonable given the customer base. These goals will be modified through agreement of both parties if there are circumstances outside the control of RPU or MMP that necessitate changes or delays in the program implementation.



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EXHIBIT B

Compensation for Project Services

For performance of the services specified in Exhibit A and within the time period so described, Contractor will be paid quarterly based on a flat fee for a total price of \$269,500 for work performed of which \$120,500 will be for services in 2006 and \$149,000 for services in 2007.

The Budget includes the following assumptions:

- The price does not include cost for development, production, or mailing of marketing materials;
- RPU will supply an office space for two people with access to a phone for local calling to RPU customers and supply computers and other office materials;
- Project incentives for customers are not included in our pricing detail;

Reporting and Invoicing:

The Contractor will provide an activity report with main activities, successes, and challenges by the 15th of each month. Invoices are to be submitted quarterly for the upcoming quarter.


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Amendment #1: CONTRACT FOR PROJECT SERVICES

This amendment is to the agreement made and entered into May 1, 2006, by and between Morgan Marketing Partners (hereinafter referred to as MMP or Contractor) whose business address is 6205 Davenport Drive, Madison, Wisconsin, 53711 and the City of Rochester, a Minnesota municipal corporation, acting by and through its Utility Board (hereinafter referred to as RPU or Company) whose business address is 4000 East River Road, Rochester, MN 55906.

This amendment is an addition to the existing agreement and does not change the foundation or other articles of the agreement between said parties except as noted below.

Now, therefore, in consideration of the mutual promises in the agreement as amended below, the parties agree as follows:

ARTICLE I: SCOPE OF PROJECT SERVICES

RPU desires to have Contractor perform, and Contractor agrees to perform, the additional Project Services associated with the energy efficiency programs outlined in Exhibit A (attached) as amended.

ARTICLE III: COMPENSATION FOR PROJECT SERVICES

Compensation for the Project Services shall be amended in accord with Exhibit B attached and incorporated as an addendum to this agreement.

ARTICLE VIII: ENTIRE AGREEMENT

This amendment and the existing agreement constitutes the entire understanding of the parties concerning its subject matter and supersedes all prior agreements, whether oral or written. No modification shall be binding on either party unless reduced to writing and signed by both parties. This agreement is entered into and becomes effective on the date first written above. It is understood that the signatures below legally bind the parties to this contract and that without both parties' signatures, this contract shall be void.

6205 Davenport Drive • Madison, WI 53711

Voice: 608-277-9518 • Fax: 608-277-9612

email: Madison@MorganMarketing.com • www.morganmarketing.com

MMP

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ARTICLE IX: MINNESOTA LAW TO GOVERN

This agreement shall be governed by and construed in accordance with the laws of the City of Rochester and the State of Minnesota.

Morgan Marketing Partners

By: *Rick Morgan*
Name: Rick Morgan Title: President

Date: *6/13/06*

City of Rochester

By: *Samuel F. Bice*
Its Mayor

Attest: *Judy Klay*
Its City Clerk

Date: *July 7, 2006*

APPROVED AS TO FORM
Daniel Gosler
Rochester City Clerk



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EXHIBIT A

Scope of Project Services

This amendment documents the additional activities to the original scope of work to assist with the implementation of the Residential DSM program of Rochester Public Utilities.

Administrative Services

MMP will assign a local program staff person to meet the Residential program customer service needs. This individual will work half time and report directly to the RPU office on a majority of days and take work direction from RPU staff. The assigned individual needs to mesh well with RPU staff, contractors and customers in order to maximize their effectiveness. If a quality working relationship doesn't develop we will change staffing to meet RPU's needs in a timely and professional manner.

Responsibilities of this person will include but not be limited to the following:

- Residential Customer phone interaction on efficiency as needed.
- Working with Trade Allies to promote and install efficiency.
- Assist customers with information requests and incentive processing.
- Date stamp customer applications when received.
- Verify customer qualifications and information against rebate application. Make note in CIS: date received, rebate type i.e. dishwasher.
 - If information is missing the application is sent back to the customer or the contractor or
 - If clarification is needed a call is made to the contractor or customer.
- Enter application information into database.
 - May need to keep separate Excel spreadsheet for recycling program.
- Print request for payments / customer letters.
- Separate into "send" and "apply" piles.
- Obtain RPU approvals of requests for payments.
- Run SAP report for accounting.
- Provide applications to accounting.
- Run month-end reports.
- Assist with meetings promoting the programs.
- Other work as directed by RPU or MMP.

6205 Davenport Drive • Madison, WI 53711

Voice: 608-277-9518 • Fax: 608-277-9512

email: Morgan@MorganMPartners.com • www.mmpartners.com



MORGAN MARKETING PARTNERS

Strategic Marketing Consulting

EXHIBIT B

Compensation for Project Services

For performance of the additional services specified in amended Exhibit A starting June 1, 2006 and proceeding for the contract period, Contractor will be paid quarterly based on a flat fee an additional amount to the original contract of \$34,830 for work performed. The following describes these costs by year.

June 1 – Dec. 31, 2006: 34 weeks x 20 hours/wk = 680 hours * \$20.25/hour = \$13,770

Jan. 1 – Dec. 31, 2007: 52 weeks x 20 hours/wk = 1,040 hours * \$20.25/hour = \$21,060

Total = \$34,830

The Budget includes the following assumption:

- RPU will supply an office space for one additional person with access to a phone for local calling to RPU customers and supply computers and other office materials;

Holiday pay for this half time person will be as follows.

Part-time employees with a regular scheduled work week are eligible for holiday pay if the holiday falls on their regular work day. They will receive pay for the number of hours they would normally have worked, not to exceed 8 hours.

Holiday hours would not increase the number of budgeted hours above.

Thus the total budget under the amended contract will change to:

2006: \$120,500 + \$13,770 = \$134,270

2007: \$149,000 + \$21,060 = \$170,060

Total: \$304,330

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MMP

MORGAN MARKETING PARTNERS

Strategic Marketing Consulting

Amendment #2: CONTRACT FOR PROJECT SERVICES

This amendment is to the agreement made and entered into May 1, 2006, by and between Morgan Marketing Partners (hereinafter referred to as MMP or Contractor) whose business address is 6205 Davenport Drive, Madison, Wisconsin, 53711 and the City of Rochester, a Minnesota municipal corporation, acting by and through its Utility Board (hereinafter referred to as RPU or Company) whose business address is 4000 East River Road, Rochester, MN 55906.

This amendment is an addition to the existing agreement plus additional amendment #1 and does not change the foundation or other articles of the agreement between said parties except as noted below. This amendment is due to the increased work load in response to the Residential program of RPU and the need for additional time to process customer incentives in a timely manner.

Now, therefore, in consideration of the mutual promises in the agreement as amended, the parties agree to increase the Residential staff time provided by 10 hours per week average for the balance of the calendar year ending Dec. 31, 2006. In recognition of this increase, the budget for the services will increase by \$4455 for the current year (220 hours @ \$20.25/hour).

Morgan Marketing Partners

By: *Rick Morgan*
Name: Rick Morgan Title: President

Date: *3/4/06*

City of Rochester

By: _____
Its Mayor

Attest: _____
Its City Clerk

Date: _____

Amendment #3: CONTRACT FOR PROJECT SERVICES

This amendment is to the agreement made and entered into January 1, 2007, by and between Morgan Marketing Partners (hereinafter referred to as MMP or Contractor) whose business address is 6205 Davenport Drive, Madison, Wisconsin, 53711 and the City of Rochester, a Minnesota municipal corporation, acting by and through its Utility Board (hereinafter referred to as RPU or Company) whose business address is 4000 East River Road, Rochester, MN 55906.

This amendment is an addition to the existing agreement plus additional amendment #1, and amendment #2 and does not change the foundation or other articles of the agreement between said parties except as noted below. This amendment is due to the increased work load in response to the Residential program of RPU and the need for additional time to process customer incentives in a timely manner.

Now, therefore, in consideration of the mutual promises in the agreement as amended, the parties agree to increase the Residential staff time provided by 10 hours per week average for the balance of the calendar year ending Dec. 31, 2007. In recognition of this increase, the budget for the services will increase by \$10,530 for the current year (520 hours @ \$20.25/hour).

Morgan Marketing Partners

By: _____
Name: Rick Morgan Title: President

Date: _____

City of Rochester

By: _____
Its Mayor

Attest: _____
Its City Clerk

Date: _____

Amendment #4: CONTRACT FOR PROJECT SERVICES

This amendment is to the agreement made and entered into May 1, 2006, by and between Morgan Marketing Partners (hereinafter referred to as MMP or Contractor) whose business address is 6205 Davenport Drive, Madison, Wisconsin, 53711 and the City of Rochester, a Minnesota municipal corporation, acting by and through its Utility Board (hereinafter referred to as RPU or Company) whose business address is 4000 East River Road, Rochester, MN 55906.

This amendment is an addition to the existing agreement and does not change the foundation or other articles of the agreement between said parties except as noted below.

Now, therefore, in consideration of the mutual promises in the agreement as amended below, the parties agree as follows:

ARTICLE I: SCOPE OF PROJECT SERVICES

RPU desires to have Contractor perform, and Contractor agrees to perform, the additional Project Services associated with the energy efficiency programs outlined in previous agreements and amendments to this contract for another two year period. That period begins Jan. 1 2008 and continues until Dec. 31, 2009.

ARTICLE III: COMPENSATION FOR PROJECT SERVICES

For performance of the services specified as outlined in earlier agreements of this contract starting Jan. 1, 2008 and proceeding until Dec. 31, 2009, Contractor will be paid quarterly based on a flat fee in the following amounts for work performed.

2008: \$186,000

2009: \$192,000

The Budget includes the following assumption:

RPU will supply an office space for one additional person with access to a phone for local calling to RPU customers and supply computers and other office materials;

ARTICLE VIII: ENTIRE AGREEMENT

This amendment and the existing agreement constitute the entire understanding of the parties concerning its subject matter and supersede all prior agreements, whether oral or written. No modification shall be binding on either party unless reduced to writing and signed by both parties. This agreement is entered into and becomes effective on Jan. 1, 2008. It is understood that the signatures below legally bind the parties to this contract and that without both parties' signatures, this contract shall be void.

ARTICLE IX: MINNESOTA LAW TO GOVERN

This agreement shall be governed by and construed in accordance with the laws of the City of Rochester and the State of Minnesota.

Morgan Marketing Partners

By: _____
Name: Rick Morgan Title: President

Date: _____

ROCHESTER PUBLIC UTILITIES

Authorized Representative

General Manager

Dated: _____

CITY OF ROCHESTER

Mayor

Attest:

Reviewed By:

City Clerk

City Attorney

Amendment #5: CONTRACT FOR PROESSIONAL PROJECT SERVICES

This amendment is to the agreement made and entered into May 1, 2006, by and between Morgan Marketing Partners (hereinafter referred to as MMP) whose business address is 6205 Davenport Drive, Madison, Wisconsin, 53711 and the City of Rochester, a Minnesota municipal corporation, acting by and through its Utility Board (hereinafter referred to as RPU or Company) whose business address is 4000 East River Road, Rochester, MN 55906.

This amendment is an addition to the existing agreement and does not change the foundation or other articles of the agreement between said parties with the exception that Franklin Energy Services, LLC (hereinafter referred to as Franklin Energy or Contractor) whose business address is 403 West Foster St., Port Washington, WI 53074 assumes the Contract for Professional Project Services from MMP.

Now, therefore, in consideration of the mutual promises in the agreement as noted below, the parties agree as follows:

ARTICLE I: SCOPE OF PROJECT SERVICES

RPU desires to have Contractor perform, and Contractor agrees to perform, the Project Services associated with the energy efficiency programs outlined in previous agreements and amendments to this contract on an annually renewing basis until such time as either party provides the other with a 30-day notification of its intent to terminate the contract, that period begins Jan. 1, 2010.

Services are to be delivered under this existing contract by Franklin Energy Services, LLC staff for the specified period. It is understood that occasional employee furloughs or other adjustments to the contracted workload maybe necessary. It is also understood that Franklin Energy will need to continue to provide well trained and capable staff with unique energy efficiency technical project management and sales skills.

ARTICLE II: PERIOD OF PERFORMANCE/TERMINATION

The effective period of this agreement shall start from January 1, 2010, terminating at RPU's convenience. The attached Scope of Project Service (Exhibit A, dated 7/14/09) provides an outline of the proposed 2010 services. RPU may terminate this Agreement if, through any cause, Contractor fails to perform the Project Services in a timely and proper manner, or violates any of the provisions of this Agreement. RPU shall give Contactor

thirty (30) days written notice of its intent to terminate for cause. RPU will allow the Contractor this time to cure any default or violation. Upon termination, RPU's liability shall be limited to any undisputed costs incurred in performing the Services as of the date of termination.

ARTICLE III: COMPENSATION FOR PROJECT SERVICES

For performance of the services previously specified for the time period starting January 1, 2010, and proceeding annually, Contractor will be paid quarterly based on the following annual fee in the following amount for work performed.

2010: for \$210,672 - With future annual levels to be determined by RPU.

The Budget includes the following assumption:

RPU will supply an office space for contracted program staff with access to a phone for local calling to RPU customers and supply computers and other office materials.

ARTICLE IV: REPRESENTATIONS/WARRANTY

Contractor represents and warrants to RPU that the Project Services provided under this Agreement shall be performed with the degree of skill and care that is required by current, sound professional and commercial procedures and practices, and in conformance with generally accepted professional and commercial standards prevailing at the time the work is performed. RPU reserves the right to review Contractor's work so as to ensure that the Project Services are performed in a manner consistent with program guidelines and appropriate for the purposes of this Agreement.

ARTICLE V: RELATIONSHIP OF PARTIES

The parties intend to create by this Agreement an independent contractor relationship and not an employee/employer relationship. Neither Contractor nor any of its agents, servants or employees are to be considered agents, servants or employees of RPU at any time or under any circumstances, nor is Contractor or its employees entitled to any employee benefits from RPU, nor to any compensation from RPU except as specified in the attached Exhibit A. Franklin Energy will be responsible for all employment costs including (but not limited to) FICA, Wages, Tax withholding, MN Workers' Comp. RPU has direction and control only as to the end result to be accomplished and Contractor has direction and control over the means and method of accomplishing that end result. Contractor warrants that it holds a federal employer identification number with the IRS and has filed business or self-employment income tax returns with the IRS based on work or service in the previous year. Contractor is not an agent of RPU and is not authorized to contractually bind RPU, unless so authorized by RPU in writing. Contractor will have the authority to provide/quote incentive levels to customers on individual projects within the

guidelines of the program. Contractor is free to engage in any and all other professional and commercial activities without any prior notice to RPU, provided such activities do not directly conflict with Contractor's legal and contractual obligations to RPU.

ARTICLE VI: INDEMNIFICATION

Contractor hereby agrees to indemnify, defend and hold RPU, its directors, employees and agents harmless from and against all claims, liabilities, damages, losses, costs or expenses (including, but not limited to, reasonable attorneys' fees) arising out of the acts or omissions of Contractor, its employees, subcontractors and other agents of Contractor or its subcontractors. This indemnification includes, but is not limited to, the following:

- Personal injury suffered by a third party, or any employee of RPU, Contractor and any subcontractor of Contractor.
- Property damage incurred by any third party or by RPU, Contractor, and any subcontractor of Contractor.
- Any negligent, intentional or wrongful acts or omission of Contractor, and any subcontractor of Contractor.
- A breach of this Agreement by Contractor.
- A failure of Contractor to comply with any applicable laws, including but not limited to environmental protection laws.
- Any failure of Contractor to pay federal, state and local taxes, including but not limited to employee withholding, or any failure to provide workers' compensation coverage to Contractor's employees.

If Contractor negligently fails to perform the Project Services covered in this Agreement within the established time line, Contractor may be liable to RPU for damages incurred by RPU to the extent those damages are caused by the Contractor's negligent failure of performance, including but not limited to all costs reasonably incurred by RPU to complete the Project Services.

If RPU negligently fails to perform those acts covered in this Agreement, within the established time line, RPU may be liable to Contractor for damages incurred by Contractor to the extent those damages are caused by RPU's negligent failure of performance, including but not limited to all costs reasonably incurred by Contractor to complete the Project Services.

ARTICLE VII: PERMITS, LAWS, REGULATIONS AND PUBLIC ORDINANCES

Contractor shall secure and pay for all required permits and licenses, and shall comply with all Federal, State, and Local statutes, regulations and public ordinances governing

work (including the Occupational Safety and Health Act of 1970 and all amendments thereto), and shall indemnify, defend and save RPU harmless from any and all liability, fine, damage, cost and expense arising from Contractor's failure to do so. The validity, performance, and construction of this agreement shall be governed by the laws of the State of Minnesota.

ARTICLE VIII: CONFIDENTIALITY

Franklin Energy Services, LLC will hold all General Nonpublic Data in confidence and return any information that the client so specifies. "General Nonpublic Data" includes that data defined by the Minnesota Government Data Practices Act, Minn. Stat. Section 13.37 or such other information designated in advance as confidential and clearly marked as such.

ARTICLE IX: ENTIRE AGREEMENT

This amendment and the existing agreement constitute the entire understanding of the parties concerning its subject matter and supersede all prior agreements, whether oral or written. No modification shall be binding on either party unless reduced to writing and signed by both parties. This agreement is entered into and becomes effective on Jan. 1, 2010. It is understood that the signatures below legally bind the parties to this contract and that without both parties' signatures, this contract shall be void.

ARTICLE X: MINNESOTA LAW TO GOVERN

This agreement shall be governed by and construed in accordance with the laws of the City of Rochester and the State of Minnesota.

Franklin Energy Services, LLC.

By: Paul T Schueller
Name: Paul Schueller Title: CEO

Date: 11/3/09

ROCHESTER PUBLIC UTILITIES

Authorized Representative

General Manager

Dated: _____

CITY OF ROCHESTER

Mayor

Attest:

City Clerk

Reviewed By:

City Attorney

Experience. Delivery. Results.



Date: Tuesday, July 14, 2009

To: Patty Hanson, Rochester Public Utilities

From: Ed Carroll

Re: *Demand Side Management Program Support Services for RPU: 2010 - 2012*

Thank you for providing Franklin Energy with the opportunity to outline a proposed plan for supporting Rochester Public Utilities' demand side management (DSM) program efforts during the 2010 to 2012 time period. The following outlines our understanding of the proposed changes from our existing work with RPU -- as a subcontractor to Morgan Marketing Partners -- and Franklin Energy's proposed budget for this support work going forward.

We understand RPU wants to continue to contract for the DSM support services support primarily provided by three Franklin Energy staff members including: 1) Jan Blevins, 2) Victoria Cook, and 3) Bria Riess. These three staff members will continue to be responsible for direct selling and administration services associated with RPU's energy conservation solutions directed at the utility's commercial customers.

The only real change being requested has to do with contracting responsibility. From 2006 to 2009, Franklin Energy was a subcontractor to Morgan Marketing Partners (MMP). During this time, MMP held the direct contract with RPU. Given the maturity of the RPU efforts and track record, MMP and RPU agreed to transition support tasks to a direct contract between Franklin Energy and RPU starting in program year 2010.

Annual Budget

We have outlined our 2009 market rates for the support positions in the table below. This information is also found in the attached spreadsheet. Franklin Energy is proposing this budget be in effect for 2010 and 2011. During the third quarter of 2011, we propose RPU and Franklin Energy meet to discuss any changes to scope and budget for program year 2012 given the program experience to date.

July 14, 2009

RPU - Franklin Energy DSM Program Support Budget: 2010 to 2011 Program Years

Personnel	Position	Hours	Rate	OH Discount Applied	Adjusted Rate	Annual Cost	Monthly Rate
Jan Blevins	Energy Advisor II	1848	\$ 73.00	21%	\$ 58.00	\$ 107,184	\$ 8,932
Victoria Cook	Project Coordinator	1848	\$ 55.00	42%	\$ 32.00	\$ 59,136	\$ 4,928
Bria Riess	Project Coordinator	1386	\$ 55.00	42%	\$ 32.00	\$ 44,352	\$ 3,696
					Total	\$ 210,672	\$ 17,556

A couple of explanatory notes with regards to this proposed budget:

1. Hours - this budget assumes full time work for Jan Blevins and Victoria Cook (i.e. 1,848 working hours annually). Bria Riess is budgeted at .75 time, which equates to 30 hours per week (i.e. 1,386 hours annually).
2. Overhead (OH) Discount Applied - Franklin Energy has discounted its billing rates by 21% to 42% given our working relationship with RPU. These reductions reflect overhead costs supporting the positions (e.g. office space, computers provided by RPU) and our desire to continue our solid working relationship while bringing hourly rates more in line with other efforts, with similar roles and responsibilities.

Please contact Ed Carroll (608-310-6910) with any questions about this proposed support plan and corresponding budget. We sincerely appreciate our working relationship with you and all RPU staff members to date, and look forward to continued success helping serve RPU's commercial customers over the 2010 to 2012 program period.



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve Amendment 5 as an addition to the existing contract agreement with Franklin Energy Services, LLC, and request the Mayor and the City Clerk to execute the agreement for

Demand Side Management and Energy Conservation Sales

The amount of the contract agreement to be \$210,672 for 2010 with future annual levels to be determined by RPU, the contract to proceed annually, and subject to Board and Common Council approval of the annual electric utility budget.

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 24th day of November, 2009.

President

Secretary