

**CITY OF COOS BAY CITY COUNCIL**  
**Agenda Staff Report**

MEETING DATE	AGENDA ITEM NUMBER
September 17, 2013	

TO: Mayor Shoji and City Councilors

FROM: Susanne Baker, Finance Director *SB*  
Through: Rodger Craddock, City Manager *REC*

ISSUE: **Franchise Contingency Fee Audit**

**BACKGROUND:**

City staff has contacted several audit firms (Azavar Audit Solutions; Booth, Davis & Associates; Ashpaugh & Sculco; Telecommunications Consulting Associates; and Pauly Rogers), cities, and references to have a contingency fee audit performed of the franchise holders of the City of Coos Bay. Of the firms contacted, Azavar Audit Solutions was the only firm that would perform the audit on the basis of a contingency fee. A contingency fee audit is one in which the audit firm shares in the savings derived from the findings of their audit. If the franchise holders are remitting the correct amount due and no customers/revenue have been missed or miscalculated, there is not a fee owed by the City nor does the audit firm receive revenue. In 2011, the City contracted with Telecommunications Consulting Associates to perform a contingency fee audit of the Charter Cable franchise. The proposed contingency fee audit with Azavar Audit Solutions would be similar; however, the auditor will review all of the franchises (electric, cable, telecommunications, solid waste, fiber, and natural gas).

The firm proposes to perform the audit based on an amount equal to 45% of any new revenues or prospective funds recovered per account or per Provider for forty-eight (48) months following when funds begin to be properly remitted. This firm utilizes the customer base and information derived from one utility and applies this to other utilities as a crosscheck.

**ADVANTAGES:**

The City Attorney has reviewed and approved the professional services agreement.

**DISADVANTAGES:**

None.

**BUDGET:**

The possibility exist that additional franchise fees would be remitted to the City.

**RECOMMENDATION:**

Staff proposes the Council authorize the City Manager to sign the professional services agreement with Azavar Audit Solutions to perform an audit of the City's franchise holders.

**Attachment:**

Azavar Audit Solutions Professional Services Agreement

## **CONTINGENT FEE PROFESSIONAL SERVICES AGREEMENT**

This Professional Services Agreement (“Agreement”) is made and entered into by and between Azavar Audit Solutions, Incorporated, an Illinois corporation having its principal place of business at 234 South Wabash Avenue, Sixth Floor, Chicago, Illinois 60604 (“Azavar”), and the City of Coos Bay, an Oregon municipal corporation having its principal place of business at 500 Central Avenue, Coos Bay, Oregon 97420 (“Customer”).

### **1. SCOPE OF SERVICES**

1.1 Subject to the following terms and conditions, Azavar shall provide professional computer, data audit, compliance management, and management consulting services (“Services”) in accordance with the below statement of work. Azavar will render the services provided under this Agreement in a workmanlike manner in accordance with industry standards. The services and work provided shall be provided in substantial accordance with the below statements:

- (a) Azavar shall undertake a Municipal Audit Program on behalf of the Customer. As part of the Municipal Audit Program Azavar shall, on behalf of the Customer, separately audit each utility tax, taxpayer, franchise fee, and utility service fee and expense imposed by or upon the Customer within the Customer’s corporate boundaries (“Audits”) including, but not limited to Cable, Electric, Gas, and Telecommunications providers (“Providers”) on behalf of the Customer. If and where applicable, Azavar shall also audit during the course of its work for the Customer (i) addresses and databases relating to local sales/use taxes and (ii) water service.
- (b) The purpose of each audit is to determine past, present, and future taxes, franchise fees, service fees, or any other refunds, monies or revenue owed to the Customer that were not properly attributed to the Customer or were not properly paid or collected and to determine future taxes, franchise fees, and other monies owed to the Customer not previously counted so that Customer can collect these past, present, and future monies. Federal and Oregon state law, the Customer’s own local ordinances and databases, and the franchise agreements and contracts or bills between Customer and Providers are used by Azavar to conduct the Audits and Azavar will present to Customer in writing during the course of the Audits findings of monies due or potentially due to the Customer for review by the Customer (“Findings”).
- (c) Customer hereby represents that it is not engaged in any Audits as contemplated under this Agreement and shall therefore pay Azavar the fees set forth in this Agreement for any Findings made by Azavar. Customer agrees that it shall not initiate or engage in any Audits contemplated under this Agreement without Azavar’s written consent.
- (d) In order to perform the audits, Azavar will require full access to Customer records and Provider records. Customer will use its authority as necessary to assist in acquiring information and procure data from Providers; Customer agrees to cooperate with Azavar, provide any necessary documentation, and will engage in necessary meetings with Providers;
- (e) During the course of each audit, Azavar may find that rather than being owed past due funds, the Customer owes funds erroneously paid to the Customer. In this case, Azavar will immediately terminate its participation for

that specific Provider audit at no cost to the Customer and will document the error and provide the Customer with information necessary to correct the error. Azavar shall have no liability to Customer for these errors or actions arising from Azavar's or Customer's knowledge thereof.

- (f) Customer acknowledges that each Provider is a separate entity that is not controlled by Azavar and therefore Azavar cannot predict all the steps or actions that a Provider will take to limit its responsibility or liability during the audit.
- (g) The first audit start date is expected to be within no later than thirty (30) days from the date of this Agreement unless changed and approved by the Customer's Audit Primary Contact and Liaison;
- (h) Each audit is expected to last at least six (6) months. Each subsequent audit will begin after payment terms and obligations have been met from previously completed audits however overlapping audit work may take place at the discretion of Azavar. Audit timelines are set at the discretion of Azavar;
- (i) Audit status updates/meetings will be held regularly via phone, email, or in person throughout the course of the Audits between Azavar and the Customer's Audit Primary Contact and Liaison and will occur approximately every month;
- (j) Jason Perry, Azavar Municipal Audit Program Manager, and Azavar specialists will be Auditors under this agreement. All Azavar staff shall be supervised by the Azavar Program Manager.

1.2 Customer agrees to provide reasonable facilities, space, desks, chairs, telephone and reasonably necessary office supplies for Consultants working on Customer's premises as may be reasonably required for the performance of the Services set forth in this Agreement and in any Exhibit hereto. Customer will assign and designate an employee to be the Audit Primary Contact and Liaison. The Customer's Audit Primary Contact and Liaison will be the final decision maker for the Customer as it relates to this audit and will meet with Azavar staff on a regular basis as necessary. Lack of participation of Customer staff, especially at critical milestones during an audit, will adversely affect the audit timeline and successful recovery of funds. While Azavar strives to provide turn-key audit programs that require little Customer staff time, it is important that the Customer's staff be available for meetings and participation with Providers to properly verify records and recover funds.

2. **INDEPENDENT CONTRACTOR.** Azavar acknowledges and agrees that the relationship of the parties hereunder shall be that of independent contractor and that neither Azavar nor its employees shall be deemed to be an employee of Customer for any reason whatsoever. Neither Azavar nor Azavar's employees shall be entitled to any Customer employment rights or benefits whatsoever.

3. **PAYMENT TERMS.**

3.1 Customer shall compensate Azavar the fees set forth in this agreement on a contingency basis. If applicable, Azavar shall submit an invoice to Customer on a monthly basis detailing the amounts charged to Customer pursuant to the terms of this Agreement. Customer shall remit payment to Azavar in accordance within 30 days of receipt of invoice. Should Customer not timely pay Azavar, Customer shall

be responsible for all of Azavar's collection costs necessary to collect payment due to Azavar by Customer including interest, attorney's fees and court costs. Contingency payment terms are outlined below. If Customer negotiates, abates, cancels, amends, or waives, without Azavar's written consent, any tax determination or Findings that were identified by Azavar or by its Audits where such findings were allowed under the law at the time the tax determination or Findings were made, subject to section 3.1.1 below, Customer shall pay to Azavar applicable contingency fees for the total said tax determination or Findings at the rates set forth below and for the following forty-eight (48) months. Such consent by Azavar shall not be unreasonably withheld. If Customer later implements during the subsequent forty-eight (48) months any Findings Customer initially declined based on Azavar programs or recommendations, including overall utility audits included herein, Azavar will be entitled to its portion of the savings and/or recoveries over the following forty-eight (48) months at the contingency fee rates set forth below.

3.1.1 In the event that total retroactive Findings due to Customer identified by Azavar cumulatively for all providers is less than ten thousand dollars (\$10,000.00), may elect to take no collection action with regard to such revenues, without incurring any obligation to Azavar. Under such a circumstance, Azavar shall have the right to pursue any such Provider for the retroactive Findings, in the name of the Customer. Customer shall cooperate with Azavar in such collection efforts. The reasonable collection costs, including attorney fees and court costs incurred by Azavar in such a collection effort shall be reimbursed to Azavar before payments are made to either the Customer or Azavar pursuant to sections 3.2 and 3.3 herein.

3.2 Customer shall pay Azavar an amount equal to forty-five (45) percent of any new revenues or prospective funds recovered per account or per Provider for forty-eight (48) months following when funds begin to be properly remitted to the Customer. In the event Azavar is able to recover any retroactive funds, any additional savings or revenue increases for any time period, or any credits at any time, Customer will pay Azavar an amount equal to forty-five (45) percent of any retroactive funds, savings, and fair market value for any other special consideration or compensation recovered for and/or by the Customer from any audited Provider. All contingency fees paid to Azavar are based on determinations of recovery by Azavar based on Provider data and regulatory filings and agreed to by the Customer. All revenue after the subsequent forty-eight (48) month period for each account individually will accrue to the sole benefit of the Customer.

As it pertains to Customer utility service bill and cost audits, Customer shall pay Azavar an amount equal to forty-five (45) percent of prospective savings approved by Customer for forty-eight (48) months following the date savings per Provider is implemented by Azavar or Customer. In the event Azavar is able to recover any refunds or any credits at any time, Customer will pay Azavar an amount equal to forty-five (45) percent of said refunds or credits. All contingency fees paid to Azavar are based on determinations of savings by Azavar. All savings after the subsequent forty-eight (48) month period for each service provider individually will accrue to the sole benefit of the Customer.

4. **CONFIDENTIAL INFORMATION**

4.1 Each party acknowledges that in the performance of its obligations hereunder, either party may have access to information belonging to the other which is proprietary, private and highly confidential ("Confidential Information"). Each party, on behalf of itself and its employees, agrees not to disclose to any third party any Confidential Information to which it may have access while performing its obligations hereunder without the written consent of the disclosing party which shall be executed by an officer of such disclosing party. Confidential Information does not include: (i) written information legally acquired by either party prior to the negotiation of this Agreement, (ii) information which is or becomes a matter of public knowledge, and (iii) information which is or becomes available to the recipient party from third parties where such third parties have no confidentiality obligations to the disclosing party.

4.2 Azavar agrees that any work product or any other data or information that is provided by Customer in connection with the Services shall remain the property of Customer, and shall be returned promptly upon demand by Customer, or if not earlier demanded, upon expiration of the Services provided under the Statement of Work hereto.

5. **INTELLECTUAL PROPERTY**

5.1 No work performed by Azavar or any Consultant with respect to the Services or any supporting or related documentation therefor shall be considered to be a Work Made for Hire (as defined under U.S. copyright law) and, as such, shall be owned by and for the benefit of Azavar. In the event that it should be determined that any of such Services or supporting documentation qualifies as a "Work Made for Hire" under U.S. copyright law, then Customer will and hereby does assign to Azavar, for no additional consideration, all right, title, and interest that it may possess in such Services and related documentation including, but not limited to, all copyright and proprietary rights relating thereto. Upon request, Customer will take such steps as are reasonably necessary to enable Azavar to record such assignment. Customer will sign, upon request, any documents needed to confirm that the Services or any portion thereof is not a Work Made for Hire and/or to effectuate the assignment of its rights to Azavar.

5.2 Under no circumstance shall Customer have the right to distribute any software containing, or based upon, Confidential Information of Azavar to any third party without the prior written consent of Azavar which must be executed by a senior officer of Azavar.

6. **DISCLAIMER**

**EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, AZAVAR DOES NOT MAKE ANY WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES RENDERED UNDER THIS AGREEMENT OR THE RESULTS OBTAINED FROM AZAVAR'S WORK, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT SHALL AZAVAR BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, OR INDIRECT DAMAGES, OR FOR ACTS OF NEGLIGENCE THAT ARE NOT INTENTIONAL OR RECKLESS IN NATURE,**

REGARDLESS OF WHETHER IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. CUSTOMER AGREES THAT AZAVAR'S LIABILITY HEREUNDER FOR DAMAGES, REGARDLESS OF THE FORM OF ACTION, SHALL NOT EXCEED THE TOTAL AMOUNT PAID FOR THE SERVICES GIVING RISE TO THE DAMAGES UNDER THE APPLICABLE ESTIMATE OR IN THE AUTHORIZATION FOR THE PARTICULAR SERVICE IF NO ESTIMATE IS PROVIDED.

7. **TERMINATION**

7.1 Unless earlier terminated in accordance with Section 7.2 below, this Agreement shall be effective from the date first written above and shall continue thereafter until terminated upon 90 days written notice by Customer or Azavar.

7.2 Termination for any cause or under any provision of this Agreement shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either party.

7.3 The provisions set forth above in Section 3 (Payment Terms), Section 4 (Confidential Information), and Section 5 (Intellectual Property) and below in Section 9 (Assignment), and Section 10 (Use of Customer Name) shall survive termination of this Agreement.

8. **NOTICES.** Any notice made in accordance with this Agreement shall be sent by certified mail or by overnight express mail:

If to Azavar  
General Counsel  
Azavar Audit Solutions, Inc.  
234 South Wabash Avenue, Sixth  
Floor  
Chicago, Illinois 60604

If to Customer  
City Manager  
City of Coos Bay, Oregon  
500 Central Avenue  
Coos Bay, Oregon 97420

9. **ASSIGNMENT.** Neither party may assign this Agreement or any of its rights hereunder without the prior written consent of the other party hereto, except Azavar shall be entitled to assign its rights and obligations under this Agreement in connection with a sale of all or substantially all of Azavar's assets.

10. **USE OF CUSTOMER NAME.** Customer hereby consents to Azavar's use of Customer's name in Azavar's marketing materials; provided, however, that Customer's name shall not be so used in such a fashion that could reasonably be deemed to be an endorsement by Customer of Azavar unless such an endorsement is provided by customer.

11. **COMPLETE AGREEMENT.** This Agreement, along with each Statement of Work attached hereto from time to time, contains the entire Agreement between the parties hereto with respect to the matters specified herein. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision hereof. This Agreement shall not be amended except by a written amendment executed by the parties hereto. No delay, neglect or forbearance on the part of either party in enforcing against the other any term or condition of this Agreement shall either be, or be deemed to be, a waiver or in any way prejudice any right of that party under this Agreement. This Agreement shall be construed in accordance with the laws of the State of Illinois and the parties hereby consent to the jurisdiction of the courts of the State of Illinois.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in duplicate originals by their duly authorized representatives as of the date set forth below.

AZAVAR AUDIT SOLUTIONS, INC _____	CITY OF COOS BAY, OREGON CUSTOMER _____
By _____	By _____
Title _____	Title _____
Date _____	Date _____