ITEM NO. 8

STAFF REPORT *CITY OF OCEANSIDE*

DATE: November 18, 2009

TO: Honorable Mayor and City Councilmembers

FROM: Public Works Department

SUBJECT: **APPROVAL OF AN AGREEMENT FOR UNDERGROUND FACILITY LOCATION AND MARKING SERVICES**

SYNOPSIS

Staff recommends that the City Council approve a one-year agreement with Utiliquest, LLC, of Atlanta, Georgia, in the amount of $52,000 for underground facility location and marking services for the Public Works Department; and authorize the City Manager to execute the agreement.

BACKGROUND

Utiliquest currently provides these services which include reviewing daily requests from Underground Service Alert (USA) and providing location/marking services for underground utilities owned by the City of Oceanside such as street lights and traffic signals. Staff has found it more cost-effective to contract out these services and Utiliquest is currently the only company providing these services in Southern California.

ANALYSIS

California State Law requires contractors to notify USA at least 48 hours prior to excavating. Failure to do so can result in large fines and the contractor can be charged with the repair costs of any damaged underground facilities. Utiliquest will be notified by USA on a daily basis to determine if city-owned utilities are located within any excavation areas in the City limits. The price of these services provided by Utiliquest is fair and reasonable and in line with industry fair market values. The agreement is for a term of one year commencing November 17, 2009.

FISCAL IMPACT

The one-year agreement cost of $52,000 is funded in the Public Works Traffic Control System Maintenance Budget (640621101.5355).

INSURANCE REQUIREMENTS

The City's standard insurance requirements will be met.

COMMISSION OR COMMITTEE REPORT

Does not apply.

CITY ATTORNEY ANALYSIS

The referenced documents have been reviewed by the City Attorney and approved as to form.

RECOMMENDATION

Staff recommends that the City Council approve a one-year agreement with Utiliquest, LLC, of Atlanta, Georgia, in the amount of $52,000 for underground facility location and marking services for the Public Works Department; and authorize the City Manager to execute the agreement.

PREPARED BY:

H. Kiel Koger
Maintenance and Operations Manager

SUBMITTED BY:

Peter A. Weiss
City Manager

REVIEWED BY:
Michelle Skaggs Lawrence, Deputy City Manager

Joseph Arranaga, Deputy Public Works Director

Teri Ferro, Financial Services Director

Exhibit A

AGREEMENT FOR UNDERGROUND FACILITY LOCATING AND MARKING SERVICES

This agreement is made on **September 29, 2009**, between **UTILIQUEST, LLC**, Four Concourse Parkway, Suite 250, Atlanta, Georgia 30328 ("Contractor"), and **CITY OF OCEANSIDE**, 4927 Oceanside Boulevard, Oceanside, California 92056 ("Customer").

Article I: Locating and Marking Services

Section 1.1 – Retention of Contractor

Customer retains Contractor to perform, and Contractor agrees to perform, underground facility locating and marking services (Services) for Customer underground facilities in the service territory identified in **Exhibit- A** and made a part of this Agreement, and any other territories that the parties may agree to in writing.

Section 1.2 – Scope of Services

1. Contractor agrees to receive all excavation notices, (Requests), directed to Customer from any source, including requests generated through the One-Call Center.
2. Customer agrees to instruct the One-Call Center to transmit Requests involving Customer's underground facilities directly to Contractor.
3. Contractor shall respond to and complete all locate requests in accordance with State laws. Contractor shall, for each locate request, review the Customer's underground facility maps, determine any conflict between the proposed excavation and Customer's facilities, and where conflict exists locate and mark such facilities.
4. Contractor shall use paint, flags, or stakes as necessary to identify the location of Customer's facilities. Such markings shall be placed at reasonable distances and shall be in accordance with the APWA uniform color code guidelines.
5. Contractor agrees to perform the Services as promptly as possible and to electronically close out all locate requests.
6. Contractor shall maintain records of all requests for a period of Three (3) years, from the date of receipt.
7. All Services shall be performed in a good and workman-like manner and in accordance with all applicable laws, regulations and ordinances, and shall comply with the locating procedures as from time to time adopted and approved by the National Utility Locating Contractor's Association (NULCA).
8. Contractor shall designate a single point of contact between Contractor and Customer to serve as liaison for receipt and distribution of Customer's underground facility maps, and other administrative issues.
9. In the event Contractor encounters any Customer underground facilities that are "Identifiable, but Unlocateable", Contractor shall notify Customer after having exhausted reasonable efforts to locate such facility. Customer will either assist Contractor or complete said locates at no cost to Contractor.
10. An "Identifiable, but Un-locatable" facility is defined as a facility whose presence is known but which can not be located with "Reasonable Accuracy" using electronic devices designed to respond to the presence of such underground facilities.

Section 1.3 – Materials Provided by Customer

During the term of this Agreement, Customer agrees to furnish Contractor with adequate copies of Customer's underground facility maps and records. This shall include all available maps, measurements, charts, technical information and updates, which are necessary to locate Customer's underground facilities. All such materials furnished or disclosed to Contractor by Customer in the performance of this Agreement shall remain the property of Customer. All copies of such information shall be returned to Customer upon the termination of this Agreement. Unless such materials were previously known to Contractor free of any obligation to keep them confidential, or subsequently made public by Customer, such materials shall be kept confidential by Contractor, shall be used only in the performance of Services under this Agreement and may not be used for any other purpose except as may be agreed upon in writing by Customer. This obligation of confidentiality shall survive the termination of this Agreement.

Section 1.4 – Materials Provided by Contractor; Independent Contractor

During the term of this Agreement, Contractor agrees to provide sufficient staff and personnel, office and field equipment, transportation and supplies as are necessary to fulfill its obligations under this Agreement, and shall furnish and maintain any and all state, county and municipal licenses or permits which apply to the Services to be performed by Contractor. Contractor hereby represents and agrees that it is engaged in an independent business; that it will perform Services under this Agreement as an independent contractor and none of its workers, agents or employees shall under any circumstance be construed as an employee of Customer; that it has and hereby retains the right and responsibility to exercise control and supervision of the Services and full control over the employment, direction, compensation and discharge of all persons assisting it in performing the Services; that it will be solely responsible for the payment of its employees and for the payment of all federal, state, county and municipal taxes and contributions pertaining thereto; and that it will be responsible for its own acts and for the acts of its employees, agents, and subcontractors while performing Services under this Agreement. Nothing contained in this Agreement shall create or be construed as creating the relationship of employer and employee, or partnership or joint venture, between Customer and Contractor, or between Customer and any person or persons employed or engaged by Contractor.

Article II: Compensation

Section 2.1 – Compensation for Services

Contractor's compensation for all work performed in accordance with this agreement shall not exceed the total contract price of fifty-two thousand ($52,000). Subject to the foregoing, in full and complete payment for the performance of Services under this Agreement, Customer shall pay to Contractor the amounts set forth on (**Exhibit-B** Price **Schedule**) attached to this Agreement. Customer shall compensate any service performed by Contractor at the request of Customer, which is not provided on the Exhibit- B Schedule, at the rates determined from time to time between the parties. Contractor shall invoice Customer each week for the work performed the prior week. All invoices shall be due and payable, and Customer shall pay the Compensation due, within thirty (30) days of the date of the invoice.

Article III: Term and Termination

Section 3.1 – Term of the Contract

The term of this Agreement shall be one (1) year beginning on **November 17, 2009** and shall expire on **November 16, 2010**. The parties acknowledge that Contractor needs a start-up period to inspect the materials received from Customer and to prepare to provide the Services, and Customer shall provide all relevant materials to Contractor as soon as practical after the execution of this Agreement. Contractor shall perform work at the prices outlined in attached Exhibit B - Schedule of Pricing.

Section 3.2 – Termination

This Agreement, and the obligations of the parties, maybe terminated prior to the end of the term only under the following circumstances and only in accordance with the following procedures:

1. By either party after ten (10) days prior written notice in the event of the bankruptcy or insolvency of a party, or in the event of the appointment of a receiver for the assets of a party; or
2. By the non-breaching party after thirty (30) days prior written notice to the breaching party, and after compliance with the procedures set forth in Section 3.3 of this Agreement, in the event of a material breach by a party of its obligations under this Agreement; or
3. By either party, for any reason with thirty (30) days prior written notice to other party.

Section 3.3 – Procedures for Termination for Breach

In the event a party in good faith believes that the other party has breached its obligations under this Agreement, the non-breaching party shall provide a written notice to the breaching party specifying in reasonable detail the breach, which is alleged to have occurred. If the party receiving the notice agrees that the breach has occurred, it shall be given ten (10) days after the receipt of the notice to cure such breach or, in the event such a breach can not be cured, to develop and submit to the other party policies or procedures, or to take other action, to ensure that such a breach will not occur in the future. In the event the party receiving the notice does not agree that the breach has occurred, such party shall request in writing a meeting of their respective general managers to discuss the facts and circumstances alleged to have resulted in the breach and to determine whether such a breach has occurred. Such a meeting shall occur within five (5) days of the receipt of such a request. At the meeting, the parties shall cooperate with each other and act in good faith to resolve the dispute and their differences. In the event the meeting of the general managers does not resolve the dispute as to whether a breach has occurred, a second meeting shall be held between the parties and shall be attended by the general managers and the next highest position within the applicable party with authority over the subject matter of this Agreement. At the second meeting, the parties shall again cooperate with each other and act in good faith to resolve the dispute and their differences. In the event the second meeting of the parties does not resolve the dispute, the question of whether a breach has occurred under this Agreement shall be submitted to mediation. A single mediator, selected by the parties, shall conduct the mediation. If the parties cannot agree on the mediator, each party shall submit three (3) selections for mediators, and the mediator shall be selected by lot from the six (6) names submitted. The costs and expenses of the mediation shall be shared equally between the parties; provided, however, that each party shall pay their own fees and expenses of their respective counsel, witnesses and experts, if applicable. The parties acknowledge and agree that the foregoing provisions are intended to provide a process of resolving disputes between them without the necessity of terminating this Agreement. The parties hereby confirm their agreement to make diligent and good faith attempts to cooperate with each other throughout the term of this Agreement, and to resolve all differences in a fair and equitable manner. The parties understand and agree that compliance with this Section 3.3 is a condition precedent to commencing a civil action or proceeding based on

this contract. Further, no suit shall be brought on this contract unless all statutory claims filing requirements have been met.

Section 3.4 – No Solicitation of Competitive Contractors by Customer

Customer hereby agrees not to solicit any contractors or agents to bid for or to provide the Services described in this Agreement during the term of this Agreement. However, notwithstanding the termination provisions detailed in Section 3.2 of this Agreement, the Customer shall be entitled to solicit for bids for the Services within the last 120 days of the term provided the Contractor is also entitled to bid for such Services at such time. Nothing in this Section 3.4 shall be construed to prohibit or prevent customer from complying with competitive bidding laws, rules or procedures applicable to customer as a public agency.

Section 3.5 – Transition of Contractors

Upon the termination of this Agreement, the parties agree to reasonably cooperate with each other as is necessary to effect an orderly transition of the business contemplated in this Agreement. In furtherance of this provision:

1. Contractor agrees to deliver to the Customer at or prior to the date of such termination the materials supplied to Contractor pursuant to Section 1.3 of this Agreement, and to provide Customer with all Requests received for which Services have not been performed as of the date of termination; and
2. The parties mutually agree to meet, prior to the proposed date of termination, to coordinate between them the transition of unperformed Requests and ongoing major projects for which Contractor has been providing Services. Contractor shall be entitled to, and Customer shall pay, continued Compensation, pursuant to this Agreement, for any Services performed after the termination, but at the request of Customer and in connection with the transition of the business contemplated to another contractor. In the event Customer does not request any additional Services in connection with such transition, the termination of this Agreement shall relieve Contractor from all obligations to provide Services. Termination of this Agreement shall not, however, relieve either party of any obligation to the other which arose prior to the date of such termination.

Article IV: Insurance

Section 4.1 – Contractor's Insurance

Contractor shall maintain throughout the term of this Agreement the following insurance coverage, and upon request shall provide to Customer certificates or policies evidencing the following coverage:

1. Workers' compensation coverage in accordance with the laws of the State of Service
2. Commercial general liability insurance with the following minimum limits of liability:

    - $1,000,000 Each occurrence
    - $2,000,000 General aggregate
    - $2,000,000 Products aggregate
    - $1,000,000 Personal & advertising injury

3. Contractual liability insurance with minimum limits of $1,000,000.

4. Comprehensive automobile liability insurance with the minimum limits of liability at $1,000,000 Combined single limit.

All insurance policies shall be written by reputable companies, authorized to issue insurance in the State where work is performed, and shall name Customer as an additional insured party by endorsement to such policies. Each policy shall provide that it will not be canceled or amended except after ten (10) days advance written notice to Customer, mailed to the address indicated in this Agreement.

Article V: Indemnification and Liability

Section 5.1 – Indemnification by Contractor

Not withstanding the provisions of Section 5.4 herein, Contractor shall be liable for any claim, lawsuit or damage to the property or facilities of Customer that results directly from an error or omission by Contractor in locating and marking Customer's underground facilities. The Contractor shall indemnify, defend and hold harmless the Customer and its officers, directors, affiliates, agents, and employees from and against all claims, actions, damages, losses, and expenses, including reasonable attorneys' fees and disbursements, arising out of or resulting from a breach of this Agreement or the performance of the Services performed under this Agreement, provided that such claim, action, damage, loss or expense is caused in whole or in part by any act or omission of the Contractor, or any subcontractor of the Contractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. Notwithstanding the foregoing, contractor's defense and indemnity obligations hereunder shall not apply to claims arising from the willful misconduct, sole negligence or active negligence of the customer, its officers, agents or employees.

Section 5.2 – Third Party Claims

Promptly after the receipt by a party to this Agreement of notice of any claim, action, suit or proceeding by any person who is not a party to this Agreement (collectively, an "Action")' which is subject to indemnification, such party (the "Indemnified Party") shall give reasonable written notice to the party from whom indemnification is claimed (the "Indemnifying Party"). The Indemnified Party's failure to so notify the Indemnifying Party of any such matter shall not release the Indemnifying Party, in whole or in part, from its obligations to indemnify under this Agreement, except to the extent the Indemnified Party's failure to so notify actually prejudices the Indemnifying Party's ability to defend against such Action. The Indemnified Party shall be entitled, at the sole expense and liability of the Indemnifying Party, to exercise full control of the defense, compromise or settlement of any such Action unless the Indemnifying Party, within a reasonable time after the giving of such notice by the Indemnified Party, shall:

1. Admit in writing to the Indemnified Party, the Indemnifying Party's liability to the Indemnified Party for such Action under the terms of this Agreement;
2. Notify the Indemnified Party in writing of the Indemnifying Party's intention to assume the defense, and;
3. Retain legal counsel reasonably satisfactory to the Indemnified Party to conduct the defense of such Action.

The Indemnified Party and the Indemnifying Party shall cooperate with the party assuming the defense, compromise or settlement of any such Action in any manner that such party reasonably may request. If the Indemnifying Party so assumes the defense of any such Action, the Indemnified Party shall have the right to employ separate counsel and to participate in (but not control) the

defense, compromise, or settlement, but the fees and expenses of such counsel shall be the expense of the Indemnified Party unless:

a. The Indemnifying Party has agreed to pay such fees and expenses,

b. Any relief other than the payment of money damages is sought against the Indemnified parry or

c. The Indemnified Party shall have been advised by its counsel that there may be one or more legal defenses available to it, which are different from or additional to those available to the Indemnifying Party, and in any such case the fees and expenses of such separate counsel shall be borne by the Indemnifying Party.

No Indemnified Party shall settle or compromise or consent to entry of any judgment with respect to any such Action for which it is entitled to indemnification hereunder without the prior written consent of the Indemnifying Party, unless the Indemnifying Party shall have failed, after reasonable notice, to undertake control of such Action in the manner provided above in this Section. No Indemnifying Party shall, without the written consent of the Indemnified Party, settle or compromise or consent to entry of any judgment with respect to any such Action in which any relief other than the payment of money damages is sought against any Indemnified Party unless such settlement, compromise or consent includes as an unconditional term thereof the giving by the claimant, petitioner or plaintiff, as applicable, to such Indemnified Party of a release from all liability with respect to such Action.

Section 5.3 – Shared Damage Risk

In the event of any damage to Customer's underground facility, which in the opinion of Customer may be related to the Services performed hereunder, Customer shall immediately (after making the site safe) but no later than 12 hours notify Contractor to investigate such damage, and Contractor shall submit a written investigation report to Customer within 10 business days. If Contractor is notified of a damage later than 12 hours, Contractor will still investigate but will not be held liable to Customer's underground facility. Should the investigation reveal that the damage resulted directly from an error or omission of Contractor, or because Contractor failed to mark the location of such facility within reasonable accuracy as defined herein, Contractor shall reimburse Customer for repair and restoration costs of said facility not to exceed $1,000.00 per incident. Contractor shall not be responsible for down time/ delays due to any facility damages.

Article VI: Miscellaneous Provisions

Section 6.1 – Amendments

Any amendments, modifications and supplements to this Agreement must be in writing and signed by an authorized representative of both parties. The term "this Agreement" shall be deemed to include any future amendments, modifications and supplements. All such amendments, modifications and supplements shall not, unless specifically referred to, be construed to adversely affect vested rights or causes of action, which have accrued prior to the effective date of such amendment, modification or supplement.

Section 6.2 – Entire Agreement

This Agreement and any and all amendments, modifications or supplements hereto, shall constitute the entire agreement between the parties with respect to the subject matter of this Agreement and shall supersede any and all agreements, bids, or other understandings between the parties concerning such subject matter.

Section 6.3 – Severability

In the event that one or more clauses, covenants, or provisions contained in this Agreement are found by a court of competent jurisdiction to be invalid and unenforceable, such finding shall not

affect the validity or enforceability of the remainder of this Agreement, which shall remain in full force and effect, in accordance with its terms, and such invalid or unenforceable provision shall be deemed limited or modified as necessary to make the same valid or enforceable so as to give effect to the intent of the parties as expressed herein to the maximum extent possible.

Section 6.4 – Waiver

The waiver by either party of the breach of any provision of this Agreement shall not operate or be construed as a waiver of any other or subsequent breach hereof. The waiver of any provision of this Agreement shall not operate or be construed as a waiver of any other provision of this Agreement. Any waiver of a provision of this Agreement or a breach hereof shall not be effective unless the waiver is in writing and is signed by an authorized representative of the waiving party, and the waiver shall be effective only for the specific purpose for which it was given.

Section 6.5 – Notices

All notices and other communications to be given in accordance with this Agreement shall be deemed to have been duly given:

1. On the day of delivery if personally delivered to the person being served or to an appropriate officer of any corporate party being served, or if sent by facsimile or e-mail with confirmation of receipt, or
2. On the day of signature or refusal of the receipt if mailed by United States certified mail, return receipt requested, postage prepaid, to the parties at the following addresses:

To Customer:

City of Oceanside
Attn: Steve Elliott
4927 Oceanside Boulevard
Oceanside, CA 92506
Phone: 760.435.5192
Fax: 760.945.2080

To Contractor:

UTILIQUEST LLC
Attn: Marketing Department
Four Concourse Parkway, Suite 250
Atlanta, GA 30328
Phone: 678.461.3900
Fax: 678.461.3902

Section 6.6 – Assignment

Neither this Agreement, nor the rights and obligations hereunder, may be assigned by the parties hereto without the prior written consent of the other party. In the event of a permitted assignment hereunder, the rights and obligations of this Agreement shall inure to the benefit of, and be binding upon, the party's successors and assigns.

Section 6.7 – Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute the same agreement.

Section 6.8 – Governing Law

This Agreement shall be governed by, and construed in accordance with the laws of the State of California, without regard to the conflict of laws principles thereof.

Section 6.9 – Additional Terms

The additional terms if any, included on Schedule 6.9 hereto, if any, are hereby incorporated into this Agreement and shall be deemed to be a part hereof.

Section 6.10 – Headings

The Article and Section headings used in this Agreement are inserted for convenience of reference only, and shall not be construed as confining or limiting in any way the scope or intent of the provisions of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives effective as of the date and year first written above.

For Contractor (UTILIQUEST LLC)

By: Jamal Masumi
Title: President

Date: 9/30/09

By: Dennis Tarosky
Title: Chief Financial Officer

Date: 9/30/09

Witness

For Customer (City of Oceanside)

By:
Title:

Date:

Witness

APPROVED AS TO FORM
OCEANSIDE CITY ATTORNEY
BARBARA L. HAMILTON
Assistant City Attorney

Exhibit A - Contract Service Territories

The following describes the geographic area / facilities to be covered by this agreement:

The City of Oceanside, California

EXHIBIT – B Schedule of Pricing

The Contractor will be reimbursed for services as described below.

Field Locates (Transmissions):

1) Weekly Service Charge (0-150 Locates)	$1,000.00/week
2) Additional Locates (151+)	$12.75 each*

* One unit for each transmission received from One Call. Additional units for each 400 linear feet located.

Full time, stand-by and route patrol:	$65.00/hour
After hours emergency call out:	$100.00 (minimum 2 hours)

* Per Hour Rates apply to special customer requests, generally for 'non-routine' locate responses not processed through California One Call or on-site standby service or for storm related services.

_____ Initials
UtiliQuest LLC 9/30/09

_____ Initials
City of Oceanside

Transmission Pricing: Is to be applied as a price per Underground Service Alert (USA) transmission (ticket). Transmission pricing is not the actual price for the incremental work; it is a method of assigning the billings over the total volume of transmissions received by Contractor. Transmission billing is for ALL transmissions received and is not dependent upon the work content of any one transmission.

Hourly Rates:

Standard Working Hours:	7:00 a.m. to 5:00 p.m., Monday through Friday.
Standard Hourly Rate:	Rate applicable for work performed during standard working hours.
After Hours Rate:	Rate applicable for locates performed outside standard working hours.