

PERALTA COMMUNITY COLLEGE DISTRICT
Board of Trustees Agenda Report
For the Trustee Meeting Date of December 15, 2009

ITEM # 6

ITEM TITLE: *(Please define the subject; e.g., change order – Berkeley City College)*

Contract extension for the Pineapple Group, LLC

SPECIFIC BOARD ACTION REQUESTED:

Vote to approve contract extension for the Pineapple Group, LLC to provide financial advisory services.

ITEM SUMMARY: *(PLEASE DISCUSS THIS ITEM)*

BACKGROUND/ANALYSIS: DURING 2007, THE PINEAPPLE GROUP, LLC WAS HIRED BY THE DISTRICT TO PROVIDE IT WITH FINANCIAL ADVISORY SERVICES PERTAINING TO THE INVESTMENT OF THE DISTRICT'S OTHER POST EMPLOYMENT BENEFIT ("OPEB") BOND PROCEEDS. THE ORIGINAL TERM OF THE PROFESSIONAL SERVICES CONTRACT BY AND BETWEEN THE DISTRICT AND THE PINEAPPLE GROUP, WAS FOR A FIVE YEAR PERIOD, FROM JANUARY 2008 UNTIL DECEMBER 2013, WITH A POTENTIAL TWO-YEAR EXTENSION. BY THIS ACTION, THE BOARD WILL EXTEND THE CONTRACT TERM, RELATIVE TO THIS CONTRACT, BY EXTENDING THE TERM TO BE FOR A PERIOD FROM JANUARY 1, 2010 UNTIL DECEMBER 31, 2015, WITH A POTENTIAL TWO-YEAR EXTENSION. ALL OTHER EXISTING CONTRACT TERMS, BETWEEN THE PARTIES, WILL REMAIN UNCHANGED.

ALTERNATIVES/OPTIONS: TAKING NO ACTION LEAVES EXISTING CONTRACT TERMS IN PLACE.

EVALUATION AND RECOMMENDED ACTION: Recommend approval.

SOURCE OF FUNDS (AND FISCAL/BUDGETARY IMPACT): UNKNOWN

OTHER DEPARTMENTS IMPACTED BY THIS ACTION (E.G. INFORMATION TECHNOLOGY):

YES _____ NO X

COMMENTS:

WHO WILL BE PRESENTING THIS ITEM AT THE BOARD MEETING? TRUSTEE BILL WITHROW, CHAIR COMMITTEE ON BUDGET AND FINANCE

DID A BOARD STANDING COMMITTEE RECOMMEND THE ITEM? YES _____ NO X
_____ IF "YES", PLEASE INCLUDE THAT INFORMATION IN YOUR SUMMARY.

(*****Board contract approval is subject to negotiation and execution by the Chancellor.)

DOCUMENT PREPARED BY:

Prepared by: Thomas Smith
[Enter Here Your Name and Title of Individual]

Date: _____

DOCUMENT PRESENTED AND APPROVED BY:

Presented and approved by: Thomas Smith
[Enter Here Name of College President, (if originating from a college), or Vice-Chancellor or Manager (if originating from the District), and Title of the Individual]

Date: _____

FINANCE DEPARTMENT REVIEW

_____ Finance review required _____ Finance review *not* required

If Finance review is required, determination is: ___ Approved ___ Not Approved

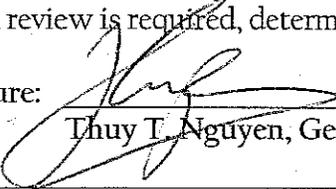
If not approved, please give reason: _____

Signature: _____ Date: _____
Thomas Smith, Vice Chancellor for Finance and Administration

GENERAL COUNSEL (Legality and Format/adherence to Education Codes):

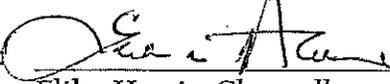
 P Legal review required _____ Legal review *not* required

If Legal review is required, determination is: P Approved ___ Not Approved

Signature:  _____ Date: 12/9/09
Thuy T. Nguyen, General Counsel

CHANCELLOR'S OFFICE APPROVAL

___ Approved, and Place on Agenda ___ Not Approved, but Place on Agenda

Signature:  _____ Date: _____
Elihu Harris, Chancellor

AGREEMENT
TO FURNISH PROFESSIONAL SERVICES TO THE
PERALTA COMMUNITY COLLEGE DISTRICT

THIS AGREEMENT, made and entered into this ___ day of January, 2008, between the Peralta Community College District (hereinafter called "The District") and independent contractor the Pineapple Group, LLC, hereinafter called the "Consultant," or "Representative," is as follows:

WHEREAS, The District wishes to monitor the investment of the bond proceeds from its "OPEB" ("Other Post Employment Benefits") financing; and

WHEREAS, The District wishes to implement a process that may lead to the selection of asset manager(s) in as many as six separate asset classes; and

WHEREAS, The District wishes to monitor the market fluctuation in the value of several separate derivative transactions (also known as "swaps"); and

WHEREAS The District desires to engage the Consultant to render the professional services described in this Agreement and the Consultant is willing and qualified to provide such services; and

NOW THEREFORE, in consideration of the mutual understandings and agreements set forth, The District and the Consultant agree as follows:

I. THE PROJECT

The Project consists of Consultant providing advice and counsel to the District in an effort to assist it in its management of the investment program associated with the reinvestment of bond proceeds from its OPEB financing.

Consultant will establish a monitoring and reporting process that will require it to track the investment decisions of the District's asset manager and analyze those decisions on the basis of several different evaluative criteria. Consultant will report its findings to The District through periodic reports and an annual report throughout the period it is retained to provide The District with its services.

Consultant will establish a process through which additional asset managers will be presented to The District for its consideration in the asset categories of real estate; infrastructure and emerging markets.

Consultant agrees to perform the services set forth by verbal and/or written agreement in furtherance of the goals of the Project, between the Consultant and The District. Notwithstanding any other provision in this Agreement, Consultant shall deliver any report requested by The District during the Agreement period, either orally, or in writing.

Failure by Consultant to submit the report within the time frame agreed upon by both parties will be considered a breach of the Agreement.

II. CONSULTANT'S SERVICES AND RESPONSIBILITIES

The Consultant will provide the professional and technical services as agreed to by Consultant and The District's representative in a timely and professional manner.

III. ADDITIONAL SERVICES

When authorized by The District, the Consultant agrees to furnish or obtain from others, additional professional services in connection with the Project due to the changes in the scope of the service or its design, subject to mutual agreement as to additional compensation for those additional services,

IV. CONSULTANT'S FEE

As compensation for the basic services described in this Agreement, the Consultant shall be paid a fee to be paid over a five year period with an additional two year option, in quarterly installments equivalent to six basis points of the total asset value of the OPEB investment account to be established on the first day of each year this Agreement is in effect. Additionally, Consultant shall be paid ten thousand dollars (\$10,000.00) each quarter in compensation for the derivatives monitoring services provided by Consultant to The District. This shall constitute full and complete payment for said services and all expenditures which may be made and expenses incurred, except as otherwise expressly provided in this Agreement. Such payment will become due and payable on the first of January, the first of April, the first of July, and the first of October each year this Agreement is in effect and shall be paid to Consultant upon submission of an invoice by Consultant to The District.

Expenses for travel authorized by The District shall be reimbursed to the Consultant. Such expenses shall not exceed five hundred dollars (\$500) during any monthly period without prior approval of The District's authorized designee.

V. COMMENCEMENT AND COMPLETION OF SERVICES

The Consultant understands that time is an essential requirement of this Agreement. The services shall be completed as soon as good practice and due diligence will permit. This contract is effective for an initial contract term from January 1, 2008 through December 31, 2013. In the event the option is exercised, the contract term will extend until December 31, 2015.

VI. TERMINATION

A. This Agreement may be terminated by either party upon thirty (30) days written notice to the other party.

B. In the event of termination as provided in this Article, The District shall pay the Consultant in full for services performed up to the date of notice of termination plus any services The District deems necessary during the notice period. Said compensation shall be paid upon the Consultant's delivering or otherwise making available to the District all data, drawings, specifications, reports, estimates, summaries and such other information and materials as may have been accumulated by the Consultant in performing the services included in this Agreement, whether completed or in progress.

VII. INSURANCE

Consultant will as a condition of this contract, maintain all applicable insurances as required by law.

VIII. EQUAL EMPLOYMENT OPPORTUNITY

In connection with the execution of this Agreement, Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, disability, creed, actual or perceived sexual orientation, transgender status at any stage, marital status, medical status or conditions, age, ancestry, gender identity, political affiliation, veteran status, or other personal characteristic protected by law. Such actions shall include, but not be limited to, the following: employment; upgrading; demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Consultant assures that it will not sexually harass or permit sexual harassment against any individual, including but not limited to employees, applicants for employment, or students. The District shall have the right to remove an alleged offender from performance of any work pending the results of a sexual harassment investigation.

Consultant further agrees to fully comply with all laws, executive orders, regulations, District Board Policies, and other legal requirements applicable to consultants. Failure to comply with this Article shall constitute a material breach of the Agreement. (Board policies can be found on The District's website).

IX. PROHIBITED INTEREST

A. Consultant agrees that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services hereunder. The Consultant further agrees that in the performance of the Agreement, no person having any such interests shall be employed.

B. No official or employee of The District shall have any interest, direct or indirect, in this Agreement or the proceeds thereof.

X. GENERAL PROVISIONS

A. Independent Contractor

In the performance of the services, the Consultant shall act as an independent contractor and not an agent of The District, except to the extent and not as an agent of The District except to the extent the Consultant is specifically authorized to act as an agent of The District. Consultant is an independent contractor, and neither Consultant nor Consultant's employees or contract personnel are, or shall be deemed The District's employees.

State and Federal Taxes

The District will not:

- Withhold FICA (Social Security and Medicare taxes) from Consultant's payments or make FICA payments on Consultant's behalf,
- Make state or federal unemployment compensation contributions on Consultant's behalf, or
- Withhold state or federal income tax from Consultant's payments.

Consultant shall pay all taxes incurred while performing services under this Agreement including all applicable income taxes and, if Consultant is not a corporation, self-employment (Social Security) taxes.

Fringe Benefits

Consultant understands that neither Consultant nor Consultant's employees are eligible to participate in any employee pension, health, vacation pay, sick pay or other fringe benefit plan of The District.

Workers' Compensation

The District shall not obtain workers' compensation insurance on behalf of the Consultant or Consultant's employees. If Consultant hires employees to perform any work under this Agreement, Consultant will cover them with workers' compensation insurance and provide The District with a certificate of workers' compensation insurance before the employee begins the work.

B. Books and Records

The Consultant's books and records with respect to the services and reimbursable costs shall be kept in accordance with recognized accounting principles and practices, consistently applied, and will be made available for The District's inspection at all reasonable times at the places where the same may be kept. The Consultant shall not be required to retain such books and records for more than three (3) years after the completion of the Services.

C. Responsibility; Liability – Indemnification

The Consultant shall indemnify and hold harmless The District and its agents and employees from and against all claims, damages, losses and expenses including, but not limited to, attorney's fees, arising out of or resulting from the performance of the services, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Project itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Consultant, any subcontractor of the Consultant, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this paragraph (C).

In any and all claims against The District, or any of its agents or employees by any employee of the Consultant, any subcontractor of the Consultant, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this paragraph (C) (2) shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Consultant or any subcontractor under workers' or workmen's compensation acts, disability benefits acts or other employee benefits acts.

D. Communications

All communications relating to the day-to-day activities for the Project shall be exchanged between The District's Audit and Finance Committee Chair, The District's Vice Chancellor for Finance and Administration, or their designee and a designee of the Consultant who will be identified by the parties promptly upon commencement of the services.

E. Assignment

The Consultant shall not assign this Agreement in whole or in part, including the Consultant's right to receive compensation hereunder, without the prior written consent of The District ; provided, however, that such consent shall not be unreasonably withheld with respect to assignments shall not relieve the Consultant of any of its obligations under this Agreement. This restriction on assignment includes, without limitation, assignment of the Consultant's right to payment to its surety or lender.

F. Applicable Laws

This Agreement, and all questions concerning the execution, validity or invalidity, capacity of the parties, and the performance of this Agreement, shall be interpreted in all respects in accordance with the laws of the State of California. The Agreement shall be deemed to have been executed in the City of Oakland, Alameda County, California. Enforcement of the Agreement, including arbitration, shall be governed by, and construed and enforced in accordance with the local, state and federal laws in effect in the City of Oakland, Alameda County, California, including but not limited to California Government Code Section 818, but excluding California's conflict of laws principles that would cause the application of laws of any other jurisdiction.

G. Dispute Resolution

Mediation

If a dispute arises under this Agreement, the parties agree to first attempt in good faith to resolve the dispute with a mutually agreed upon mediator in Alameda County, California. A party may initiate mediation by sending the other party a written demand for mediation, which demand shall describe with specificity the nature of the dispute. Any costs and fees other than the attorney fees associated with the mediation shall be shared equally by the parties. If the parties are unable to arrive at a mutually satisfactory solution through mediation, or if a mediator has not been chosen and a date set for mediation, within sixty (60) calendar days from the date of the demand for mediation, then the parties hereby agree to submit the dispute to a mutually agreed upon arbitrator in Alameda County, California, pursuant to the terms below.

Arbitrations

Any actions to enforce or interpret this Agreement, or to resolve disputes with respect to this Agreement, (other than claims for preliminary injunctive relief or other pre-judgment or equitable remedies) shall be settled by binding arbitration in Alameda County, California, in accordance with then current Commercial Arbitration Rules of the American Arbitration Association, if a mutually acceptable resolution cannot be reached in mediation or if sufficient steps towards mediation have not been taken pursuant to the aforementioned section. Arbitration shall be the exclusive dispute resolution process for all claims other than for preliminary injunctive relief or other pre-judgment or equitable remedies. Any party may commence arbitration by sending a written demand for

arbitration to the other party and to the American Arbitration Association. Such demand shall set forth the nature of the matter to be resolved by arbitration.

A request for arbitration must be submitted within the same limitation periods that would be applicable in court and must be in writing. If either party fails to submit and serve a written request for arbitration within the applicable statute of limitations, that party agrees that it will have waived any right to raise said claim, in any forum, regarding the dispute. The arbitrator shall be one that is mutually agreeable to both parties. Both parties shall have the right to conduct normal civil discovery, including the taking of depositions, prior to the arbitration hearing, and specifically agree that the provisions of Section 1283.05 of the California Code of Civil Procedure are incorporated into and made applicable to any arbitration, *provided however* that the arbitrator will retain his or her statutory discretion under that section to limit the number, and scope of, the depositions. The substantive law of the State of California shall be applied by the arbitrator to the resolution of the dispute.

The arbitrator shall be empowered to award either party any remedy at law or in equity that the prevailing party would otherwise have been entitled to had the matter been litigated in court, including but not limited to, injunctive relief or specific performance; provided however that the authority to award any remedy is subject to whatever limitations, if any, that exist in the applicable law on such remedies. The arbitrator shall issue a decision or award in writing, stating the essential findings of fact and conclusions of law. The arbitrator shall have no jurisdiction to issue any award contrary to or inconsistent with the law. The arbitrator shall have no jurisdiction to issue any award contrary to or inconsistent with the law. Following the evidentiary portion of an arbitration hearing, both parties shall have the right to prepare and file with the arbitrator a post-hearing brief not to exceed twenty-five (25) pages in length. Any such brief shall be served on the other arbitrator and the other party within thirty (30) days of the close of the evidentiary portion of the hearing, unless the parties agree to some other time period. Should any part of this arbitration provision be declared by a court of competent jurisdiction to be invalid, unlawful or otherwise unenforceable, the remaining part shall not be affected thereby and the parties shall arbitrate their dispute without reference to or reliance upon the invalid, unlawful or unenforceable part of the AGREEMENT.

The parties shall share equally in all initial costs of arbitration. However, the prevailing party shall be entitled to reimbursement of attorney fees, costs, and expenses incurred in connection with the arbitration and in association with the enforcement of said judgment. All decisions of the arbitrator shall be final, binding and conclusive on all parties. Judgment may be entered upon any such decision in accordance with applicable law in any court having jurisdiction thereof. The arbitrator (if permitted under applicable law) or such court may issue writ of execution to enforce the arbitrator's decision.

H. Entire Agreement

This Agreement shall constitute the entire agreement between the parties hereto and shall supersede all prior contracts, proposals, representations, negotiations and letters of intent, whether written or oral, pertaining to the services for the Project.

IN WITNESS WHEREOF, THE PARTIES HAVE CAUSED THIS Agreement to be executed by their authorized officers on the date first appearing above.

The Pineapple Group, LLC

By: Mark T. Harris
Mark T. Harris, President and Managing Principal

Address: The Esquire Building, 1215 K Street, Seventeenth Floor
Sacramento, CA 95814

Peralta Community College District

By: Elihu M. Harris
Elihu M. Harris, Chancellor

Address: 333 East Eighth Street
Oakland, CA 94606