

**STAFF REPORT FOR CALENDAR ITEM NO.: 11
FOR THE MEETING OF: September 14, 2023**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Authorizing the Executive Director to execute Amendment No. 5 to the Professional Services Agreement with the law firm Seyfarth Shaw, LLP to provide legal services related to Phase 1 construction close-out, increasing the total amount of the contract by \$4,100,000 for a not-to-exceed amount of \$20,000,000, and amending the FY23-24 Capital Budget for Phase 1 to reallocate \$2,500,000 to accommodate the contemplated legal services, but with no change to the total amount of the fiscal year budget or the overall Phase 1 Program Budget.

EXPLANATION:

Background

In 2020, the TJPA issued an RFP for legal services, seeking expertise to provide a full range of legal services for the TJPA, including general counsel; land use, land acquisition, real estate and redevelopment law; labor and employment law, including human resources advice; construction law; public transit/transportation law; environmental law; public contracting law including federal and State of California procurement requirements and compliance; legislative matters; risk management; intellectual property; public and private finance; and litigation services in all these areas, on an if-and-as-needed basis. As a result of that competitive procurement process, in August 2020, the TJPA Board approved professional services agreements with a bench of six firms that ranked most highly in their respective practice areas for the legal services needed now and in the near future as the Transbay Program advances Phase 2.

Among the bench of firms, the TJPA entered a Professional Services Agreement dated August 18, 2020 (Agreement) with the law firm Seyfarth Shaw, LLP (Seyfarth) to provide legal services related to the close-out of Phase 1. Seyfarth's services are focused on efforts to close-out claims by trade subcontractors under the Construction Manager/General Contractor (CM/GC) agreement with Webcor/Obayashi Joint Venture (WOJV) to build Phase 1 (the transit center and its related components). Seyfarth is representing the TJPA in dispute resolution proceedings and mediation, as well as litigation related to the claims and associated matters.

The Agreement with Seyfarth is for a term of five years. The Agreement set an initial not-to-exceed amount for Seyfarth's services of \$4,000,000. The Agreement explains, however, that at the time of execution of the Agreement, the TJPA and Seyfarth did not know with certainty the amount and type of legal services the TJPA may require, and that the actual need for services could be substantially more or less than that budgeted amount.

Effective July 1, 2021, consistent with the TJPA Board's Procurement Policy, the TJPA entered Amendment No. 1 to the Agreement with Seyfarth, increasing the amount by \$400,000, for a total not-to-exceed amount of \$4,400,000; no other changes were made to the Agreement.

Effective March 1, 2022, the TJPA Board approved an Amendment No. 2 to the Agreement with

Seyfarth, increasing the amount by \$4,000,000, for a total not-to-exceed amount of \$8,400,000; no other changes were made to the Agreement.

Effective December 8, 2022, the TJPA Board approved an Amendment No. 3 to the Agreement with Seyfarth, increasing the amount by \$4,000,000, for a total not-to-exceed amount of \$12,400,000; no other changes were made to the Agreement.

Effective June 8, 2023, the TJPA Board approved an Amendment No. 4 to the Agreement with Seyfarth, increasing the amount by \$3,500,000, for a total not-to-exceed amount of \$15,900,000.

Amendment No. 5 to Legal Services Contract

As has been previously discussed in detail with the Board, there are a number of outstanding pending claims related to the CM/GC contract with WOJV for Phase 1 construction. The parties are continuing to meet in an attempt to resolve outstanding claims. The ultimate goal is to completely close-out the CM/GC contract and is the reason for the legal support effort as the TJPA has engaged in diligent and good faith claim review and resolution proceedings.

Accordingly, the Director of Design & Construction for the Transit Center, Ron Alameida (San Francisco Public Works), and TJPA staff recommend increasing the maximum compensation under the Agreement by an additional \$4,100,000, increasing the total not-to-exceed amount to \$20,000,000 as per Amendment No. 5, attached hereto.

Amendment to FY 23-24 Capital Budget for Phase 1

Each year, the TJPA Board approves an annual operating budget; separate annual capital budgets for Phase 1, Phase 2, and Tenant Improvements; and an annual debt service budget. The annual capital budget for Phase 1 presents the revenues and expenses staff expects the agency to incur for Phase 1 capital costs in that fiscal year; thus, the annual capital budget is a slice of the Phase 1 overall program budget. In June 2023, the TJPA Board adopted the FY23-24 Capital Budget for Phase 1 in the amount of \$17,540,365. The budget assumed certain expenditures related to close-out of construction claims, legal and dispute resolution services, and minimal administrative support for the close-out processes during the fiscal year. The FY 23-24 Capital Budget for Phase 1 budget was planned to be funded with TJPA's reimbursement from proceeds from the City's Community Facilities District (CFD) bond sales.

TJPA staff recommends amending the FY23-24 Capital Budget for Phase 1 by reallocating \$2,500,000, reducing the Transit Center Building & Ramps Construction line item and increasing the Legal Counsel line item by the amounts as shown in the attached. This amendment will allow services under the amended Seyfarth Agreement to proceed through the rest of this fiscal year (through June 30, 2024). The amendment reallocates funds between line item expenses in the budget but does not change the total amount of the FY23-24 Capital Budget for Phase 1 or the overall Phase 1 Program Budget.

Pursuant to the TJPA Board Policy No. 3 (Budget Policy), Board approval is required to augment an existing line-item appropriation by reallocating funding within and among expenditure categories where the aggregate amount reallocated during the fiscal year is greater

than 10% of the original appropriation for that category. Accordingly, TJPA staff is seeking Board authorization for the amendment proposed here.

No Change to Overall Phase 1 Program Budget

The proposed Amendment No. 5 to the Seyfarth Agreement does not change the overall Phase 1 Program Budget, which remains \$2,259.4 million.

RECOMMENDATION:

TJPA staff recommends that the TJPA Board: (1) Authorize the Executive Director to execute Amendment No. 5 to the Professional Services Agreement with the law firm Seyfarth Shaw to provide legal services related to Phase 1 construction closeout, increasing the total amount of the contract by \$4,100,000 for a not-to-exceed amount of \$20,000,000, in the form attached; and (2) Amend the FY23-24 Capital Budget for Phase 1 to reallocate \$2,500,000, as shown in the attached, but with no change to the total amount of the fiscal year budget or the overall Phase 1 Program Budget.

ENCLOSURES:

1. Resolution
2. Amendment No. 5 to Professional Services Agreement with Seyfarth Shaw
3. Amendment to FY23-24 Capital Budget for Phase 1

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) has primary jurisdiction with respect to all matters concerning the financing, design, development, construction, and operation of the Transbay Program; and

WHEREAS, The TJPA requires legal representation related to the close-out of construction of Phase 1 of the Transbay Program; and

WHEREAS, As the result of a competitive procurement, the TJPA Board of Directors authorized the Executive Director to enter a Professional Services Agreement with the law firm Seyfarth Shaw, LLP (Seyfarth) dated August 18, 2020 (Agreement) to provide legal services related to the close-out of Phase 1 of the Transbay Program, with an initial compensation not-to-exceed \$4,000,000; and

WHEREAS, Effective July 1, 2021, the parties entered Amendment No. 1 to the Agreement, increasing the amount by \$400,000, for a total not-to-exceed amount of \$4,400,000; and

WHEREAS, Effective March 1, 2022, the parties entered Amendment No. 2 to the Agreement, increasing the amount by \$4,000,000, for a total not-to-exceed amount of \$8,400,000; and

WHEREAS, Effective December 8, 2022, the parties entered Amendment No. 3 to the Agreement, increasing the amount by \$4,000,000, for a total not-to-exceed amount of \$12,400,000; and

WHEREAS, Effective June 8, 2023, the parties entered Amendment No. 4 to the Agreement, increasing the amount by \$3,500,000, for a total not-to-exceed amount of \$15,900,000; and

WHEREAS, The Director of Design & Construction for the Transit Center, Ron Alameida (San Francisco Public Works), and TJPA staff recommend increasing the maximum compensation under the Agreement by an additional \$4,100,000, increasing the total not-to-exceed amount to \$20,000,000; and

WHEREAS, On June 8, 2023, the TJPA Board of Directors adopted Fiscal Year 2023-2024 (FY23-24) Capital Budget for Phase 1 in the amount of \$17,540,365, which assumed certain expenditures related to close-out of construction claims, legal and dispute resolution services, and minimal administrative support for the close-out processes during the fiscal year; and

WHEREAS, TJPA staff recommends amending the FY23-24 Capital Budget for Phase 1 by \$2,500,000, to allow services under the amended Seyfarth Agreement to proceed through the

rest of this fiscal year (through June 30, 2024), in the form presented; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to execute Amendment No. 5 to the Professional Services Agreement with Seyfarth, in the form presented, increasing the total amount of the contract by \$4,100,000 for a not-to-exceed amount of \$20,000,000; and

FURTHER RESOLVED, That the TJPA Board approves an amendment to the FY23-24 Capital Budget for Phase 1 to reallocate \$2,500,000, in the form presented, but with no change to the total amount of the fiscal year budget or the overall Phase 1 Program Budget.

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I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 14, 2023.

Secretary, Transbay Joint Powers Authority

Amendment No. 05
Professional Services Agreement between
the Transbay Joint Powers Authority and Seyfarth Shaw, LLP

THIS Amendment No. 5 to the Professional Services Agreement, 20-05-LEGAL-005, to provide legal services dated August 18, 2020, as first amended July 1, 2021, second amended March 1, 2022, third amended December 8, 2022 and fourth amended June 8, 2023 (as amended, "Agreement") is now entered into as of the ___ day of September, 2023 in San Francisco, California, with an effective date of August 1, 2023, by and between **Seyfarth Shaw, LLP** ("Attorney"), and the **Transbay Joint Powers Authority** ("TJPA").

Recitals

The TJPA and Attorney desire to increase the maximum compensation under the Agreement.

Terms and Conditions

The TJPA and Attorney agree to amend Section 5 of the Agreement in its entirety to read as follows:

5. Compensation

a. The Attorney shall perform all services on an as-needed basis, based on RFS that may be issued by the TJPA from time to time. At the time of execution of this agreement, it is unknown as to the amount and type of legal work that may arise. Accordingly, for purposes of convenience only, the total compensation under this Agreement is set at an amount not to exceed *Twenty Million Dollars (\$20,000,000)* ~~Fifteen Million Nine Hundred Thousand Dollars (\$15,900,000)~~. As the need for services arises, the services under this Agreement could end up to be substantially more or substantially less than *Twenty Million Dollars (\$20,000,000)* ~~Fifteen Million Nine Hundred Thousand Dollars (\$15,900,000)~~ stated herein, with no guarantee of a minimum amount.

b. All work under this Agreement shall be compensated on an hourly fee basis, subject to any maximum price set forth in a particular RFS. In no event shall the total compensation under this Agreement exceed *Twenty Million Dollars (\$20,000,000)* ~~Fifteen Million Nine Hundred Thousand Dollars (\$15,900,000)~~. The breakdown of the Attorney's fees appears in Appendix B, Fees (as amended).

c. Hourly rates for services are to remain fixed during the entire contract period, including any option periods, pursuant to Appendix B (as amended).

d. No charges shall be incurred under this Agreement nor shall any payments become due to the Attorney until the Services required under this Agreement are received from the Attorney and approved by the Executive Director as being in accordance with this Agreement. The TJPA may withhold payment to the Attorney in any instance in which the Attorney has failed or refused to satisfy any material obligation provided for under this Agreement.

e. In no event shall the TJPA be liable for interest or late charges for any late payments.

All other provisions of the Agreement shall remain in full force and effect.

**TRANSBAY JOINT POWERS
AUTHORITY**

ATTORNEY: Seyfarth Shaw LLP

Adam Van De Water
Executive Director

Michael T. McKeeman
Attorney
Seyfarth Shaw LLP
560 Mission Street, 31st Floor
San Francisco, CA 94105

Approved as to Form by:

TJPA Legal Counsel

Date

Tax Identification Number: 36-2152202

Transbay Joint Powers Authority
Board of Directors
Resolution No. _____
Adopted: _____
Attest:

Secretary, TJPA Board

FY 23-24 Phase 1 Final Budget Amendment 1	FY 23 -24 Budget Final	FY23-24 Budget Amendment 1	Difference
Revenues			
Transit Center District CFD Funds	17,540,365	17,540,365	0
TOTAL REVENUES	17,540,365	17,540,365	0
Expenses			
Legal Counsel	3,500,000	6,000,000	2,500,000
Transit Center Program Administration	179,574	179,574	
Financial and Grants Management	10,000	10,000	
Construction Dispute Resolution Services	250,000	250,000	
Program Management / Program Controls	10,000	10,000	
Transit Center Engineering & Design	75,000	75,000	
Transit Center Building & Ramps Construction	13,515,791	11,015,791	(2,500,000)
TOTAL EXPENSES	17,540,365	17,540,365	0