

STAFF REPORT FOR CALENDAR ITEM NO.: 13
FOR THE MEETING OF: April 11, 2024

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Authorizing the Executive Director to execute Amendment No. 6 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 \$3,000,000 for a not-to-exceed amount of \$23,000,000; adopting an amended Baseline Budget for Phase 1 of the Transbay Transit Center Program (Program) in the amount of \$2,281,400,000; adopting a corresponding amendment No. 4 to the Fiscal Year (FY) 2023-24 Capital Budget for Phase 1 increasing the budget to a total amount of \$21,875,365; and adopting amendment No. 2 to the FY2022-23 Capital Budget for Phase 1 increasing the budget to a total amount of \$50,396,712.

EXPLANATION:

Background of Seyfarth Contract

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 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.

Effective September 14, 2023, the TJPA Board approved an Amendment No. 5 to the Agreement with Seyfarth, increasing the amount by \$4,100,000, for a total not-to-exceed amount of \$20,000,000.

Amendment No. 6 to Legal Services Contract

As has been previously discussed in detail with the Board, there is one outstanding pending claim related to the CM/GC contract with WOJV for Phase 1 construction. The parties are continuing to meet in an attempt to resolve the outstanding claim. The ultimate goal is to completely close out the CM/GC contract, which 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 \$3,000,000, increasing the total not-to-exceed amount to \$23,000,000 as per Amendment No. 6, attached hereto.

Amendment to Phase 1 Baseline Budget

In 2007, the TJPA Board adopted a Baseline Budget for Phase 1 of the Program in the amount of \$1,189,000,000. The 2007 budget excluded construction of the below-grade train box.

In 2010, the Board adopted a revised Baseline Budget, Financial Plan, and construction schedule for Phase 1 of the Program in the amount of \$1,589,000,000. The revised budget incorporated the construction of the train box in Phase 1 to reflect a \$400,000,000 American Recovery and Reinvestment Act (ARRA) grant award from the Federal Railroad Administration. By successfully securing the ARRA grant, the TJPA was able to construct the train box using a traditional bottom-up construction method and avoid the significant risks associated with the previously planned “top-down” method whereby the train box would have been excavated underneath the Transit Center building in Phase 2 after the building had been put into operation.

Subsequently, in July 2013 and November 2015, the Board adopted two amendments to the Baseline Budget, based, in substantial part, on higher than anticipated cost escalation and

resulting bid prices, reflective of the active construction market in the San Francisco Bay Area, in general, and the Transbay District, in particular, which limited the bidder pool.

In 2015, the Metropolitan Transportation Commission conducted a cost and risk review of Phase 1 to advise on the cost to complete the Phase 1 project. In 2016, the Board adopted a revised Baseline Budget for Phase 1 in the amount of \$2,259,400,000.

In December 2023, the Board adopted an amendment that increased the Phase 1 Baseline Budget to its current amount of \$2,278,400,000.

Staff recommend further amending the Phase 1 Baseline Budget by \$3,000,000 to reflect the proposed Amendment No. 6 to the Agreement with Seyfarth, for a total Phase 1 Baseline Budget amount of \$2,281,400,000.

TJPA staff have identified sufficient funding for the proposed Phase 1 Baseline Budget amendment. However, the allocation of these funds to Phase 1 results in less funding available for Phase 2.

Amendment No. 4 to the FY23-24 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 has been amended three times for a total amount under the current budget of \$20,075,365.

Staff recommends increasing the FY23-24 Capital Budget for Phase 1 by \$1,800,000 for a total amount of \$21,875,365 to address the revised cashflow projections related to Phase 1 close-out during the fiscal year, as shown in the attached.

Amendment No. 2 to the FY22-23 Capital Budget for Phase 1

In June 2022, the TJPA Board adopted the FY22-23 Capital Budget for Phase 1 in the amount of \$17,875,000. In November and December 2022, the TJPA Board authorized the transfer of \$9,000,000 and \$4,000,000, respectively, from the Phase 1 Program Reserve to replenish construction contingency. The Board amended the FY22-23 Capital Budget for Phase 1 in December 2022 in the amount of \$38,445,000.

Staff recommends adopting amendment No. 2 to the FY22-23 Capital Budget for Phase 1, increasing the budget by \$11,951,712 for a total amount of \$50,396,712, as shown in the attached, to reflect the actual expenditures incurred during the year related to construction closeout, and to identify the sources used to fund expenditures authorized by the use of the

reserve. The proposed amendment No. 2 does not change the overall Phase 1 Baseline Budget.

RECOMMENDATION:

TJPA staff recommends that the TJPA Board: (1) Authorize the Executive Director to execute Amendment No. 6 to the Agreement with Seyfarth to provide legal services related to Phase 1 construction closeout, increasing the total amount of the contract by \$3,000,000 for a not-to-exceed amount of \$23,000,000, in the form attached; (2) adopt an amended Baseline Budget for Phase 1 of the Program in the amount of \$2,281,400,000; (3) adopt a corresponding amendment No. 4 to the FY23-24 Capital Budget for Phase 1 in the form attached; and (4) adopt amendment No. 2 to the FY22-23 Capital Budget for Phase 1 in the form attached.

ENCLOSURES:

1. Resolution
2. Amendment No. 6 to Professional Services Agreement with Seyfarth Shaw
3. Amendment No. 4 to FY23-24 Capital Budget for Phase 1
4. Amendment No. 2 to FY22-23 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, Effective September 14, 2023, the parties entered Amendment No. 5 to the Agreement, increasing the amount by \$4,100,000, for a total not-to-exceed amount of \$20,000,000; 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 \$3,000,000, increasing the total not-to-exceed amount to \$23,000,000; and

WHEREAS, On December 14, 2023, the TJPA Board of Directors approved an updated Baseline Budget for Phase 1 of \$2,278,400,000; and

WHEREAS, Staff recommend that the TJPA Board of Directors adopt a further amendment to the Baseline Budget for Phase 1 of the Transbay Program, increasing the budget by \$3,000,000 to the amount of \$2,281,400,000, corresponding with the recommended increase in the not-to-exceed amount of the Agreement with Seyfarth; and

WHEREAS, On December 14, 2023, the TJPA Board of Directors adopted an amendment No. 3 to the Fiscal Year 2023-2024 (FY23-24) Capital Budget for Phase 1 in the amount of \$20,075,365, which assumed certain expenditures related to close-out of construction claims, legal and dispute resolution services, and minimal administrative support for the close-out process during the fiscal year; and

WHEREAS, Staff recommend that the TJPA Board of Directors adopt a further amendment to the FY23-24 Capital Budget for Phase 1, increasing the budget by \$1,800,000 for a total amount of \$21,875,365 to address the revised cash flow projections related to Phase 1 close-out during the fiscal year; and

WHEREAS, On December 8, 2022, the TJPA Board of Directors adopted an amendment No. 1 to the Fiscal Year 2022-2023 (FY22-23) Capital Budget for Phase 1 in the amount of \$38,445,000; and

WHEREAS, Staff recommend that the TJPA Board of Directors adopt a further amendment to the FY22-23 Capital Budget for Phase 1, increasing the budget by \$11,951,712 for a total amount of \$50,396,712, to reflect the actual expenditures incurred during the year related to construction closeout, and to identify the sources used to fund expenditures authorized by the use of the reserve, as well as additional expenses incurred in FY22-23; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to execute Amendment No. 6 to the Professional Services Agreement with Seyfarth, in the form presented, increasing the total amount of the contract by \$3,000,000 for a not-to-exceed amount of \$23,000,000; and, be it

FURTHER RESOLVED, That the TJPA Board of Directors adopts the recommended amendment to the Baseline Budget for Phase 1 of the Transbay Program in the amount of \$2,281,400,000, the recommended amendment No. 4 to the FY23-24 Capital Budget for Phase 1 in the amount of \$21,875,365 in the form presented, and the recommended amendment No. 2 to the FY22-23 Capital Budget for Phase 1 in the amount of \$50,396,712 in the form presented.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of April 11, 2024.

Secretary, Transbay Joint Powers Authority

Amendment No. 06
Professional Services Agreement between
the Transbay Joint Powers Authority and Seyfarth Shaw, LLP

THIS Amendment No. 6 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, fourth amended June 8, 2023 and fifth amended September 14, 2023 (as amended, “Agreement”) is now entered into as of the ____ day of April, 2024 in San Francisco, California, with an effective date of March 1, 2024, 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 Three Million Dollars (\$23,000,000)* ~~Twenty Million Dollars (\$20,000,000)~~. As the need for services arises, the services under this Agreement could end up to be substantially more or substantially less than *Twenty Three Million Dollars (\$23,000,000)* ~~Twenty Million Dollars (\$20,000,000)~~ 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 Three Million Dollars (\$23,000,000)* ~~Twenty Million Dollars (\$20,000,000)~~.

c. 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.

d. 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**

Adam Van de Water
Executive Director

Approved as to Form by:

TJPA Legal Counsel

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

Secretary, TJPA Board

ATTORNEY: Seyfarth Shaw LLP

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

Tax Identification Number: 36-2152202

FY 23-24 Phase 1 Budget	FY23-24 Budget Amendment 3 (Board 12-14-23)	FY23-24 Budget Amendment 4 (Board 4-11-24)	Difference
Revenues			
Transit Center District CFD Funds	20,075,365	21,875,365	1,800,000
TOTAL REVENUES	20,075,365	21,875,365	1,800,000
Expenses			
Legal Counsel	6,000,000	7,800,000	1,800,000
Transit Center Program Administration	179,574	179,574	-
Financial and Grants Management	35,000	35,000	-
Construction Dispute Resolution Services	250,000	250,000	-
Program Management / Program Controls	10,000	10,000	-
Transit Center Engineering & Design	99,000	99,000	-
Transit Center Building & Ramps Construction	13,501,791	13,501,791	-
TOTAL EXPENSES	20,075,365	21,875,365	1,800,000

Fiscal Year 2022-23 Phase 1 Budget	FY22-23 Phase 1 Budget Amendment 1	FY22-23 Phase 1 Budget Amendment 2	Difference
Revenues			
Transit Center District CFD Funds	15,406,000	26,045,594	10,639,594
Land Sales Proceeds	5,597,000	6,104,222	507,222
Bond Proceeds from TIFIA Refinance	3,849,000	0	(3,849,000)
Settlement Revenue		8,150,778	8,150,778
Net Tax Increment		8,249,197	8,249,197
TIFIA Remaining Balance		1,522,295	1,522,295
Miscellaneous & Interest Income	93,000	324,626	231,626
Transfer from Reserve*	13,500,000		(13,500,000)
TOTAL RESOURCES	38,445,000	50,396,712	11,951,712
Expenses			
Legal Counsel	7,000,000	8,887,517	1,887,517
Financial and Grants Management	10,000	15,303	5,303
Construction Dispute Resolution Services	250,000	0	(250,000)
Program Management / Program Controls	10,000	0	(10,000)
Transit Center Engineering & Design	75,000	0	(75,000)
Transit Center Building & Ramps Construction	31,100,000	41,493,891	10,393,891
TOTAL EXPENSES	38,445,000	50,396,711	11,951,711