

STAFF REPORT FOR CALENDAR ITEM NO.: 16
FOR THE MEETING OF: September 13, 2018

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Authorizing the Executive Director to increase the legal services budget by \$2,000,000 to a total of \$17,000,000 for the current bench of law firms providing services in their respective practice areas on an as-needed basis, and to transfer \$900,000 from Program Reserve to the legal services budget.

EXPLANATION:

Prior to establishment of the legal bench, TJPA received legal services from Shute, Mihaly & Weinberger for general counsel, from Thompson Coburn for specialized legal services related to federal matters, and from Deputy City Attorney Sheryl Bregman for matters relating to design and construction. Prior to the issuance of the 2012 Request for Proposals (RFP) for legal services, Ms. Bregman was promoted to serve as general counsel to the San Francisco International Airport and TJPA no longer had nearly full-time City Attorney representation. While the City Attorney was the officially appointed Legal Counsel of the TJPA at the time, the City Attorney's office did not have sufficient resources to assign full-time representation to TJPA, particularly for construction. The bench was thus established to ensure access to experienced construction counsel, as well as counsel with extensive financing expertise to support securing funding to complete Phase 1 of the project, and counsel with experience in labor and employment law, including human resources (HR) advice as TJPA had just become its own employer of record. Other necessary practice areas include land use, land acquisition, real estate and redevelopment 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; and litigation services in all these areas, on an if-and-as-needed basis.

A competitive RFP process was conducted in May and June 2012, with Ms. Bregman participating in the selection process. On September 13, 2012, the TJPA Board approved the execution of Professional Services Agreements for Legal Services with the following bench of law firms:

- Shute, Mihaly & Weinberger LLP, real estate, general counsel
- Seyfarth Shaw LLP, construction counsel
- Renne Sloan Holtzman Sakai LLP, labor and employment counsel
- Nixon Peabody LLP, public and private finance counsel

Each firm has an agreement to provide legal services in their respective practice areas on an as-needed basis for five year terms, with the option to extend each for three additional years. The options have been authorized, and the individual contracts will expire in August and September of 2019. Work is authorized via written Requests for Services and billed hourly at the rates

included in each respective agreement. The total compensation across all bench agreements was originally capped at \$8,000,000; on March 12, 2015, the TJPA Board authorized an increase of \$2,000,000; and on May 12, 2016, the TJPA Board authorized an increase of \$5,000,000, bringing the total authorization to \$15,000,000.

TJPA staff recommends increasing the maximum compensation in the Agreement by \$2,000,000 to a total of \$17,000,000. Of this increase, \$500,000 will be used to fund legal support services related to Salesforce Transit Center operations, \$900,000 will be used to fund legal support services related to 301 Mission litigation, and \$600,000 will be used to fund legal support services for Phase 1 and Phase 2 activities.

The current Phase 1 Program budget for outside legal services is \$24.2 million, with approximately \$700,000 that has not been committed to contracts. To date, \$22.5 million has been spent under previous and current agreements. In addition to the Phase 1 Program budget, the Fiscal Year 2018-19 operating budget includes \$500,000 for legal expenses. TJPA staff requests authorization to transfer \$900,000 from the Program Reserve to fund the legal expenditures related to 301 Mission.

As of September 1, 2018, \$14.89 million has been authorized for the bench under their current contracts, and through June 30, 2018, \$14.34 million has been billed. A breakdown of the type of legal advice and amounts authorized and billed by the bench from September 2012 through June 2018 by firm follows:

Firm	Practice Areas	Authorized	Billed
Shute, Mihaly & Weinberger	Board counsel; real estate (including Community Facilities District); redevelopment dissolution and successor; environmental; professional services procurement and contracting; public agency law	\$10,034,600	\$9,844,216
Seyfarth Shaw	Design and construction procurement and contracting; construction litigation	\$3,904,000	\$3,586,434
Nixon Peabody	Financing, including TIFIA and other debt	\$685,000	\$663,446
Renne Sloan Holtzman Sakai	Labor, including Project Labor Agreement, and HR-related laws and regulations	\$270,773	\$249,483
Total		\$14,894,373	\$14,343,577

The litigation related to 301 Mission has necessitated substantial legal services that were unforeseen when the legal services contracts were awarded and Phase 1 Program budget developed and approved by the Board. Since July 2016, Shute, Mihaly & Weinberger's costs related to 301 Mission litigation total \$2,118,807. A significant portion of these expenditures is expected to be reimbursed by insurance carriers.

As noted at the time of the May 2016 bench increase, construction counsel is vital on all large and complex construction projects to ensure that work continues uninhibited, construction claims are addressed and defended against promptly, and risk exposure is minimized. At the time of initially establishing the bench, the level of legal effort required to defend the construction claims was unknown. To date, this effort has been vital in preserving the TJPA's contractual rights and hence achieving the best outcome for the project. In addition, construction counsel has assisted with construction procurement and related design matters, and has been involved in the significant research effort to properly develop the contract documents and obtain Federal Transit Administration approval for the alternative construction procurement delivery methods such as the Design-Build/Design-Assist methods that were successfully used on the Exterior Awning, Glass Curtain Walls, and Metal Ceiling trade packages, which was unanticipated at the time the bench was established.

It was also noted in May 2016 that other legal services were not necessarily foreseen at the time the bench was established, including extensive engagement with the San Francisco Office of Community Investment and Infrastructure related to the sale of the former State-owned parcels, the formation of the Transit Center Community Facilities District, and bond counsel services for the negotiation and close of the interim bridge financing that was needed in lieu of drawing down early on the TIFIA loan, as well on-going negotiations with TIFIA and the City as necessary for the planned City financing.

Staff will continue to be conscientious of cost and make every effort to utilize legal services in the most cost-effective manner. Staff does anticipate that the TJPA will continue to require the services provided by each of the law firms on the bench, and recommends an increase in the maximum compensation for the bench of \$2,000,000 at this time, for a total compensation under all bench agreements not-to-exceed \$17,000,000.

RECOMMENDATION:

TJPA staff recommends that the TJPA Board authorize the Executive Director to increase the budget authorization by \$2,000,000 for the current bench of law firms providing services in their respective practice areas on an as-needed basis, and to transfer \$900,000 from the Program Reserve to the legal services budget.

ENCLOSURES:

1. Resolution

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) is ultimately responsible for the Transbay Program, including the Transit Center and associated facilities, the Downtown Rail Extension, associated land acquisition, and for assisting the Office of Community Investment and Infrastructure with the Transbay Redevelopment Plan, and requires legal services to fulfill this responsibility; and

WHEREAS, On May 15, 2012, the TJPA issued a Request for Proposals (RFP) for Legal Services to provide a broad range of general and specialized legal advice and representation; and

WHEREAS, The TJPA received nineteen responses to the RFP that met all minimum requirements; and

WHEREAS, A selection committee evaluated proposals and interviewed ten firms, and ranked four of those firms with the highest scores in four respective practice areas; and

WHEREAS, Those four firms and practice areas are Shute, Mihaly & Weinberger LLP (SMW) – real estate, general counsel, Seyfarth Shaw LLP (Seyfarth) – construction counsel, Renne Sloan Holtzman Sakai LLP (RSHS) – labor counsel, and Nixon Peabody LLP (Nixon) – public/private finance counsel; and

WHEREAS, On September 13, 2012, in Resolution No. 12-024, the TJPA Board of Directors (TJPA Board) authorized the Executive Director to create a bench of firms and execute Legal Services Agreements with SMW, Seyfarth, RSHS and Nixon (Attorneys) for terms of five years each, with an option to extend each agreement for up to three years, and maximum compensation under all of the agreements together not to exceed \$8,000,000; and

WHEREAS, On March 12, 2015, in Resolution No. 15-005, the TJPA Board authorized an increase to the maximum compensation under all of the agreements together not to exceed \$10,000,000; and

WHEREAS, On May 12, 2016, in Resolution No. 16-018, the TJPA Board authorized an increase to the maximum compensation under all of the agreements together not exceed \$15,000,000; and

WHEREAS, \$14.89 million of the \$15 million total compensation for the bench has been authorized, with \$14.34 million billed through June 30, 2018; and

WHEREAS, \$700,000 remains to be committed in the Program legal services budget and \$500,000 remains to be committed in the Fiscal Year 2018-19 annual operating budget, and the services provided by the Attorneys continue to be required; and

WHEREAS, TJPA desires to increase the authorized budget for the four Legal Services Agreements together by \$2,000,000 at this time, for a total not-to-exceed amount of \$17,000,000; and

WHEREAS, Transferring \$900,000 from the Program Reserve will provide funds to cover the costs for additional legal services provided under the Legal Services Agreements related to 301 Mission; now, therefore, be it

RESOLVED, That the TJPA Board authorizes the Executive Director to amend the Legal Services Agreements with the Attorneys, to increase the authorized budget across all the agreements together not to exceed \$2,000,000 at this time; and, be it further

RESOLVED, That the TJPA Board authorizes staff to transfer \$900,000 from the Program Reserve for 301 Mission legal services; and, be it further

RESOLVED, That TJPA staff will continue to utilize legal services in the most cost-effective and cost conscientious manner possible, and return to the TJPA Board should any further budget authorizations be required.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 13, 2018.

Secretary, Transbay Joint Powers Authority