

**STAFF REPORT FOR CALENDAR ITEM NO.: 11  
FOR THE MEETING OF: December 8, 2022**

**TRANSBAY JOINT POWERS AUTHORITY**

**BRIEF DESCRIPTION:**

Authorizing the Executive Director to execute Amendment No. 3 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 \$4,000,000 for a not-to-exceed amount of \$12,400,000; making an associated transfer of \$4,000,000 from Phase 1 Program Reserves; and making a \$20,570,000 amendment to the FY22-23 Capital Budget for Phase 1 to accommodate the contemplated legal services and recent, reasonably anticipated claims settlements, but with no change to 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.

Amendment No. 3 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 \$4,000,000, increasing the total not-to-exceed amount to \$12,400,000 as per Amendment No. 3, attached hereto; no other changes to the Agreement are proposed at this time.

Program Reserves Transfer

In furtherance of the effort to close-out Phase 1 construction, staff is requesting approval to transfer the final \$4,000,000 from the Phase 1 Program Reserves to fund this legal support effort. The table below shows the current balance of Phase 1 contingencies and Program Reserve, and the balances after the proposed transfer.

|                        | <b>Construction Contingency</b> | <b>CM/GC Contingency</b> | <b>Program Reserves</b> | <b>Total Contingency &amp; Reserve</b> |
|------------------------|---------------------------------|--------------------------|-------------------------|--|
|                        | in \$ millions                  |                          |                         |  |
| Current Balance        | \$9.93                          | \$5.87                   | \$4.0                   | \$19.8                                 |
| Proposed Transfer      | --                              | --                       | (\$4.0)                 | --                                     |
| Balance After Transfer | \$9.93                          | \$5.87                   | \$0                     | \$15.8                                 |

Amendment to FY 22-23 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 2022, the TJPA Board adopted the FY22-23 Capital Budget for Phase 1 in the amount of \$17,875,000. 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 22-23 Capital Budget for Phase 1 budget was planned to be funded primarily with TJPA’s reimbursement from proceeds from the City’s Community Facilities District (CFD) bond sales, as well as remaining funds from several sources including land sales proceeds, bond proceeds from TIFIA refinance, and a small amount of interest income.

TJPA staff recommends increasing the FY22-23 Capital Budget for Phase 1 by \$20,570,000, to \$38,445,000, 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, 2023); expected legal services in the next fiscal year would be reflected in the next fiscal year's proposed capital budget for Phase 1. The proposed amendment to the FY22-23 Capital Budget for Phase 1 will also cover certain reasonably anticipated claims settlements with the CM/GC contractor and subcontractors; these anticipated settlements are based on very recent mediation

efforts and, thus, could not be projected at the time the FY22-23 budget was adopted in June. If there are additional claims settlements, there may be a need to further amend the FY22-23 Capital Budget for Phase 1 at a later time. The budget amendment includes the Program Reserves transfer approved by the Board at the November 10 meeting as well as the Program Reserves transfer proposed today.

#### No Change to Overall Phase 1 Program Budget

The proposed Amendment No. 3 to the Seyfarth Agreement, transfer of funds from Program Reserves, and amendment to the FY 22/23 Capital Budget for Phase 1 do 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. 3 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 \$4,000,000 for a not-to-exceed amount of \$12,400,000, in the form attached; (2) Transfer an associated \$4,000,000 from Phase 1 Program Reserves; and (3) Amend the FY22-23 Capital Budget for Phase 1 to add \$20,570,000, increasing the total amount to \$38,445,000, as shown in the attached.

#### **ENCLOSURES:**

1. Resolution
2. Amendment No. 3 to Professional Services Agreement with Seyfarth Shaw
3. Amendment 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, 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 \$4,000,000, increasing the total not-to-exceed amount to \$12,400,000; and

WHEREAS, TJPA staff recommends transferring \$4,000,000 from Program Reserves for the increase in the not-to-exceed amount of the Seyfarth Agreement; and

WHEREAS, Based on recent, reasonably anticipated settlement of certain Phase 1 related claims and to accommodate the anticipated legal services, TJPA staff also recommends amending the FY22-23 Capital Budget for Phase 1 by \$20,570,000, increasing the total amount of such budget to \$38,445,000; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to execute Amendment No. 3 to the Professional Services Agreement with Seyfarth, in the form presented, increasing the total amount of the contract by \$4,000,000 for a not-to-exceed amount of \$12,400,000; and, be it

FURTHER RESOLVED, That the TJPA Board of Directors approves a transfer of \$4,000,000 from Program Reserves for the above actions; and, be it

FURTHER RESOLVED, That the TJPA Board of Directors adopts an amendment to the FY22-23 Capital Budget for Phase 1, in the form presented, to add \$20,570,000, increasing the total amount to \$38,445,000, but with no change to the overall Phase 1 Program Budget, which remains \$2,259.4 million.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of December 8, 2022.

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Secretary, Transbay Joint Powers Authority

**Amendment No. 03**  
**Professional Services Agreement between**  
**the Transbay Joint Powers Authority and Seyfarth Shaw, LLP**

THIS Amendment No. 3 to the Professional Services Agreement, 20-05-LEGAL-005, to provide legal services dated August 18, 2020, as first amended July 1, 2021 and second amended March 1, 2022 (as amended, "Agreement") is now entered into as of the \_\_\_ day of December, 2022 in San Francisco, California, 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. The TJPA and Attorney agree to amend Section 5 of the Agreement in its entirety to read as follows:

**Terms and Conditions**

**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 *Twelve Million Four Hundred Thousand Dollars (\$12,400,000)* ~~Eight Million Four Hundred Thousand Dollars (\$8,400,000)~~. As the need for services arises, the services under this Agreement could end up to be substantially more or substantially less than the *Twelve Million Four Hundred Thousand Dollars (\$12,400,000)* ~~Eight Million Four Hundred Thousand Dollars (\$8,400,000)~~ 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 *Twelve Million Four Hundred Thousand Dollars (\$12,400,000)* ~~Eight Million Four Hundred Thousand Dollars (\$8,400,000)~~. The breakdown of the Attorney's fees appears in Appendix B, Fees.

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

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, 31<sup>st</sup> 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



| <b>FY22-23 Phase 1 Budget<br/>Amendment 1</b>     | <b>FY22-23<br/>Final Budget</b> | <b>FY22-23 Budget<br/>Amendment 1</b> | <b>Difference</b> |
|---|---------------------------------|---------------------------------------|-------------------|
| <b><u>Revenues</u></b>                            |                                 |                                       |                   |
| Transit Center District CFD Funds                 | 15,406,000                      | 15,406,000                            | 0                 |
| Land Sales Proceeds                               | 1,027,000                       | 5,597,000                             | 4,570,000         |
| Bond Proceeds from TIFIA Refinance                | 1,349,000                       | 3,849,000                             | 2,500,000         |
| Miscellaneous & Interest Income                   | 93,000                          | 93,000                                | 0                 |
| <b>TOTAL RESOURCES</b>                            | <b>17,875,000</b>               | <b>24,945,000</b>                     | <b>7,070,000</b>  |
| <b><u>Transfers From/(To)</u></b>                 |                                 |                                       |                   |
| Transfer From/(To) Program Reserve/Fiscal Reserve | 0                               | 13,500,000                            | 13,500,000        |
| <b>Subtotal Transfers</b>                         | <b>17,875,000</b>               | <b>38,445,000</b>                     | <b>20,570,000</b> |
| <b><u>Expenses</u></b>                            |                                 |                                       |                   |
| Legal Counsel                                     | 3,000,000                       | 7,000,000                             | 4,000,000         |
| Financial and Grants Management                   | 10,000                          | 10,000                                | 0                 |
| Construction Dispute Resolution Services          | 250,000                         | 250,000                               | 0                 |
| Program Management / Program Controls             | 10,000                          | 10,000                                | 0                 |
| Transit Center Engineering & Design               | 75,000                          | 75,000                                | 0                 |
| Transit Center Building & Ramps Construction      | 14,530,000                      | 31,100,000                            | 16,570,000        |
| <b>TOTAL EXPENSES</b>                             | <b>17,875,000</b>               | <b>38,445,000</b>                     | <b>20,570,000</b> |
|   |                                 |                                       |                   |