



REPORT TO COUNCIL

City of Sacramento

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14

CONSENT
August 10, 2010

**Honorable Mayor and
Members of the City Council**

**Title: Approving Fourth Amendment to Agreement for Legal Services
for Sacramento Intermodal Transportation Facility Site Acquisition**

Location/Council District: Downtown next to Sacramento Valley Station between I Street bridge and 7th Street (District 1)

Recommendation: Adopt a **Resolution** Approving the Fourth Amendment to Agreement for Legal Services (City Agreement No. 2007-0579) with Miller, Owen & Trost for Sacramento Intermodal Transportation Facility Site Acquisition (T15029001) to increase the contract amount by \$325,000, for a total consideration not to exceed \$1,000,000.

Contact: Sheryl Patterson, Senior Deputy City Attorney 808-5346

Presenters: NA

Department: Office of the City Attorney

Division: NA

Organization No: 03000

Description/Analysis

Issue: Whether to amend the agreement with Miller, Owen & Trost (MOT) to make payment of the outstanding costs incurred by the appraisers, consultants, arbitrator, and MOT attorneys for the arbitration proceedings regarding the valuation of the Railyards Parcels A and B for the Sacramento Intermodal Transportation Facility (SITF). The second and third contract amendments, at the request of the City, provided for MOT to contract directly with the City's two appraisal firms and the seven consulting firms to prepare additional reports to submit into evidence and to serve as expert witnesses during the arbitration hearing. In addition, the City's share of costs of the arbitrator were paid through the MOT contract.

The total arbitration related costs were \$195,000 for the appraisers, \$150,600 for the consultants, \$74,400 for the arbitrator, and \$522,000 for MOT's legal services and costs. Pre-arbitration expenses under the MOT contract were \$50,000. The additional costs to complete the post-arbitration proceedings are expected not to exceed \$8,000, for a total cost of \$1,000,000. The total consideration in the MOT contract currently is \$675,000, so an additional \$325,000 is needed to pay outstanding costs and to complete the arbitration proceedings. The Background (Attachment 1) provides information regarding why the arbitration costs exceeded the estimate by this additional amount.

Policy Considerations: The proposed action to facilitate implementation of the SITF is consistent with the City's 2030 General Plan to promote development of an integrated, multi-modal transportation system to reduce air pollution and greenhouse gases.

Environmental Considerations:

California Environmental Quality Act (CEQA): Under the California Environmental Quality Act (CEQA) guidelines, continuing administrative activities do not constitute a project and are therefore exempt from review.

Sustainability Considerations: The SITF project will provide facilities to accommodate rail freight movement, heavy passenger rail trains, light rail transit, intercity and local buses, and taxis, as well as bicycle and pedestrian transportation modes. The improvements are consistent with the City's sustainability goals to provide better accessibility to public transportation.

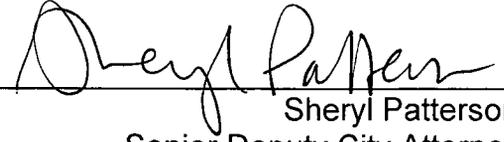
Other: None.

Commission/Committee Action: None.

Rationale for Recommendation: Amending the existing legal services contract to fund the final costs of the arbitration is needed to make the payments owed. Acquisition of the Intermodal facility site will allow the Track Relocation Project (T15029006) construction to commence in accordance with the federal and state grant funding program commitments.

Financial Considerations: The current Legal Services Agreement (including expert and arbitrator fees) is for an amount not to exceed \$675,000. Based on the actual costs of the arbitration and the costs to complete the proceedings, an additional \$325,000 is needed. As of July 21, 2010, the Sacramento Intermodal Transportation Facility Site Acquisition Project (PN: T15029001) has a total budget of \$56,804,500 and an unobligated budget of \$360,951, which is sufficient to increase the total consideration in the agreement for legal services and expert and arbitrator fees (City Agreement No. 2007-0579) with Miller, Owen & Trost by \$325,000.

Emerging Small Business Development (ESBD): The prior appraisers and consultants who prepared reports to support the Intermodal Site Acquisition Project were rehired, so there were no opportunities to contract with ESBD.

Respectfully Submitted by: 
Sheryl Patterson
Senior Deputy City Attorney

Recommendation Approved:


Eileen Teichert
City Attorney

Attachments

- 1 Background pg. 4-6
- 2 Resolution pg. 7-8
Exhibit A – pg. 9-12
Fourth Amendment to Agreement for Legal Services

Attachment 1

BACKGROUND

The City and S. Thomas Enterprises of Sacramento, LLC (“Thomas Enterprises”), the owner of the Downtown Railyards, were unable to agree on the acquisition price of Parcels A and B (the “Property”) after completion of their respective appraisals, based on a date of value of December, 12, 2006. On December 28, 2006, the City took title to Parcel A and paid Thomas Enterprise \$55 million as an advanced payment for the Property, with the actual purchase price to be set based on appraisals and through negotiation, mediation, or arbitration, as set out in the Purchase and Sale Agreement.

The City made its offer for the Property to Thomas Enterprises on July 7, 2008, and provided copies of its two appraisal reports. The City’s offer which was rejected by Thomas Enterprises on July 11, 2008. After the parties agreed that negotiation would not be fruitful given the significant differences in the Property valuation per the respective appraisal reports, in January of 2009 the City agreed to proceed with mediation. However, Thomas Enterprises subsequently requested to waive that step and proceed into arbitration, and the City agreed to that request in March of 2009. Thereafter, Thomas Enterprises delayed in hiring local counsel for its representation.

After the City obtained a right to possession of Parcel B on September 3, 2009, as needed to secure Track Relocation federal stimulus funds, the City forced the matter into arbitration by issuing a demand notice on September 18, 2009. Thereafter, after exchanging lists of names of retired judges and attorneys, the parties could not agree on the selection of an arbitrator. On October 13, 2009, the City commenced legal action in Sacramento Superior Court to seek the assistance of the Presiding Judge to select the arbitrator. After the arbitrator was selected, the soonest that the hearing could be set was March of 2010. The dispute over the arbitrator’s selection and delays in setting the hearing resulted in increased legal costs.

In January and February of 2010, Thomas Enterprises’ attorneys filed pre-hearing motions in an attempt to exclude the City’s two appraisal reports, certain documents prepared by the City’s consultants regarding the development plan for the Property relied on by the appraisers, and some of the proposed witnesses for the proceedings. In response, the City had to engage its two appraisal firms to prepare supplemental reports to verify their valuation estimates and appraisal methodology, and MOT had to prepare briefs to support the methodology and defend the need for such reports and witnesses.

Thomas Enterprises’ attorneys ultimately were successful in excluding the City’s second appraisal report from being introduced into evidence. In response, MOT had to further prepare the two witnesses from the Integra appraisal firm and develop materials to support the assumptions in Integra’s report and its appraisal methodology. These extra efforts resulted in increased legal and consultant costs.

In addition, because of Thomas Enterprises' intransigence, the City had to file a pre-arbitration motion so that the arbitrator would order Thomas Enterprises to provide copies of documents relating to the value of the Property, including the purchase and sale and escrow agreements between Thomas Enterprises and the Union Pacific Railroad Company regarding the sale of the larger 240 acre Railyards property in December of 2006. This pre-arbitration discovery dispute resulted in increased legal costs.

These extensive pre-hearing matters involving the demand for arbitration, selection of the arbitrator, the City's second appraisal and its appraisal methodology, and discovery dispute were not anticipated. Thomas Enterprises knew well in advance what appraisal methodology was to be used in preparing the City's appraisal reports. Thomas Enterprises also knew of the need for the City to prepare the second appraisal report to comply with federal acquisition regulations in early 2007. The City provided Thomas Enterprises with a copy of the two appraisal reports and the supporting consultant studies in July of 2008. Thomas Enterprises did not object to these matters until almost two years later, after the arbitration hearing had been set. Furthermore, the City did not anticipate that Thomas Enterprises would refuse to participate in limited pre-arbitration discovery, as specifically allowed under the Purchase and Sale Agreement.

The arbitration hearing occurred between March 15 and March 29. Judge Benttinelli (Ret.) served as the arbitrator in the matter regarding setting the value for the two parcels of land comprising a net 15.22 acres, which the City was to acquire from Thomas Enterprises to develop its planned Intermodal project. The Property is 32.68 gross acres, but an easement held by the Union Pacific Railroad Company for its relocated mainline tracks encompasses 17.46 acres, and the Depot covers 3 acres.

The \$79.6 million difference in value between the City's and Thomas Enterprises' appraisers was due to the different appraisal methodologies and adjustments, and the assumptions regarding the cost and timing for development of the Property. The value of the Property for its highest and best use was based on the assumption of a private mixed-use retail, office and possibly residential high-rise development project. The City's and Thomas Enterprises' appraisers and experts disagreed as to the amount and type of development, the remediation and infrastructure costs that would be incurred for such development, the market demand in regards to timing for absorption of such development, and the holding costs that would have to be paid until the Property was fully developed. In summary, this was an extremely complicated appraisal assignment with an enormous difference in valuations, which required a very thorough examination of the assumptions and a very intensive and lengthy period of preparation for the arbitration. Ultimately, the arbitrator ruled that the Property value was \$52.350 million, which was \$44.15 million more than the City's offer and \$35.45 million less than Thomas Enterprises' appraisal.

The arbitration proceedings extended much longer than had been anticipated, even though the matters presented at the hearing were limited to the areas of dispute over the Property valuation. There was an unusually large amount of reports and materials

(about 10,000 pages) submitted into evidence. As many as 16 witnesses testified over the 10 days of examination, and additional witnesses had to be prepared in planning for the presentation and defense of the City's valuation. As a result, there was an extraordinary amount of pre-hearing preparation that MOT had to undertake. In addition, presentation materials including graphics, power point slides and computer modeling were prepared in coordination with the appraiser and consultant witnesses. Also, during the two week hearing new issues arose, which required preparation of additional materials and witnesses.

Due to the pre-hearing motions, the matters that were raised during the arbitration hearing, and the extended schedule of the arbitration proceedings, additional consultant and appraiser work, as well as additional legal work, was required. The lead appraisal firm, Integra, reduced its final bill by \$32,800 and Harris Engineering waived its \$20,000 fee, but the total appraiser and consultant costs exceeded the prior estimate in the Third Amendment by \$54,200. The parties also split the costs of the arbitrator, which exceeded the prior estimate by \$50,000 due to the pre- and post-hearing motions and the extended hearing schedule.

MOT had to incur substantially more hours of work to prepare for the proceedings than had been anticipated due to (i) Thomas Enterprises' delays in selecting local counsel, commencing the arbitration, (ii) the disputes over selection of the arbitrator and pre-hearing motions and discovery, (iii) the extensive volume of documents to review and analyze, (iv) the time required to properly prepare the City's witnesses and to prepare for cross-examination of Thomas Enterprises' witnesses, and (v) the preparation of additional reports and witnesses to effectively respond to issues raised by Thomas Enterprises' attorneys during the arbitration proceedings. Also, MOT had to file post-hearing motions seeking the arbitrator's assistance in interpreting his ruling to set the values for Parcels A and B, again due to the unwillingness of Thomas Enterprises to concur with the common sense and factual interpretation of the arbitrator's assessment of the Property valuation. As a result, the total legal costs for MOT's representation exceeded the original estimate, but MOT made reductions in the amount of its bills throughout the course of its engagement by over \$40,000.

In addition to the arbitration expenses, the original contract amount for MOT's pre-arbitration costs to oversee the consultant studies and the appraisal report preparation was \$50,000. There were also pre-arbitration payments to MOT of \$61,211.54 and to the consultants of \$75,442.27, for a total of \$136,653.81, which were approved under the cost ratification resolution (No. 2008-258). However, the MOT contract consideration does not include these cost ratification expenses. The total cost of the Property acquisition effort, as overseen by MOT, would include these additional cost ratification expenses.

RESOLUTION NO.

Adopted by the Sacramento City Council

**APPROVING FOURTH AMENDMENT TO AGREEMENT FOR LEGAL SERVICES
WITH MILLER, OWEN & TROST FOR SACRAMENTO INTERMODAL TRANSPORTATION
FACILITY SITE ACQUISITION (T15029001)**

BACKGROUND

- A. The City Attorney approved an Agreement for Legal Services, City Agreement No. 2007-0579, with Miller Owen and Trost (MOT) for the Sacramento Intermodal Transportation Facility Site Acquisition Project (T15029001) on January 25, 2007. On May 6, 2008, the City Council approved the First Amendment to increase the total consideration to \$450,000. On October 13, 2009, the City Council approved the Second Amendment to include appraiser, consultant and arbitrator costs under the MOT contract at the request of the City, and to increase the total consideration to \$575,000. On February 26, 2010, the City Attorney approved the Third Amendment to increase the total consideration to \$675,000.
- B. Under the contract amendments, the City authorized MOT to contract with the two appraisers and the various consultants the City had previously hired to prepare reports regarding the valuation of the Railyards Parcels A and B (the "Property") to support the City's position in arbitration. The appraisers and consultants had to prepare additional reports and served as expert witnesses at the arbitration hearing.
- C. Due the pre-hearing and post-hearing motions, the extended length of the arbitration hearing, and the matters raised during these proceedings, additional costs were incurred by the appraisers, consultants and MOT to represent the City's interests and to present evidence supporting the City's valuation of the Property. In addition, MOT paid the arbitrator for his services on behalf of the City, which substantially exceeded the original estimate. It is desirable to amend the existing Agreement for Legal Services to allow for payment of the outstanding invoices by increasing the total consideration by \$325,000, for a revised total amount not to exceed \$1,000,000.
- D. There are adequate funds available in the Sacramento Intermodal Transportation Facility Site Acquisition Project (T15029001) for the proposed amendment.

**BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL
RESOLVES AS FOLLOWS:**

Section 1. The City Attorney is authorized to execute the Fourth Amendment to Agreement for Legal Services (City Agreement No. 2007-0579) with Miller, Owen & Trost (MOT) for the Sacramento Intermodal Transportation Facility Site Acquisition Project (T15029001) to increase the total consideration by \$325,000, for a total amount not to exceed \$1,000,000, to allow for MOT to make payment to the appraisers and consultants who prepared reports and served as witnesses related to the valuation of the Railyards Parcels A and B during the arbitration proceedings, to pay the City's share of the arbitrator's fee, and to fund the additional legal services needed to complete the arbitration process, in the form attached as Exhibit A.

Section 2. The City Attorney's authority for City Agreement No. 2007-0579 is hereby reset.

Table of Contents:

Exhibit A: Fourth Amendment to Agreement for Legal Services

Exhibit A

FOURTH AMENDMENT TO AGREEMENT FOR LEGAL SERVICES

This Fourth Amendment (hereafter, the “Fourth Amendment”) to the Agreement for Legal Services is made and entered into as of this ___ day of August, 2010, by and between the City of Sacramento, a charter municipal corporation, (“City”) and Miller, Owen & Trost, a California professional corporation (“Attorneys”), which are herein individually referred to as “Party” and collectively referred to as “Parties.”

Recitals

A. City and Attorneys previously entered into the “Agreement for Legal Services” dated January 25, 2007, City Agreement No. 2007-0579 (the “Agreement”), which was modified as follows: the First Amendment dated May 22, 2008, City Agreement No. 2007-0579-1, (the “First Amendment”), the Second Amendment dated October 15, 2009, City Agreement No. 2007-0579-2 (the “Second Amendment”), and the Third Amendment dated February 26, 2010, City Agreement No. 2007-0579-3 (the “Third Amendment”). The Agreement for Legal Services, as amended, related to overseeing the preparation of appraisals and consultant studies and representing City at the arbitration hearing regarding the acquisition of Parcels A and B (the “Property”) located in the Downtown Railyards from S. Thomas Enterprises of Sacramento, LLC (“Thomas Enterprises”) for the City’s Intermodal project.

B. City and Thomas Enterprises were unable to agree on the acquisition price for the Property after completion of their respective appraisals. Formal negotiation and mediation was waived by consensus of City and Thomas Enterprises that such efforts would be unlikely to result in a mutually agreeable valuation determination for the Property. City then invoked its rights to demand that Thomas Enterprises participate in an arbitration proceeding in accordance with the terms of the Purchase and Sale Agreement.

C. The selection of the arbitrator required the assistance of the Presiding Judge of the Superior Court due to the inability of City and Thomas Enterprises to agree on an arbitrator. This dispute delayed setting the arbitration hearing by two months. Once the arbitrator was selected, the hearing could not be schedule any sooner than five months thereafter due to the pre-hearing motions and the conflicting schedules of the arbitrator, attorneys and witnesses.

D. Thomas Enterprises’ attorneys filed pre-hearing motions in an attempt to have the City’s appraisals excluded from the arbitration proceedings. City had to engage its consultants and direct its appraisers to prepare supplemental appraisal reports to defend against such motions. In addition, City had to file a pre-hearing motion in an attempt to obtain relevant, discoverable documents from Thomas Enterprises, requiring Attorneys to spend additional time to conduct pre-hearing proceedings.

E. Prior to and during the arbitration proceedings, Attorneys needed to consult with the experts City previously hired to prepare various technical reports regarding development of the Property, and to consult with the two appraisal firms City hired to prepare appraisals of the Property valuation, all of which were submitted to the arbitrator. Each of these consultants and appraisers were intended to be called upon as witnesses to testify at the arbitration hearing. Attorneys had to expend time to oversee and direct the work of these consultants and appraisers and to prepare them to serve as witnesses during the arbitration hearing. Attorneys obtained scopes of work and fee schedules from each of the consultants and appraisers, which estimated the hours of work and travel costs they anticipated may be needed for their respective tasks to review and prepare reports, attend meetings with Attorneys and participate in mock hearing sessions, and to testify as a witness and attend portions of the arbitration proceedings. The Second and Third Amendments authorized Attorneys, at the request of City, to contract directly with the named consultants and appraisers and the estimated costs were added to the total consideration under the Agreement for Legal Services, with payment for such consultants and appraisers to be made by Attorneys.

F. The arbitration hearing extended over a three week period, which was longer than what had been anticipated. Due to the pre-hearing motions, the matters that were raised during the arbitration hearing, and the extended schedule of the arbitration proceedings; additional consultant and appraiser work was required and Attorneys had to incur more hours of work than what had been estimated under the Third Amendment. In addition, Attorneys had to expend additional time than what had been anticipated to prepare City employees as witnesses to respond to issues raised by Thomas Enterprises' attorneys during the arbitration proceedings.

G. Subsequent to the arbitrator's ruling, motions had to be filed by Attorneys to seek the arbitrator's agreement to modify his ruling to allocate his Property valuation decision between Parcels A and B because Thomas Enterprises was unwilling to set such parcel values, contrary to the express terms of the Purchase and Sale Agreement. Attorneys also had to consult with City and undertake research to determine and evaluate all options available to City to resolve this dispute. Attorneys have voluntarily agreed to reduce their total bill by well over \$40,000 in light of the additional and unanticipated costs incurred during and after the arbitration proceedings.

H. Attorneys also paid the invoices for the JAMS arbitrator and such costs greatly exceeded the estimate in the Third Amendment, due to the additional time required for pre-hearing motions, the extended hearing schedule, and the post-hearing motions.

I. Accordingly, the Parties desire to amend the Agreement for Legal Services as provided below. The Parties understand and agree that this Fourth Amendment is to cover the additional costs already incurred related to the arbitration proceedings and minimal costs to complete the post-arbitration motion proceedings. The revised total consideration does not include costs associated with the potential

need to seek court orders in regards to enforcement of, or challenge to, the arbitrator's rulings.

Agreement

NOW, THEREFORE, in consideration of the mutual obligations set forth in the Agreement, as amended under the First, Second and Third Amendments, City and Attorneys hereby amend the Agreement as follows:

1. The paragraphs added to the scope of services to be rendered by Attorneys set forth in Section 1 of the Agreement, as amended, shall be revised to read as follows:

"Attorneys will also contract with the following firms ("Consultants") to provide support for the binding arbitration hearing process, based on the scopes of work and fee schedules, estimated total costs and invoices of actual costs incurred, all of which have been provided to City by Attorneys:

<u>Firm</u>	<u>Actual Cost</u>
Integra (appraiser)	\$175,000.00 (\$32,771.58 in fees waived)
NVC (appraiser)	\$ 20,000.00
Harris (civil engineers)	\$ 0 (\$20,000 in fees waived)
West Yost (hydrology)	\$ 27,774.16
Geocon (remediation)	\$ 15,537.50
DKS (traffic modeling)	\$ 33,071.45
LPA (land use planning)	\$ 44,666.73
Tuassig (finance)	\$ 0
SMWM/ARUP	\$ 0
Fanning & Associates	\$ 28,160.00
Leland & Associates	\$ 1,372.50
Total:	\$345,582.34

City acknowledges that Attorneys' agreement to hire the Consultants is given as an accommodation for City's benefit and Attorneys are not responsible for the Consultants' work product, including the accuracy or quality thereof.

In addition, Attorneys shall pay the arbitrator directly for his services, his travel and other direct costs, and for the costs of the hearing room at one half of the total cost as invoiced by JAMS. As of the date of the Fourth Amendment, City's share of the arbitrator's cost based on actual invoices is \$74,367.11."

2. The not-to-exceed amount set forth in Section 3 of the Agreement shall be increased by this Fourth Amendment by an additional \$325,000.00. This additional amount of compensation is provided for Attorneys to pay the additional costs of the Consultants needed to support the arbitration hearing and the costs of the arbitrator as set out in Section 1, above, plus to pay for the unanticipated costs incurred by Attorneys for the extensive pre-hearing motions, to prepare witnesses and represent the City during the arbitration hearing, to prepare post-hearing motions, and to consult with City in regards to the arbitrators' rulings. As amended, the total consideration under the Agreement for Legal Services is a not-to-exceed amount of One Million Dollars (\$1,000,000.00).

3. Except as specifically revised in this Fourth Amendment, all terms and conditions of the Agreement, as amended under the First, Second and Third Amendments, shall remain in full force and effect.

4. This Fourth Amendment may be executed in counterparts, each of which, when so executed and delivered, shall be an original, and such counterparts shall together constitute one and the same instrument.

5. Each person signing this Fourth Amendment warrants that it is authorized to bind its respective Party on whose behalf he or she signs.

CITY:
CITY OF SACRAMENTO
a charter municipal corporation

ATTORNEYS:
MILLER, OWEN & TROST
a Professional corporation

Eileen M. Teichert
City Attorney

Kirk E. Trost
Shareholder

APPROVED AS TO FORM:

Senior Deputy City Attorney

ATTEST:

City Clerk