

Meeting Date: 10/7/2014

Report Type: Consent

Report ID: 2014-00712

Title: Amendments of Agreements with Bond Counsel and Disclosure Counsel for Financing the Entertainment and Sports Center

Location: Citywide

Recommendation: Pass a Motion 1) approving the attached amendments of the agreements with Orrick, Herrington & Sutcliffe and Stradling Yocca Carlson & Rauth; and 2) authorizing the City Attorney or his designee to sign the amendments on the City's behalf.

Contact: Joseph P. Cerullo, Senior Deputy City Attorney, (916) 808-5346, Office of the City Attorney

Presenter: None

Department: City Attorney

Division: City Attorney

Dept ID: 03001011

Attachments:

1-Description/Analysis

2-First Amendment to Agreement for Special Counsel Services with Orrick, Herrington & Sutcliffe

3-First Amendment to Disclosure Counsel Agreement with Stradling Yocca Carlson & Rauth

City Attorney Review

Approved as to Form

Joseph Cerullo

10/1/2014 10:16:22 AM

Approvals/Acknowledgements

Department Director or Designee: Sandra Talbott - 9/23/2014 8:35:25 AM

Description/Analysis

Issue Detail: In 2013, the City entered into two legal-services agreements in connection with the issuance and sale of bonds needed to finance the City's contribution to the development of the new Entertainment and Sports Center (the "**ESC**") in downtown Sacramento:

- An Agreement for Special Counsel Services with Orrick, Herrington & Sutcliffe ("**Orrick**"), dated June 1, 2013, and designated as City Agreement No. 2013-1120
- A Disclosure Counsel Agreement with Stradling Yocca Carlson & Rauth ("**Stradling**"), dated June 1, 2013, and designated as City Agreement No. 2013-1121

When they entered into these agreements, the City, Orrick, and Stradling anticipated that the bonds would be issued sometime in mid-2014. But the subsequent filing and prosecution of lawsuits challenging the ESC has required the City to delay issuance, as the City is unable sell the bonds until the lawsuits have been resolved, most likely in the second quarter of 2015.

This unexpected delay posed a serious problem for the City's partner in developing the ESC, Sacramento Downtown Arena LLC ("**ArenaCo**"). ArenaCo needed to secure its financing by the end of July 2014 but could not do so unless the City had likewise secured its own financing. So to facilitate ArenaCo's financing, the City, Orrick, and Stradling entered into extensive negotiations with the City's underwriter, Goldman, Sachs & Company ("**Goldman**"), on an agreement that commits Goldman to purchase the City's bonds on specified terms once the lawsuits are resolved. The City and Goldman entered into this agreement on June 30, 2014, enabling ArenaCo to secure its financing on schedule.

Because of the above-described delay and the negotiations on the Forward Bond Purchase Agreement, Orrick and Stradling have expended considerably more time on the ESC than originally anticipated, and there is still more work to do once the lawsuits are resolved and the City can go to the municipal-bond market. Yet as their agreements with the City now read, Orrick and Stradling will not be paid for their work until the City successfully issues and sell bonds—which, as already noted, has delayed almost a year beyond what was originally anticipated. The proposed amendments address this unanticipated delay by authorizing payment of Orrick's and Stradling's legal fees in two installments. The first installment covers their work on the ESC through the date of the Forward Bond Purchase Agreement and will be paid immediately from the ESC debt-service fund under the budget authority approved in Resolution No. 2014-0131. The second installment covers their remaining work and will be paid once the bonds are successfully issued and sold, with payment coming from the bond proceeds. (The City will also reimburse itself from the bond proceeds for the first installment.)

Policy Considerations: Orrick and Stradling have been working on the ESC financing since early 2013. Their detailed knowledge of the City and their expertise in municipal bonds were critical to the successful negotiation of the Forward Bond Purchase Agreement, and their continued efforts will be equally critical to the successful issuance and sale of the bonds next year. Staff recommends that the City enter into the attached amendments to the agreements with Orrick and Stradling so that they do not have to wait unreasonably long to be compensated for their work to date.

Economic Impacts: None

Environmental Considerations:

California Environmental Quality Act (“CEQA”): CEQA does not apply. Approval of staff’s recommendation is not a “project” subject to CEQA because it (a) has no potential to cause a significant effect on the environment and (b) concerns government fiscal activities that do not involve any commitment to any specific project that may result in a potentially significant physical impact on the environment. (Cal. Code Regs., tit. 14, §§ 15061(b)(3) and 15378(b)(4).) Even if approval were a “project,” the issuance of bonds relates to the ESC project, for which the City certified an environment-impact report on May 20, 2014.

Sustainability: Not applicable.

Commission/Committee Action: Not applicable.

Rationale for Recommendation: The proposed amendments are needed to conform the City’s agreements with Orrick and Stradling to the current circumstances.

Financial Considerations:

Amendment to Orrick’s Agreement. As amended, the agreement expires on December 31, 2015, unless sooner terminated. Orrick’s compensation will be based on time actually expended and paid in two installments. The first installment is capped at \$500,000 and will be paid immediately from the ESC debt-service fund under the budget authority approved in Resolution No. 2014-0131, which will be reimbursed from bond proceeds if bonds are sold. The second installment covers the balance of Orrick’s work on the ESC and is subject to the following:

- If bonds are sold, then the second installment will be paid in full from the bond proceeds.

- If bonds are *not* sold, then the second installment will be capped at \$250,000 and paid from the multi-year operating project (MYOP) for the Downtown ESC Project (102000500).

Amendment to Stradling's Agreement. As amended, the agreement expires when the bonds are sold or when the bond financing is abandoned. Stradling's compensation will be based on time actually expended and paid in two installments. The first installment is capped at \$100,000 and will be paid immediately from the ESC debt-service fund under the budget authority approved in Resolution No. 2014-0131, which will be reimbursed from bond proceeds if bonds are sold. The second installment, covering the balance of Stradling's work on the ESC, is contingent on the sale of bonds and will be paid in full from the bond proceeds.

Local Business Enterprise (LBE): Not applicable.

FIRST AMENDMENT TO AGREEMENT FOR SPECIAL COUNSEL SERVICES
REVENUE BONDS FOR SACRAMENTO ENTERTAINMENT AND SPORTS CENTER

This First Amendment to Agreement for Special-Counsel Services, dated as of September 23, 2014, for reference, is between the CITY OF SACRAMENTO, a California municipal corporation (the “City”); and ORRICK, HERRINGTON & SUTCLIFFE LLP, a California limited-liability partnership (“Orrick”).

Background

The City and Orrick are parties to an Agreement for Special Counsel Services, dated June 1, 2013, and designated as City Agreement No. 2013-1120 (the “Original Agreement”), under which Orrick serves as bond counsel in connection with the issuance and sale of bonds to finance the City’s contribution to the development of a new Entertainment and Sports Center in downtown Sacramento (the “Project”). The Original Agreement provides that Orrick will be compensated for its services when the bonds have been sold.

When entering into the Original Agreement, the City and Orrick anticipated that the bonds would be issued by a joint-powers agency or other eligible issuer; that the bonds would be a combination of tax-exempt and taxable obligations, as circumstances dictated; that the issuer would loan the proceeds of the bonds to a non-profit corporation, which would pay the proceeds to the City in return for the right to operate certain City-owned parking assets under a long-term agreement; and that the City would apply the payment from the corporation to the Project. After entering into the Original Agreement, the City formed the Sacramento Public Financing Authority to serve as the issuer of the bonds, determined that all of the bonds will be taxable, and decided against using a non-profit corporation in financing the Project, opting instead to use a lease-leaseback financing structure.

On May 20, 2014, the City Council approved the Project and authorized the issuance of the bonds. Soon after, several lawsuits challenging those actions were filed, and, so long as those lawsuits are pending, they effectively prevent the City from issuing long-term fixed-rate bonds. That posed a problem for the City’s partners in developing the Project, Sacramento Downtown Arena LLC and its affiliates, as they needed to secure their financing by the end of July 2014 but could not do so unless the City had likewise secured its own financing. Accordingly, the City and its underwriter, Goldman, Sachs & Company, negotiated and entered into a Forward Bond Purchase Agreement, dated July 30, 2014, that commits Goldman, Sachs & Company to purchase the bonds on specified terms once the lawsuits are resolved.

To accommodate these changed circumstances, the City and Orrick desire to amend the Original Agreement so that Orrick is compensated in two installments: the first installment covers a portion of Orrick’s work on the Project before the effective date of the Forward Bond Purchase Agreement and will be paid upon Orrick’s submission of an invoice; the second installment covers Orrick’s work on the issuance and sale of the bonds and will be paid after the City successfully issues the bonds.

With these background facts in mind, the parties hereby agree as follows:

1. Section 4(d) in the Original Agreement is hereby amended to read as follows in its entirety:

- (d) Given the complex nature of this financing, payment of all fees and disbursements under this agreement is not contingent upon the issuance of the Bonds. The City's payment of legal fees and disbursements will be due and payable as follows:
 - (1) After the City enters into a Forward Bond Purchase Agreement with Goldman, Sachs & Company, the City shall pay Orrick's legal fees and disbursements for work on the Project as soon as is practicable after Orrick's presentation of an itemized invoice. This invoice will be for a partial payment of compensation, and the fees and disbursements for the invoiced work (including any discounts) may not exceed \$500,000.
 - (2) After the successful closing of the Bond Financing, the City shall pay the balance of Orrick's legal fees and disbursements for work on the Project, i.e., the amount owed less any amount paid under Section 4(d)(1), as soon as is practicable after Orrick's presentation of an itemized invoice for that balance.
 - (3) If this agreement is terminated early under section 5, then the City shall pay Orrick's legal fees and disbursements for work on the Project up to the date of termination (not including any amount paid under Section 4(d)(1)) as soon as is practicable after Orrick's presentation of an itemized invoice.

2. Section 5 in the Original Agreement is hereby amended to read in its entirety as follows:

- 5. *Termination.* This agreement and all legal services to be rendered under it will terminate as follows:
 - (a) If the Bond Financing successfully closes before midnight at the end of December 31, 2015, then termination will occur upon the City's payment in full to Orrick of all fees and disbursements due under section 4.
 - (b) If the Bond Financing has not successfully closed by midnight at the end of December 31, 2015, then termination will occur at that time on that date. Upon such termination, the City shall pay Orrick forthwith for all satisfactory work at the hourly rates specified in section 4(a) above, but Orrick's total compensation will not exceed \$500,000 for work done before midnight at the end of December 31, 2014, and will not exceed \$250,000 for work done after midnight at the beginning of January 1, 2015, and before midnight at the end of December 31, 2015.
 - (c) Either party may, at any time, terminate this agreement and all legal services to be rendered under it, with or without cause, by giving written notice to the other party. The City shall pay Orrick at the hourly rates specified in section 4(a) above for all satisfactory work done before such early termination, subject to the following:

- (1) Orrick's compensation will not exceed \$500,000 for work done before midnight at the end of December 31, 2014, and will not exceed \$250,000 for work done after midnight at the beginning of January 1, 2015, and before midnight at the end of December 31, 2015.
 - (2) If the City terminates for cause, then Orrick's compensation will be adjusted in the light of the facts and circumstances involved in the termination.
 - (d) Upon termination under section 5(b) or 5(c), all finished and unfinished documents that Orrick has prepared for the City's, the Issuer's, or the Corporation's adoption, approval, or execution will, at the City's option, become the City's property, and Orrick shall deliver them to the City or to any person or entity the City may designate, all subject to the condition that Orrick will have no liability whatsoever for any subsequent use of such documents.
 - (e) After this agreement terminates or is terminated, Orrick will have no future duty of any kind to the City or the Issuer with respect to the Bond Financing or the Bonds, except as provided in sections 1(m) and 1(n) above.
 - (f) Except as stated above, Orrick retains the right to discard any files and materials. Orrick's current policy (subject to change) is to discard all files and materials after issuance of the Bonds (except the closing transcript, which will be retained until after the Bonds are paid or defeased) or following cessation of work on the Bond Financing without issuance of the Bonds.
3. *All Other Terms Remain in Force.* Except as amended by sections 1 and 2 above, all terms and conditions of the Original Agreement remain in full force.
 4. *Counterparts.* The parties may sign this agreement in counterparts, each of which will be considered an original, but all of which will constitute the same agreement.
 5. *Effective Date.* This agreement is effective on the date both parties have signed it, as indicated by the dates in the signature blocks below.

(Signature Page Follows)

City of Sacramento

Orrick, Herrington & Sutcliffe LLP

By: _____
James Sanchez, City Attorney
Date: September __, 2014

By: Jenna Magan
Jenna Magan, Partner
Date: September 8, 2014

Attest
City Clerk

By: _____

Approved as to Form
Sacramento City Attorney

By: Joseph Cerullo
Joseph P. Cerullo
Senior Deputy City Attorney

FIRST AMENDMENT TO DISCLOSURE COUNSEL AGREEMENT

REVENUE BONDS FOR SACRAMENTO ENTERTAINMENT AND SPORTS CENTER

This First Amendment to Disclosure Counsel Agreement, dated September 23, 2014, for reference, is between the CITY OF SACRAMENTO, a California municipal corporation (the “City”), and STRADLING YOCCA CARLSON & RAUTH, a California professional corporation (“SYCR”).

Background

The City and SYCR are parties to a Disclosure Counsel Agreement, dated June 1, 2013, and designated as City Agreement No. 2013-1121 (the “Original Agreement”), under which SYCR serves as disclosure counsel in connection with the issuance and sale of bonds to finance the City’s contribution to the development of a new Entertainment and Sports Center in downtown Sacramento (the “Project”). The Original Agreement provides that SYCR will be compensated for its services only if the bonds are sold.

When entering into the Original Agreement, the City and SYCR anticipated that the bonds would be issued by a joint-powers agency or other eligible issuer; that the bonds would be a combination of tax-exempt and taxable obligations, as circumstances dictated; that the issuer would loan the proceeds of the bonds to a non-profit corporation, which would pay the proceeds to the City in return for the right to operate certain City-owned parking assets under a long-term agreement; and that the City would apply the payment from the corporation to the Project. After entering into the Original Agreement, the City formed the Sacramento Public Financing Authority to serve as the issuer of the bonds, determined that all of the bonds will be taxable, and decided against using a non-profit corporation in financing the Project, opting instead to use a lease-leaseback financing structure.

On May 20, 2014, the City Council approved the Project and authorized the issuance of the bonds. Soon after, several lawsuits challenging those actions were filed, and, so long as those lawsuits are pending, they effectively prevent the City from issuing long-term fixed-rate bonds. That posed a problem for the City’s partners in developing the Project, Sacramento Downtown Arena LLC and its affiliates, as they needed to secure their financing by the end of July 2014 but could not do so unless the City had likewise secured its own financing. Accordingly, the City and its underwriter, Goldman, Sachs & Company, negotiated and entered into a Forward Bond Purchase Agreement, dated July 30, 2014, that commits Goldman, Sachs & Company to purchase the bonds on specified terms once the lawsuits are resolved.

To accommodate these changed circumstances, the City and SYCR desire to amend the Original Agreement so that SYCR is compensated in two installments: the first installment covers SYCR’s work on the Project before the effective date of the Forward Bond Purchase Agreement and will be paid upon SYCR’s submission of an invoice; the second installment covers SYCR’s work after the effective date of the Forward Bond Purchase Agreement and will be paid only if the City successfully issues the bonds.

With these background facts in mind, the parties agree as follows:

1. Section 2 in the Original Agreement is hereby amended to read as follows in its entirety:

- 2. Compensation.** The City shall pay SYCR the amounts set forth in this Section 2 as full compensation for all services SYCR renders under this agreement.
- (a) For the services SYCR renders under this agreement, the City shall pay SYCR's legal fees at an hourly rate of \$450 for shareholders and an hourly rate ranging from \$275 to \$325 for associates (depending on seniority).
 - (b) The City shall reimburse SYCR for any out-of-pocket expenses SYCR reasonably incurs while rendering services under this agreement, including but not limited to document-reproduction costs, telecommunications charges, printing costs, filing fees, fees for messenger services, fees for overnight-delivery services, and travel expenses.
 - (c) After the City enters into a Forward Bond Purchase Agreement with Goldman, Sachs & Company, the City shall pay, as soon as is practicable after SYCR's presentation of an itemized invoice, SYCR's legal fees and out-of-pocket expenses for work on the Project before the date of the Forward Bond Purchase Agreement. This invoice will be for a partial payment of compensation, and the amount invoiced may not exceed \$100,000.
 - (d) After the successful closing of the Bond Financing, the City shall pay the balance of SYCR's legal fees and out-of-pocket expenses for work on the Project, i.e., the amount owed less any amount paid under Section 2(c), as soon as is practicable after SYCR's presentation of an itemized invoice for that balance. The City's obligation to pay SYCR under this Section 2(d) is contingent on the successful closing of the Bond Financing (the "Closing"), with the payment to come exclusively from the proceeds of the Bonds at the Closing. If, for any reason, the Closing does not occur, then the City will not be obligated to compensate SYCR under this Section 2(d).
 - (e) On October 1, 2013, and on each January 1, April 1, July 1, and October 1 thereafter until the Closing, SYCR shall provide the City with a summary of the total legal fees and out-of-pocket expenses accrued up to the date of the summary for services rendered under this agreement.

2. Section 4 in the Original Agreement is hereby amended to read as follows in its entirety:

4. Termination

- (a) After the City has paid SYCR the amount owed under Section 2(d), either party may terminate this agreement with or without cause by giving written notice to the other party. The notice must state the termination date, which must be at least three business days after the date the notice is delivered.
- (b) Unless terminated sooner under section 4(a), this agreement terminates on the date of the Closing.

3. *All Other Terms Remain in Force.* Except as amended by sections 1 and 2 above, all terms and conditions of the Original Agreement remain in full force.
4. *Counterparts.* The parties may sign this agreement in counterparts, each of which will be considered an original, but all of which will constitute the same agreement.
5. *Effective Date.* This agreement is effective on the date both parties have signed it, as indicated by the dates in the signature blocks below.

(Signature Page Follows)

City of Sacramento

Stradling Yocca Carlson & Rauth

By: _____
James Sanchez, City Attorney
Date: September __, 2014

By: Kevin Civale
Kevin M. Civale, Shareholder
Date: September 9, 2014

Attest
City Clerk

By: _____

Approved as to Form
Sacramento City Attorney

By: Joseph Cerullo
Joseph P. Cerullo
Senior Deputy City Attorney