

RESOLUTION NO. 2010-481

Adopted by the Sacramento City Council

August 10, 2010

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

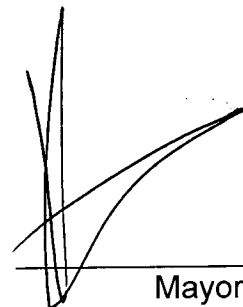
Adopted by the City of Sacramento City Council on August 10, 2010 by the following vote:

Ayes: Councilmembers Cohn, Fong, Hammond, Pannell, Sheedy, Tretheway, Waters, and Mayor Johnson.

Noes: None.

Abstain: None.

Absent: Councilmember McCarty.



Mayor Kevin Johnson

Attest:



Shirley Concolino, City Clerk

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 scheduled 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	<u>\$ 1,372.50</u>
Total:	<u>\$345,582.34</u>

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