



Legislation Text

File #: 2017-083, Version: 1

Report to Carson Reclamation Authority

Tuesday, February 07, 2017

Consent

SUBJECT:

CONSIDER AMENDMENT NUMBER 2 TO A SPECIAL COUNSEL ENGAGEMENT AGREEMENT WITH GREENBERG TRAURIG, LLP FOR LEGAL SERVICES RELATED TO POST-TERMINATION ACTIVITIES, FINANCIAL ASSURANCE, AND OTHER RELATED MATTERS IN THE AMOUNT OF \$353,750

I. SUMMARY

The Authority contracted in May, 2016 with Greenberg Traurig, LLP to provide it and the Authority's legal counsel specific legal assistance in the procurement of a new Pollution Legal Liability Policy, and associated negotiations on the Environmental Protection Program Policy (the "EPP Policy") that Carson Marketplace has purchased from American International Special Lines Insurance Company ("Insurer" or "AIG"), and with Tetra Tech, the environmental contractor. The Contract was amended on October 4, 2016 to take the work up through the end of December, 2016, to complete the work on the AIG EPP, the DTSC Financial Assurance, and the work transitioning the Authority from the Tetra Tech contract into a new time and materials based contract with another vendor for the installation of the remedial systems under the RAP as well as the future OM&M of those systems. The First Amendment also finalized work on the Bridge PLL, helped secure the CPL replacement and began the larger Development PLL program, including working with Macerich and a prospective "Master Developer" on the balance of the site.

II. RECOMMENDATION

1. APPROVE Amendment No. 2 to a Special Counsel Engagement Agreement ("Amendment") with Greenberg Traurig, LLP for legal services related to post-termination activities, financial assurance and other related matters in the amount of \$353,750.
2. AUTHORIZE the Chairman to execute the Amendment following approval as to form by the City Attorney.

III. ALTERNATIVES

TAKE another action the Authority deems necessary.

IV. BACKGROUND

The CRA contracted in May, 2016 with Greenberg Traurig, LLP (“GT”) to provide it and the Authority’s legal counsel specific legal assistance in the procurement of a new Pollution Legal Liability Policy, and associated negotiations on the Environmental Protection Program Policy (the “EPP Policy”) that Carson Marketplace has purchased from American International Special Lines Insurance Company (“Insurer” or “AIG”), and with Tetra Tech, the environmental contractor. Most of the tasks under the original Agreement were accomplished by September and in October the contract was amended for several months to complete the work on the AIG EPP, the DTSC Financial Assurance, and the work transitioning the CRA from the Tetra Tech contract into a new time and materials based contract with another vendor for the installation of the remedial systems under the RAP as well as the future OM&M of those systems. It also finalized work on the Bridge PLL, helped secure the CPL replacement and began the larger Development PLL program, including working with the Macerich.

In May, as part of the original proposal from GT, the CRA anticipated amending the Tetra Tech contract to allow for the phased development of the site and for assistance with the commutation of the AIG policy. It was anticipated that if the AIG policy was commuted, the Authority and Tetra Tech could mutually determine an OM&M strategy that was much more cost effective than the cost structure under the existing EAA with Tetra Tech.

Not fully appreciated was Tetra Tech’s reluctance to remain in the contract under a phased development program, since the structure of the EAAs was that they are the holders of the environmental risk. One way of managing the risk was for them to hold very firmly to the original provisions of the EAA (no phasing), secured by AIG’s EPP (only the original provisions of the EAA (no phasing), secured by AIG’s EPP (only the original site plan, and no phasing) and memorialized in the Compliance Framework with DTSC. Even with a release of liability from the Authority, Tetra Tech felt strongly enough about their risk exposure that they were willing to discuss termination of the Remediation Agreements.

Most of the scope in the original Engagement Letter, then, shifted to the negotiation of a potential Termination and Release Agreement with Tetra Tech, subject to a number of conditions that would need to occur prior to becoming effective.

On November 14, 2016, Tetra Tech and CRA executed the Termination and Release Agreement (“Termination Agreement”), which terminated the various Remediation Agreements and required the dissolution of the Remediation Trust Account, of which Tetra Tech is the beneficiary.

One of the tasks was also to cancel the EPP Policy for operation and maintenance of the remedial systems and seek a return of money designated for future payments (a “commutation.”) In order to receive approval of the termination and the dissolution of the Trust, the CRA needed to negotiate the replacement Financial Assurance structure with DTSC, to ensure that funds would be reserved for the completion of the remedial systems and eventually the operation of the remedial systems. The creation of an Enterprise Fund and its operation through an Enterprise Fund Administration Agreement with DTSC satisfied these requirements.

The Tetra Tech termination became effective on January 28, 2017.

Now that the TT termination has been completed and a new environmental contractor is on site, there is some additional Scope of Work with GT for the next five months, through May 31, 2017, that is necessary to complete all of the termination-related activities and prepare the CRA for the next phase of development. Staff and GT expect that these are less intensive efforts than the previous few months. Approximately the same amount of funding would be utilized over a considerably longer period of time and to accomplish more tasks (the estimate now runs through May 31).

Since the TT deal did not close until the end of January, rather than December, the first component of the Scope is for the efforts in January to close that transaction and to do the post-closing “true-up” and closing binder preparation and distribution. The other areas of the Scope relate to: (1) Fixing the financial assurance and CFD documents to provide greater flexibility on remedial construction; (2) supporting the transactions with the three selected master developers on environmental, regulatory and insurance matters; (3) negotiating and drafting new regulatory documents; and (4) placement of the Development PLL and Development CPL/PLI. There is also added a component of scope to support a master DDA or fee developer agreement with RES (the selected Environmental Master Developer, now under a consulting contract) at the discretion of the CRA.

In order to save the CRA money in 2017, they have left the Associate’s rate the same; additionally, the principal deferred his annual increase until January 31 since it was a carryover of tasks anticipated to be closed in 2016, and also to provide some additional savings to CRA. They also expect to utilize more associates this year on some of these tasks wherever possible. In keeping with the original engagement letter no travel time will be billed. The total for all elements of the Scope of Work, including direct travel costs, is approximately \$353,750, which includes the approximately \$70,000 estimated for the closing of the TT deal in January.

The GT Scope for January-May 2017 is as follows:

- I. Completion of TT Termination and Release Transaction (January).
 - A. Complete the documentation and closing of Tetra Tech Termination and Release Agreement, including related permit transfers, Post-Closing Change Order “true-up,” EPP Commutation, placement of TT Stand-Alone PLL and site-specific insurance policies.

- B. Distribute closing documents from escrow; preparation of closing binders.
- C. Timing: 30 days.
- D. 125 hours; \$68,750.

II. Financial Assurance Replacement/CFD Updates.

- A. Scope of Work (100 hours):
 - 1. Work with CRA staff, RES and SCS to revise Enterprise Fund Administration Agreement and new financial assurance mechanism to provide greater flexibility for use of remedial construction funds in "O&M Subaccount."
 - 2. Work with prospective master developers to document flow of funds into CFD-1 and loan structure for repayment of CRA advances; documentation of CRA advances and loans.
 - 3. Negotiate and document amendments to Enterprise Fund Administration Agreement with CRA representatives and DTSC.
- B. Timing: 3-4 months.
- C. 100 hours; \$55,000.

III. Macerich and Master Developer Transaction Insurance and Remediation/Development Issues.

- A. Scope of Work:
 - 1. Assist in negotiation, structuring and documenting transaction with Macerich, other selected developers regarding insurance provisions, allocation of environmental liabilities, Tetra Tech release, installation of remedial systems and allocation of costs for OCIP and Development PLL and related matters (80 hours).
 - 2. Support negotiations with new Master Developer regarding allocation of environmental liabilities, installation of remedial systems, OCIP and Development PLL and allocation of costs (65 hours).
 - 3. Engagement with JLT, Macerich and key reinsurance markets and Lloyds syndicates (in London) for reinsurance capacity for Development PLL and Development CPL/PLI (65 hours).
- B. Timing: 5 months.
- C. 210 hours; \$115,500.

IV. Support RES Contract for Horizontal Master Developer Role.

- A. Legal support to CRA for negotiation and documentation of RES horizontal developer DDA/Fee Developer Agreement as requested by CRA.
 - a. Structure, negotiate and document appropriate agreements between RES and CRA.
- B. Timing: 60 days.
- C. 80 hours; \$44,000.

V. New Regulatory Agreement Structure for CRA Operations.

- A. Select and negotiate new regulatory document structure for Phased Development Plan implementation, as needed to correct deficiencies in current regulatory documents, support new insurance programs and provide guidance to support site-wide remedial construction efforts.
 - a. Negotiate, draft and document new regulatory documents with DTSC and RES/CRA. Coordinate with insurers for PLL and CPL/PLI.
- B. Timing: 4-5 months.
- C. 100 hours; \$55,000

Travel Cost Estimate for travel to CA for DTSC meetings and related matters, trip to London for meetings with reinsurers and insurer negotiations (\$15,500). No travel time billed as per engagement letter; only out-of-pocket costs in accordance with terms of engagement letter.

Associates will continue to bill time in 2017 at \$525; principal's hourly rate will be billed at \$580 for time after January 31, 2017. For purposes of the cost estimate, hourly rates are calculated using a blended rate of \$550 per hour.

The CRA has already begun to use alternative, less-expensive contractors for completion of the RAP-related report and preparation of the Property for development, RE|Solutions (RES). The CRA and RES will oversee the remaining remedial activities, including, but not limited to installation of piles, groundwater monitoring and landfill gas monitoring.

V. FISCAL IMPACT

The Total Cost of the engagement would be \$353,750, payable by the CRA. Funds are

available in the line item budgeted for Contractual Services in FY 2016-17. All of the other terms of Special Counsel Engagement Letter remain in effect.

VI. EXHIBITS

1. Scope of Work (pgs. 7-9)

Prepared by: John S. Raymond, Director of Community Development