

FORT ORD REUSE AUTHORITY BOARD REPORT

OLD BUSINESS

Subject: FORA Legal Representation

Meeting Date: April 12, 2013

Agenda Number: 7c

ACTION

RECOMMENDATION(S):

- i. Consider authorizing the Executive Officer to execute a contract with the Law Offices of Alan Waltner, not to exceed \$24,950, for review of Base Reuse Plan (BRP) actions (**Attachment A**).
- ii. Consider authorizing the Executive Officer to execute a contract with Jon Giffen of Kennedy, Archer, and Giffen to serve as Authority Counsel (**Attachment B**).

BACKGROUND/DISCUSSION:

At its March 22, 2013 meeting, the FORA Board directed staff to retain special Land Use/CEQA counsel to complete a retrospective and prospective legal analysis of Category II from the BRP Reassessment Report and other items as identified. Alan Waltner previously provided Land Use and CEQA legal services to FORA in FY 2007/2008 related to Chapter 8 of the FORA Master Resolution and its requirements to perform a reassessment of the BRP. Section 3.02.130 of the FORA Master Resolution (**Attachment C**) allows exceptions to competitive bidding requirements when the estimated amount involved is less than \$25,000. The draft contract with Alan Waltner would meet this requirement since it is less than \$25,000.

At its March 15, 2013 meeting, Authority Counsel Jerry Bowden announced that he would be leaving his role as Authority Counsel within five months. Board approval of recommendation #2 would authorize Jon Giffen to serve as Authority Counsel.

FISCAL IMPACT:

Reviewed by FORA Controller M.F. for I.B.

Staff time for this item is included in the approved annual budget. The proposed contract for special counsel Alan Waltner would not exceed \$24,950. Funding for this contract is available in the Base Reuse Plan Reassessment budget from the approved FY 12-13 budget. Funding for the Authority Counsel contract is available in Legal Services budget from the approved FY 12-13 budget.

COORDINATION:

Administrative Committee, Executive Committee, Authority Counsel, Kennedy, Archer, and Giffen, and the Law Offices of Alan Waltner.

Prepared by

Jonathan Garcia
Jonathan Garcia

Reviewed by

Steve Endsley
Steve Endsley

Approved by

Michael A. Houlemard, Jr.
Michael A. Houlemard, Jr.

Agreement No. FC-040513

Agreement for Professional Services

This Agreement for Professional Services ("Agreement") is by and between the Fort Ord Reuse Authority, a political subdivision of the State of California ("FORA") and Alan Waltner ("CONSULTANT").

The parties agree as follows:

1. SERVICES. Subject to the terms and conditions set forth in this Agreement, CONSULTANT shall provide FORA with Land Use and CEQA legal services associated with the Post-Base Reuse Plan Reassessment process and associated with other FORA projects as directed, described in **Exhibit A**. Such services will be at the direction of the Executive Officer of the Fort Ord Reuse Authority or the Executive Officer's designee.
2. TERM. This contract starts April 12, 2013 and ends June 30, 2013 or until the maximum amount of authorized compensation is reached.
3. COMPENSATION AND OUT OF POCKET EXPENSES. In consideration for services, FORA shall pay CONSULTANT for services rendered at the hourly rate specified in **Exhibit A**. In addition, FORA shall reimburse CONSULTANT for one half of his travel time and for reasonable business expenses in accordance with FORA'S expense reimbursement policy. The overall maximum amount of compensation to CONSULTANT over the full term of this Agreement is \$24,950.
4. FACILITIES AND EQUIPMENT. CONSULTANT shall, at his cost, furnish all facilities and equipment required for the services to be provided under this Agreement.
5. GENERAL PROVISIONS. If any part of this Agreement is inconsistent with the general provisions in **Exhibit B**, this Agreement will prevail.
6. EXHIBITS. All exhibits referred to herein are attached hereto and are by this reference incorporated herein.

IN WITNESS WHEREOF, FORA and CONSULTANT execute this Agreement as follows:

FORA

CONSULTANT

By _____
Michael A. Houlemard, Jr.

Date

By _____
Alan Waltner

Date

Approved as to form:

By _____
Gerald Bowden

Authority Counsel

SCOPE OF WORK

For Assistance on California Environmental Quality Act Issues

Related to the Fort Ord Base Reuse Plan Reassessment

This attachment outlines the tasks that Alan Waltner will perform to assist the Fort Ord Reuse Authority ("FORA") with Land Use and California Environmental Quality Act ("CEQA") issues arising from the Post-Base Reuse Plan ("BRP") reassessment. The main goals of this scope of work are: 1) provide retrospective and prospective advice on Post-BRP reassessment considerations and their compliance with Land Use and CEQA requirements and 2) to inform the FORA Board of both Land Use and CEQA implications of potential actions. This scope of work has four tasks. Any of the four tasks may require Alan Waltner to work with Authority Counsels Gerald Bowden and Jon Giffen.

Task 1: Review of the Final 2012 BRP Reassessment Report – Category 2

At the March 22, 2013 FORA Board meeting, the Board directed FORA staff to retain Land Use and CEQA special counsel to advise the Board on Land Use and CEQA implications of potential Board direction concerning Category 2 items described in the 2012 BRP Reassessment Report.

Deliverable: Legal memorandum addressed to FORA Board advising retrospectively and prospectively on the Land Use and CEQA implications of potential Board direction concerning Category 2 items (prior FORA Board Consistency Determinations and other Board Actions), and other items as identified, described in the 2012 BRP Reassessment Report. In-person presentation to the FORA Board of Directors or Board-established committee(s). Note: FORA staff will provide 2012 BRP Reassessment Report, correspondence from members of the public and community groups related to Category 2, and other background materials as needed.

Task 2: Land Use and CEQA advice with respect to potential Board actions

The FORA Board of Directors, FORA staff, and land use jurisdictions need to be aware of other potential Land Use and CEQA implications with respect to potential future Board actions. As such items are identified, Alan Waltner will prepare a legal memorandum analyzing these aspects and present his analysis, as directed, to the FORA Board of Directors or Board-established committee(s).

Deliverables: Legal memorandum on potential Land Use and CEQA implications with respect to potential future Board actions. In-person presentation to the FORA Board of Directors or Board-established committee(s).

COMPENSATION: CONSULTANT is entitled to a maximum amount of \$24,950 including out-of-pocket expenses and will be compensated for services rendered in the following manner:

- 1) FORA agrees to pay CONSULTANT at the hourly rate of \$300.
- 2) CONSULTANT shall submit monthly invoices to FORA for the period ending on the last day of each month. Each invoice shall contain a summary description of services provided during the billing period.
- 3) CONSULTANT shall be reimbursed for reasonable business expenses if consistent with FORA policy and IRS guidelines and directly incurred pursuant to the terms of this agreement. Invoices for expenses must contain detailed itemizations and any expense of \$50.00 or more must be accompanied by a receipt.
- 4) FORA shall pay CONSULTANT no later than 30 days from receiving an acceptable invoice.
- 5) Final Invoice: CONSULTANT shall provide a final report for each task completed.

CONTRACT AMENDMENTS: Any changes in services, time-line, and/or financial terms will require an amendment to this Agreement.

EXHIBIT B

GENERAL PROVISIONS

1. INDEPENDENT CONSULTANT. At all times during the term of this Agreement, CONSULTANT shall be an independent CONSULTANT and shall not be an employee of FORA. FORA shall have the right to control CONSULTANT only insofar as the results of CONSULTANT'S services rendered pursuant to this Agreement.
2. TIME. CONSULTANT shall devote such services pursuant to this Agreement as may be reasonably necessary for satisfactory performance of CONSULTANT'S obligations pursuant to this Agreement. CONSULTANT shall adhere to the Schedule of Activities shown in Exhibit "A".
3. INSURANCE: MOTOR VEHICLE INSURANCE
CONTRACTOR shall maintain insurance covering all motor vehicles (including owned and non-owned) used in providing services under this Agreement, with a combined single limit of not less than \$100,000/\$300,000.
4. CONSULTANT NO AGENT. Except as FORA may specify in writing, CONSULTANT shall have no authority, express or implied to act on behalf of FORA in any capacity whatsoever as an agent. CONSULTANT shall have no authority, express or implied, pursuant to this Agreement, to bind FORA to any obligation whatsoever.
5. ASSIGNMENT PROHIBITED. No party to this Agreement may assign any right or obligation pursuant to this Agreement. Any attempted or purported assignment of any right or obligation pursuant to this Agreement shall be void and of no effect.
6. PERSONNEL. CONSULTANT shall assign only competent personnel to perform services pursuant to this Agreement. In the event that FORA, in its sole discretion, at anytime during the term of this Agreement, desires the removal of any person or persons assigned by CONSULTANT. CONSULTANT shall remove any such person immediately upon receiving notice from FORA of the desire for FORA for the removal of such person or person.
7. STANDARD OF PERFORMANCE. CONSULTANT shall perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which CONSULTANT is engaged in the geographical area in which CONSULTANT practices his profession. All products and services of whatsoever nature, which CONSULTANT delivers to FORA pursuant to this Agreement, shall be prepared in a substantial, first-class, and workmanlike manner, and conform to the standards of quality normally observed by a person practicing in CONSULTANT'S profession. FORA shall be the sole judge as to whether the product or services of the CONSULTANT are satisfactory.
8. CANCELLATION OF AGREEMENT. Either party may cancel this Agreement at any time for its convenience, upon written notification. CONSULTANT shall be entitled to receive full payment for all services performed and all costs incurred to the date of receipt entitled to no further compensation for work performed after the date of receipt of written notice to cease work shall become the property of FORA.
9. PRODUCTS OF CONTRACTING. All completed work products of the CONSULTANT, once accepted, shall be the property of FORA. CONSULTANT shall have the right to use the data and products for research and academic purposes.

10. INDEMNIFY AND HOLD HARMLESS. CONSULTANT is to indemnify, defend, and hold harmless FORA, its officers, agents, employees and volunteers from all claims, suits, or actions of every name, kind and description, brought forth on account of injuries to or death of any person or damage to property arising from or connected with the willful misconduct, negligent acts, errors or omissions, ultra-hazardous activities, activities giving rise to strict liability, or defects in design by the CONSULTANT or any person directly or indirectly employed by or acting as agent for CONSULTANT in the performance of this Agreement, including the concurrent or successive passive negligence of FORA, its officers, agents, employees or volunteers.

It is understood that the duty of CONSULTANT to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance of insurance certificates and endorsements required under this Agreement does not relieve CONSULTANT from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply whether or not such insurance policies have been determined to be applicable to any of such damages or claims for damages.

FORA is to indemnify, defend, and hold harmless CONSULTANT, the State of California, the Trustees of the California State University, and California State University Monterey Bay, its officers, agents, employees and volunteers from all claims, suits, or actions of every name, kind and description, brought forth on account of injuries to or death of any person or damage to property arising from or connected with the willful misconduct, negligent acts, errors or omissions, ultra-hazardous activities, activities giving rise to strict liability, or defects in design by FORA or any person directly or indirectly employed by or acting as agent for FORA in the performance of this Agreement, including the concurrent or successive passive negligence of CONSULTANT, its officers, agents, employees or volunteers.

11. PROHIBITED INTERESTS. No employee of FORA shall have any direct financial interest in this agreement. This agreement shall be voidable at the option of FORA if this provision is violated.

12. CONSULTANT-NOT PUBLIC OFFICIAL. CONSULTANT possesses no authority with respect to any FORA decision beyond the rendition of information, advice, recommendation or counsel.

April 3, 2013

Fort Ord Reuse Authority
Attention: Michael A. Houlemard, Jr.
920 2nd Ave., Suite A
Marina, CA 93933

Re: *Retention of Kennedy, Archer & Giffen as Authority Counsel for
Fort Ord Reuse Authority*

Dear Mr. Houlemard:

We are pleased to confirm that the Fort Ord Reuse Authority ("FORA") will retain Kennedy, Archer & Giffen ("KAG") as Authority Counsel under the terms and conditions set forth below.

Both FORA and KAG acknowledge that FORA has retained KAG (or its predecessor firm) as special outside counsel to defend FORA in separate and distinct complex lawsuits currently pending in Monterey County Superior Court. KAG has significant legal research and litigation capacity, broad experience with municipal law issues confronting FORA, and, from its work with FORA as special counsel, a certain exposure to and familiarity with the current legal issues confronted by the various FORA Committees and the FORA Board. These qualities make KAG uniquely qualified to serve FORA as both special outside counsel, and from the effective date of this agreement, as Authority Counsel.

As Authority Counsel, the legal services KAG will provide to FORA will include but not be limited to the following: day-to-day advice, written opinions, legal document review, legal research, factual investigation, appearances at all Board Meetings and at committee or subcommittee meetings at FORA upon request, telephone conferences, and travel time. Jon R. Giffen is designated as lead attorney, although legal services can be provided by other firm counsel or non-firm counsel upon approval by the Board or the FORA Executive Director.

KAG will commence work under this agreement upon Board approval on or about May 10, 2013. The contemplated term of this agreement will be six (6) months, although the agreement may be terminated at any time upon the mutual agreement of KAG and FORA, or by either KAG or FORA giving each other thirty days written notice of termination.

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At the end of the six (6) month period, KAG and FORA will review and analyze the efficiency and effectiveness of the Authority Counsel services provided to FORA by KAG, and will either extend the agreement for a time to be agreed-upon, implement any and all appropriate changes to the agreement which are acceptable to FORA and KAG, or terminate the Agreement.

To establish its fees for legal services, KAG generally uses an hourly rate for services rendered, although the hourly rate is not the sole basis of our fees. Our hourly rates are principally based upon the experience of the person providing the service. Although these rates will change periodically, at present the standard hourly rate ranges for the lawyers and personnel in our firm are as follows.

Members of the firm:	\$175.00 – 350.00
Associates:	\$160.00 – 250.00
Paralegals and Legal Assistants:	\$ 80.00 – 100.00

To serve as Authority Counsel for FORA, Jon R. Giffen will bill his time at the rate of \$250.00 per hour. Any associate attorneys who work on Authority Counsel matters will bill at the rate of \$200.00 per hour. Paralegals will bill at the rate of \$90.00 per hour. Should Nolan Kennedy, Dan Archer or David Willoughby provide legal services under this agreement, they will bill their time at their respective hourly rates, which range from \$300 to \$350 per hour.

While the hourly rate is a principal guide, our firm, like most attorneys, also considers a number of other relevant factors in the final determination of a reasonable fee for legal services. These factors include: (i) the novelty and difficulty of the questions presented, and the skill required to perform the legal service; (ii) the fee customarily charged in this area for similar legal service; and (iii) any time limitations imposed by the client or the circumstances. These factors, when taken together with the hourly rate, are all considered carefully in an effort to establish a fee which is a fair charge to FORA and to our firm for the services rendered.

In addition to charging the above hourly rates for providing legal services as Authority Counsel to FORA, KAG will charge for costs incurred in connection with our representation. Costs include, but are not limited to, travel costs, long-distance telephone charges, messenger service fees, photocopying expenses, facsimile charges, postage and express mail fees, and charges by governmental agencies or other third parties. A schedule of KAG's current charges and fees for some of the more common cost items is attached. Costs are generally advanced by KAG and then billed. However, if during the course of KAG representation of FORA as Authority Counsel, it becomes necessary for KAG to arrange for the services of experts or consultants, or to incur other major expenses on FORA's behalf, KAG will arrange to have those charges billed directly to FORA unless other arrangements are agreed to between us. Even if KAG advances costs or expenses charged by others, FORA agrees to reimburse KAG for such expenses in a timely manner.

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Statements are generally sent monthly, indicating attorney fees for services, and costs incurred by the firm and advanced on your behalf, together with any current balance due. Any statement rendered is payable within thirty (30) days.

One of the purposes of this letter is to comply with the requirement of California law with respect to a written agreement to our firm's representation and fees. In order to enable us to fully comply with this provision, please indicate agreement with the terms of this letter by signing the enclosed copy in the space provided below, and returning it to me at your earliest convenience.

Please do not hesitate to call me with any questions or concerns. Once again, we appreciate your confidence in Kennedy, Archer & Giffen and look forward to working with you as Authority Counsel.

Very truly yours,

KENNEDY, ARCHER & GIFFEN

Jon R. Giffen

JRG/dcj
Enclosure

CLIENT ACKNOWLEDGMENT AND AGREEMENT

The undersigned hereby consents to representation by Kennedy, Archer & Giffen on the terms set out above and specifically waives any conflict of interest, actual or potential, arising out of the relationship between Kennedy, Archer & Giffen and FORA as described above.

Michael A. Houlemard, Jr.

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SCHEDULE OF COSTS AND CHARGES

Postage:	Cost
Courier Delivery:	Cost charged by courier
Telephone Charges for Telephone and Facsimile:	Cost charged by long distance carrier
Photocopying:	20¢ per page
Color Photocopies:	\$1.00 per page
Facsimile: Outgoing -	\$1.00 per page
Incoming -	No charge
Messenger Delivery:	Cost charged by messenger service
Computer Assisted Research (Lexis):	Cost charged by provider
Court Fees:	Cost charged by court
Automobile Travel:	The amount specified by IRS regulation
Travel, Lodging & Meals on Client Business:	Cost

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3.02.130. EXCEPTIONS TO COMPETITIVE BIDDING REQUIREMENT.

(a) Notwithstanding any provision of this Article to the contrary, the competitive bidding procedures and requirements may be dispensed with in any of the following instances:

- (1) When the estimated amount involved is less than \$25,000.00.
- (2) When the commodity can be obtained from only one vendor.
- (3) When the Board finds that the commodity is unique and not subject to competitive bidding.
- (4) The Board may authorize the purchase of materials, supplies, equipment, and services where an emergency is deemed to exist and it is determined that service involving the public health, safety, or welfare would be interrupted if the normal procedure were followed.
- (5) Any agreement involving acquisition of supplies, equipment, or service entered into with another governmental entity.

(b) Contracts for personal services, for professional and consultant services, and for other, non-public projects and contractual services may be executed without observing the bidding procedures provided in this Article. The Executive Officer is authorized to enter into such contracts where the amount of the contract does not exceed \$25,000.00, provided there exists an unencumbered appropriation in the fund account against which the expense is to be charged. Where the amount of the contract exceeds \$25,000.00, the contract will be approved by the Authority Board. In the case of professional services, qualifications and experience to the benefit of the Authority will receive first consideration. Upon determination of these factors, a price or fee may be negotiated.

3.02.140. REGULATIONS REGARDING SELECTION OF CONTRACT SERVICES.

The Executive Officer will, by resolution, prescribe procedures, rules, and regulations, governing the solicitation, selection and award of proposals or bids for the furnishing of personal services or professional or consulting services or for other contractual services, the contracts for which may be awarded without observing the bidding procedures provided for in this chapter. Such procedures, rules and regulations have as one purpose: the obtaining of contractual services of the highest quality together with cost effectiveness.

FORT ORD REUSE AUTHORITY BOARD REPORT

EXECUTIVE OFFICER'S REPORT

Subject: Notice of Requirement Regarding Items Received from the Public for Reproduction and Distribution at Board/Committee Meetings

Meeting Date: April 12, 2013

Agenda Number: 10j

INFORMATION

RECOMMENDATION(S):

Receive an informational report from the Executive Officer regarding items from the public for reproduction and distribution at Board/Committee meetings.

BACKGROUND:

On April 3, 2013, the Executive Officer requested and received concurrence by the Executive Committee in a practice/requirement that all requests by the public for duplication and distribution of materials at Board/committee meetings be submitted to FORA staff by 5:00 p.m. one day prior to the meeting.

This practice is similar to those found in many other local agencies and was instituted in response to repeated last-minute requests from some members of the public to distribute materials received by staff as little as twenty minutes before the meeting. These last-minute requests are nearly impossible to address when staff is busily preparing and setting up for a meeting. Staff has discussed the disruptive nature of these requests with requesting parties in an attempt to prompt timelier submission of materials, to no avail.

The FORA Master Resolution section 2.04.040 (a) states that the Executive Officer is responsible "for the efficient administration of all affairs of the authority..." FORA staff indicated, and the Executive Committee agreed, that submission of public materials by 5:00 p.m. the day prior to a meeting is both reasonable and much less disruptive than the previous practice.

This requirement pertains ONLY to materials provided by members of the public for reproduction and distribution to Board/committee members and public at publicly noticed meetings. Comments not received by 5:00 p.m. the day prior to the meeting may be emailed directly to the Board at board@fora.org, submitted to the Deputy Clerk (with copies if Board/Committee distribution is requested) at the meeting in question or provided during the public comment period.

FISCAL IMPACT:

Reviewed by FORA Controller M. F. for I.B.

Costs for staff time and duplication are included in the approved annual budget.

COORDINATION:

Executive Committee

Prepared by

Lena Spilman
Lena Spilman

Approved by

Michael A. Houlemard, Jr.
Michael A. Houlemard, Jr.