

San Francisco Bay Conservation and Development Commission

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TO: Commissioners and Alternates

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdc.ca.gov)
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SUBJECT: Staff Report and Recommendation to Approve a Contract for Legal Consulting Services
(For Commission consideration on March 2, 2017)

Summary

The staff recommends that the Commission authorize the Executive Director to enter into a contract for an amount not to exceed \$25,000 with Kilpatrick Townsend & Stockton LLP (Kilpatrick Townsend) to provide legal consulting services in connection with litigation the Commission has filed against the U.S. Army Corps of Engineers (USACE) regarding the USACE's refusal to comply with certain conditions imposed by the Commission in its conditional concurrence with the USACE's consistency determination for the USACE's 2015-2017 maintenance dredging program for San Francisco Bay. The staff further recommends that the Commission authorize the Executive Director to amend the contract as necessary, including revising the amount or duration of the agreement, so long as the amendment does not involve substantial changes in the services provided.

Staff Report

On March 17, 2016, the Commission authorized the California Attorney General's Office to initiate litigation to challenge the USACE's refusal to comply with certain conditions to the Commission's conditional concurrence with the USACE's consistency determination, under the Coastal Zone Management Act (CZMA), for the USACE's 2015-2017 maintenance dredging program for San Francisco Bay. On or about July 19, 2016, the Executive Director entered into a Standard Agreement with the Kilpatrick Townsend, for an amount not to exceed \$4,999, for the law firm to provide legal consulting services in connection with BCDC's preparation and filing of a Complaint against the USACE in federal district court. In the course of that contract, BCDC's Chief Counsel determined that Kilpatrick Townsend added significant value with respect to litigation strategy and framing the substantive issues raised by BCDC's claims. He also determined that Kilpatrick Townsend would continue to provide significant value to BCDC in advocating its position if the firm were retained to provide further advice and assistance as the litigation moved forward.

On September 22, 2016, the California Attorney General's Office filed the subject lawsuit on behalf of the Commission against the USACE in federal district court in San Francisco. *BCDC v. United States Army Corps of Engineers*, N.D. Cal. Case No. 16-cv-05420-RS. The litigation raises legal and factual issues under Section 307(a) of the CZMA, 16 U.S.C. § 1456(a), the CZMA's implementing regulations, 15 C.F.R. Part 930, Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, and the USACE's dredging regulations, 33 C.F.R. Parts 335-338.

Kilpatrick Townsend has extensive specialized knowledge related to the USACE's dredged material management practices and federal district court litigation involving the legal principles that govern those practices. Since these USACE practices and the associated legal principles are at issue in the subject litigation filed by BCDC, Kilpatrick Townsend is in a unique position to provide the proposed legal consulting services. Kilpatrick Townsend has been involved, and is currently involved, in other litigation challenging the USACE's dredged material management practices in cases raising similar or identical issues to those raised in BCDC's litigation. In particular, Kilpatrick Townsend is currently retained as Special Counsel representing the State of Ohio in a federal lawsuit against the USACE involving dredging and dredged material disposal in which the court granted the State of Ohio's motion for a preliminary injunction, requiring the USACE to dredge the Cleveland Harbor and dispose of the dredged material in the manner requested by the State. Kilpatrick Townsend also represented Carteret County, North Carolina in litigating a case against the USACE that involved dredged material management practices associated with a federal navigation project and negotiated a favorable settlement that led to a significant increase in beneficial reuse of dredged material. In addition to litigating a number of other cases that involved dredging and/or dredged material management, Kilpatrick Townsend has provided advice to other states, including Louisiana, related to potential challenges to the USACE's dredged material management practices.

Under the proposed contract, Kilpatrick Townsend will assist and advise BCDC staff and counsel regarding the Commission's claims, the USACE's defenses, and litigation strategy issues. Kilpatrick Townsend will review and provide comments on the Commission's draft pleadings and will also assist and provide advice in connection with the preparation of and response to cross-motions for summary judgment on the merits of the Commission's claims and the USACE's defenses. Kilpatrick Townsend may also provide comments in connection with the preparation of any motion filed by the Commission concerning the contents of the administrative record. Kilpatrick Townsend will not represent the Commission in the litigation; the Commission is represented by the California Attorney General's Office. Working with and through BCDC's Chief Counsel, Kilpatrick Townsend may advise the Commission's counsel of record with the Attorney General's Office regarding legal issues raised by the litigation.

BCDC's Chief Counsel has consulted with the Deputy Attorney Generals involved in the litigation, Chris Tiedemann and Tara Mueller, regarding BCDC's request to retain Kilpatrick & Townsend to provide legal consulting services and has been informed that the Attorney General's Office has no objection to BCDC's request given that BCDC recognizes that the Attorney General's office must represent BCDC in the litigation (and that Kilpatrick & Townsend will not and may not do so).

In December 2016, BCDC's Chief Counsel conducted a market survey of four law firms with sophisticated federal environmental law practices that could potentially provide the necessary legal consulting services in connection with BCDC's lawsuit against the USACE. The results of the survey demonstrate that Kilpatrick Townsend, which is the only firm that responded affirmatively to each and every project requirements, is the only firm that has the expertise and experience in the specialized subject matter at issue in the litigation to perform the required consulting services. In contrast to Kilpatrick Townsend, not one of the other three firms surveyed had in the past 10 years represented a client in litigation in federal district court: (1) in which the Complaint raised issues under the CZMA, Section 401 of the CWA, or the USACE's dredging regulations; or (2) involving an administrative decision by the USACE to dredge a federal navigation channel, the manner of disposal or use of material dredged from a federal navigation channel, or the USACE's dredged material management practices.

The proposed contract meets the standards of Government Code § 66633(c), which authorizes the Commission to contract for professional services that cannot satisfactorily be performed by its officers or employees or by other federal, state, or local government agencies.

Recommendation

Staff recommends that the Commission authorize the Executive Director to enter into a contract with Kilpatrick Townsend for an amount not to exceed \$25,000 for purposes of providing legal consulting services in connection with the subject litigation. The contract terms would be from approval through December 2018. The staff further recommends that the Commission authorize the Executive Director to amend the contract as necessary, including revising the amount or duration of the agreement, so long as the amendment does not involve substantial changes in the services provided.