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May 24, 2011

Chairperson DeLaFuentes and Members of the Finance and Management Committee

**RE: Outside Counsel Selection Process & Outside Counsel Policy**

The Office of the City Attorney is responsible for providing all legal services for the City of Oakland. The Office of the City Attorney retains outside counsel to handle various legal issues. The Office of the City Attorney retains outside counsel for three types of cases: (1) those that require specialized expertise; (2) those that present conflict of interest issues; and, (3) those for which we have insufficient numbers of attorneys on staff due to City Council reductions to the City Attorney's budget. The City of Oakland engages outside counsel only through the Office of the City Attorney.

Attachment 1 is the City Attorney's Outside Counsel Policy which has been in place since the late 1990s.

### Outside Counsel Selection

Our goal is to select firms that will provide high-quality services and that are as dedicated as we are to containing legal costs. We seek to build continuing relations with firms that share our commitment to quality and to cost containment, as well as expand and strengthen our relations with minority, women and locally based firms.

Selection of outside counsel for all matters-- large and small-- is based on the quality of their work, their commitment to controlling costs, their adherence to budgets and their commitment to providing opportunities for minorities and women. We encourage innovative approaches to billing, fixed rate per project, blended hourly rate per project, discounted rates, etc. Where a matter is large enough to require active involvement of a number of attorneys and paralegals, we favor proposals to create teams comprised of our personnel and law firm personnel. We have staff who are experts in most of the legal

issues we encounter and who know how the City operates. We expect our outside counsel to take maximum advantage of that expertise and experience.

Although we contract with law firms, we select lawyers. When we select a firm to represent the City of Oakland we decide which attorneys will be working on our matters, and we require advance approval of any changes in assignments.

We generally seek proposals from several firms before assigning significant matters. However due to the urgency of some issues and the expertise required, we do not always request multiple written proposals. We may contact a particular firm directly due to our knowledge of their expertise and discuss a scope of work and a fee structure.

All firms selected to provide legal services to the City of Oakland, must enter into the City's standard Professional Services Agreement (PSA). In addition to the PSA, Scope of Service/Retention Agreements are established for each specific matter. Each Scope of Service / Retention Agreement includes a written work plan, a capped "not to exceed" amount and the names of the individuals in the law firm to work on the matter with their hourly rates. The Scope of Service / Retention Agreement becomes a part of the overall agreement and cannot be modified without the advance written approval of the City Attorney or one of the two Chief Assistant City Attorneys.

As requested by the Finance Committee, the City Attorney's Office will follow a more consistent process in selecting outside counsel whenever feasible. The procedure will include:

- Prepare a written RFQ.
- Publish RFQ on City Attorney's web-site and send the RFQ to various Bar Associations including the Minority Counsel Association.
- Evaluate submitted RFQs.
- Select Outside Counsel based upon expertise and cost.

Sustainable Opportunities:

No economic, environmental or social equity opportunities have been identified in connection with the subject of this report.

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**Disability and Senior Citizen Access:**

There are no direct disabilities or senior citizen access issues associated with this report.

**Action Requested of the City Council:**

The City Attorney requests that City Council accept this informational report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Russo', written in a cursive style.

John A. Russo

City Attorney

## **Attachment 1**

### **CITY OF OAKLAND OUTSIDE COUNSEL POLICY**

The Office of the City Attorney (OCA) is responsible for providing all legal services for the City of Oakland. OCA retains Outside Counsel to handle various legal issues, such as for specialized expertise, to handle conflict of interest issues and to assist in handling excess work due to the lost of in-house attorneys. The City of Oakland engages Outside Counsel only through the Office of the City Attorney.

#### **SELECTION OF COUNSEL**

OCA's goal is to select firms which will provide high-quality services and are as dedicated to containing legal costs. The office seeks to build continuing relations with firms that share OCA's commitment to quality and cost containment, as well as expand and strengthen our relations with minority, women and locally based firms.

OCA will seek proposals from several firms before assigning significant matters. Selection of Outside Counsel for all matters-- large and small-- is based on the quality of their work, their commitment to controlling costs, their adherence to budgets and their commitment to providing opportunities for minorities and women. OCA encourages innovative approaches to billing, fixed rate per project, blended hourly rate per project, discounted rates, etc. Where a matter is large enough to require active involvement of a number of attorneys and paralegals, OCA favors proposals to create teams comprised of OCA's personnel and the law firm personnel. OCA has staff who are experts in most of the legal issues the City encounters and know how the City operates. OCA expects our Outside Counsel to take maximum advantage of that expertise and experience.

Although OCA contract with law firms, we select lawyers. When OCA selects a firm to represent the City, OCA decides which attorneys will be working on the City's matters, and OCA requires advance approval of any changes in assignments.

Where litigation is or may be involved, OCA expects that alternative dispute resolution approaches, be given consideration if it is found to be less costly, but equally effective.

## **GENERAL EXPECTATIONS**

It is the policy of OCA that the City Attorney has the ultimate responsibility for managing every legal matter affecting the City of Oakland. All strategic and tactical decisions must be approved in advance by the responsible in-house attorney.

It is expected that firms hired as Outside Counsel observe the highest ethical standards when representing the City and that potential conflicts be discussed with OCA as soon as they are recognized.

Outside Counsel must fully understand the objectives to be achieved and their role in achieving them. This includes participation in establishing a strategy and a budget.

Outside Counsel is to keep OCA advised of significant developments as they occur, and obtain the approval of the City Attorney or Assistant City Attorneys prior to performing services that would cause the contractual budget to be exceeded.

Further, Outside Counsel must avoid overstaffing, rotating the attorneys assigned to the City's matters, and multiple representation at meetings, depositions, hearings and court appearances. We discourage changes in the individual attorneys who are working on our matters and we must be consulted in advance of any proposed changes.

Drafts of all briefs and submissions to courts and agencies should be provided to the responsible in-house attorney. It is important that drafts be received in adequate time for review and comment. OCA also expects to receive the final version of briefs, filings and legal memos.

## **CONFLICT OF INTEREST**

It is expected that OCA will be notified immediately if Outside Counsel becomes aware of an actual or potential conflict. OCA recognizes that on occasion Outside Counsel will be asked to represent clients whose interests are inconsistent with the City's, and that Outside Counsel may even be asked to represent parties whose interest are in direct conflict with the City. OCA will generally waive conflicts where no issues of significant City policy are involved and where there is no connection between matters in which Outside Counsel has represented the City and matters in which Outside Counsel has been retained by other clients. Whenever OCA waives a conflict the waiver will be conditioned on written agreement from the other client that it will not object to Outside Counsel representing the City in any pending or future matter.

OCA generally will not waive a conflict if the matter is related to a matter, in which Outside Counsel has represented the City, or if your firm has access to relevant confidential information of the City, or if your representation of the other client involves issues of important City of Oakland policy.

### **ASSIGNMENT OF ATTORNEY**

Before OCA contracts with Outside Counsel, OCA expects a commitment with respect to the attorneys who will be representing the City. If it later becomes necessary to substitute an attorney or add additional attorneys, Outside Counsel must receive prior approval before doing so. Significant roles should not be given to other attorneys without OCA's prior concurrence.

While OCA expects senior attorneys to perform those tasks that require substantial experience, OCA expects that Outside Counsel will attempt to minimize legal expenses by relying on junior attorneys and paralegals for less demanding tasks.

### **STRATEGY AND BUDGET**

For every new matter Outside Counsel and the responsible in-house attorney are required to prepare a strategy and a budget. The budget should estimate total fees and expenses to see the matter to its conclusion. If Outside Counsel anticipates a change in the budget after the contract is executed, Outside Counsel must discuss it with the City Attorney or one of the Assistant City Attorneys before the work is done or the expense is incurred. OCA will not approve bills/invoices that are in excess of budget, absent prior approval.

Lifigation strategy should identify alternate methods of disposing of the case, including ADR (Alternative Dispute Resolution) and settlement. An outline should be made of the proposed course of litigation, including dispositive pretrial motions, the scope of discovery and the trial strategy. If it appears that a case will go to trial, an estimate of costs should be sent to the responsible in-house attorney no later than the close of discovery, if possible. The detail of all plans (litigation and otherwise) will be dictated by the significance of the matter.

## LITIGATION

Advance approval from the City Attorney or Assistant City Attorneys is required before:

- Preparing pretrial motions;
- Preparing a cross-complaint which adds new parties to the action;
- Selecting and retaining expert witnesses;
- Preparing motions during trial, post-trial motions or appeals;
- Undertaking any unusual activity, such as a major research memorandum;
- Agreeing to alternative dispute resolution processes;
- Agreeing to settlement.

Outside Counsel must consult with the in-house attorney concerning the strategy for taking depositions and other discovery. The deposition plan should include a brief explanation of the proposed deponent's location, his or her involvement in the matter, and the purpose of the deposition.

Outside Counsel must exercise restraint in discovery and legal research conducted in routine small matters. We will not return to a firm that allows costs to approach - much less exceed - the City's exposure or potential recovery.

Litigation counsel must evaluate ADR as substitute for full-scale litigation. OCA expects that ADR techniques will be given active consideration from the commencement of litigation. OCA does not view ADR as an alternative to be considered only when trial is imminent and after months or years of costly discovery and pretrial battles.

## RATE STRUCTURE

Billing rates will be established at the outset of each matter. In establishing the billing rates it is expected that Outside Counsel will consider the competitive climate in the practice of law and the fact that OCA assures prompt payment.

Changes in billing rates must obtain our advance consent and the existing contract will need to be amended. OCA assumes that the rates agreed upon are as low as those offered to any other government/public agency client; if any other clients enjoy more favorable billing rates, OCA expects to be told how to qualify for similar billing treatment.

If the billing method is hourly rates, the rates should contain all overhead and internal charges associated with Outside Counsel's practice, such as administration, secretarial, docket, word processing, accounting, library and other clerical time. If Outside Counsel customarily makes separate charges for any of these functions; the billing arrangement must be specifically approved in advance by the responsible in-house attorney and the amount must be factored into the overall budget. OCA expects that the hourly rates of Outside Counsel that bill separately for secretarial or other services will be less than those of competitive firms that include all overhead in their billing rates.

## BILLING/INVOICING

Absent an express agreement to the contrary, statements must be submitted monthly, unless another arrangement is agreed in advance, or unless the matter is inactive. Each statement should have the associated fees and costs for each matter, with a total billing amount for all matters.

The detailed backup should include charges by case or file name and our specific file number. Within each file number, the name, hours spent (to nearest fraction), and billing rate for each individual who provided services should be indicated with a brief description of the services rendered. "Legal Research", "Argument of Motion", and similar general descriptions are not acceptable. The subject of a motion or research and the purpose are also required.

All bills/invoices for services and disbursements must conform to the format of the budget, i.e., the bill/invoice must be in a form that will enable OCA to compare the items that made up the budget with the items that appear on the bill/invoice.

If travel time is devoted to working for one or more clients in addition to the City, OCA should not be billed for the time devoted to other clients. Billing for time spent in transit should not include time that would be spent in normal commute to your office. Unless



agreed to in advance, OCA should not be billed for time away from home or the office, which is not in transit or spent performing legal services.

Any travel that requires an overnight stay or transportation by an airline must be approved in advance. If an overnight stay is necessary, OCA has the right to approve the accommodations. Reimbursement for meals will be made at the City's per diem rate (Breakfast \$11.00, Lunch \$16.00 and Dinner \$29.00 or \$56.00 per day). If airline travel is necessary, the OCA will reimburse at the coach rate.

As noted above, bills/invoices for disbursements must be detailed and must reflect only the amounts that were paid.

If Outside Counsel charges separately for fax services, duplicating, computer-assisted research, for a special word-processing project that was approved in advance, the bill/invoice must show the way in which the charge was developed (for example, in the case of fax and duplicating charges, the bill/invoice must show the number of pages and the per-page charge; in the case of Westlaw or Lexis research the bill/invoice must show the amount that was charged to Outside Counsel).

All disbursement charges must be accompanied by a copy of the invoice or statement to verify the charges. OCA will not pay charges that exceed the market rate for any service such as messenger, depositions, expert witness, etc.

### COMMUNICATION

Outside Counsel must contact the responsible in-house attorney if any issue arises that is not covered by this policy, or if Outside Counsel wishes to deviate from any of the stated policies.