

ALAMEDA-CONTRA COSTA TRANSIT DISTRICT



STAFF REPORT

MEETING DATE: 4/26/2023

Staff Report No. 23-256

TO: AC Transit Board of Directors
FROM: Michael A. Hursh, General Manager/Chief Executive Officer
SUBJECT: Contract Amendment for Outside Legal Counsel

ACTION ITEM

AGENDA PLANNING REQUEST:

RECOMMENDED ACTION(S):

Consider authorizing the General Manager to execute an amendment to Contract 2022-10480 with Herrig & Vogt, LLP adding \$1,750,000 to the contract and extending the term to December 31, 2024, for legal services related to disputes and issues arising out of the construction of the East Bay Bus Rapid Transit (BRT) Project.

Staff Contact:
Jill A. Sprague, General Counsel/Chief Legal Officer

STRATEGIC IMPORTANCE:

Goal - Financial Stability and Resiliency
Initiative - Financial Efficiency and Revenue Maximization

The BRT project has been operational as the Tempo line since August 2020. In order to close out the third construction bid package which constructed the platforms, signals, pavement, etc and to eliminate the financial uncertainty of outstanding claims, the contractor delay claims must be defended against and/or settled and third-party claims by the District must be pursued to offset the District's potential liability. Outside counsel for the District has been retained to achieve these objectives.

BUDGETARY/FISCAL IMPACT:

Legal fees and expert fees to (1) defend the District against delay claims by contractor O.C. Jones and subcontractor Mike Brown Electric; and (2) pursue claims against third parties responsible for project delays will likely exceed \$1.5 million. This amount is expected to be offset by a reduction in the amount claimed as well as by potential recovery against third parties who contributed to the project delays.

BACKGROUND/RATIONALE:

The BRT project was implemented in three construction bid packages. The first two construction bid packages were successfully completed and closed out without any claims. The third construction bid package with \$108 million initial contract award went into construction in the first quarter of 2017 and after multiple extensions, began operations in August 2020. The prime contractor, O.C. Jones & Sons, Inc., and its primary subsidiary, Mike Brown Electric, have asserted damages related to project delays in the tens of millions of dollars. In

November 2021, the District retained the law firm Herrig & Vogt, LLP, to provide a legal analysis of the delay claims and claims against third parties, and to represent the District in mediation and arbitration proceedings related to delay claims and claims against third parties. The contract amount for the initial contract through December 31, 2022, was within the General Manager's authority of \$250,000. In December 2022, the parties amended the contract to extend the contract through December 31, 2023 for an additional amount within GM's \$250,000 annual authority. Legal and expert fees incurred through the initial mediation session in January 2023 committed most of the amount of the contract extension.

The parties were unable to settle the delay claims during the January 27, 2023 mediation. Accordingly, the parties are preparing for binding arbitration and/or a potential second mediation. Legal and expert fees required to defend the District against the delay claims as well as to pursue claims against third parties who contributed to the project delays will be significant. These amounts are expected to be offset by a reduction in the amount recovered by the contractors as well as potential recovery against third parties. Accordingly, staff seeks a contract amendment to extend the current contract to December 31, 2024, and to increase the contract amount by \$1,750,000.

ADVANTAGES/DISADVANTAGES:

The advantage to authorizing the General Manager to execute an amendment extending the Herrig & Vogt contract to December 31, 2024, and adding \$1,750,000 to the contract amount is that the legal and expert fees will ensure the District can defend against the contractor delay claims and pursue third party claims against parties who caused project delays. The disadvantage is the high cost of representation.

ALTERNATIVES ANALYSIS:

No alternatives were considered by staff as the District must defend against the delay claims in arbitration.

PRIOR RELEVANT BOARD ACTION/POLICIES:

Board Policy 465 - Procurement Policy

ATTACHMENTS:

None.

Prepared by:

Jill A. Sprague, General Counsel/Chief Legal Officer

Approved/Reviewed by:

Ramakrishna Pochiraju, Executive Director of Planning & Engineering
Chris Andrichak, Chief Financial Officer
Michael A. Hursh, General Manager/Chief Executive Officer