



Midpeninsula Regional
Open Space District

R-12-108
Meeting 12-36
December 12, 2012

AGENDA ITEM 5

AGENDA ITEM

Award of Contract for Interim Assistant General Counsel Services with the Law Firm Shute, Mihaly and Weinberger, LLP, in an Amount Not-to-Exceed \$248,795 through March 31, 2014

GENERAL MANAGER'S RECOMMENDATION

A handwritten signature in black ink, appearing to be "SJD".

Approve a contract with the law firm Shute, Mihaly and Weinberger, LLP, to provide Interim Assistant General Counsel services, in an amount equal to the cost savings realized by the current vacancy in that position, totaling \$248,795 for the remainder of this fiscal year 2012-13 and next fiscal year 2013-14.

SUMMARY

As previously announced, the District's Assistant General Counsel, James Atencio, recently took another job, leaving a vacancy in the General Counsel's Office. After a review of twenty (20) proposals to fill the position on an interim basis, and in consultation with District General Counsel Sheryl Schaffner, staff recommends contracting with the law firm Shute, Mihaly and Weinberger, LLP. The firm presented a competitive mix of lower than average hourly rates and well qualified and appropriately experienced assigned counsel, with partner Tamara Galanter assigned as lead. The District is familiar with Ms. Galanter's work and has been happy with the services she has provided to the District previously.

DISCUSSION

The vacancy in the position of Assistant General Counsel (AGC) creates a salary savings of \$77,883 for the remainder of this fiscal year (through March 31, 2013), and \$170,912 for the next fiscal year, assuming the budget for this position remains the same as this year. Both figures include salary and benefits, and total \$248,795 through March 31, 2014. The Board directed the General Manager and General Counsel to use those salary savings to temporarily provide the services lost with the AGC departure, until a plan for what to do with the position in the long-term can be developed and brought forth for Board consideration.

In response, the General Counsel put out a request for proposals from the local government law community. Twenty (20) proposals were received. The proposals ranged from solo attorneys with little relevant experience and rates as low as \$70 per hour, to higher-end firms with well-qualified attorneys and rates of \$300 per hour. All proposals, including those from high-end firms, were discounted from private sector rates, as is customary for public agency general legal work. A careful review of the proposals received led the General Counsel to conclude that the proposal submitted by Shute, Mihaly & Weinberger with partner Tamara Galanter named as lead was the best one, with the right mix of skills, experience and rate structure.

The proposed rate structure, as set out in Exhibit A to the Agreement (see Attachment), is \$190 per hour, with no charge for travel. Most of Ms. Galanter's services would be provided via telephone and email, but she would come in to the office at least once a week to provide "office hours" in person, to meet with staff, and attend special meetings as needed. This deeply discounted rate is only good for the first twenty-five (25) hours of Ms. Galanter's time per week. This is not a problem though, since we will only be able to use about seventeen (17) hours of service per week at this rate before we exceed the salary savings set out above.

Ms. Galanter and her firm appear to be a good fit for this service at this time as both she and her firm are already well-acquainted with the District and its needs, the firm has a "deep bench" of attorneys with relevant experience and specializations to back Ms. Galanter up as needed, and can provide the flexibility we need in terms of hours of availability and turnaround time on individual projects.

It is important to reiterate that the salary savings translate to less than half of the hours of service we are accustomed to receiving from this position, which is fairly typical when you move from in-house to contract services. We will need to increase our efficiencies to keep up with core projects under that reduced level of service, which the General Counsel is working on, with the assistance of the rest of the Management Team. As was previously planned, the General Counsel will prepare an overview of the position, which was a temporary position needing review already, and bring forth for Board consideration a set of options and a long-term recommendation for this position sometime within the next year. This partial vacancy will hopefully help to focus that analysis.

The term of the contract is set to expire at the end of the next fiscal year, with the salary savings allocated accordingly as the maximum contract amount. It is not likely that the contract will need to go the full length. It can be terminated with notice by either the contractor or the District, which at this time is anticipated to occur when the General Counsel brings an analysis and set of options regarding what to do with the position at her annual review in June.

Any direction given by the Board during that review would then be implemented, which depending on what that direction is, could take one month (if termination of both the contract and the position is the path chosen) to several months (if a recruitment to fill the position is the path chosen). In short, the time and amount set out in the contract is the outer limit of what is anticipated, with a margin of safety in case there are delays in getting to a final outcome.

FISCAL IMPACTS

The amount of the contract is equal to the salary savings realized through the present vacancy in the position. Consistent with previous Board direction, these savings are simply being redirected to temporarily and partially fill the vacancy through contract services, creating no additional fiscal impacts.

BOARD COMMITTEE REVIEW

This decision is not one requiring committee review.

PUBLIC NOTICE

This action requires no special public notice outside the regular Brown Act notice that is already provided for this meeting.

CEQA COMPLIANCE

This decision does not have any environmental impacts triggering the California Environmental Quality Act (CEQA).

NEXT STEPS

Upon approval by the Board of Directors, staff will proceed to finalize the contract. Within the next year, the General Counsel will return to the Board with a set of options and long-term recommendations for the position of Assistant General Counsel.

Attachments:

1. Agreement for Professional Services Between the Midpeninsula Regional Open Space District and Shute, Mihaly & Weinberger, LLP.

Prepared by:

Sheryl Schaffner, General Counsel

Contact person:

Same as above



Midpeninsula Regional
Open Space District

**AGREEMENT FOR PROFESSIONAL SERVICES
BETWEEN THE MIDPENINSULA REGIONAL OPEN SPACE DISTRICT
AND SHUTE, MIHALY & WEINBERGER LLP**

THIS AGREEMENT is by and between SHUTE, MIHALY & WEINBERGER LLP (“Consultant”) and the Midpeninsula Regional Open Space District, a public body of the State of California (“District”). Consultant and District agree:

1. **Services.** Consultant shall provide the Services set forth in Exhibit A, attached hereto and incorporated herein.
2. **Compensation.** Notwithstanding the expenditure by Consultant of time and materials in excess of said Maximum compensation amount, Consultant agrees to perform all of the Scope of Services herein required of Consultant as set out in Exhibit A, for an amount not to exceed \$77,800.00 for the remainder of this fiscal year (ending March 31, 2013), and for a total not to exceed \$248,795.00, including all materials and other reimbursable amounts (“Maximum Compensation”). Consultant shall submit invoices on a monthly basis. All bills submitted by Consultant shall contain sufficient information to determine whether the amount deemed due and payable is accurate. Bills shall include a brief description of services performed, the date services were performed, the number of hours spent and by whom, a brief description of any costs incurred and the Consultant’s signature.
3. **Term and Termination.** This Agreement commences on full execution hereof and terminates on March 31, 2014, unless otherwise extended or terminated pursuant to the provisions hereof. Agreement shall be terminable at will by either party with thirty (30) days written notice on either side. Consultant agrees to diligently prosecute the services to be provided under this Agreement to completion and in accordance with any schedules specified herein. In the performance of this Agreement, time is of the essence. Time extensions for delays beyond the Consultant’s control, other than delays caused by the District, shall be requested in writing to the District’s Contract Administrator prior to the expiration of the specified completion date.
4. **Assignment and Subcontracting.** A substantial inducement to District for entering into this Agreement is the professional reputation and competence of Consultant. Neither this Agreement nor any interest herein may be assigned or subcontracted by Consultant without the prior written approval of District. It is expressly understood and agreed by both parties that Consultant is an independent contractor and not an employee of the District.
5. **Indemnification.** Consultant shall indemnify, defend, and hold District, its directors, officers, employees, agents, and volunteers harmless from and against any and all liability, claims, suits, actions, damages, and causes of action arising out of, pertaining or relating to the negligence, recklessness or willful misconduct of Consultant, its employees, subcontractors, or agents, or on account of the performance or character of the Services, except for any such claim arising out of the sole negligence or willful misconduct of the District, its officers, employees, agents, 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 shall have been determined to be applicable to any of such damages or claims for damages.
6. **Termination and Abandonment.** This Agreement may be cancelled at any time by District for its convenience upon written notice to Consultant. In the event of such termination, Consultant shall be entitled

to pro-rated compensation for authorized Services performed prior to the effective date of termination provided however that District may condition payment of such compensation upon Consultant's delivery to District of any or all materials described herein. In the event the Consultant ceases performing services under this Agreement or otherwise abandons the project prior to completing all of the Services described in this Agreement, Consultant shall, without delay, deliver to District all materials and records prepared or obtained in the performance of this Agreement. Consultant shall be paid for the reasonable value of the authorized Services performed up to the time of Consultant's cessation or abandonment, less a deduction for any damages or additional expenses which District incurs as a result of such cessation or abandonment.

7. **Ownership of Materials.** All documents, materials, and records of a finished nature, including but not limited to final plans, specifications, video or audio tapes, photographs, computer data, software, reports, maps, electronic files and films, and any final revisions, prepared or obtained in the performance of this Agreement, shall be delivered to and become the property of District. All documents and materials of a preliminary nature, including but not limited to notes, sketches, preliminary plans, computations and other data, and any other material referenced in this Section, prepared or obtained in the performance of this Agreement, shall be made available, upon request, to District at no additional charge and without restriction or limitation on their use. Upon District's request, Consultant shall execute appropriate documents to assign to the District the copyright or trademark to work created pursuant to this Agreement. Consultant shall return all District property in Consultant's control or possession immediately upon termination.

8. **Compliance with Laws.** In the performance of this Agreement, Consultant shall abide by and conform to any and all applicable laws of the United States and the State of California, and all ordinances, regulations, and policies of the District. Consultant warrants that all work done under this Agreement will be in compliance with all applicable safety rules, laws, statutes, and practices, including but not limited to Cal/OSHA regulations. If a license or registration of any kind is required of Consultant, its employees, agents, or subcontractors by law, Consultant warrants that such license has been obtained, is valid and in good standing, and Consultant shall keep it in effect at all times during the term of this Agreement, and that any applicable bond shall be posted in accordance with all applicable laws and regulations.

9. **Conflict of Interest.** Consultant warrants and covenants that Consultant presently has no interest in, nor shall any interest be hereinafter acquired in, any matter which will render the services required under the provisions of this Agreement a violation of any applicable state, local, or federal law. In the event that any conflict of interest should nevertheless hereinafter arise, Consultant shall promptly notify District of the existence of such conflict of interest so that the District may determine whether to terminate this Agreement. Consultant further warrants its compliance with the Political Reform Act (Government Code § 81000 et seq.) respecting this Agreement.

10. **Whole Agreement and Amendments.** This Agreement constitutes the entire understanding and Agreement of the parties and integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or any previous written or oral Agreements between the parties with respect to all or any part of the subject matter hereof. The parties intend not to create rights in, or to grant remedies to, any third party as a beneficiary of this Agreement or of any duty, covenant, obligation, or undertaking established herein. This Agreement may be amended only by a written document, executed by both Consultant and District's General Manager, and approved as to form by the District's General Counsel. Such document shall expressly state that it is intended by the parties to amend certain terms and conditions of this Agreement. The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement. Multiple copies of this Agreement may be executed but the parties agree that the Agreement on file in the office of District's District Clerk is the version of the Agreement that shall take

precedence should any differences exist among counterparts of the document. This Agreement and all matters relating to it shall be governed by the laws of the State of California.

11. **Capacity of Parties.** Each signatory and party hereto warrants and represents to the other party that it has all legal authority and capacity and direction from its principal to enter into this Agreement and that all necessary actions have been taken so as to enable it to enter into this Agreement.

12. **Severability.** Should any part of this Agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this Agreement, which shall continue in full force and effect, provided that the remainder of this Agreement, absent the unexcised portion, can be reasonably interpreted to give effect to the intentions of the parties.

13. **Notice.** Any notice required or desired to be given under this Agreement shall be in writing and shall be personally served or, in lieu of personal service, may be given by (i) depositing such notice in the United States mail, registered or certified, return receipt requested, postage prepaid, addressed to a party at its address set forth in Exhibit A; (ii) transmitting such notice by means of Federal Express or similar overnight commercial courier (“Courier”), postage paid and addressed to the other at its street address set forth below; (iii) transmitting the same by facsimile, in which case notice shall be deemed delivered upon confirmation of receipt by the sending facsimile machine’s acknowledgment of such with date and time printout; or (iv) by personal delivery. Any notice given by Courier shall be deemed given on the date shown on the receipt for acceptance or rejection of the notice. Either party may, by written notice, change the address to which notices addressed to it shall thereafter be sent.

14. **Miscellaneous.**

- a. Except to the extent that it provides a part of the definition of the term used herein, the captions used in this Agreement are for convenience only and shall not be considered in the construction of interpretation of any provision hereof, nor taken as a correct or complete segregation of the several units of materials and labor.
- b. Capitalized terms refer to the definition provide with its first usage in the Agreement.
- c. When the context of this Agreement requires, the neuter gender includes the masculine, the feminine, a partnership or corporation, trust or joint venture, and the singular includes the plural.
- d. The terms “shall”, “will”, “must” and “agree” are mandatory. The term “may” is permissive.
- e. The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement.
- f. When a party is required to do something by this Agreement, it shall do so at its sole cost and expense without right to reimbursement from the other party unless specific provision is made otherwise.
- g. Where any party is obligated not to perform any act, such party is also obligated to restrain any others within its control from performing such act, including its agents, invitees, contractors, subcontractors and employees.

IN WITNESS WHEREOF, Consultant and District execute this Agreement.

**MIDPENINSULA REGIONAL OPEN
SPACE DISTRICT**
330 Distel Circle
Los Altos, CA 94022-1404

**CONSULTANT
SHUTE, MIHALY & WEINBERGER LLP**
396 Hayes Street
San Francisco, CA 94102

By: _____
Stephen E. Abbors
General Manager

By: _____
Tamara S. Galanter
Partner

Date: _____

Date: _____

Attest: _____
Michelle Radcliffe
District Clerk

Federal Employer ID Number: _____

License Number: _____

Expiration Date: _____

Approved as to form:

Sheryl Schaffner
General Counsel

Attachments:
Exhibit A Scope of Services



Midpeninsula Regional
Open Space District

EXHIBIT A SCOPE OF SERVICES AND COMPENSATION

Scope of Services and Compensation

Commencing on October 23, 2012, Consultant shall provide attorney services to temporarily fulfill the duties of Assistant General Counsel. Consultant has designated Tamara Galanter as the firm attorney primarily assigned to this role, with backup from Fran Layton, Gabriel Ross and Sarah Sigman, as needs dictate. Ms. Galanter's and other Partner and Senior Associate services will be provided at the discounted rate of \$190 per hour, for up to twenty-five (25) hours per week. Paralegal services will be provided at \$100 per hour. Law Clerk services will be provided at \$60 per hour. Consultant will not charge for travel time or mileage.

Any excess hours will be charged at \$250 per hour for a Partner, \$235 per hour for a Junior Partner, \$215 per hour for a Senior Associate, \$185 per hour for a Junior Associate/Fellow, \$170 for a Planner, \$145 for an Assoc. Planner, \$100 for a Paralegal, and \$60 for a law clerk.

Consultant shall not exceed 25 hours per week without advance written notice (email to the General Counsel is sufficient) and approval by the District. In no event shall the billable hours exceed the contract amount of \$77,880 for the remainder of this fiscal year, unless the contract is amended in writing.

All of the above rates and terms apply only to regular Assistant General Counsel duties, and any higher level or special counsel services, including any litigation, would be subject to separate terms and rates, to be negotiated as needed.

For most matters, Consultant's team as specified in Consultant's proposal dated October 5, 2012, will be used to provide legal services. However, Consultant may use other attorneys in the office if necessary to provide the best legal services to the District.

Hourly Rate Arrangement For performance of the Scope of Services by Consultant as herein required, District shall pay Consultant for the productive hours of time spent by Consultant in the performance of said Services, at the rates or amounts set forth above.

Limitation without Further Authorization on Time and Materials Arrangement. At such time as Consultant shall have incurred time and materials equal to Two Hundred Forty-eight Thousand Seven Hundred Ninety-five and 00/100 Dollars (\$248,795.00) ("Authorization Limit"), Consultant shall not be entitled to any additional compensation without further authorization issued in writing and approved by the District. Nothing herein shall preclude Consultant from providing additional Services at consultant's own cost and expense.

Contract Administrators

District: Sheryl L. Schaffner, General Counsel

Consultant: Shute, Mihaly & Weinberger LLP