

HARBOR DIVISION

425 S. PALOS VERDES ST.

P.O. BOX 151

SAN PEDRO, CA 90733-0151

FACSIMILE

(310) 831-9778

(310) 732-3750



OFFICE OF THE CITY ATTORNEY

CARMEN A. TRUTANICH
CITY ATTORNEY

THOMAS A. RUSSELL
GENERAL COUNSEL

JOY M. CROSE
ASSISTANT GENERAL COUNSEL

CHRISTOPHER B. BOBO
ESTELLE M. BRAAF
JOHN T. DRISCOLL
TIMOTHY A. HOGAN
JUSTIN HOUTERMAN
SIMON M. KANN
JANET KARKANEN
KENNETH F. MATTFELD
HEATHER M. MCCLOSKEY
ESTHER S. OLSEN
STEVEN Y. OTERA
MINAH PARK

DATE: FEBRUARY 12, 2013

FROM: OFFICE OF THE CITY ATTORNEY

**SUBJECT: RESOLUTION NO. _____ APPROVE AND AWARD
AGREEMENT FOR LEGAL SERVICES BETWEEN THE CITY OF LOS
ANGELES AND BROWN & WINTERS**

SUMMARY:

The Office of the City Attorney seeks the assistance of outside legal counsel to discover policies and to pursue claims against old insurance as a means of recovering the cost of investigating, monitoring and remediating contaminated properties. The effort demands special expertise in the areas of insurance archeology and insurance coverage analysis of environmental claims. Brown & Winters, located in Cardiff By The Sea, California, has been successful in a similar endeavor for the Port of San Diego. The Office of the City Attorney requests the Board of Harbor Commissioners (Board) approve a three-year contingent fee agreement (Agreement) under which Brown & Winters will be compensated in the amount of one-third of funds recovered for the benefit of the City of Los Angeles Harbor Department (Harbor Department).

RECOMMENDATION:

It is recommended that the Board of Harbor Commissioners:

1. Approve and award the Agreement with Brown & Winders of Cardiff By The Sea, California, for a three-year contingent fee in the amount of one-third of funds recovered;
2. Authorize the Executive Director to execute and the Board Secretary to attest to The Agreement; and
3. Adopt Resolution No. _____.

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DISCUSSION:

Background and Context - In accordance with Los Angeles City (City) Charter Section 275, the Office of the City Attorney has determined that it requires outside legal counsel to assist in an effort to recover the costs of investigating, monitoring, and remediating contaminated properties in the Harbor District from old Harbor Department and tenant insurance policies. The effort demands specialized expertise and resources in the field of insurance archeology, insurance coverage analysis and environmental claims.

Scope of Work - Governmental Accounting Standards Board ("GASB") Statement 49, "Accounting and Financial Reporting for Pollution Remediation Obligations" forced municipalities to recognize the liabilities associated with properties that have become environmentally impaired as a result of legacy operations. Upon its implementation in 2009, the Harbor Department recorded a \$93 million liability attributable to roughly twenty individual properties. In many instances, the contamination of these properties relates to operations that occurred twenty or more years ago. The ongoing costs associated with investigating, monitoring and remediating these properties has been averaging around \$3-4 million per year over the last several years.

The Harbor Department has historically procured liability insurance, mostly in the form of excess or umbrella coverage. Primary insurance is typically provided by Harbor Department tenants, whose policies name the City as an additional insured. Mining Harbor Department records in conjunction with insurance archeology techniques will be used to identify policies that provide potential coverage of the environmental expenses associated with legacy contamination.

Finding policies is just the first step. Coverage analysis will identify those policies that cover pollution liabilities, and more specifically, policies that do not require litigation to trigger coverage. Insurance company genealogy is another important component of the work because over time, insurance companies merge, dissolve, or simply sell the risks associated with old policies. Current owners of the policies must be found and claims prepared and forwarded. Claim preparation will require the assistance of the Environmental Management Division in gathering and copying agency orders, characterization reports and proof of payment to consultants and contractors. Finally, outside counsel will engage in the time-consuming process of claim negotiation. In some cases, coverage litigation may be required.

Our Office proposes to undertake this cost recovery effort on a pilot basis addressing three or four properties selected in cooperation with outside counsel. Based on the initial success, additional properties may be added to the effort.

Competitive Selection Process - The Office of the City Attorney issued a Request for Proposal (RFP) in August 2012. Sixteen responses were received. Written responses were graded based on the quality and responsiveness of the proposal, specific

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expertise in the areas of insurance coverage for the expenses associated with contaminated properties, the quality of responses to questions, and general experience representing and advising municipal entities. On December 7, 2012, the top four proposers (Squire & Sanders, Alvarado & Smith, Pioneer Law Group and Brown & Winters) were interviewed.

The Office recommends Brown & Winters on the basis of their demonstrated expertise in this specialized field and their willingness to undertake the work on a contingent fee basis. Brown & Winters has recovered significant funds for the Port of San Diego from insurance policies dating back to the 1960's. Through their work for the Port of San Diego, they have become familiar with historic insurance policies procured through the California Association of Port Authorities. Brown & Winters has identified, and has relationships with, the underwriters that currently own those risks. In addition, they are familiar with the environmental legacies that are unique to harbor environments, in particular, contaminated sediments. On account of their experience and familiarity with the Harbor Department's insurance portfolio, Brown & Winters was the only firm that offered to undertake this work on a contingent fee basis without reservation, which this Office believes is the most effective way to assure that the effort is cost effective from the outset. Finally, because Brown & Winters serves municipalities almost exclusively, there are no concerns that a conflict of interest will arise with any of the insurance companies they will pursue.

Proposed Contingent Fee Agreement - A three-year contingent fee agreement is proposed whereby Brown & Winters will keep one-third of all funds recovered, whether through the negotiation and settlement of claims, litigation or arbitration (Transmittal 1). The Agreement does not cover the appeal of judgments or arbitration awards that the City finds unsatisfactory nor the defense of appeals opposing parties. Brown & Winters will be reimbursed by the Harbor Department for associated costs and expenses (transcripts, telephone, expert witness fees, etc.) regardless of the outcome of the claims. A total of \$105,000 or \$35,000 per contract year will be requested as an appropriation.

ENVIRONMENTAL ASSESSMENT:

The proposed action is approval of a three-year Agreement with Brown & Winters for legal services. As an administrative activity, the Director of Environmental Management has determined that the proposed action is exempt from the requirements of the California Environmental Quality Act (CEQA) in accordance with Article III Section 2 (f) on the Los Angeles City CEQA Guidelines.

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ECONOMIC IMPACT:

This Board action will have no employment impact for the five-county region since the company associated with the proposed Agreement is located outside the region.

FINANCIAL IMPACT:

The proposed Agreement provides for legal services on a contingent fee basis. The law firm will retain 33% of any funds recovered from insurance policies. The law firm will be reimbursed for associated actual costs and expenses up to \$35,000 per year. The Environmental Management Division will support the initiative using in-house staff and no budget impact is anticipated.

Funding for the proposed new Agreement has not been budgeted in the FY 2012-13 Operating Budget, however there are funds available within the Harbor Department City Attorney's Office Account No. 54410, Division No. 0120 and Program No. 000. A total of \$5,000 can be committed for the proposed Agreement to cover costs and expenses for the remaining portion of FY 2012-13 (March 1, 2013 to June 30, 2013).

Funding for the proposed new Agreement has been proposed to be budgeted, upon Board approval as part of the annual budget adoption process in the amount of \$35,000 in the FY 2013-14 Operating Budget within the Harbor Department City Attorney's Office Account No. 54410, Division No. 0120 and Program No. 000. Funding for future fiscal years if necessary, will be requested to be budgeted as part of the annual budget adoption process, upon Board approval. A funding out clause is included in the proposed Agreement.

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CITY ATTORNEY:

The Office of the City Attorney has reviewed and approved the proposed Agreement as to form and legality.

TRANSMITTAL:

1. Proposed Agreement with Brown & Winters

FIS Approval: *KP* (initials)

CA Approval: *JMC* (initials)



KENNETH F. MATTFELD
Deputy City Attorney



JOY M. CROSE
Assistant General Counsel

APPROVED:

By *Geraldine Knatz*
GERALDINE KNATZ, Ph.D.
Executive Director