

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. GROSE
ASSISTANT GENERAL COUNSEL

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

SEPTEMBER 29, 2011

THE HONORABLE BOARD
OF HARBOR COMMISSIONERS

SUBJECT: RESOLUTION NO. _____ - SIXTH AMENDMENT TO
AGREEMENT FOR PROFESSIONAL LEGAL SERVICES BETWEEN
THE CITY OF LOS ANGELES AND KAYE SCHOLER, LLP

SUMMARY:

The Office of the City Attorney requests approval of a Sixth Amendment (Sixth Amendment) to Agreement for Professional Legal Services No. 2519 (Agreement No. 2519) between and among the City of Los Angeles (POLA) and Kaye Scholer LLP (Kaye Scholer), increasing the compensation by \$200,000 to an amount not to exceed \$7,753,679.

RECOMMENDATIONS:

It is respectfully recommended that the Board of Harbor Commissioners:

1. Approve the Sixth Amendment to Agreement No. 2519 with Kaye Scholer in the form attached as Transmittal 1, increasing compensation by \$200,000 to an amount not to exceed \$7,753,679;
2. Authorize the Executive Director to execute and the Board Secretary to attest to the Sixth Amendment to Agreement No. 2519;
3. Authorize and direct the Board Secretary to forward the Sixth Amendment to Agreement No. 2519 to the City Council for its approval pursuant to Section 373 of the City Charter;
4. Adopt Resolution No. _____.

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SUBJECT: SIXTH AMENDMENT TO AGREEMENT NO. 2519 – KAYE SCHOLER

DISCUSSION:

Background

On January 4, 2007, the Board of Harbor Commissioners authorized Agreement No. 2519 (Agreement No. 2519), a three-party Professional Legal Services Agreement between and among the City of Los Angeles and the City of Long Beach (collectively referred to as Cities) and Kaye Scholer LLP, for a term of three years, from January 4, 2007 through January 3, 2010, at a not-to-exceed amount of \$500,000. The scope of work was for joint Cities' work to support the Clean Air Action Plan (CAAP) including the Clean Trucks Program, Ocean Vessels measures, Rail measures, defense of legal challenges to the CAAP, and the Federal Maritime Commission legal work required in order to implement the CAAP.

Agreement No. 2519 also included an approved subcontractor law firm, Troutman Sanders. Kaye Scholer and its subcontractor, Troutman Sanders, were selected following a competitive process through an RFP issued in 2006. Kaye Scholer was selected because of its legal expertise in federal constitutional and preemption issues, litigation abilities, and work with the Environmental Protection Agency, Port Authorities of New York and New Jersey, California Air Resources Board, and other agencies regulating air quality. Under Agreement 2519, the Cities shared the costs of both the Kaye Scholer and Troutman Sanders outside counsel firms for shared legal services relating to the Clean Air Action Plan, with services for one port only paid solely by the applicable port. Agreement No. 2519 was amended five times to extend the term to six years, which expires on January 3, 2013, and increase compensation to an amount not to exceed \$7,553,679. Through August 2011, the total amount spent by both Cities collectively for a broad scope of shared services under Agreement No. 2519 (described below), is \$7,531,004 and the total remaining contract authority is \$22,675.

Kaye Scholer and subcontractor Troutman Sanders represented both Cities under the three-party Agreement No. 2519 to provide legal advice on CAAP and CTP program development, FMC regulatory work and defense of several challenges to the CAAP, including representation in the *American Trucking Associations (ATA) vs. City of Los Angeles et al.* litigation case (ATA Case). Two previous legal challenges by the Federal Maritime Commission for which services were delivered under Agreement No. 2519 have been dismissed. Long Beach settled its case with the ATA in October 2009 and is no longer actively involved in the ATA Case, and terminated its participation in Agreement No. 2519 in October, 2010 as there was no further need for joint legal work for both Cities by the Kaye Scholer law firm. Previous attorneys at the Troutman Sanders subcontractor law firm have left that firm and no further joint Cities work is needed from Troutman Sanders.

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SUBJECT: SIXTH AMENDMENT TO AGREEMENT NO. 2519 – KAYE SCHOLER

Sixth Amendment

The Office of the City Attorney requests approval of a Sixth Amendment between the City of Los Angeles and the Kaye Scholer law firm, to increase compensation by \$200,000 to an amount not to exceed \$7,753,679. The scope of work under the Sixth Amendment is for handling the appeals of the judgment in the ATA case, including the possibility of further proceedings before the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court.

The City went to trial in the ATA Case in April, 2010. On August 26, 2010, the U.S. District Court issued a decision with final judgment entered on September 15, 2010, granting judgment for City and finding the City's concession agreement enforceable under the market participant exception to federal preemption. The ATA appealed the final judgment to the U.S. Court of Appeals for the Ninth Circuit, which on September 26, 2011 issued a decision affirming in part, and reversing in part, the judgment. At this stage, the ATA Case has the potential for further rehearing by the U.S. Court of Appeals for the Ninth Circuit and/or an appeal to the U.S. Supreme Court, if any of the parties files a petition. The Office of the City Attorney recommends that the City retain the same outside legal counsel that assisted our Office in obtaining a favorable outcome at trial and the appeal to represent the City in these proceedings, should they occur.

A discussion of the future legal work to be performed under the proposed Sixth Amendment is the subject of a separate, privileged and confidential attorney-client communication to the Board of Harbor Commissioners. Because of the length of contract term being six years, Agreement No. 2519 has been approved by City Council pursuant to Los Angeles City Charter Section 373 and Los Angeles Administrative Code Section 10.5, and will require the City Council's approval of the Sixth Amendment.

ENVIRONMENTAL ASSESSMENT:

The proposed action is approval of an amendment to Agreement No. 2519 with Kaye Scholer law firm to increase compensation. As an administrative activity, the Director of Environmental Management has determined that the proposed action is exempt from the California Environmental Quality Act (CEQA) in accordance with Article II Section 2(f) of the Los Angeles City CEQA Guidelines.

FINANCIAL IMPACT:

The proposed amendment to agreement with Kaye Scholer increases compensation by \$200,000 to an amount not to exceed \$7,753,679. There is currently \$22,675 remaining authority under Agreement No. 2519, which together with the proposed \$200,000 increase would equal an FY 2011-12 budget for Agreement No. 2519 in the amount of

