



SAN RAFAEL CITY COUNCIL AGENDA REPORT

Department: City Attorney

Prepared by: Lisa Goldfien, Asst. City Attorney

City Manager Approval: _____

TOPIC: LEGAL SERVICES CONTRACT

SUBJECT: RESOLUTION APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT WITH BURKE, WILLIAMS & SORENSEN, LLP FOR ESSENTIAL LEGAL SERVICES TO SUPPLEMENT STAFF IN THE CITY ATTORNEY’S OFFICE, IN AN AMOUNT NOT TO EXCEED \$150,000

RECOMMENDATION:

Adopt resolution approving the legal services agreement.

BACKGROUND:

The Deputy City Attorney II essential position was vacated at the end of May 2019, and staff has determined not to advertise for a new attorney at this time during the economic recovery related to COVID-19. Since June 2019 the City Attorney’s office has had an agreement to obtain “on-call” legal services from the firm of Burke, Williams & Sorensen, LLP, mainly from partner Nira Doherty. The part-time services that Nira and her firm have provided have enabled the office to function without a fulltime deputy city attorney. The current agreement for services expires on June 30, 2021 and staff now wishes to enter into a new agreement for these legal services during fiscal year 2021-22.

ANALYSIS:

Nira Doherty is an experienced city attorney, litigator, and land use expert. Her litigation and transactional practices emphasize general municipal law, land use and development, CEQA, and code enforcement issues. She serves as General Counsel for the Tahoe Transportation District, City Attorney for the City of Menlo Park and Assistant City Attorney for the City of Benicia. Nira advises city councils and staff in all areas of municipal law including complex land use, zoning, and development matters, open meeting laws, the Public Records Act, conflicts of interest, CEQA, elections, initiatives, contracts and torts, and conflicts of interest. She also advises municipal clients throughout the state on issues related to cannabis. Nira has spoken extensively on cannabis issues and has successfully represented municipalities in cannabis-related litigation.

FOR CITY CLERK ONLY

File Number:

Council Meeting:

Disposition:

Staff recommends entering into an agreement with Burke, Williams & Sorensen for general municipal law services during fiscal year 2021-22. Payment would be made at the firm's standard public entity hourly rates, in a total not-to-exceed amount of \$150,000. This would provide approximately 40 hours of legal services per month. City Attorney staff expects that most services would be provided by Nira, but this agreement would also provide the City Attorney's office with the benefit of access to subject-matter experts in the Burke firm when needed. In the past year, Nira and other attorneys at the Burke firm have been providing supplemental City Attorney services on a wide range of municipal issues, including COVID-19-related economic regulations, land use, employment, affordable housing, real estate, and telecommunications.

FISCAL IMPACT:

Funds to cover the recommended contract amount are available due to budget savings from the vacant Deputy City Attorney II essential position. As with the current agreement, staff is proposing to cap the fees for the 12-month term of this agreement at \$150,000. Staff expects this amount to be sufficient; however, if unanticipated events result in a need for additional contract legal services during the fiscal year, staff will return to the City Council for approval of any increase in total contract fees.

OPTIONS:

The City Council has the following options to consider on this matter:

1. Adopt the resolution approving the legal services agreement as recommended.
2. Adopt the resolution with modifications to the agreement.
3. Direct staff to return with more information.
4. Take no action.

RECOMMENDED ACTION:

Adopt the resolution.

ATTACHMENTS:

1. Resolution
2. Proposed Agreement for Legal Services

RESOLUTION NO.

A RESOLUTION OF THE SAN RAFAEL CITY COUNCIL APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT WITH BURKE, WILLIAMS & SORENSEN, LLP FOR ESSENTIAL LEGAL SERVICES TO SUPPLEMENT STAFF IN THE CITY ATTORNEY'S OFFICE, IN AN AMOUNT NOT TO EXCEED \$150,000

WHEREAS, the Deputy City Attorney II essential position was vacated at the end of May 2019; and

WHEREAS, for assistance with overflow work pending the hiring of a new deputy city attorney, the City Attorney's office has had an agreement since June 2019 to obtain "on-call" legal services from the firm of Burke, Williams & Sorensen, LLP (BW&S); and

WHEREAS, the part-time services provided by BW&S have enabled the City Attorney's office to function, on a temporary basis, without a fulltime deputy city attorney; and

WHEREAS, to achieve budget savings, City staff have determined to continue to rely upon contract legal services rather than to fill the Deputy City Attorney II position during Fiscal Year 2021-2022; and

WHEREAS, funds to cover the recommended contract amount are available due to budget savings from the vacant Deputy City Attorney II position;

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of San Rafael hereby approves and authorizes the City Manager to execute an Agreement for General Municipal Legal Services with Burke, Williams & Sorensen, LLP for essential legal services to supplement staff in the City Attorney's office during Fiscal Year 2021-2022, in an amount not to exceed \$150,000 and in the form presented in the staff report accompanying this resolution, subject to final approval as to form by the City Attorney.

I, LINDSAY LARA, Clerk of the City of San Rafael, hereby certify that the foregoing resolution was duly and regularly introduced and adopted at a regular meeting of the Council of said City on Monday, the 7th day of June 2021, by the following vote, to wit:

AYES: COUNCILMEMBERS:

NOES: COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:

LINDSAY LARA, City Clerk

AGREEMENT FOR PROFESSIONAL SERVICES
FOR GENERAL MUNICIPAL SERVICES

This Agreement is made and entered into this _____ day of _____, 20____, by and between the CITY OF SAN RAFAEL (hereinafter "**CITY**"), and BURKE, WILLIAMS & SORENSEN, LLP (hereinafter "**CONTRACTOR**").

AGREEMENT

NOW, THEREFORE, the parties hereby agree as follows:

1. **PROJECT COORDINATION.**

A. **CITY'S Project Manager.** The Assistant City Attorney is hereby designated the PROJECT MANAGER for the **CITY**, and said PROJECT MANAGER shall supervise all aspects of the progress and execution of this Agreement.

B. **CONTRACTOR'S Project Director.** **CONTRACTOR** shall assign a single PROJECT DIRECTOR to have overall responsibility for the progress and execution of this Agreement for **CONTRACTOR**. Nira Doherty is hereby designated as the PROJECT DIRECTOR for **CONTRACTOR**. Should circumstances or conditions subsequent to the execution of this Agreement require a substitute PROJECT DIRECTOR, for any reason, the **CONTRACTOR** shall notify the **CITY** within ten (10) business days of the substitution.

2. **DUTIES OF CONTRACTOR.**

CONTRACTOR shall perform the duties and/or provide services as follows:

- a. Representation and advice regarding general municipal matters for the City Attorney's office and for the City Council, City Manager, Boards and Commissions and City staff as directed and delegated by the City Attorney's office.
- b. Attendance at Council meetings and staff meetings as directed and delegated by the City Attorney's office.
- c. Occasional office hours at City Hall during Assistant City Attorney vacation, in an agreed upon schedule by the parties.

This Agreement shall include all general municipal legal services which includes all legal services with the exception of special counsel services. Special counsel services include:

- Litigation
- Arbitration
- Complex construction

- Eminent domain
- Complex personnel matters including disciplinary actions (routine personnel matters and advice are included within the Agreement.)
- Imposition of fees and taxes pursuant to Props 26 and 218

3. DUTIES OF CITY.

CITY shall pay the compensation as provided in Paragraph 4.

4. COMPENSATION.

For the full performance of the services described herein by **CONTRACTOR**, **CITY** shall pay **CONTRACTOR** on a time and materials basis at **CONTRACTOR's** standard public agency rates as follows:

- \$325/hour - partners
- \$295/hour – associates

In no event shall the compensation payable to **CONTRACTOR** hereunder exceed the sum of \$150,000 except by written amendment to this Agreement.

Payment will be made monthly upon receipt by PROJECT MANAGER of itemized invoices submitted by **CONTRACTOR**.

5. TERM OF AGREEMENT.

The term of this Agreement shall commence on July 1, 2021 and end on June 30, 2022.

6. TERMINATION.

A. **Discretionary.** Either party may terminate this Agreement without cause upon thirty (30) days written notice mailed or personally delivered to the other party.

B. **Cause.** Either party may terminate this Agreement for cause upon fifteen (15) days written notice mailed or personally delivered to the other party, and the notified party's failure to cure or correct the cause of the termination, to the reasonable satisfaction of the party giving such notice, within such fifteen (15) day time period.

C. **Effect of Termination.** Upon receipt of notice of termination, neither party shall incur additional obligations under any provision of this Agreement without the prior written consent of the other.

D. **Return of Documents.** Upon termination, any and all **CITY** documents or

materials provided to **CONTRACTOR** and any and all of **CONTRACTOR's** documents and materials prepared for or relating to the performance of its duties under this Agreement, shall be delivered to **CITY** as soon as possible, but not later than thirty (30) days after termination.

7. OWNERSHIP OF DOCUMENTS.

The written documents and materials prepared by the **CONTRACTOR** in connection with the performance of its duties under this Agreement, shall be the sole property of **CITY**. **CITY** may use said property for any purpose, including projects not contemplated by this Agreement.

8. INSPECTION AND AUDIT.

Upon reasonable notice, **CONTRACTOR** shall make available to **CITY**, or its agent, for inspection and audit, all documents and materials maintained by **CONTRACTOR** in connection with its performance of its duties under this Agreement. **CONTRACTOR** shall fully cooperate with **CITY** or its agent in any such audit or inspection.

9. ASSIGNABILITY.

The parties agree that they shall not assign or transfer any interest in this Agreement nor the performance of any of their respective obligations hereunder, without the prior written consent of the other party, and any attempt to so assign this Agreement or any rights, duties or obligations arising hereunder shall be void and of no effect.

10. INSURANCE.

A. **Scope of Coverage.** During the term of this Agreement, **CONTRACTOR** shall maintain, at no expense to **CITY**, the following insurance policies:

1. A commercial general liability insurance policy in the minimum amount of one million dollars (\$1,000,000) per occurrence/two million dollars (\$2,000,000) aggregate, for death, bodily injury, personal injury, or property damage.

2. An automobile liability (owned, non-owned, and hired vehicles) insurance policy in the minimum amount of one million dollars (\$1,000,000) dollars per occurrence.

3. If any licensed professional performs any of the services required to be performed under this Agreement, a professional liability insurance policy in the minimum amount of one million dollars (\$1,000,000) per occurrence/two million dollars (\$2,000,000) aggregate, to cover any claims arising out of the **CONTRACTOR's** performance of services under this Agreement. Where **CONTRACTOR** is a professional not required to have a professional license, **CITY** reserves the right to require **CONTRACTOR** to provide professional liability insurance pursuant to this section.

4. If it employs any person, **CONTRACTOR** shall maintain worker's compensation insurance, as required by the State of California, with statutory limits, and employer's liability insurance with limits of no less than one million dollars (\$1,000,000) per accident for bodily injury or disease. **CONTRACTOR's** worker's compensation insurance shall be specifically endorsed to waive any right of subrogation against **CITY**.

B. Other Insurance Requirements. The insurance coverage required of the **CONTRACTOR** in subparagraph A of this section above shall also meet the following requirements:

1. Except for professional liability insurance or worker's compensation insurance, the insurance policies shall be specifically endorsed to include the **CITY**, its officers, agents, employees, and volunteers, as additional insureds (for both ongoing and completed operations) under the policies.

2. The additional insured coverage under **CONTRACTOR'S** insurance policies shall be "primary and noncontributory" with respect to any insurance or coverage maintained by **CITY** and shall not call upon **CITY's** insurance or self-insurance coverage for any contribution. The "primary and noncontributory" coverage in **CONTRACTOR'S** policies shall be at least as broad as ISO form CG20 01 04 13.

3. Except for professional liability insurance or worker's compensation insurance, the insurance policies shall include, in their text or by endorsement, coverage for contractual liability and personal injury.

4. By execution of this Agreement, **CONTRACTOR** hereby grants to **CITY** a waiver of any right to subrogation which any insurer of **CONTRACTOR** may acquire against **CITY** by virtue of the payment of any loss under such insurance. **CONTRACTOR** agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this provision applies regardless of whether or not **CITY** has received a waiver of subrogation endorsement from the insurer.

5. If the insurance is written on a Claims Made Form, then, following termination of this Agreement, said insurance coverage shall survive for a period of not less than five years.

6. The insurance policies shall provide for a retroactive date of placement coinciding with the effective date of this Agreement.

7. The limits of insurance required in this Agreement may be satisfied by a combination of primary and umbrella or excess insurance. Any umbrella or excess insurance shall contain or be endorsed to contain a provision that such coverage shall also apply on a primary and noncontributory basis for the benefit of **CITY** (if agreed to in a written contract or agreement) before **CITY'S** own insurance or self-insurance shall be called upon to protect it as a named insured.

8. It shall be a requirement under this Agreement that any available insurance proceeds broader than or in excess of the specified minimum insurance coverage requirements and/or limits shall be available to CITY or any other additional insured party. Furthermore, the requirements for coverage and limits shall be: (1) the minimum coverage and limits specified in this Agreement; or (2) the broader coverage and maximum limits of coverage of any insurance policy or proceeds available to the named insured; whichever is greater. No representation is made that the minimum Insurance requirements of this agreement are sufficient to cover the obligations of the **CONTRACTOR** under this agreement.

C. **Deductibles and SIR's.** Any deductibles or self-insured retentions in **CONTRACTOR's** insurance policies must be declared to and approved by the PROJECT MANAGER and City Attorney, and shall not reduce the limits of liability. Policies containing any self-insured retention (SIR) provision shall provide or be endorsed to provide that the SIR may be satisfied by either the named insured or **CITY** or other additional insured party. At **CITY's** option, the deductibles or self-insured retentions with respect to **CITY** shall be reduced or eliminated to **CITY's** satisfaction, or **CONTRACTOR** shall procure a bond guaranteeing payment of losses and related investigations, claims administration, attorney's fees and defense expenses.

D. **Proof of Insurance.** **CONTRACTOR** shall provide to the PROJECT MANAGER or **CITY'S** City Attorney all of the following: (1) Certificates of Insurance evidencing the insurance coverage required in this Agreement; (2) a copy of the policy declaration page and/or endorsement page listing all policy endorsements for the commercial general liability policy, and (3) excerpts of policy language or specific endorsements evidencing the other insurance requirements set forth in this Agreement. **CITY** reserves the right to obtain a full certified copy of any insurance policy and endorsements from **CONTRACTOR**. Failure to exercise this right shall not constitute a waiver of the right to exercise it later. The insurance shall be approved as to form and sufficiency by PROJECT MANAGER and the City Attorney.

11. INDEMNIFICATION.

A. Except as otherwise provided in Paragraph B., **CONTRACTOR** shall, to the fullest extent permitted by law, indemnify, release, defend with counsel approved by **CITY**, and hold harmless **CITY**, its officers, agents, employees and volunteers (collectively, the "**City Indemnitees**"), from and against any claim, demand, suit, judgment, loss, liability or expense of any kind, including but not limited to attorney's fees, expert fees and all other costs and fees of litigation, (collectively "**CLAIMS**"), arising out of **CONTRACTOR'S** performance of its obligations or conduct of its operations under this Agreement. The **CONTRACTOR's** obligations apply regardless of whether or not a liability is caused or contributed to by the active or passive negligence of the **City Indemnitees**. However, to the extent that liability is caused by the active negligence or willful misconduct of the **City Indemnitees**, the **CONTRACTOR's** indemnification obligation shall be reduced in proportion to the **City Indemnitees'** share

of liability for the active negligence or willful misconduct. In addition, the acceptance or approval of the **CONTRACTOR**'s work or work product by the **CITY** or any of its directors, officers or employees shall not relieve or reduce the **CONTRACTOR**'s indemnification obligations. In the event the **City Indemnitees** are made a party to any action, lawsuit, or other adversarial proceeding arising from **CONTRACTOR**'S performance of or operations under this Agreement, **CONTRACTOR** shall provide a defense to the **City Indemnitees** or at **CITY'S** option reimburse the **City Indemnitees** their costs of defense, including reasonable attorneys' fees, incurred in defense of such claims.

B. Where the services to be provided by **CONTRACTOR** under this Agreement are design professional services to be performed by a design professional as that term is defined under Civil Code Section 2782.8, then, to the extent permitted by law including without limitation, Civil Code sections 2782, 2782.6 and 2782.8, **CONTRACTOR** shall indemnify and hold harmless the **CITY** and its officers, officials, and employees (collectively **City Indemnitees**) from and against damages, liabilities or costs (including incidental damages, Court costs, reasonable attorney's fees as may be determined by the Court, litigation expenses and fees of expert witnesses incurred in connection therewith and costs of investigation) to the extent they are caused by the negligence, recklessness, or willful misconduct of **CONTRACTOR**, or any subconsultants, or subcontractor or anyone directly or indirectly employed by them, or anyone for whom they are legally liable (collectively Liabilities). Such obligation to hold harmless and indemnify any indemnity shall not apply to the extent that such Liabilities are caused in part by the negligence or willful misconduct of such City Indemnitee.

C. The defense and indemnification obligations of this Agreement are undertaken in addition to, and shall not in any way be limited by, the insurance obligations contained in this Agreement, and shall survive the termination or completion of this Agreement for the full period of time allowed by law.

12. NONDISCRIMINATION.

CONTRACTOR shall not discriminate, in any way, against any person on the basis of age, sex, race, color, religion, ancestry, national origin or disability in connection with or related to the performance of its duties and obligations under this Agreement.

13. COMPLIANCE WITH ALL LAWS.

CONTRACTOR shall observe and comply with all applicable federal, state and local laws, ordinances, codes and regulations, in the performance of its duties and obligations under this Agreement. **CONTRACTOR** shall perform all services under this Agreement in accordance with these laws, ordinances, codes and regulations. **CONTRACTOR** shall release, defend, indemnify and hold harmless **CITY**, its officers, agents and employees from any and all damages, liabilities, penalties, fines and all other consequences from any noncompliance or violation of any laws, ordinances, codes or regulations.

14. NO THIRD PARTY BENEFICIARIES.

CITY and **CONTRACTOR** do not intend, by any provision of this Agreement, to create in any third party, any benefit or right owed by one party, under the terms and conditions of this Agreement, to the other party.

15. NOTICES.

All notices and other communications required or permitted to be given under this Agreement, including any notice of change of address, shall be in writing and given by personal delivery, or deposited with the United States Postal Service, postage prepaid, addressed to the parties intended to be notified. Notice shall be deemed given as of the date of personal delivery, or if mailed, upon the date of deposit with the United States Postal Service. Notice shall be given as follows:

TO **CITY**'s Project Manager: Lisa Goldfien
City of San Rafael
1400 Fifth Avenue
San Rafael, CA 94901

TO **CONTRACTOR**'s Project Director: Nira Doherty
Burke, Williams & Sorensen, LLP
181 Third Street
San Rafael, CA 94901

16. INDEPENDENT CONTRACTOR.

For the purposes, and for the duration, of this Agreement, **CONTRACTOR**, its officers, agents and employees shall act in the capacity of an Independent Contractor, and not as employees of the **CITY**. **CONTRACTOR** and **CITY** expressly intend and agree that the status of **CONTRACTOR**, its officers, agents and employees be that of an Independent Contractor and not that of an employee of **CITY**.

17. ENTIRE AGREEMENT -- AMENDMENTS.

A. The terms and conditions of this Agreement, all exhibits attached, and all documents expressly incorporated by reference, represent the entire Agreement of the parties with respect to the subject matter of this Agreement.

B. This written Agreement shall supersede any and all prior agreements, oral or written, regarding the subject matter between the **CONTRACTOR** and the **CITY**.

C. No other agreement, promise or statement, written or oral, relating to the

subject matter of this Agreement, shall be valid or binding, except by way of a written amendment to this Agreement.

D. The terms and conditions of this Agreement shall not be altered or modified except by a written amendment to this Agreement signed by the **CONTRACTOR** and the **CITY**.

E. If any conflicts arise between the terms and conditions of this Agreement, and the terms and conditions of the attached exhibits or the documents expressly incorporated by reference, the terms and conditions of this Agreement shall control.

18. SET-OFF AGAINST DEBTS.

CONTRACTOR agrees that **CITY** may deduct from any payment due to **CONTRACTOR** under this Agreement, any monies which **CONTRACTOR** owes **CITY** under any ordinance, agreement, contract or resolution for any unpaid taxes, fees, licenses, assessments, unpaid checks or other amounts.

19. WAIVERS.

The waiver by either party of any breach or violation of any term, covenant or condition of this Agreement, or of any ordinance, law or regulation, shall not be deemed to be a waiver of any other term, covenant, condition, ordinance, law or regulation, or of any subsequent breach or violation of the same or other term, covenant, condition, ordinance, law or regulation. The subsequent acceptance by either party of any fee, performance, or other consideration which may become due or owing under this Agreement, shall not be deemed to be a waiver of any preceding breach or violation by the other party of any term, condition, covenant of this Agreement or any applicable law, ordinance or regulation.

20. COSTS AND ATTORNEY'S FEES.

The prevailing party in any action brought to enforce the terms and conditions of this Agreement, or arising out of the performance of this Agreement, may recover its reasonable costs (including claims administration) and attorney's fees expended in connection with such action.

21. CITY BUSINESS LICENSE / OTHER TAXES.

CONTRACTOR shall obtain and maintain during the duration of this Agreement, a **CITY** business license as required by the San Rafael Municipal Code **CONTRACTOR** shall pay any and all state and federal taxes and any other applicable taxes. **CITY** shall not be required to pay for any work performed under this Agreement, until **CONTRACTOR** has provided **CITY** with a completed Internal Revenue Service Form W-9 (Request for Taxpayer Identification Number and Certification).

22. SURVIVAL OF TERMS.

Any terms of this Agreement that by their nature extend beyond the term (or termination) of this Agreement shall remain in effect until fulfilled, and shall apply to both Parties' respective successors and assigns.

23. APPLICABLE LAW.

The laws of the State of California shall govern this Agreement.

24. COUNTERPARTS AND ELECTRONIC SIGNATURE.

This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one document. Counterpart signature pages may be delivered by telecopier, email or other means of electronic transmission.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day, month and year first above written.

CITY OF SAN RAFAEL

CONTRACTOR

By: _____
JIM SCHUTZ, City Manager

By: _____


Name: Nira F. Doherty

Title: Partner

ATTEST:

[If Contractor is a corporation, add signature of second corporate officer]

LINDSAY LARA, City Clerk

By: _____

APPROVED AS TO FORM:

Name: _____

Title: _____

ROBERT F. EPSTEIN, City Attorney