



City of San Leandro

Meeting Date: December 21, 2015

Staff Report

File Number: 15-675 **Agenda Section:** CONSENT CALENDAR

Agenda Number: 8.H.

TO: City Council

FROM: Chris Zapata
City Manager

BY: Cynthia Battenberg
Community Development Director

FINANCE REVIEW: David Baum
Finance Director

TITLE: Staff Report for Consultant Service Agreement with Keyser Marston Associates for Development Agreement Negotiation Services for the Shoreline Development Project

SUMMARY AND RECOMMENDATIONS

The Shoreline Development Project is a public-private partnership between the City of San Leandro and Cal-Coast Development. The City will continue to own the 75-acre site upon which development will occur and requirements in terms of construction, use, maintenance and lease rates need to be negotiated. Given the size and complexity of the project, the significant investment it represents and the long-term nature of the lease, staff has requested the assistance of Keyser Marston Associates (KMA) in developing and negotiating a term sheet which will serve as the foundation for the Development Agreement. KMA has expertise in financial and market analysis, public-private and ground lease negotiations and experience working with Cities in negotiating leases. Staff recommends the City Council approve a resolution for a Consultant Services Agreement between the City of San Leandro and Keyser Marston Associates, Inc. for Shoreline Development Agreement and Ground Lease Negotiations at an amount not-to-exceed \$110,980.

BACKGROUND

In 2005 the City began discussions regarding the boat harbor operations and potential development of the shoreline as the Shoreline Enterprise Fund was operating at an annual deficit and funding was not available for on-going dredging of the channel and harbor. Over the past ten years the City has worked with the community and Cal-Coast Development in a public-private partnership to identify a strategy for the development of the shoreline to meet the following objectives:

- Build an economically viable and vibrant mixed-use development which provides needed amenities and services to the citizens of the City of San Leandro including a

banquet/conference center, limited-service hotel, multiple dining options, housing units, office space and an enhanced library/community building;

- Ensure that the project uses are synergistic and create a regional destination for dining, lodging, entertainment and recreation;
- Provide recreational opportunities such as bocce ball courts, a small boat launch, public gathering spaces, and a 20-foot-wide public promenade including lookout stations, to increase and enhance the public's access to the Bay;
- Provide multiple areas for the public to enjoy scenic views and interact with the San Francisco Bay;
- Enhance connections between the San Leandro Shoreline and the San Francisco Bay Trail;
- Remove current blight, including the former Blue Dolphin site pillars and fencing and the fenced former Boatworks site;
- Ensure the redeveloped portion of the San Leandro Shoreline complements existing amenities and provides needed connection between the amenities and current shoreline uses;
- Ensure that development is provided in an environmentally sensitive manner, and promotes the latest trends in energy efficiency; and
- Recognizes the economic uncertainty of acquiring future funding for needed on-going channel and harbor dredging, the City's existing debt burden related to past harbor improvements, and the City's desire to plan for a successful transition from the existing blighted use to an environmentally and financially sustainable alternative that maintains the public's access to the harbor and San Francisco Bay.

In November 2013, Cal-Coast submitted an application to the City of San Leandro for the Proposed Shoreline Project. The Shoreline Development Conceptual Master Plan is included as Exhibit A. The plan includes the redevelopment of the 52-acres of land and 23-acres of water owned by the City which encompass the San Leandro Marina and surrounding properties with residential, commercial and public recreational uses. The project includes the following:

- 200-room hotel;
- 15,000 square foot conference center;
- 150,000 square foot office campus;
- 3 restaurants;
- 2,500 square foot community library;
- 354 housing units;
- Bocce ball courts and recreational areas;
- 2 miles of pedestrian/bicycle promenade including a bridge and lookout piers;
- Aquatic Center, kayak storage building, docks and a small boat launch;
- Restoration of the natural shoreline within the interior of the harbor basin including a perched beach and sitting steps;
- An aeration fountain to aide in water circulation; and,
- Refurbishment of public restrooms on site.

In July 2015, the City Council certified the San Leandro Shoreline Development Project Environmental Impact Report, amended the General Plan land use designation for

approximately 12 acres of the Shoreline Development Project and rezoned a portion of the project site.

Cal-Coast is now on a fast track to obtain the remaining entitlements and permits, including those from outside agencies. The Shoreline Development Project will come back to the City Council in late 2016 for approval of the Planned Development and vesting tentative map. Staff plans to bring the Development Agreement to the City Council for approval along with the remaining entitlements.

Analysis

The Development Agreement will be a comprehensive document that addresses all matters of construction, use, maintenance and lease rates including details regarding infrastructure, development schedule and phasing, performance and construction guarantees, redevelopment of the boat harbor, and issues such as default and right to terminate, transfer of the agreement, insurance and indemnification to name a few.

Given the size of the project and various uses as well as the significant investment that it represents and the long-term nature of the lease, staff has requested the assistance of Keyser Marston Associates (KMA) in developing and negotiating a term sheet which will serve as the foundation for the Development Agreement. KMA specializes in public-private real estate development, specifically the evaluation and negotiations of transactions that achieve the goals and objects of both the public sector and private developer. Their services include financial feasibility and market feasibility analysis, business term and ground lease negotiations and public private financing plans.

KMA would provide assistance to staff in support of the negotiations with Cal-Coast as directed by staff. The detailed Scope of Services can be found in Exhibit A of the Consultant Services Agreement. A summary of the tasks, budget and timeline follows.

Task 1: Draft basic term sheet /Request financials from Developer/Equity Partner

Timeline: January Budget: \$16,800

- Review goals and objectives of City
- Assist City in developing a negotiating strategy
- Summarize, interpret, and explain key aspects of developer proposal
- Assist in preparing business terms for term sheet
- Evaluate the return on the publicly owned asset. Identify possible public financing opportunities, such as EIFD and CFD, to replace expensive private funds with for infrastructure, harbor redevelopment, site development and public facilities.
- Recommend guarantee's, such as a completion guarantee, to protect the City
- Discuss with City if fiscal neutrality should be demonstrated with a payment to the City's General Fund for Phase 1 and each of the subsequent phases.
- Request financials from developer/equity partner and other submittals in support of the Project, including: market studies, conceptual programs and phasing, development pro forma by land use, site development costs, debt and equity requirements, ground lease terms by land use, etc.

Task 2: Review financial feasibility based on development program and pro forma

Timeline: February Budget: \$18,040

- Review financials and submittals from developer, including the developer equity partner, to determine feasibility
- Review developer's proposed financial return requirements
- Prepare an estimate of the property value on ground lease and compare with developer's proposal
- Evaluate real estate financial returns to City through ground leases. Does developer's proposal provide a fair return to the publicly owned asset?
- Evaluate the risk to City return
- Review financing plan for infrastructure, site development costs, and the redevelopment of the boat harbor.
- Findings from analysis would be included in the term sheet.

Task 3: Negotiation of term sheet with Lessee

Timeline: March/April Budget: \$23,040

- Attend negotiating meetings
- Assist City in establishing primary and secondary negotiating positions
- Update business terms as positions and project changes in negotiations
- Assist in preparing term sheet for discussion with City Council

Task 4: Review of term sheet with City Council

Timeline: May Budget: \$4,480

Task 5: Review of ground lease agreement prepared by City legal counsel

Timeline: June/July Budget: \$16,800

- Assist City's legal counsel in preparing business term portions of the agreement
- Attend negotiating meetings

Task 6: Prepare documents for public hearing with City Council

Timeline: August Budget: \$10,540

- Prepare consultant report summarizing transaction

Task 7: Public meeting for ground lease consideration

Timeline: September Budget: \$4,480

An optional task is also included in order to assist the City in lease negotiations with the Marina Inn as the Marina Inn has requested a lease extension. KMA's role would be assisting staff in determining appropriate business terms for a potential lease extension to increase the term based on the lessee's compliance with the current lease and KMA's experience with ground lease extensions. The budget for this optional task is \$16,800.

The Consultant Services Agreement with KMA for negotiations of the Development Agreement with Cal-Coast is for a not-to-exceed cost of \$94,180. Staff recommends that the optional task be included as part of the agreement as the two leases are related. Therefore, the agreement would be for a cost not-to-exceed \$110,980.

KMA's work will establish the foundation upon which the City Attorney's Office will draft the Development Agreement for the project. KMA's financial expertise, knowledge of

public-private development agreements and experience assisting Cities in negotiating ground leases make them an ideal and important partner for this significant transaction.

Previous Actions

- On October 20, 2008 the City Council approved an Exclusive Negotiating Rights Agreement with Cal-Coast Development, LLC relating to development of the Shoreline-Marina area
- On November 10, 2008 the City Council ratified the composition of the Shoreline Development Citizens Advisory Committee
- On April 4, 2011 the City Council ratified three additional members to the Shoreline Development Citizens Advisory Committee
- On April 2, 2012 the City Council approved an Exclusive Negotiating Rights Agreement with Cal-Coast Development relating to development of the Shoreline consistent with the Conceptual Master Plan
- On June 4, 2012 the City Council approved a Minute Order which established the Shoreline Advisory Group
- On May 20, 2013 the City Council approved a Contractual Services Agreement Between the City of San Leandro and The Planning Center | DC&E to Prepare the Environmental Impact Report for the San Leandro Shoreline Development Project
- On July 20, 2015 the City Council certified the San Leandro Shoreline Development Project Environmental Impact Report
- On July 20, 2015 the City Council amended the General Plan Land Use Designation for the San Leandro Shoreline Development Project
- On July 20, 2015 the City Council rezoned the Shoreline Development Project site

Legal Analysis

This report has been reviewed and approved by the City Attorney.

Fiscal Impacts

This General Fund project will cost up to \$110,980, which requires increasing the FY 2015-16 Budget, Account Number 010-41-003-5120, by \$110,980 to be funded by the City's Economic Uncertainty Reserves.

ATTACHMENTS

Attachment to Staff Report

- Exhibit A - Shoreline Development Conceptual Master Plan

Attachment to Resolution

- Consultant Services Agreement Between the City of San Leandro and Keyser Marston Associates, Inc. for Shoreline Development and Ground Lease Negotiations

PREPARED BY: Cynthia Battenberg, Community Development Director, Community Development Department

Exhibit A

Shoreline Development Conceptual Master Plan





City of San Leandro

Meeting Date: December 21, 2015

Resolution - Council

File Number: 15-678 **Agenda Section:** CONSENT CALENDAR

Agenda Number:

TO: City Council

FROM: Chris Zapata
City Manager

BY: Cynthia Battenberg
Community Development Director

FINANCE REVIEW: David Baum
Finance Director

TITLE: RESOLUTION Approving a Consultant Services Agreement with Keyser Marston Associates, Inc. for Shoreline Development Agreement and Ground Lease Negotiations (approves agreement for assistance in negotiating lease extension with The Marina Inn and Development Agreement with Cal-Coast Development for the Shoreline Development Project in an amount not-to-exceed \$110,980)

WHEREAS, an agreement between the City of San Leandro and Keyser Marston Associates, Inc., a copy of which is attached, has been presented to this City Council; and

WHEREAS, the City Council is familiar with the contents thereof; and

WHEREAS, the City Manager recommends approval of said agreement.

NOW, THEREFORE, the City Council of the City of San Leandro does RESOLVE as follows:

That said agreement is hereby approved, execution by the City Manager is hereby authorized and funding is provided in the amount of \$110,980 from the City's economic uncertainty reserve to account 010-41-003-5120.

**CONSULTING SERVICES AGREEMENT BETWEEN
THE CITY OF SAN LEANDRO AND
KEYSER MARSTON ASSOCIATES, INC.
FOR
SHORELINE DEVELOPMENT AGREEMENT AND GROUND LEASE NEGOTIATIONS**

THIS AGREEMENT for consulting services is made by and between the City of San Leandro ("City") and Keyser Marston Associates, Inc. ("Consultant") (together sometimes referred to as the "Parties") as of December 21, 2015 (the "Effective Date").

Section 1. SERVICES. Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the Effective Date and shall end on December 31, 2016, the date of completion specified in Exhibit A, and Consultant shall complete the work described in Exhibit A on or before that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as referenced in Section 8.
- 1.2 **Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which Consultant is engaged.
- 1.3 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 **Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Subsection 1.2 above and to satisfy Consultant's obligations hereunder.
- 1.5 **City of San Leandro Living Wage Rates.** This contract may be covered by the City of San Leandro Living Wage Ordinance (LWO). Bidder's attention is directed to the San Leandro Municipal Code, Title 1, Chapter 6, Article 6. Successful Bidder must submit completed self-certification form and comply with the LWO if covered.

Section 2. COMPENSATION. City hereby agrees to pay Consultant a sum not to exceed \$110,980, notwithstanding any contrary indications that may be contained in Consultant's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Consultant's proposal, attached as Exhibit B, regarding the amount of compensation, the Agreement shall prevail. City shall pay Consultant for services rendered pursuant to this Agreement at the

time and in the manner set forth herein. The payments specified below shall be the only payments from City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City in writing, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consequently, the Parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

2.1 **Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred prior to the invoice date. Invoices shall contain the following information:

- Serial identifications of progress bills; i.e., Progress Bill No. 1 for the first invoice, etc.;
- The beginning and ending dates of the billing period;
- A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion;
- The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant performing services hereunder;
- The Consultant's signature;
- Consultant shall give separate notice to the City when the total number of hours worked by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours within a 12-month period under this Agreement and any other agreement between Consultant and City. Such notice shall include an estimate of the time necessary to complete work described in Exhibit A and the estimate of time necessary to complete work under any other agreement between Consultant and City, if applicable.

2.2 **Monthly Payment.** City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have 30 days from the receipt of an invoice that complies with all of the requirements above to pay Consultant.

2.3 **This section is left intentionally blank**

2.4 **Total Payment.** City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment.

2.5 **Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on the compensation schedule attached hereto as Exhibit B.

2.6 **Reimbursable Expenses.** Reimbursable expenses are specified in Exhibit B, and shall not exceed \$0. Expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses are included in the total amount of compensation provided under this Agreement that shall not be exceeded.

2.7 **Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.

2.8 **Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets to verify costs incurred to that date.

2.9 **Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of authorization from the Contract Administrator.

Section 3. FACILITIES AND EQUIPMENT. Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, long-distance telephone or other communication charges, vehicles, and reproduction facilities.

Section 4. INSURANCE REQUIREMENTS. Before fully executing this Agreement, Consultant, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in

connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning work to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of such insurance shall be included in the Consultant's bid. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence that such insurance is in effect to City. VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS AGREEMENT PRIOR TO EXECUTION. Consultant shall maintain all required insurance listed herein for the duration of this Agreement.

4.1 Workers' Compensation.

4.1.1 General Requirements. Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than \$1,000,000 per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the California Labor Code shall be solely in the discretion of the Contract Administrator.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the Consultant, its employees, agendas, and subcontractors.

4.1.2 Submittal Requirements. To comply with Subsection 4.1, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section; and
- b. Waiver of Subrogation Endorsement as required by the section.

4.2 Commercial General and Automobile Liability Insurance.

4.2.1 General Requirements. Consultant, at its own cost and expense, shall maintain commercial general liability insurance for the term of this Agreement in an amount not less than \$1,000,000 and automobile liability insurance for the term of this Agreement in an amount not less than \$1,000,000 per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general

aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

4.2.2 Minimum Scope of Coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001, Code 1 (any auto). No endorsement shall be attached limiting the coverage.

4.2.3 Additional Requirements. Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:

- a. The Insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- b. City, its officers, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the Consultant; or automobiles owned, leased, hired, or borrowed by the Consultant.
- c. Consultant hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Consultant agrees to obtain any endorsements that may be necessary to affect this waiver of subrogation.
- d. For any claims related to this Agreement or the work hereunder, the Consultant's insurance covered shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.

4.2.4 Submittal Requirements. To comply with Subsection 4.2, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section;
- b. Additional Insured Endorsement as required by the section;
- c. Waiver of Subrogation Endorsement as required by the section; and

- d. Primary Insurance Endorsement as required by the section.

4.3 Professional Liability Insurance.

4.3.1 General Requirements. Consultant, at its own cost and expense, shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than \$1,000,000 covering the licensed professionals' errors and omissions. Any deductible or self-insured retention shall not exceed \$150,000 per claim.

4.3.2 Claims-Made Limitations. The following provisions shall apply if the professional liability coverage is written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained and evidence of insurance must be provided for at least 3 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant shall purchase an extended period coverage for a minimum of 3 years after completion of work under this Agreement.
- d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

4.3.3 Additional Requirements. A certified endorsement to include contractual liability shall be included in the policy.

4.3.4 Submittal Requirements. To comply with Subsection 4.3, Consultant shall submit the Certificate of Liability Insurance in the amounts specified in the section.

4.4 All Policies Requirements.

4.4.1 Acceptability of Insurers. All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A:VII.

4.4.2 Verification of Coverage. Prior to beginning any work under this Agreement, Consultant shall furnish City with complete copies of all Certificates of Liability Insurance delivered to Consultant by the insurer, including complete copies of all endorsements attached to the policies. All copies of Certificates of Liability Insurance and certified endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf. If the City does not

receive the required insurance documents prior to the Consultant beginning work, it shall not waive the Consultant's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

- 4.4.3 **Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the written approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, employees, and volunteers; or the Consultant shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.
- 4.4.4 **Wasting Policies.** No policy required by this Section 4, with the exception of Consultant's professional liability policy, shall include a "wasting" policy limit (i.e. limit that is eroded by the cost of defense).
- 4.4.5 **Endorsement Requirements.** Each insurance policy required by Section 4 shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days' prior written notice has been provided to the City.
- 4.4.6 **Subcontractors.** Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

4.5 **Remedies.** In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement.

Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES. Refer to the attached Exhibit C, which is incorporated herein and made a part of this Agreement.

Section 6. STATUS OF CONSULTANT.

- 6.1 **Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subsection 1.3; however, otherwise City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.
- 6.2 **Consultant Not an Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

Section 7. LEGAL REQUIREMENTS.

- 7.1 **Governing Law.** The laws of the State of California shall govern this Agreement.
- 7.2 **Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws and regulations applicable to the performance of the work hereunder, including but not limited to, the California Building Code, the Americans with Disabilities Act, and any copyright, patent or trademark law. Consultant's failure to comply with any law(s) or regulation(s) applicable to the performance of the work hereunder shall constitute a breach of contract.
- 7.3 **Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.
- 7.4 **Licenses and Permits.** Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.

- 7.5 **Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the Contract Administrator or this Agreement.

Section 8. TERMINATION AND MODIFICATION.

- 8.1 **Termination.** City may cancel this Agreement at any time and without cause upon written notification to Consultant.

Consultant may cancel this Agreement upon 30 days' written notice to City and shall include in such notice the reasons for cancellation.

In the event of termination, Consultant shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

- 8.2 **Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if City grants such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the Contract Administrator, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.

- 8.3 **Amendments.** The Parties may amend this Agreement only by a writing signed by all the Parties.

- 8.4 **Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written

approval of the Contract Administrator. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors noted in the proposal, without prior written approval of the Contract Administrator.

- 8.5 **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.
- 8.6 **Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, City's remedies shall include, but are not limited to, the following:
- 8.6.1 Immediately terminate the Agreement;
 - 8.6.2 Retain the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement;
 - 8.6.3 Retain a different consultant to complete the work described in Exhibit A not finished by Consultant; or
 - 8.6.4 Charge Consultant the difference between the cost to complete the work described in Exhibit A that is unfinished at the time of breach and the amount that City would have paid Consultant pursuant to Section 2 if Consultant had completed the work.

Section 9. KEEPING AND STATUS OF RECORDS.

- 9.1 **Records Created as Part of Consultant's Performance.** All reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City upon termination of the Agreement. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are confidential and will not be released to third parties without prior written consent of both Parties.
- 9.2 **Consultant's Books and Records.** Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of 3 years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.

- 9.3 **Inspection and Audit of Records.** Any records or documents that Subsection 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds \$10,000.00, the Agreement shall be subject to the examination and audit of the State Auditor, at the request of City or as part of any audit of the City, for a period of 3 years after final payment under the Agreement.

Section 10. MISCELLANEOUS PROVISIONS.

- 10.1 **Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.
- 10.2 **Venue.** In the event that either party brings any action against the other under this Agreement, the Parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Alameda or in the United States District Court for the Northern District of California.
- 10.3 **Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.
- 10.4 **No Implied Waiver of Breach.** The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 **Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the Parties.
- 10.6 **Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.
- 10.7 **Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Section 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous 12 months, an employee, agent, appointee, or official of the City. If Consultant was an employee, agent, appointee, or official of the City in the previous 12 months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of California Government Code Section 1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of California Government Code Section 1090 *et seq.*, and, if applicable, will be disqualified from holding public office in the State of California.

- 10.8 Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.
- 10.9 Contract Administration.** This Agreement shall be administered by Cynthia Battenberg, Community Development Director ("Contract Administrator"). All correspondence shall be directed to or through the Contract Administrator or his or her designee.
- 10.10 Notices.** Any written notice to Consultant shall be sent to:
Timothy C Kelly, President
Keyser Marston Associates, Inc.
160 Pacific Avenue, Suite 204
San Francisco, CA 94111
tkelly@keysermarston.com
- Any written notice to City shall be sent to:
Cynthia Battenberg, Community Development Director
City of San Leandro
835 East 14th Street
San Leandro, CA 94610
cbattenberg@sanleandro.org
- With a copy to:
City of San Leandro
Department of Finance
c/o Purchasing Technician
835 East 14th Street
San Leandro, CA 94577
- 10.11 Professional Seal.** Where applicable in the determination of the contract administrator, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation. The stamp/seal shall be in a block entitled

"Seal and Signature of Registered Professional with report/design responsibility," as in the following example.



10.12 **Integration.** This Agreement, including the scope of work attached hereto and incorporated herein as Exhibits A, B, and C represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.

<u>Exhibit A</u>	Scope of Services
<u>Exhibit B</u>	Compensation Schedule & Reimbursable Expenses
<u>Exhibit C</u>	Indemnification

10.13 **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

10.14 **Certification per Iran Contracting Act of 2010.** In the event that this contract is for one million dollars (\$1,000,000.00) or more, by Consultant's signature below Consultant certifies that Consultant, and any parent entities, subsidiaries, successors or subunits of Consultant are not identified on a list created pursuant to subdivision (b) of Section 2203 of the California Public Contract Code as a person engaging in investment activities in Iran as described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5 of the California Public Contract Code, as applicable.

SIGNATURES ON FOLLOWING PAGE

The Parties have executed this Agreement as of the Effective Date. The persons whose signatures appear below certify that they are authorized to sign on behalf of the respective Party.

CITY OF SAN LEANDRO

KEYSER MARSTON ASSOCIATES, INC.

Chris Zapata, City Manager

Timothy C. Kelly, President

Attest:

Consultant's DIR Registration Number, if applicable

Tamika Greenwood, City Clerk

Approved as to Fiscal Authority:

David Baum, Finance Director

597-57-003-5120
Account Number

Approved as to Form:

Richard D. Pio Roda, City Attorney

Per Section 10.7:

- Form 700 Not Required
- Form 700 Required

Cynthia Battenberg
Community Development Director

1969630.2 (2015)

EXHIBIT A

SAN LEANDRO SHORELINE PROJECT SCOPE OF SERVICES

Project

As part of a public/private partnership, the City of San Leandro and Cal Coast Companies LLC propose to redevelop the approximately 52-acre City-owned Shoreline Recreational Area plus a water surface area of approximately 23 acres. The proposed project includes:

- New 200-room hotel
- Conference center and office campus
- 354 housing units
- 3 new restaurants
- Parking structure
- Library/community meeting space
- Aquatic center/dock; small boat launch and kayak storage
- Outdoor recreational areas, including: picnic areas, a perched beach, bocce ball courts, pedestrian piers, two miles of public promenade including lookout piers and a pedestrian/bicycle bridge

The project also includes restoration of a natural shoreline along the interior of the harbor basin, refurbishment of existing public restrooms, and an aeration fountain in the harbor basin to aid in water circulation. Throughout construction of the project, continuous public access will be maintained to Marina Park and the shoreline nature path.

The City owned site will be conveyed to Cal Coast Companies LLC (lessee) by means of a long-term ground lease. Lessee may be responsible for funding all site development costs, including the cost to redevelop the boat harbor which the City would repay over time. Additionally, the Shoreline Enterprise Fund owes the City General Fund approximately \$4 million and there is an approximately \$4 million in outstanding debt owed to the Department of Boating and Waterways.

Scope of Services

KMA will provide assistance in support of the negotiations with the selected developer. On an as directed basis by staff, KMA will provide the following services:

Task 1: Draft of basic term sheet with staff /Request financials from Developer/Equity Partner

Considerations in drafting a term sheet would include:

- Review goals and objectives of City
- Assist City in developing a negotiating strategy

- Summarize, interpret, and explain key aspects of developer proposal
- Assist in preparing business terms for term sheet
- Evaluate the return on the publicly owned asset. Identify possible public financing opportunities, such as EIFD and CFD, to replace expensive private funds with for infrastructure, harbor redevelopment, site development and public facilities.
- Recommend guarantee's, such as a completion guarantee, to protect the City
- Discuss with City if Fiscal Neutrality should be demonstrated with a net positive payment to the City's General Fund with Phase 1 and with each of the subsequent phases.
- Request for financials from developer/equity partner and other submittals in support of the Project, including: market studies, conceptual programs and phasing, development pro forma by land use, site development costs, debt and equity requirements, ground lease terms by land use, etc.

Task 2: Review of financial feasibility based on Lessee development program and pro forma

- Review financials and submittals from developer, including for the developer equity partner, to determine feasibility.
- Review developer's proposed financial return requirements
- Prepare an estimate of the property value on ground lease and compare with developer's proposal
- Evaluate real estate financial returns to City through ground leases. Does developer's proposal provide a fair return to the publicly owned asset?
- Evaluate the risk to City return
- Review financing plan for infrastructure, site development costs, and the redevelopment of the boat harbor. Does the proposed plan take advantage of possible public financing opportunities, such as EIFD and CFD, replacing expensive private funds with public funding?
- Findings from analysis would be included in the term sheet.

Task 3: Negotiation of term sheet with Lessee

- Attend negotiating meetings
- Assist City in establishing primary and secondary negotiating positions
- Update business terms as positions and project changes in negotiations
- Assist in preparing term sheet for discussion with City Council

Task 4: Review of term sheet with City Council

Task 5: Review of ground lease agreement prepared by City legal counsel

- Assist City's legal counsel in preparing business term portions of the agreement
- Attend negotiating meetings

Task 6: Prepare documents for public hearing with City Council

- Prepare consultant report summarizing transaction in support of staff recommendation

Task 7: Public meeting for ground lease consideration

Optional Task

Assist the City of San Leandro, as needed, in lease extension negotiations with The Marina Inn. KMA's role would be assisting staff in determining appropriate business terms for lease extension to increase the term based on the Lessee's compliance with the current lease and KMA's experience with ground lease extensions.

EXHIBIT B
SAN LEANDRO SHORELINE PROJECT
Compensation Schedule and Rembursement Expenses
Keyser Marston Associates, Inc.

	KMA Hourly Rate	Task 1		Task 2		Task 3		Task 4		Task 5		Task 6		Task 7		Total
		Draft of Basic Term Sheet with Staff; Request Financials from Developer / Equity Partner		Review of Developer Financials and Submittals on Financial Feasibility		Negotiation of Term Sheet with Lessee		Review of Term Sheet with City Council		Review Ground Lease Document		Prepare Documents for Public Hearing with City Council		Public Meeting Ground Lease Consideration		
		January		February		March/April		May		June/July		August		September		
Position	KMA Hourly Rate	Time	Total	Time	Total	Time	Total	Time	Total	Time	Total	Time	Total	Time	Total	Total
Managing Principal	\$280.00	60	\$16,800	30	\$8,400	80	\$22,400	16	\$4,480	60	\$16,800	30	\$8,400	16	\$4,480	
Principal	\$250.00															
Manager	\$225.00															
Associate	\$167.50															
Senior Analyst	\$150.00			60	\$9,000							10	\$1,500			
Technical	\$95.00															
Administrative	\$80.00			8	\$640	8	\$640					8	\$640			
			\$16,800		\$18,040		\$23,040		\$4,480		\$16,800		\$10,540		\$4,480	\$94,180

Position	KMA Hourly Rate	Optional Task	
		As directed by Staff, advise Staff on lease extention negotiations with The Marina Inn	
		Time	Total
Managing Principal	\$280.00	60	\$16,800
Principal	\$250.00		
Manager	\$225.00		
Associate	\$167.50		
Senior Analyst	\$150.00		
Technical	\$95.00		
Administrative	\$80.00		
			\$16,800

EXHIBIT C

INDEMNIFICATION

Consultant shall indemnify, defend with counsel acceptable to City, and hold harmless City and its officers, elected officials, employees, agents and volunteers from and against any and all liability, loss, damage, claims, expenses, and costs (including without limitation, attorney's fees and costs and fees of litigation) (collectively, "Liability") of every nature arising out of or in connection with Consultant's negligence or willful misconduct in the performance of the services called for or its failure to comply with any of its obligations contained in this Agreement, except such Liability caused by the active negligence or willful misconduct of City.

Notwithstanding the forgoing, to the extent this Agreement is a "construction contract" as defined by California Civil Code Section 2782, as may be amended from time to time, such duties of Consultant to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

The Consultant's obligation to defend and indemnify shall not be excused because of the Consultant's inability to evaluate Liability or because the Consultant evaluates Liability and determines that the Consultant is not liable to the claimant. The Consultant must respond within 30 days to the tender of any claim for defense and indemnity by the City. If the Consultant fails to accept or reject a tender of defense and indemnity within 30 days, in addition to any other remedy authorized by law, so much of the money due the Consultant under and by virtue of this Agreement as shall reasonably be considered necessary by the City, may be retained by the City until disposition has been made of the claim or suit for damages, or until the Consultant accepts or rejects the tender of defense, whichever occurs first.