



Police Department cases include excessive force incidents resulting in death or great bodily injury (including officer involved shootings) and accidents involving police vehicles. The firm's strategic approach to cases includes liability analysis and, when appropriate, early resolution of cases by mediation pre-lawsuit or early mandatory settlement conference after a lawsuit is filed. This approach usually allows for efficient and timely resolution of a potential liability case without the expense of significant attorneys' fees and costs expended by plaintiff or defense counsel. For other cases, the tactical use of qualified immunity and other immunities by motion and/or persuasion often results in voluntary or court ordered dismissal of claims and lawsuits.

The Public Works Department and Engineering & Transportation Department's cases, respectively, usually involve claims that City property was negligently designed or maintained causing death or great bodily injury. These cases have included fatal accidents involving motorists, pedestrians, or bicycle riders killed by trains at intersections or on bridges. Other cases include street and right-of-way intersection accidents; falling trees, errant golf balls originating from the City's golf courses or alleged defective sidewalks and streets. Defense strategies have included motions seeking dismissal of claims based on the immunities provided by the Tort Claims Act and filing cross complaints on behalf of the City against other more responsible parties such as PG&E, Amtrak, AC Transit, or other negligent corporate, public, or private entities.

The firm, in cooperation with the City Attorney, Risk Manager, Department Heads, or Police Command staff review each claim and lawsuit and implement new training and policies or changes to existing training and policies to minimize or prevent similar future accidents and critical incidents.

The firm has an excellent reputation for customer service, responsiveness, ethics, and professionalism especially with the plaintiffs' attorneys' bar and federal and state judges.

### **Analysis**

The Bertrand, Fox, Elliot, Osman & Wenzel law firm continues to provide excellent service on tort claims and litigation assigned to them and charges reasonable hourly rates for service. Due to these successful outcomes on litigated matters, staff requests, with the City Attorney's approval, the continued use of Bertrand, Fox, Elliot, Osman & Wenzel legal services for a variety of risk management issues and tort claims.

On June 25, 2013, the City of San Leandro entered into a Legal Services Agreement with BFEOW to provide contract legal representation services to the City for a not to exceed amount of \$49,999.

On November 3, 2014, the City amended the Agreement with BFEOW to provide legal representation on tort claims and litigation presented to the City on various issues for a not to exceed amount of \$100,000 and an end date of June 30, 2016.

On February 16, 2016, the City amended the Agreement to extend the term for an additional two years through June 30, 2018 and increase the compensation to a level not to exceed \$500,000 as a result of substantial tort claims filed against the City in 2015.

On April 16, 2018, the City amended the Agreement to extend the term for an additional two years through June 30, 2021 and increase the compensation limit not to exceed \$1,100,000.

On May 17, 2021, the City Council approved a fourth amendment with BFEOW that terminates on June 30, 2021.

Staff proposes a new contract for BFEOW with an effective date that aligns with the next biennial

budget cycle and a not to exceed amount of \$500,000. Additionally, staff recommends Council approve the City Manager to authorize change orders up to 10% of the total contract amount-or \$50,000. This authority would allow the City Manager or her designee to adjust contractual spending limits given the dynamic nature of risk management in local government right now.

### **Previous Actions**

- 2014-083: Authorizing an agreement with BFEOW
- 2015-155: Amendment #1 to BFEOW agreement (NTE \$285k)
- 2016-020: Amendment #2 to BFEOW agreement (NTE \$500k)
- 2018-032: Amendment #3 to BFEOW agreement (NTE \$1.1MM)
- 2021-076: Amendment #4 to BFEOW agreement (NTE \$2.07MM)

### **Legal Analysis**

The City Attorney's Office reviewed this staff report, resolution, and legal services agreement and approved them as to form.

### **Fiscal Impacts**

This Self-Insurance Fund program will cost \$500,000 and is incorporated into the City Manager's Proposed FY 2021-2022 and FY2022-2023 Budget.

### **Budget Authority**

The Self-Insurance Fund (689) operating budget for Fiscal Years 2022 and 2023 reflects a proposed appropriation of \$500,000 in account # 689-19-004-5110 to cover this legal services contract through the next biennial budget.

### **ATTACHMENT(S)**

#### **Attachment(s) to Staff Report**

- Bertrand, Fox, Elliot, Osman and Wenzel draft agreement

**PREPARED BY:** Scott Koll, Financial Services Manager

**LEGAL SERVICES AGREEMENT BETWEEN  
THE CITY OF SAN LEANDRO AND  
BERTRAND, FOX, ELLIOT, OSMAN & WENZEL  
FOR  
LEGAL SERVICES**

THIS AGREEMENT for consulting services is made by and between the City of San Leandro (“City”) and Bertrand, Fox, Elliot, Osman & Wenzel (“Attorney”) (together sometimes referred to as the “Parties”) as of July 1, 2021 (the “Effective Date”).

**Section 1. SERVICES.** Subject to the terms and conditions set forth in this Agreement, Attorney 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 June 30, 2023 the date of completion specified in Exhibit A, and Attorney 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 Attorney 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.** Attorney 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 Attorney is engaged.
- 1.3 Assignment of Personnel.** Attorney 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, Attorney shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 Time.** Attorney 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 Attorney’s obligations hereunder.
- 1.5 Section Reserved.**

- 1.6 City of San Leandro Living Wage Rates.** This contract may be covered by the City of San Leandro Living Wage Ordinance (LWO). Attorney's attention is directed to the San Leandro Municipal Code, Title 1, Chapter 6, Article 6. Attorney must submit completed self-certification form and comply with the LWO if covered.
- 1.7 Section Reserved.**

**Section 2. COMPENSATION.** City hereby agrees to pay Attorney a sum not to exceed \$500,000 notwithstanding any contrary indications that may be contained in Attorney's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Attorney's proposal, attached as Exhibit B, regarding the amount of compensation, the Agreement shall prevail. City shall pay Attorney 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 Attorney for services rendered pursuant to this Agreement. Attorney shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City in writing, Attorney shall not bill City for duplicate services performed by more than one person.

Attorney and City acknowledge and agree that compensation paid by City to Attorney under this Agreement is based upon Attorney's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Attorney. Consequently, the Parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Attorney 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.** Attorney 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;
- At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
- The total number of hours of work performed under the Agreement by Attorney and each employee, agent, and subcontractor of Attorney performing services hereunder;
- The Attorney's signature;
- Attorney shall give separate notice to the City when the total number of hours worked by Attorney and any individual employee, agent, or subcontractor of Attorney reaches or exceeds 800 hours within a 12-month period under this Agreement and any other agreement between Attorney 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 Attorney 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 Attorney.

**2.3 Final Payment.** City shall pay the last 10% of the total sum due pursuant to this Agreement within 60 days after completion of the services and submittal to City of a final invoice, if all services required have been satisfactorily performed.

**2.4 Total Payment.** City shall pay for the services to be rendered by Attorney pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Attorney 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 Attorney 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 Attorney 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 the amount outlined in Exhibit B. 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.** Attorney 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 Attorney terminates this Agreement pursuant to Section 8, the City shall compensate the Attorney for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Attorney shall maintain adequate logs and timesheets to verify costs incurred to that date.
- 2.9 Authorization to Perform Services.** The Attorney 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, Attorney 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 Attorney 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 Attorney'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, Attorney, 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 Attorney and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Attorney 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. Attorney 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 Attorney's bid or proposal. Attorney shall not allow any subcontractor to commence work on any subcontract until Attorney has obtained all insurance required herein for the subcontractor(s) and provided evidence to City that such insurance is in effect. VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS AGREEMENT PRIOR TO EXECUTION. Attorney shall maintain all required insurance listed herein for the duration of this Agreement.

**4.1 Workers' Compensation.**

**4.1.1 General Requirements.** Attorney 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 Attorney. 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, Attorney may rely on a self-insurance program to meet these 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 Attorney, its employees, agents, and subcontractors.

**4.1.2 Submittal Requirements.** To comply with Subsection 4.1, Attorney 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.** Attorney, 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 Attorney; or automobiles owned, leased, hired, or borrowed by the Attorney.
- c. Attorney hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of

the payment of any loss. Attorney agrees to obtain any endorsements that may be necessary to effect this waiver of subrogation.

- d. For any claims related to this Agreement or the work hereunder, the Attorney's insurance coverage 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 Attorney's insurance and shall not contribute with it.

**4.2.4 Submittal Requirements.** To comply with Subsection 4.2, Attorney 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.** Attorney, 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 5 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, Attorney shall purchase an extended period coverage for a minimum of 5 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, Attorney shall submit the Certificate of Liability Insurance in the amounts specified in the section.

#### **4.4 Section Reserved.**

#### **4.5 All Policies Requirements.**

**4.5.1 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.

**4.5.2 Verification of Coverage.** Prior to beginning any work under this Agreement, Attorney shall furnish City with complete copies of all Certificates of Liability Insurance delivered to Attorney 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 Attorney beginning work, it shall not waive the Attorney's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

**4.5.3 Deductibles and Self-Insured Retentions.** Attorney 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 Attorney shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

**4.5.4 Wasting Policies.** No policy required by this Section 4 shall include a “wasting” policy limit (i.e. limit that is eroded by the cost of defense).

**4.5.5 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.

**4.5.6 Subcontractors.** Attorney 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.

**4.6 Submittal of Proof of Insurance Coverage.** All certificates of insurance and original endorsements effecting coverage required in this Section 4 must be electronically submitted through the City’s online insurance document management program, PINS Advantage. Contractor shall comply with all requirements provided by City related to the PINS Advantage program.

**4.7 Remedies.** In addition to any other remedies City may have if Attorney 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 Attorney’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 Attorney to stop work under this Agreement or withhold any payment that becomes due to Attorney hereunder, or both stop work and withhold any payment, until Attorney demonstrates compliance with the requirements hereof; and/or

- Terminate this Agreement.

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

**Section 6. STATUS OF ATTORNEY.**

**6.1 Independent Contractor.** At all times during the term of this Agreement, Attorney shall be an independent contractor and shall not be an employee of City. City shall have the right to control Attorney only insofar as the results of Attorney'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 Attorney accomplishes services rendered pursuant to this Agreement.

Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Attorney 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 Attorney Not an Agent.** Except as City may specify in writing, Attorney shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Attorney 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.** Attorney 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. Attorney'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, Attorney 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.** Attorney represents and warrants to City that Attorney 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. Attorney represents and warrants to City that Attorney 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, Attorney and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.

**7.5 Nondiscrimination and Equal Opportunity.** Attorney 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 Attorney under this Agreement. Attorney 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 Attorney thereby.

Attorney 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 Attorney.

Attorney 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, Attorney shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Attorney delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Attorney or prepared by or for Attorney 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. Attorney understands and agrees that, if City grants such an extension, City shall have no obligation to provide Attorney 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 Attorney 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 Attorney recognize and agree that this Agreement contemplates personal performance by Attorney and is based upon a determination of Attorney'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 Attorney. Attorney may not assign this Agreement or any interest therein without the prior written approval of the Contract Administrator. Attorney 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 Attorney shall survive the termination of this Agreement.
- 8.6 Options upon Breach by Attorney.** If Attorney 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 Attorney pursuant to this Agreement;
- 8.6.3 Retain a different Attorney to complete the work described in Exhibit A not finished by Attorney; or
- 8.6.4 Charge Attorney 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 Attorney pursuant to Section 2 if Attorney had completed the work.

**Section 9. KEEPING AND STATUS OF RECORDS.**

- 9.1 **Records Created as Part of Attorney'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 Attorney prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Attorney 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 Attorney 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 **Attorney's Books and Records.** Attorney 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 Attorney to this Agreement.
- 9.3 **Inspection and Audit of Records.** Any records or documents that Subsection 9.2 of this Agreement requires Attorney 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.** Attorney 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.** Attorney may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Attorney in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Attorney 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.*

Attorney 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 Attorney was an employee, agent, appointee, or official of the City in the previous 12 months, Attorney warrants that it did not participate in any manner in the forming of this Agreement. Attorney understands that, if this Agreement is made in violation of California Government Code Section 1090 *et seq.*, the entire Agreement is void and Attorney will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Attorney will be required to reimburse the City for any sums paid to the Attorney. Attorney 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.

At City's sole discretion, Attorney may be required to file with the City a Form 700 to identify and document Attorney's economic interests, as defined and regulated by the California Fair Political Practices Commission. If Attorney is required to file a Form 700, Attorney is hereby advised to contact the San Leandro City Clerk for the Form 700 and directions on how to prepare it.

**10.8 Solicitation.** Attorney 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 Richard D. Pio Roda ("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 Attorney shall be sent to:

Mr. Greg Fox, Esq.  
Bertrand, Fox, Elliot, Osman and Wenzel  
2749 Hyde Street  
San Francisco, CA 94109  
Email: gfox@bfesf.com

Any written notice to City shall be sent to:

Richard D. Pio Roda  
City Attorney, San Leandro

With a copy to:  
City of San Leandro  
Department of Finance  
c/o Risk Management  
835 East 14<sup>th</sup> 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, C, and D represents the entire and integrated agreement between City and Attorney 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
<u>Exhibit D</u>	COVID-19 Compliance Requirements

**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 Attorney's signature below Attorney certifies that Attorney, and any parent entities, subsidiaries, successors or subunits of Attorney 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

ATTORNEY

\_\_\_\_\_  
Frances Robustelli, City Manager

\_\_\_\_\_  
Greg Fox, Esq.  
Bertrand, Fox, Elliot, Osman & Wenzel

Attest:

\_\_\_\_\_  
Leticia I. Miguel, City Clerk

Budget Approved:

Approved as to Fiscal Authority:

\_\_\_\_\_  
Susan Hsieh, Finance Director

689-19-004-5110

\_\_\_\_\_  
Account Number

Approved as to Form:

\_\_\_\_\_  
Richard D. Pio Roda, City Attorney

Per Section 10.7: Form 700 Required

## EXHIBIT A

### SCOPE OF SERVICES

The City hires Attorney to represent it in litigation. Litigation as used in this Agreement shall mean all work as follows:

- (1) after a notice or summons has been served regarding tort claim litigation
- (2) a decision to initiate litigation, is approved by the City Council
- (3) meet and confer with clients on options for litigation strategy and receive approval for City's preferred course of action
- (4) prepare responsive pleadings for federal court including appropriate motions to dismiss or answer
- (5) meet with defendant officers, investigate case and explain proceedings
- (6) prepare for, meet and confer with opposing counsel on preparation of joint case management conference (CMC) statement and appear in Court for initial CMC
- (7) prepare discovery plan, propound written discovery, respond to plaintiffs' discovery, analyze plaintiffs' discovery responses
- (8) prepare clients and attend alternative dispute resolution (ADR) as ordered by federal court
- (9) prepare clients and defend clients' depositions, prepare for and depose plaintiffs and depose other witnesses as necessary and relevant
- (10) prepare Motion for Summary Judgment (MSJ) after meet and confer with clients on options and preferred strategy
- (11) Prepare for settlement conference, meet and confer with clients and attend MSC with clients
- (12) if case is not resolved by MSJ or settlement prepare for and attend jury trial of the case
- (13) review with clients appellate strategy and options following verdict, post verdict motions, if necessary.

## EXHIBIT B

### COMPENSATION SCHEDULE & REIMBURSABLE EXPENSES

#### Attorney Fees

Senior Partner Hourly Rate	\$215.00
Partner Hourly Rate	\$185.00
Associate Hourly Rate	\$175.00

#### Reimbursable Expenses

Duplication costs:	Reasonable costs and invoice must be attached for payment
Delivery costs:	Reasonable costs and invoice must be attached for payment
Expert Witness costs:	Must be approved by the City prior to retaining; agreement must be provided for payment.

## EXHIBIT C

### INDEMNIFICATION

Attorney 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 Attorney's 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 sole 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 Attorney to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

The Attorney's obligation to defend and indemnify shall not be excused because of the Attorney's inability to evaluate Liability or because the Attorney evaluates Liability and determines that the Attorney is not liable to the claimant. The Attorney must respond within 30 days to the tender of any claim for defense and indemnity by the City. If the Attorney 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 Attorney 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 Attorney accepts or rejects the tender of defense, whichever occurs first.

Attorney shall also indemnify, defend and hold harmless the City from all suits or claims for infringement of any patent rights, copyrights, trade secrets, trade names, trademarks, service marks, or any other proprietary rights of any person or persons because of the City or any of its officers, employees, volunteers, or agents use of articles, products things, or services supplied in the performance of Attorney's services under this Agreement, however, the cost to defend charged to Attorney shall not exceed Attorney's proportionate percentage fault.



## EXHIBIT D

### REQUIREMENTS RELATED TO THE COVID-19 PANDEMIC AND THE CITY OF SAN LEANDRO'S EMERGENCY DECLARATION

The novel coronavirus ("COVID-19") has been declared a worldwide pandemic by the World Health Organization. The City of San Leandro is currently in a local emergency and state of emergency due to the COVID-19 pandemic.

COVID-19 is extremely contagious and is believed to spread mainly from person-to-person contact, through touched surfaces, and in airborne particles. As a result, federal, state, and local governments, including the City of San Leandro, and federal, state, county, and local health agencies recommend social distancing and additional cleaning protocols to limit the spread of the disease. The City has taken steps and put in place preventative measures recommended by federal, state, and local health agencies to reduce the spread of COVID-19. These measures include steps each person must take to prevent the spread of COVID-19 and include, but are not limited to, requiring face coverings, frequent hand washing and/or use of hand sanitizer, social distancing where possible, limiting of person-to-person contact, frequent cleanings of high-touch surfaces, and avoiding entering any building if they have COVID-19 symptoms.

Attorney shall obey all local orders and abide by all applicable preventative measures recommended by federal, state, county, and local health agencies and any preventative measures specifically implemented by the City. Attorney agrees that when entering any City buildings, Attorney will follow all COVID-19 related signage, wear a face covering, follow all social distancing protocols, and abide by any other COVID-19 preventative measure that are in place when performing the services described in this Agreement. Attorney shall also adhere to any subsequently communicated COVID-19 preventative measures as directed by City staff. The COVID-19 preventative measures are subject to change over time, and Attorney shall maintain knowledge of and adhere to the current COVID-19 preventative measures when interacting with City employees, officials, volunteers, agents, and representatives, and when entering City buildings.





the approval of the City Attorney as to form; and

4. That the City Manager is authorized to execute said agreement; and
5. That the Self-Insurance Fund account 689-19-004-5110 for legal services in both Fiscal Years 2021-2022 and 2022-2023, as detailed in the City Manager's Proposed Budget, has sufficient appropriations to cover this contractual obligation; and
6. That an original executed agreement shall be provided to the City Clerk and be attached to this resolution.

**LEGAL SERVICES AGREEMENT BETWEEN  
THE CITY OF SAN LEANDRO AND  
BERTRAND, FOX, ELLIOT, OSMAN & WENZEL  
FOR  
LEGAL SERVICES**

THIS AGREEMENT for consulting services is made by and between the City of San Leandro (“City”) and Bertrand, Fox, Elliot, Osman & Wenzel (“Attorney”) (together sometimes referred to as the “Parties”) as of July 1, 2021 (the “Effective Date”).

**Section 1. SERVICES.** Subject to the terms and conditions set forth in this Agreement, Attorney 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 June 30, 2023 the date of completion specified in Exhibit A, and Attorney 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 Attorney 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.** Attorney 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 Attorney is engaged.
- 1.3 Assignment of Personnel.** Attorney 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, Attorney shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 Time.** Attorney 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 Attorney’s obligations hereunder.
- 1.5 Section Reserved.**

**1.6 City of San Leandro Living Wage Rates.** This contract may be covered by the City of San Leandro Living Wage Ordinance (LWO). Attorney's attention is directed to the San Leandro Municipal Code, Title 1, Chapter 6, Article 6. Attorney must submit completed self-certification form and comply with the LWO if covered.

**1.7 Section Reserved.**

**Section 2. COMPENSATION.** City hereby agrees to pay Attorney a sum not to exceed \$500,000 notwithstanding any contrary indications that may be contained in Attorney's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Attorney's proposal, attached as Exhibit B, regarding the amount of compensation, the Agreement shall prevail. City shall pay Attorney 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 Attorney for services rendered pursuant to this Agreement. Attorney shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City in writing, Attorney shall not bill City for duplicate services performed by more than one person.

Attorney and City acknowledge and agree that compensation paid by City to Attorney under this Agreement is based upon Attorney's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Attorney. Consequently, the Parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Attorney 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.** Attorney 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;
- At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
- The total number of hours of work performed under the Agreement by Attorney and each employee, agent, and subcontractor of Attorney performing services hereunder;
- The Attorney's signature;
- Attorney shall give separate notice to the City when the total number of hours worked by Attorney and any individual employee, agent, or subcontractor of Attorney reaches or exceeds 800 hours within a 12-month period under this Agreement and any other agreement between Attorney 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 Attorney 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 Attorney.

**2.3 Final Payment.** City shall pay the last 10% of the total sum due pursuant to this Agreement within 60 days after completion of the services and submittal to City of a final invoice, if all services required have been satisfactorily performed.

**2.4 Total Payment.** City shall pay for the services to be rendered by Attorney pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Attorney 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 Attorney 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 Attorney 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 the amount outlined in Exhibit B. 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.** Attorney 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 Attorney terminates this Agreement pursuant to Section 8, the City shall compensate the Attorney for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Attorney shall maintain adequate logs and timesheets to verify costs incurred to that date.
- 2.9 Authorization to Perform Services.** The Attorney 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, Attorney 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 Attorney 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 Attorney'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, Attorney, 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 Attorney and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Attorney 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. Attorney 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 Attorney's bid or proposal. Attorney shall not allow any subcontractor to commence work on any subcontract until Attorney has obtained all insurance required herein for the subcontractor(s) and provided evidence to City that such insurance is in effect. VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS AGREEMENT PRIOR TO EXECUTION. Attorney shall maintain all required insurance listed herein for the duration of this Agreement.

**4.1 Workers' Compensation.**

**4.1.1 General Requirements.** Attorney 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 Attorney. 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, Attorney may rely on a self-insurance program to meet these 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 Attorney, its employees, agents, and subcontractors.

**4.1.2 Submittal Requirements.** To comply with Subsection 4.1, Attorney 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.** Attorney, 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 Attorney; or automobiles owned, leased, hired, or borrowed by the Attorney.
- c. Attorney hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of

the payment of any loss. Attorney agrees to obtain any endorsements that may be necessary to effect this waiver of subrogation.

- d. For any claims related to this Agreement or the work hereunder, the Attorney's insurance coverage 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 Attorney's insurance and shall not contribute with it.

**4.2.4 Submittal Requirements.** To comply with Subsection 4.2, Attorney 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.** Attorney, 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 5 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, Attorney shall purchase an extended period coverage for a minimum of 5 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, Attorney shall submit the Certificate of Liability Insurance in the amounts specified in the section.

#### **4.4 Section Reserved.**

#### **4.5 All Policies Requirements.**

**4.5.1 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.

**4.5.2 Verification of Coverage.** Prior to beginning any work under this Agreement, Attorney shall furnish City with complete copies of all Certificates of Liability Insurance delivered to Attorney 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 Attorney beginning work, it shall not waive the Attorney's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

**4.5.3 Deductibles and Self-Insured Retentions.** Attorney 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 Attorney shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

**4.5.4 Wasting Policies.** No policy required by this Section 4 shall include a “wasting” policy limit (i.e. limit that is eroded by the cost of defense).

**4.5.5 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.

**4.5.6 Subcontractors.** Attorney 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.

**4.6 Submittal of Proof of Insurance Coverage.** All certificates of insurance and original endorsements effecting coverage required in this Section 4 must be electronically submitted through the City’s online insurance document management program, PINS Advantage. Contractor shall comply with all requirements provided by City related to the PINS Advantage program.

**4.7 Remedies.** In addition to any other remedies City may have if Attorney 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 Attorney’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 Attorney to stop work under this Agreement or withhold any payment that becomes due to Attorney hereunder, or both stop work and withhold any payment, until Attorney demonstrates compliance with the requirements hereof; and/or

- Terminate this Agreement.

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

**Section 6. STATUS OF ATTORNEY.**

**6.1 Independent Contractor.** At all times during the term of this Agreement, Attorney shall be an independent contractor and shall not be an employee of City. City shall have the right to control Attorney only insofar as the results of Attorney'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 Attorney accomplishes services rendered pursuant to this Agreement.

Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Attorney 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 Attorney Not an Agent.** Except as City may specify in writing, Attorney shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Attorney 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.** Attorney 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. Attorney'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, Attorney 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.** Attorney represents and warrants to City that Attorney 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. Attorney represents and warrants to City that Attorney 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, Attorney and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.

**7.5 Nondiscrimination and Equal Opportunity.** Attorney 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 Attorney under this Agreement. Attorney 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 Attorney thereby.

Attorney 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 Attorney.

Attorney 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, Attorney shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Attorney delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Attorney or prepared by or for Attorney 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. Attorney understands and agrees that, if City grants such an extension, City shall have no obligation to provide Attorney 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 Attorney 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 Attorney recognize and agree that this Agreement contemplates personal performance by Attorney and is based upon a determination of Attorney'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 Attorney. Attorney may not assign this Agreement or any interest therein without the prior written approval of the Contract Administrator. Attorney 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 Attorney shall survive the termination of this Agreement.
- 8.6 Options upon Breach by Attorney.** If Attorney 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 Attorney pursuant to this Agreement;
- 8.6.3 Retain a different Attorney to complete the work described in Exhibit A not finished by Attorney; or
- 8.6.4 Charge Attorney 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 Attorney pursuant to Section 2 if Attorney had completed the work.

**Section 9. KEEPING AND STATUS OF RECORDS.**

- 9.1 **Records Created as Part of Attorney'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 Attorney prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Attorney 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 Attorney 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 **Attorney's Books and Records.** Attorney 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 Attorney to this Agreement.
- 9.3 **Inspection and Audit of Records.** Any records or documents that Subsection 9.2 of this Agreement requires Attorney 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.** Attorney 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.** Attorney may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Attorney in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Attorney 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.*

Attorney 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 Attorney was an employee, agent, appointee, or official of the City in the previous 12 months, Attorney warrants that it did not participate in any manner in the forming of this Agreement. Attorney understands that, if this Agreement is made in violation of California Government Code Section 1090 *et seq.*, the entire Agreement is void and Attorney will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Attorney will be required to reimburse the City for any sums paid to the Attorney. Attorney 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.

At City's sole discretion, Attorney may be required to file with the City a Form 700 to identify and document Attorney's economic interests, as defined and regulated by the California Fair Political Practices Commission. If Attorney is required to file a Form 700, Attorney is hereby advised to contact the San Leandro City Clerk for the Form 700 and directions on how to prepare it.

**10.8 Solicitation.** Attorney 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 Richard D. Pio Roda ("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 Attorney shall be sent to:

Mr. Greg Fox, Esq.  
Bertrand, Fox, Elliot, Osman and Wenzel  
2749 Hyde Street  
San Francisco, CA 94109  
Email: gfox@bfesf.com

Any written notice to City shall be sent to:

Richard D. Pio Roda  
City Attorney, San Leandro

With a copy to:  
City of San Leandro  
Department of Finance  
c/o Risk Management  
835 East 14<sup>th</sup> 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, C, and D represents the entire and integrated agreement between City and Attorney 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
<u>Exhibit D</u>	COVID-19 Compliance Requirements

**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 Attorney's signature below Attorney certifies that Attorney, and any parent entities, subsidiaries, successors or subunits of Attorney 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

ATTORNEY

\_\_\_\_\_  
Frances Robustelli, City Manager

\_\_\_\_\_  
Greg Fox, Esq.  
Bertrand, Fox, Elliot, Osman & Wenzel

Attest:

\_\_\_\_\_  
Leticia I. Miguel, City Clerk

Budget Approved:

Approved as to Fiscal Authority:

\_\_\_\_\_  
Susan Hsieh, Finance Director

689-19-004-5110

\_\_\_\_\_  
Account Number

Approved as to Form:

\_\_\_\_\_  
Richard D. Pio Roda, City Attorney

Per Section 10.7: Form 700 Required

## EXHIBIT A

### SCOPE OF SERVICES

The City hires Attorney to represent it in litigation. Litigation as used in this Agreement shall mean all work as follows:

- (1) after a notice or summons has been served regarding tort claim litigation
- (2) a decision to initiate litigation, is approved by the City Council
- (3) meet and confer with clients on options for litigation strategy and receive approval for City's preferred course of action
- (4) prepare responsive pleadings for federal court including appropriate motions to dismiss or answer
- (5) meet with defendant officers, investigate case and explain proceedings
- (6) prepare for, meet and confer with opposing counsel on preparation of joint case management conference (CMC) statement and appear in Court for initial CMC
- (7) prepare discovery plan, propound written discovery, respond to plaintiffs' discovery, analyze plaintiffs' discovery responses
- (8) prepare clients and attend alternative dispute resolution (ADR) as ordered by federal court
- (9) prepare clients and defend clients' depositions, prepare for and depose plaintiffs and depose other witnesses as necessary and relevant
- (10) prepare Motion for Summary Judgment (MSJ) after meet and confer with clients on options and preferred strategy
- (11) Prepare for settlement conference, meet and confer with clients and attend MSC with clients
- (12) if case is not resolved by MSJ or settlement prepare for and attend jury trial of the case
- (13) review with clients appellate strategy and options following verdict, post verdict motions, if necessary.

## EXHIBIT B

### COMPENSATION SCHEDULE & REIMBURSABLE EXPENSES

#### Attorney Fees

Senior Partner Hourly Rate	\$215.00
Partner Hourly Rate	\$185.00
Associate Hourly Rate	\$175.00

#### Reimbursable Expenses

Duplication costs:	Reasonable costs and invoice must be attached for payment
Delivery costs:	Reasonable costs and invoice must be attached for payment
Expert Witness costs:	Must be approved by the City prior to retaining; agreement must be provided for payment.



## EXHIBIT C

### INDEMNIFICATION

Attorney 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 Attorney's 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 sole 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 Attorney to indemnify shall not apply when to do so would be prohibited by California Civil Code Section 2782.

The Attorney's obligation to defend and indemnify shall not be excused because of the Attorney's inability to evaluate Liability or because the Attorney evaluates Liability and determines that the Attorney is not liable to the claimant. The Attorney must respond within 30 days to the tender of any claim for defense and indemnity by the City. If the Attorney 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 Attorney 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 Attorney accepts or rejects the tender of defense, whichever occurs first.

Attorney shall also indemnify, defend and hold harmless the City from all suits or claims for infringement of any patent rights, copyrights, trade secrets, trade names, trademarks, service marks, or any other proprietary rights of any person or persons because of the City or any of its officers, employees, volunteers, or agents use of articles, products things, or services supplied in the performance of Attorney's services under this Agreement, however, the cost to defend charged to Attorney shall not exceed Attorney's proportionate percentage fault.

## EXHIBIT D

### REQUIREMENTS RELATED TO THE COVID-19 PANDEMIC AND THE CITY OF SAN LEANDRO'S EMERGENCY DECLARATION

The novel coronavirus ("COVID-19") has been declared a worldwide pandemic by the World Health Organization. The City of San Leandro is currently in a local emergency and state of emergency due to the COVID-19 pandemic.

COVID-19 is extremely contagious and is believed to spread mainly from person-to-person contact, through touched surfaces, and in airborne particles. As a result, federal, state, and local governments, including the City of San Leandro, and federal, state, county, and local health agencies recommend social distancing and additional cleaning protocols to limit the spread of the disease. The City has taken steps and put in place preventative measures recommended by federal, state, and local health agencies to reduce the spread of COVID-19. These measures include steps each person must take to prevent the spread of COVID-19 and include, but are not limited to, requiring face coverings, frequent hand washing and/or use of hand sanitizer, social distancing where possible, limiting of person-to-person contact, frequent cleanings of high-touch surfaces, and avoiding entering any building if they have COVID-19 symptoms.

Attorney shall obey all local orders and abide by all applicable preventative measures recommended by federal, state, county, and local health agencies and any preventative measures specifically implemented by the City. Attorney agrees that when entering any City buildings, Attorney will follow all COVID-19 related signage, wear a face covering, follow all social distancing protocols, and abide by any other COVID-19 preventative measure that are in place when performing the services described in this Agreement. Attorney shall also adhere to any subsequently communicated COVID-19 preventative measures as directed by City staff. The COVID-19 preventative measures are subject to change over time, and Attorney shall maintain knowledge of and adhere to the current COVID-19 preventative measures when interacting with City employees, officials, volunteers, agents, and representatives, and when entering City buildings.

