



## Legislation Text

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**File #:** 21-337, **Version:** 1

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Staff Report for a City of San Leandro City Council Resolution to Authorize the City Manager to Execute a Legal Services Agreement with Bertrand, Fox, Elliot, Osman & Wenzel for Legal Representation Associated with Tort Liability Claims and Litigation for a Not to Exceed Value of \$500,000 and set to expire June 30, 2023; and to Negotiate and Approve Change Orders Up to a Cumulative Value not to Exceed 10% (\$50,000) of the Original Contract Amount

### **SUMMARY AND RECOMMENDATIONS**

Staff requests that the City Council consider and approve a new Legal Services Agreement (Agreement) with Bertrand, Fox, Elliot, Osman & Wenzel (BFEOW) to continue to provide legal representation services associated with tort liability and tort claims litigation for the City through June 30, 2023. Funding is available in the Self-Insurance Fund to cover the cost for legal fees through Fiscal Year 2022-23.

### **BACKGROUND**

Bertrand, Fox, Elliot, Osman and Wenzel was formed in 1986 by Tom Bertrand and Greg Fox (Bertrand & Fox) as a law firm specializing in representation of public entities like the City of San Leandro. City Attorney Steve Meyers originally retained the firm to defend the City in civil litigation for several years in both state and federal courts. Since that time, the firm has continued to specialize in police and public works (streets, sidewalks, and parks) litigation representation. Today the firm represents approximately 60 public entities throughout the Bay Area and Northern California.

Since 2015, attorneys Greg Fox, Joanne Tran, Ilana Kohn, and Molly Cherala have been co-counsel with City Attorney Richard Pio Roda on approximately 59 claims and lawsuits filed in either federal or state courts.

The claims and lawsuits are roughly divided between civil rights litigation involving the Police Department (primarily filed in federal court) and the Public Works and Engineering and Transportation Departments involving dangerous conditions of City property cases (primarily filed in state superior court).

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