



## BOARD REPORT 18-48

Date: November 20, 2018

To: Board of Deferred Compensation Administration (Board)

From: Board Counsel

Subject: Outside Tax Counsel Services

### Board Members

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### **Recommendation:**

That the Board (a) approve the retentions of Reed Smith and Ice Miller for the provision of tax and regulatory guidance and advice and (b) recommend to the City Council that it approve the retentions and authorize the Office of the City Attorney (City Attorney) to negotiate and enter into professional services agreements with both of the law firms in a combined amount of \$15,000 for the first year of outside tax counsel services.

### **Discussion:**

In March 2013 the Board approved the retention of Steptoe & Johnson (Steptoe) to provide tax and regulatory advice and recommended that the City Council approve the retention and authorize the Office of the City Attorney to negotiate and enter into a professional services agreement with the law firm. In August 2013, the City Council approved the City Attorney's retention of Steptoe and initial funding of the contract in the amount of \$10,000.

The City Attorney entered into a three-year contract with Steptoe in October 2013 (August 2013 to August 2016) in an initial amount of \$10,000. The contract was subsequently amended to extend the term through August 2018 and increase funding to \$30,000. Steptoe assisted the Board and staff with a number of matters during the contract term, including the implementation of automatic enrollment, the loan program, hardship determinations, and beneficiary issues and provided fiduciary training to the Board. Total billings for legal services provided during the five year term of the agreement were \$12,870.

On September 5, 2018, the City Attorney sent letters to six law firms soliciting proposals for tax and regulatory services to the Board. The six law firms included four that had responded to the Request for Proposals (RFP) issued by the City Attorney for the City's three pension systems for tax and IRS regulatory advice and guidance; the other two law firms had responded to the City Attorney's previous recruitment for outside counsel for the Board in 2012. The proposed scope of services stated in the letter identified five topics for advice/guidance: (i) matters that impact the tax-exempt status of the Deferred Compensation Plan (Plan), (ii) the application of various provisions of the Internal Revenue Code (IRC), including Sections 401, 409A and 457(b) and

applicable California statutes, (iii) review of and proposed amendments to the Los Angeles Administrative Code and Plan Document, (iv) fiduciary obligations and best practices, and (v) other legal matters that could impact the Plan.

The Office received proposals from four of the six law firms—(i) Best, Best & Kreiger (BBK), (ii) Ice Miller, (iii) Kutak Rock, and (iv) Reed Smith. The two law firms that did not submit responses were Boutwell Fay and Nossaman. Review of the responses indicated that the four law firms were qualified to provide the scope of services.

In-person interviews were conducted with the four responders on October 17 (Reed Smith), October 18 (BBK) and October 23 (Kutak Rock and Ice Miller). The interview panel consisted of Plan Executive Director Steven Montagna, Plan Staff Member Matthew Vong, Deputy City Attorney Charles Hong, and Assistant City Attorney/Board Counsel Curtis S. Kidder. The following attorneys represented each law firm: Don Wellington and Jenni Krengel of Reed Smith; Isabel Saffie, Jeff Chang and David Allen (pension consultant) of BBK; John Schembari and William McCartney of Kutak Rock; and Audra Ferguson-Allen and Robert Gauss of Ice Miller.

Following the interviews, the panel concurred that Ice Miller and Reed Smith were the most qualified to provide advice and guidance regarding the scope of services. Ice Miller is based in Indianapolis, Indiana, has a nation-wide practice, and has attorneys well qualified to provide advice and guidance on deferred compensation issues. The law firm's particular strengths are as follows:

- (i) the firm works for a number of large public entity deferred compensation plans, including the City of New York plan;
- (ii) the firm has provided advice/guidance on issues relevant to the City's plan, such as a Deemed IRA program and plan document compliance;
- (iii) the firm has a level of proficiency in obtaining favorable private letter rulings from the IRS on IRC Section 457(b) matters;
- (iv) Mr. Gauss and Ms. Ferguson-Allen would both be contacts for the firm and available to provide services;
- (v) the firms' hourly rates are significantly less than Reed Smith's (but about the same as the rates offered by BBK and somewhat higher than Kutak's rates); and
- (vi) the firm has also been retained to provide services to the City's three pension plans.

The law firm, however, did not demonstrate familiarity with California law; the firm recently added an attorney licensed to practice in the State, but that attorney was not present at the interview. The primary focus of the scope of services, however, is on federal tax and regulatory guidance, so this limitation may not be a significant issue. Matters involving primarily State regulation, if any, could be assigned to the Reed Smith lawyers.

Ice Miller's hourly rates are offered at a 15% discount from their regular rates. Ms. Ferguson-Allen's rate is \$361 per hour and Mr. Gauss' rate is \$476 per hour. The law firm's proposal indicates that they will charge for travel costs if required to appear at meetings or to conduct

business in Los Angeles; however it is anticipated that virtually all of the advice/guidance can be done via the internet. The charge for travel costs could be addressed in contract negotiations.

Reed Smith's attorneys provide tax and regulatory advice to other large deferred compensation plans, including the California Public Employees Retirement System (CalPERS), are licensed to practice law in the State of California and are located in the firm's downtown Los Angeles office. Mr. Wellington has broad knowledge and expertise regarding deferred compensation statutes and regulations due, in part, to his prior service with the Department of the Treasury and work on amendments to IRC Section 457(b). Mr. Wellington has maintained his relationship with IRS staff members and is able to obtain unofficial guidance on the interpretation of IRC Section 457(b) and issues affecting deferred compensation plans. Mr. Wellington has a Masters in Law (LLM) in tax from New York University School of Law and has been practicing in the field for over 25 years. The law firm has been selected for retention for the City's three pension plans.

Regarding billing, Reed Smith has offered an initial blended rate of \$525 per hour—a significant discount from Mr. Wellington's and Ms. Krenal's regular hourly rates. The law firm's lawyers indicated that the hourly rate will increase to \$574 at the end of the first year; however, this will be negotiated by the City Attorney. Steptoe's hourly rate was fixed at \$450 per hour throughout the five years of the prior contract.

The BBK lawyers, while qualified to perform the scope of services, do not appear to have the same level of expertise as the Reed Smith and Ice Miller attorneys, nor do they have experience in areas relevant for the City's plan, such as a Deemed IRA program and locating missing plan members. Kutak Rock appears to have a limited public sector IRC Section 457(b) practice—the firm primarily provides services to pension plans and private sector deferred compensation plans. The law firm's lawyers indicated that they have no experience with Deemed IRA programs and had never worked on an automatic enrollment program for a public entity plan (but had worked on programs for private plans).

The retention of Reed Smith and Ice Miller must, pursuant to the requirements of the Charter, be approved by the City Council. The City Attorney will then negotiate and enter into professional service agreements with each of the law firms. Requests for outside counsel services will be made through the Board Counsel and it is our understanding that routine requests will be made by Plan staff, while requests of a complex nature or which require extensive legal services will be approved by the Board. Any advice provided by outside counsel will be reviewed by Board Counsel prior to submission to the Board and staff. The Board Counsel and the City Attorney's Outside Counsel Oversight Division will monitor the performance of outside tax counsel and will review all invoices submitted for payments. Approved invoices will be submitted to the Plan for payment and the payment will be funded from Plan participant fees. Plan staff has requested that the compensation to be paid under both contracts for the first year of services be in an amount not to exceed \$15,000.

It is recommended that Ice Miller and Reed Smith be retained to provide the specified scope of services to the Board and Plan staff. The two law firms are recommended because both have expertise in specific matters relevant to the Plan and can be tasked to work on portions of the scope of services for which they have demonstrated expertise. It is anticipated that Ice Miller will be initially tasked to work on the feasibility of a Deemed IRA program and to review the Plan Document.

Submitted by:

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Curtis S. Kidder  
Board Counsel/Assistant  
City Attorney