

TO: City of Riverside City Council

FROM: Hanson Bridgett LLP

DATE: August 24, 2016

RE: Independent Audit of City Attorney Engagement Of Outside Legal Counsel

I. EXECUTIVE SUMMARY

The City of Riverside commissioned an internal Performance Audit (Exhibit A) into the procurement of outside legal services by its City Attorney during the five fiscal years from July 1, 2009 through June 30, 2014 (the Audit Period). Subsequent to the preparation of the Performance Audit, the City Council engaged Hanson Bridgett in February 2016 to review and comment on the Performance Audit, and to conduct additional investigation related to the City's engagement of outside legal counsel during the Audit Period.

The City Council, with additional direction from the Mayor Pro Tem, placed certain limits on the scope of our investigation. In particular, we were not privy to attorney-client privileged information that could have revealed details about the way in which outside legal counsel was engaged and compensated. In addition, for reasons that remain unclear as discussed below, we did not receive certain requested documentation and information. Notwithstanding the above disclaimer, we did receive and review over 3,000 pages of documentation and so our findings are based on considerable insight into the workings of the City Attorney's office during the Audit Period.

Our preliminary conclusions delivered at the April 26, 2016 City Council meeting were constrained by the limits described above. When we explained at that meeting the depth of inquiry necessary for comprehensive and conclusive findings, the Council did not direct us to perform such an in-depth additional or continued investigation. Rather, we were directed by the Council to work with Mayor Pro Tem Soubirous to develop a report summarizing our preliminary findings. Subsequently, Mayor Pro Tem Soubirous directed us to answer five specific questions based on the extensive but incomplete documentation provided to us up to that point in our investigation.

Based on our review, we are able to make the following findings:

1. In engaging outside legal counsel directly, without prior Council approval, the former City Attorney did not violate the City Charter.
2. We believe that the former City Attorney generally followed best practices in developing an appropriately sized panel list from which to engage outside counsel. While we do not have a complete record, from the records made available to us we believe it is more likely than not that the former City Attorney did not always follow best practices with regard to memorializing agreements with each firm engaged for each specific matter during the Audit Period. This conclusion does not mean that the City received less than excellent legal advice, or that the City overpaid for legal services.

3. We agree with the Performance Audit that there was no competitive process used in the engagement of outside legal counsel. But we did not find any City policies or procedures that require such a competitive process. To the contrary, we think the evidence indicates that many, though not all, outside counsel were selected from the Council-approved panels, and that the Council granted the City Attorney the authority to add law firms to the panels as needed.

4. We found no affirmative evidence that the City Attorney entered into oral agreements with any law firm. Nor did we locate written contracts for all engagements for which the City paid outside legal counsel (see Finding No. 2 above). But this lack of written contracts does not necessarily mean that the engagements were oral.

5. Even assuming that the City Attorney entered into oral contracts with some outside law firms, it is difficult to say whether forming such oral contracts would violate California law. Given the lack of evidence that an oral contract existed, we do not think it necessary to reach a firm conclusion on this point.

II. BACKGROUND AND CHRONOLOGY

On March 1, 2016, we appeared before the City Council at a public meeting. At that meeting, the Council directed us, in broad strokes, to address the following three issues:

- Review and comment on the June, 2015 Performance Audit prepared by the City's internal auditor.
- Compare the City's costs of outside legal counsel during the five-year Audit Period to those of comparable cities.
- Look at the record of City Attorney engagement of outside counsel during the Audit Period for any indication of impropriety or malfeasance.

The Council directed us to appear in person to provide a status update within 60 days of the March 1, 2016 meeting. Accordingly, on April 26, 2016, we appeared before the City Council to provide the requested update with regard to the above three issues. At that meeting, we reported what we had learned based on a limited set of documentation that was provided to us by the City. We further explained the level of effort that would be required should the Council desire an expanded investigation to comprehensively answer all of its questions. In response to our report, the Council was not inclined to direct us to expand our enquiry. Rather, the Council directed us to consult as necessary with the City's Internal Audit Manager, Cheryl Johannes, and to seek direction from Mayor Pro Tem Soubirous as to our specific next tasks, all with an eye towards preparing a final written report based on the information we had learned to date.

Subsequent to the April 26, 2016 Council meeting, we had a series of telephone conversations and email communications with both Ms. Johannes and Mayor Pro Tem Soubirous. As a result of those communications, Mayor Pro Tem Soubirous instructed us to hold off on any further work until he had had a chance to meet with the City Manager and Ms. Johannes.

On June, 24, 2016, Mayor Pro Tem Soubirous contacted us via email (Exhibit B) and specified that the scope of our investigation should answer the following five questions:

1. Was the Riverside City Charter violated (related to the investigation of the former City Attorney's use of outside attorneys)?
2. Did [the former City Attorney] follow standard practice for municipalities for letting of contracts?
3. Were there any controls that were supposed to be followed [by the former City Attorney in the engagement of outside legal counsel]?
4. Were contracts [with outside legal counsel] created orally?
5. If so, did this violate CA law related to municipal contracts?

We then had a telephone conversation with Mayor Pro Tem Soubirous on June 28, 2016 to clarify his email. In that call, he told us not to engage in further fact finding or in any way expand the scope of our investigation. Rather, he directed that we provide answers to the above five questions based on what we had learned to date.

In accordance with Mayor Pro Tem Soubirous' direction, we proceeded to analyze his five questions based on the information we had learned to date. We did not specifically address the Council's three original areas of enquiry, although those issues were not inconsistent with Mayor Pro Tem Soubirous' five questions. The exception is the second of the original three issues, concerning a comparison of the City's legal costs during the Audit Period with those of comparable cities. We do not address that issue in this Report but limit our discussion to Mayor Pro Tem Soubirous' five questions.¹

III. METHODOLOGY AND CONDUCT OF INVESTIGATION

It is important to note at the outset that our findings are based on an incomplete record. There are many records we requested that we did not receive. Our investigation was conducted mostly through the review of written documentation, although we had numerous conversations with paralegals/legal assistants in the City Attorney department assigned by the City Attorney to assist with producing documentation that we requested. Our investigation was impacted by the retirement of the first paralegal assigned to assist us and the assignment of a replacement. Our investigation was further hampered by staff's seeming inability to locate some records that we requested. Despite these difficulties, we would like to stress that in all instances the City Attorney staff behaved professionally and made best efforts to help us despite what appeared to be some obvious limitations on their ability to answer all of our questions.

¹ Comparing the cost of outside legal counsel during the five-year Audit Period to those of comparable cities would have been a difficult if not impossible task. Not only are all cities unique, but legal challenges ebb and flow and a comparison of a single, five-year period would not be likely to provide useful information to the Council.

We also had a number of conversations with Ms. Johannes, the City's Internal Audit Manager, regarding the Performance Audit which she drafted. Finally, we were contacted by a number of members of the Riverside community by email suggesting that we review records and interview witnesses concerning the former City Attorney's conduct. As our investigation was focused on the engagement of outside counsel, not on the substantive work performed by the City Attorney's office, we did not investigate such matters.

So that the Council understands some of the limitations under which we conducted our investigation, we outline below the types of records we requested, and the responses (or lack thereof) we received from the City.

- On March 1 and April 26, 2016, we attended City Council meetings to receive guidance as to how our investigation should proceed. Specifically, there was discussion at both of those meetings as to whether we were entitled to attorney-client privileged information. To date, in response to our requests, the City has not provided any documentation subject to the attorney-client privilege. Consistent with our impression at the Council meetings, we understood our task to be to draft this report based on the non-privileged information received.
- We wanted to see all the records on which the internal auditor based her Performance Audit. On March 2, 2016, Ms. Johannes electronically sent us approximately 1,758 pages of records.
- We wanted to review information in addition to that sent to us by Ms. Johannes. We asked the following initial questions and requested the following information from the City Attorney's office:
 - (1) Whether the City ever issued a request for proposals (RFP) for legal services.
 - (2) If the City had, we requested copies of RFPs as well as any Council meeting agenda where the RFP was discussed or contracts awarded.
 - (3) Copies of Council meeting agendas with closed sessions regarding litigation and any minutes in which an action was reported out after such a closed session.
 - (4) Because the Performance Audit only tracked total amount spent on outside counsel by firm and year, we requested a list of each matter assigned to each law firm in each year during the Audit Period.
 - (5) Engagement letters for each specific matter.
 - (6) Any correspondence between the City Attorney's office and an outside firm regarding budgets of specific matters, including any preliminary or updated budgets submitted by the outside firm, case summaries or reports filed with the insurance carrier, copies of the complaint or claim for litigation matters, and copies of any contracts for transactional matters.
 - (7) Any reports to insurance carriers related to each matter, including the initial tender.
 - (8) Total amount paid to the law firm for each matter.
 - (9) Any motion filed by the City for the recovery of attorneys' fees—such a motion would likely include details of hourly rates and amount of time spent on a particular matter.

In response to these requests, we received the following responses from the City Attorney staff assigned to assist us:

- (1) There were no records of the City ever having issued a RFP for legal services.
- (2) In line with (1), there were no records of any Council meeting agenda where a RFP was discussed or contracts awarded.
- (3) We received and reviewed copies of Council meeting agendas with closed sessions regarding litigation and any minutes in which an action was reported out after a closed session.
- (4) In response to our request for a list of each matter assigned to each law firm in each year during the relevant time period, we were provided with ten spreadsheets representing data from the City Law program of municipal and litigation transactions from 2009 through 2014. The spreadsheets included the following limited information: outside counsel firm name, file name, file number, the attorneys' initials, some notes of the matter, and the City Department. This information was useful, but ultimately inadequate to track the financial trail necessary to answer the questions presented us.² We were told that researching and producing this information would be a labor intensive matter, and we never received the information. We later received a binder containing 710 pages of information about the use of outside counsel—much of which went back long before the Audit Period.³ This additional binder did not provide the information we were looking for in order to match a particular matter to a particular law firm. Moreover, we received this binder after Mayor Pro Tem Soubirous' direction to refrain from conducting further fact-finding.
- (5) We were provided with some engagement letters with outside law firms. As discussed below, we never received a complete set of engagement letters for all firms that billed the City during the Audit Period.
- (6) We were not provided any correspondence between the City Attorney's office and the outside firms regarding budgets of specific matters, including any preliminary or updated budgets submitted by the outside firms, case summaries or reports filed with the insurance carrier, copies of the complaint or claim for litigation matters, or copies of any contracts for transactional matters. We received no explanation for the lack of response to our question, although we assume that much of the information is privileged.
- (7) We were not provided any reports to insurance carriers related to any matter. We do not know whether such documentation exists.
- (8) We were told that the City does not pay legal invoices through a central database and, instead, invoices are paid by the City Attorney's office, the third party claims

² Not only did these spreadsheets not include all matters during the Audit Period, we were told that the City Attorney's "City Law" program could not automatically be cross-referenced with the Finance Department's database of payments made to outside counsel.

³ The binder included information that predates the Audit Period. But it did include a list of firms on panels, engagement letters for specific matters that predate the Audit Period, and a set of Litigation Guidelines that presumably were provided to outside counsel. This binder, if kept up to date, would have been very useful in understanding how the City Attorney engaged outside counsel.

administrator, or by a different City Department. No central database exists for all legal invoices which could produce a comprehensive list of invoices for each matter during the Audit Period. We therefore had to rely on the pay details included in the Performance Audit for financial information. As discussed below, those pay details provide no detail regarding specific hourly rates applicable to specific invoices.

- (9) We were not provided copies of any motion filed by the City for recovery of attorneys' fees.

Following up on the initial document requests described above, we repeated our initial request, and/or asked for copies of additional records from the City Attorney staff, including the following:

- (1) Engagement letters for 23 specific firms for which we had found records of payment or other documentation.
- (2) Any documentation concerning increases of legal fees for each firm.
- (3) Any correspondence with the outside firms regarding budgets for specific matters, including any preliminary or updated budgets submitted by the outside firms, case summaries or reports filed with the insurance carrier, copies of the complaint or claim for litigation matters, and copies of any contracts for transactional matters.
- (4) Any reports to insurance carriers related to the matters, including the initial tender of the matters.
- (5) Any motion for recovery of attorneys' fees related to the matters.
- (6) Explanation for the use of the term "RFP" on specified invoices.

We received the following responses to this second round of requests:

- (1) We received additional engagement letters from a number of firms, but as discussed below, we never received engagement letters for all law firms that the City engaged.
- (2) We received some limited documentation concerning increases of legal fees for each firm.
- (3) We never received copies of any correspondence with any outside firm regarding budget for a specific matter, including any preliminary or updated budgets submitted by the outside firm, case summaries or reports filed with the insurance carrier, copies of the complaint or claim for litigation matters, or copies of any contracts for transactional matters.
- (4) We never received any reports to insurance carriers related to any matter, including the initial tender of the matter.
- (5) We never received any copies of any motion for recovery of attorneys' fees related to any matter.
- (6) We had been puzzled by the use of the abbreviation "RFP" on specified invoices and wondered if that meant the City had issued a Request for Proposals. We were informed that RFP stood for "Request for Payment" and did not indicate any competitive solicitation process.

Overall, we received over 3,000 pages of documentary evidence. Not all information provided to us was during the relevant time period, some information was redacted, and, largely, the

information was unorganized. A considerable effort was required to load this data into our document review system, in order to organize and analyze each document. After our April 26, 2016 appearance before the City Council, we were directed not to pursue further fact-finding. We therefore did not pursue our communications with the City Attorney staff after that date and did not press staff to provide us with records we had not received. We believe we had enough information on which to base the findings described in this Report. The following analysis and findings are based upon this documentation.

IV. ANALYSIS AND FINDINGS

1. We find no evidence that the former City Attorney violated the City Charter.

Based on our conversations with the Council and with Mayor Pro Tem Soubirous, we interpret the issue to be whether the City Attorney's engagement of outside legal counsel without advance permission by the Council violated the City Charter.

Section 702 of the City Charter describes the powers and duties of the City Attorney. Under Section 702, subparagraph (a), the City Attorney has the power to "represent and advise the City Council and all City officers in all matters of law pertaining to their offices."

Section 702, subparagraph (f) states that "[t]he City Council shall have control of all legal business and proceedings and may employ other attorneys to take charge of any litigation or matter or to assist the City Attorney therein."

There are a number of reasons why it would not be inconsistent with Section 702 for the City Attorney to engage outside counsel on his own initiative, without approval by the Council, including the following:

First, subparagraph (a) is a broad grant of power that does not include any specific limitations regarding how legal matters are handled and how the Council is advised. In the absence of any specific prohibition, we think that the City Attorney likely has the implied authority to engage outside counsel within his discretion.

Second, subparagraph (f) uses the permissive term "may" when describing the authority to employ other attorneys, in contrast to the mandatory term "shall" used earlier in the same sentence. A logical reading of the sentence, therefore, is that the City Council's authority is not exclusive, but that the City Attorney may also engage outside legal counsel.

Third, the City Council has periodically approved a panel list of outside law firms. The only specific approval we could locate during the Audit Period was on September 10, 2013. (Exhibit C, "2013 Panel.")⁴ This historic pattern and practice of Council approval of a panel of outside law firms indicates express authority for the City Attorney to engage firms on the panel for

⁴ Our knowledge of the 2013 Panel derives from a staff report requesting an increase in hourly rates for specified firms. While the staff report describes a number of firms as being on a panel, no actual list of panel attorneys was attached to that staff report.

specific engagements without the need for Council approval of each specific engagement for each specific matter.

Moreover, at its meeting on October 26, 2004, the Council authorized the City Attorney to "add additional qualified law firms to the panel as necessary with subsequent reports back to the City Council on the addition of any such new panel members." (See staff report and minutes of meeting at Exhibit D.) Thus, even if Section 702, subparagraph (f) requires Council approval of the engagement of outside legal counsel, the Council provided such approval.

Finally, in addition to the express authority provided by way of the approval of a panel of attorneys, and the authorization to add to the panel without Council pre-approval, the Council may well have provided implicit authority for the engagement of additional attorneys, even if not on the Council-approved panel. We have reviewed all Council agendas during the Audit Period that included a closed session item. During that time frame, the Council was briefed in closed session by legal counsel on 223 named cases (there are many additional closed sessions that do not name the specific case name, consistent with Brown Act procedures). While we are not privy to any privileged information regarding those closed sessions, it is a reasonable inference that some of those briefings would have either included the participation by, or at least a reference to, the outside legal counsel handling a specific matter. As such, the Council may have at least known that the City was being represented by outside counsel, and indeed may have authorized, at least by acquiescence, such representation. The minutes of these meetings do not include any reports that the Council took formal action in closed session to engage outside counsel.

In sum, we do not read the City Charter to prohibit the City Attorney from engaging outside legal counsel without prior Council approval. And there is evidence that the Council did approve the hiring of outside counsel, though we do not know exactly which outside counsel received Council approval.

2. The former City Attorney followed many but not all Best Practices with regard to engaging outside legal counsel.

The Mayor Pro Tem requested our response to the specific question of whether the City Attorney followed "standard practices for municipalities." We do not think there is a single "standard" practice for the letting of municipal contracts. Moreover, to the extent that general law imposes specified procurement requirements, a charter city like Riverside has individualized power under the doctrine of Home Rule. (See Johnson v Bradley (1992) 4 Cal 4th 389.) Finally, because of the nature of legal services and the uniquely fact-specific and time sensitive circumstances that often lead to the need for an attorney, it is not uncommon for legal counsel to be selected without adherence to the procurement procedures that might ordinarily apply to the letting of other municipal contracts. It is therefore difficult to identify standard practices for municipalities in the hiring of outside legal counsel.

That outside legal services are not necessarily solicited by way of a standard set of practices or procedures makes sense. A city hires its city attorney to manage its legal affairs. Given the complexities of municipal law, a city attorney must perform as a generalist who should have the ability to understand when to look to outside counsel for special expertise. It is not practical for a city, even those larger than Riverside, to have an in-house all-purpose law firm that can

handle all matters. Because each legal matter is unique, an essential part of a city attorney's job is matching the right attorney with the right matter—all in a timely manner.

While we are unaware of any "standard" practices that all city attorneys follow, there are some key general principles that rise to the level of "best practices" with regard to the engagement of outside counsel. Consistent with our conversations with Mayor Pro Tem Soubirous, we therefore will attempt to answer the question regarding "standard" practices with a discussion of "best practices." Following are some "best practices" that are particularly relevant to our investigation of the City's engagement of outside counsel during the Audit Period.

- The city attorney should have a strategy in place as to what type of work it will handle in-house and what type of work will be delegated to outside law firms. Of course, there may be exceptions to this general strategy.
- The number of outside law firms used should be small enough for the city attorney to manage relationships with the individual attorneys and to understand their strengths and weaknesses, but large enough that no individual outside law firm believes it will automatically be handed a particular matter. This will preserve a measure of competition among firms that hopefully will result in the city receiving competitive rates.
- Because the city attorney is ultimately accountable for the city's legal work, the city attorney is in the best position to engage outside legal counsel. Reliance on the city attorney's judgment and discretion in engaging outside counsel is an appropriate allocation of responsibility by a city council.
- Outside counsel should be engaged with clear expectations set forth in a written agreement. These expectations should include, at a minimum, the applicable hourly rate as well as identification of the individual lawyer responsible for handling the matter. Setting budgetary expectations at the outset is also a good idea, though not always possible or entirely accurate. Managing that budget is also critical, but beyond the scope of this Report.

Given the limited scope of our investigation, we can not opine with certainty whether the City Attorney followed these best practices during the Audit Period. We found no conclusive evidence that the City Attorney did not follow these best practices, and much evidence that he did. However, we are also unable to conclude with certainty whether the City Attorney followed all best practices throughout the entire Audit Period. With regard to Mayor Pro Tem Soubirous' five questions in relation to these identified best practices, we offer the following observations:

- The City Attorney appears to have considered what kind of work could be handled in-house and when to seek outside counsel. In his September 10, 2013 report to the Council (Exhibit C), the City Attorney indicated that his office "has worked to handle litigation in house. . . . Over the past five years, approximately 78% of all tort litigation filed against the City of Riverside is handled by the City Attorney's Office." This indicates that the City Attorney was tracking the balance of in-house and outside legal work and was reasonably concerned with whether the staffing levels of his office were appropriate for the volume of legal work.

- The City Attorney developed at least four panels during the Audit Period—for public liability litigators, for employment and labor relation law firms, for workers' compensation law firms, and for general municipal law firms.⁵ The establishment of subject matter specific law firm panels is consistent with the best practice for a strategic approach to the engagement of outside counsel. As discussed elsewhere in this Report, we can not say with certainty that all outside counsel were selected from the list of panel attorneys. But it may well be that certain engagements could have called for special expertise not reflected in the panel lists.
- That the City Attorney was singularly responsible for the engagement of outside counsel does not strike us as inconsistent with his obligations under the Charter, and is consistent with the best practices for a city council to rely on the judgment and discretion of its city attorney.
- The number of law firms on the panels does not strike us as unusually large or small. We would not second guess the City Attorney regarding the size of the panels, or the particular strengths and weaknesses of any particular firm(s). Based on the data contained in the Performance Audit, it appears that the work provided by outside counsel was spread over at least 15 law firms, which number may be greater as the Performance Audit only tracked payments that exceeded \$100,000 during the Audit Period.
- Based on our review of the Performance Audit, it does not appear that a disproportionate number of matters was assigned to a single firm. When measured by the amount of dollars paid, Best Best & Krieger (BBK) provided the most outside legal services during the Audit Period, accounting for approximately 21% of the total paid to outside firms during the Audit Period (amounting to \$4.1 million out of a total of \$19.4 million). While this is a sizable portion of the City's legal work, we can not say it is an unreasonably large percentage, given BBK's breadth and depth of expertise in municipal law and primary location in Southern California.
- One of the purposes of establishing a panel of law firms is to diversify the allocation of work, which allows for competition among firms and results in some benefit to the City. Certainly, as indicated by the rates listed on the panel adopted in 2013 (Exhibit C), rates received by the City are competitive. Because, as discussed below, we do not have engagement letters for some law firms, we are unable to state what the rates were for a number of law firms. We discuss below additional findings with regard to specific law firms' rates.
- We agree with the Performance Audit's conclusion that the record of written engagements on a matter-specific basis is incomplete, inadequate, or both. We identified 41 outside law firms that billed the City for legal services during the Audit Period. Of those 41 firms, we located written engagement letters for only 27 law firms. From this, one could assume that there are no engagement letters, or other written record memorializing outside counsels' work, for at least 14 law firms. Yet one could

⁵ We also found evidence of additional panels in place between 1999-2007 for Americans with Disabilities Act (ADA), Bankruptcy, Agency, and Eminent Domain. A sample of the panels is collected in Exhibit E.

also assume that engagement letters or other records memorializing outside counsels' work do exist, but that those records were not provided to us for a variety of reasons. For example, staff may not have been able to locate the records because they were misfiled or lost. Overall, it is impossible to state, based on the records provided to us, whether the City Attorney memorialized each engagement for each matter in a written agreement that specified applicable hourly rates. Importantly, to be clear, we also can not state with certainty that such records do not exist. A primary reason why these engagement letters would have been important to our investigation is that they would have provided applicable hourly rates that we could then check against invoices to make sure that the City was being properly charged. As discussed in this report, we also lack invoicing from most law firms and have records only of the City's monthly lump sum payments. Even had we located engagement letters, their utility in understanding how the City paid its outside counsel would have been limited.

For those engagement letters we did review, it was difficult to match the engagement letter to the payments made by the City in order to determine whether the specified rates provided in the engagement letters were actually billed to the City as reflected on a firm's invoice or the Finance Department's pay details. In addition, the documentation suggests that a specific firm may have handled multiple matters, making it even more difficult to match the Finance Department's pay detail records to the City Attorney's records of engaging a particular firm for a particular matter. Faced with the large amount of disparate data, and our inability to locate the hourly rates paid to outside counsel as it was often masked as a "total" rather than a specific rate, we picked three representative law firms to more carefully examine and ascertain whether more concrete conclusions could be drawn with regard to billing. Accordingly, we examined payments made during the Audit Period to BBK (totaling \$4,168,388), Arent Fox LLP (totaling \$1,227,666), and Lewis Brisbois Bisgaard & Smith LLP ("Lewis Brisbois," totaling \$712,365).

- The 2013 Panel lists BBK rates at \$250 per hour (Exhibit C). We located three separate engagement letters with BBK. (Exhibit F.) The first was for a specific matter regarding water rights on the Santa Ana River. The second was a "master" agreement for general legal services, with each specific matter to be assigned pursuant to an unspecified procedure. The last was a similar "master" agreement to replace a prior agreement between BBK and the City's Development Agency. All three agreements specified rates of \$225 per hour for all attorneys—less than the amount specified on the 2013 Panel list. While the Finance Department's pay details indicate multiple payments on multiple invoices each month, we were provided with only one invoice, dated September 13, 2013, for \$25,300.87. (Exhibit G.) The invoice is heavily redacted so we are unable to identify the work involved, but the rates specified are \$225 per hour.
- The 2013 Panel list does not include Arent Fox. However, we may not have received all applicable panel lists. And as discussed above, the City Attorney had the authority to add firms to the panel list, and so the lists we do have may not be comprehensive. The records provided to us include a single engagement letter dated November 22, 2011. (Exhibit

H.) That engagement letter specifies hourly rates of \$395 or less. We were provided with five invoices from Arent Fox, all of which are heavily redacted, but all of which bill the City at the \$395 per hour rate (or less). (Exhibit I.)

- The 2013 Panel list specifies Lewis Brisbois rates at \$165 per hour, increased from \$150 during the first few years of the Audit Period. (Exhibit C.) We were unable to locate any engagement letters with Lewis Brisbois. Nor were we provided any invoices submitted by the law firm. The Finance Department's pay details do not provide any information about the firm's applicable hourly rates, only indicating the monthly totals. (Exhibit J.) Without access to the firm's detailed invoices, we cannot say whether Lewis Brisbois charged the City the same \$165 rate as specified in the 2013 Panel List.

Our review of the above three sample law firms is instructive in several respects. First, it does not appear that the panel lists were kept up to date or, alternatively, that we were not provided with all iterations of the panel lists during the Audit Period. Arent Fox is not the only firm engaged by the City that did not appear on a panel list presented to the Council. We identified a total of 31 law firms that the City made payment to during the Audit Period that do not appear on any panel list we could locate.⁶ As discussed elsewhere, the City Attorney had the express authority to add firms to the panel list, so this issue would appear at most to implicate follow-up reporting to the Council and not implicate questions of the City Attorney's authority. As discussed above, pursuant to the authority granted in 2004 (Exhibit D), the City Attorney could add firms to panels, but was supposed to notify the Council of such updates. We did not find evidence of such periodic reporting.

Second, it appears that the City Attorney engaged firms either by way of a single matter-specific engagement letter (e.g., Arent Fox) or by way of a "master" agreement that contemplated multiple assignments (e.g., BBK). In our view, best practices allow for the use of such a master agreement, but would call for the extra step of memorializing each specific assignment, including which attorney will handle the matter and at what estimated budget. We were not provided with any records memorializing such specific assignments with BBK. We also do not know why we could not locate an engagement letter with Lewis Brisbois, or any of the other firms for which no engagement letter was provided.

However, the lack of records does not lead us to conclude that the City overpaid its outside counsel. As indicated above, both BBK and Arent Fox billed the City the amount specified in the engagement letter. In the case of BBK, the hourly rate was less than that specified on the Council-approved panel list. Of course, without access to detailed invoices from each law firm, we are unable to definitively conclude that the City paid law

⁶ This number may be an overstatement. We have only reviewed copies of the Public Liability Litigation and Employment and Labor Relations panels, but we have seen references in other documentation to additional panels that we have located in a form that would have been current during the Audit Period.

firms at rates consistent with the initial engagement.⁷ All the firms we studied charged the City rates we would characterize as extremely competitive.

3. The City Attorney was not constrained in the engagement of outside counsel by City Procurement Policies and Procedures.

The controls that applied to the City Attorney's engagement of outside legal counsel during the Audit Period are those set forth in City policies and procedures described in the City's Administrative Manual and in the Council-adopted Resolution 22576, the "Procurement Resolution." These policies and procedures are identified in the Performance Audit, which expressed concern with the potential failure of the City Attorney to follow these policies and procedures during the Audit Period. Taken as a whole, we do not think that the City had in place during the Audit Period a clearly defined policy or policies that applied to the City Attorney in engaging the outside legal counsel he deemed in the City's best interests. We do not think this lack of policies necessarily constitutes a bad practice. With one possible exception, we have not identified a single policy or procedure that the City Attorney was supposed to, but did not follow during the Audit Period. Following are the potentially applicable policies (collectively included in Exhibit K):⁸

- Policy 02.004.00 governs the procedures for procuring professional services in excess of \$50,000. But Policy 02.004.00 explicitly does not apply to the procurement of outside legal counsel.
- Policy 02.005.00 governs the procedures for procuring professional services less than \$50,000. But Policy 02.005.00 also explicitly does not apply to the procurement of outside legal counsel.
- Policy 07.006.00 explains the "use of request for payment procedures." It describes procedures necessary for the Finance Department to process payments and does not apply to the engagement of outside counsel by the City Attorney. Hence, it does not apply to the focus of our investigation.
- Policy 07.014.00 provides "guidance for processing negotiated contracts and agreements except real property leases, easements and deeds." It describes the procedure for preparation and finalization of an agreement that has been negotiated—i.e., not resulting from a competitive process. On its face, it would seem to apply to the engagement of outside legal counsel. However, there are a number of reasons why the flow chart through various departments described in this Policy does not really pertain to contracts for outside legal services. For example, it describes the City Attorney as one step in the approval/requisition process. But if the City Attorney is engaging a law firm, the City Attorney is the only step—described as the "Originating Department."

⁷ We would imagine that law firms would retain copies of such invoices (as well as engagement letters) submitted to the City. If the Council were interested in obtaining such records, and if the City indeed can not locate them, reaching out to the outside counsel for copies would likely be productive.

⁸ These policies were revised during the Audit Period. Exhibit K includes the later versions.

Moreover, the process is in large part designed to coordinate the "Originating Department" with the Finance Department to ensure that the contract is included in the approved budget—which would not necessarily be the case with the engagement of outside counsel. However, it may be that the City Council expected its City Attorney to follow this procedure. We found no indication that the City Attorney followed Policy 07.014.00 during the Audit Period. This Policy is the single example of a procedure in the Administrative Manual that may have been applicable, but which was not followed by the City Attorney during the Audit Period.

- Policy 07.015.00 establishes "procedures for the acquisition of supplies, materials, equipment and contractual services through the competitive bidding process." We read this Policy as describing the procedures to be followed when a competitive bidding process is used. It does not compel the use of such a competitive process. If Policy 07.015.00 compelled the use of the established procedures for all procurements, then none of the other policies discussed in this Report would be applicable.
- Resolution No 22576 was adopted by the Council on September 10, 2013, and is the latest version of what is referred to in the Administrative Manual as the "Purchasing Resolution." Article Two of the Purchasing Resolution declares that it is "the policy and requirement of the City that Procurement of Goods, Services and Construction by the City shall, whenever practicable and advantageous to the City, be based on Competitive Procurement, whether by Formal Procurement if required, or Open Market Procurement if permitted, except as otherwise provided in this Resolution or the City Charter." This does not mandate competitive procurement for legal services.
- Article Eleven of the Purchasing Resolution is titled "Professional Consultant Selection Procedures." It states that "[w]hen an Originating Department is obtaining proposals from consultants in response to a Request for Proposals process, a minimum of three (3) qualified consultants must be contacted in writing and invited to submit a proposal." As with Policy 07.015.00, this language does not require a RFP process, but only requires specified procedures to elicit three proposals if such a RFP process is being used.
- Overall, the Purchasing Resolution does not mandate when a RFP process is required, only that if such a process is used, the specified procedures should be followed. The Purchasing Resolution describes no other procedures applicable to the engagement of outside legal services.

In light of the above procedures, we think that the City did not, during the Audit Period, have in place any specific protocols or procedures that applied to the engagement of outside legal counsel. To the contrary, the Council historically approved a panel of outside law firms from which the City Attorney could choose to handle specific engagements, and even authorized the City Attorney to add firms to the panel without prior Council approval. Such a panel of outside attorneys is not inconsistent with the City's policies in place during the Audit Period. As discussed in this Report, it is difficult for us to determine whether outside counsel were selected from the panel lists. But, especially given the authority provided the City Attorney discussed above, that does not mean that those firms were engaged in contravention of City policies or procedures.

4. We can not conclude whether contracts with outside legal counsel were created orally.

As discussed above, we identified 41 outside law firms that billed the City for legal services during the Audit Period. Of those 41 firms, we located written engagement letters for 27 law firms. In many cases, we were unable to identify the specific matters for which the 27 law firms were engaged. This means it is possible that one of the 27 law firms with an engagement letter billed the City during the Audit Period for services not described in that engagement letter, making it possible that no written contract existed for that specific scope of work.

While we have not located written engagement letters with 14 law firms, that does not necessarily mean that these 14 firms entered into oral contracts with the City. It is possible that the City Attorney's office misplaced or discarded written engagement letters which had originally existed. There may be other reasons why we were not provided specific engagement letters in response to our request for such documentation. It is also possible that a written contract exists based on something short of a formal engagement letter; even an exchange of emails or other written communications between the City Attorney and a law firm regarding a specific matter could constitute a legally binding written agreement. Because we were only provided a limited set of documents to review, it is impossible for us to conclude that the absence of engagement letters with outside legal counsel means that such contracts must have been created orally and never reduced to writing.

5. Even if oral contracts were created, we can not conclude that California law was violated.

Assuming that contracts with outside legal counsel were created orally (as indicated above, we do not make that assumption), we have been asked to provide a legal analysis as to whether such oral contracting would violate California law. This is not a simple question, but requires a detailed analysis of the City Charter, as well as applicable caselaw, filtered through the doctrine of Home Rule.⁹

The first step in the analysis is to assess whether the City Charter itself prohibits the making of oral contracts. There is no such explicit prohibition. However, City Charter Section 702, subparagraph (d) requires that the City Attorney "[a]pprove the form of all contracts made by . . . the City, endorsing the City Attorney's approval thereon in writing." On the one hand, there is no reason why a specific element of the City Attorney's duties—approving the form of contracts—necessarily should be converted into a broad limitation on the City Attorney's contracting power. In addition, the City Attorney could comply with Section 702, subparagraph (d)'s requirement by approving the form of a contract regardless of whether that contract was oral or written. Such an approval could be on any written document, even if the contract itself were made orally.

On the other hand, there is an argument that Section 702, subparagraph (d)'s requirement means that the City may only enter into written agreements, or else how could the City Attorney provide written approval as to form. In particular, the use of the word "thereon" in Section 702,

⁹ The analysis in this section is meant to be read in the context of our specific investigation. If the Council wants a formal legal opinion on this matter, it might coordinate with its City Attorney for the provision of such an opinion.

subparagraph (d) may indicate that City Attorney approval must be on the contract itself, thus implying that the contract must be written. If the Charter permitted the City Attorney to approve an oral contract on a separate writing, it would have stated that the City Attorney must provide approval "thereof in writing" instead of "thereon."

In the context of a general law city, there is one case holding that if a city ordinance requires the city attorney to approve contracts as to form in writing, that requirement implicitly requires that all contracts must be in writing and that oral contracts by a general law city are therefore void. (Mezzetta v. City of American Canyon (2000) 78 Cal.App.4th 1087 (Mezzetta).) In that case, the court considered facts completely different from those presented here. A contractor sought to enforce a verbal agreement with the City of American Canyon, a general law city, by which the city would provide a connection to a wastewater discharge system. (Id. at p. 1090.) The court held that an oral contract was not enforceable based on its interpretation of Government Code section 40602 as well as a city ordinance. (Id. at pp. 1093-94.) Government Code section 40602 states that all written contracts must be signed by the mayor. American Canyon Municipal Code section 2.20.030C required that the city attorney "approve the form of all contracts and agreements and bonds given to the city . . ."

The Mezzetta Court held that the statute and ordinance read together set forth the ways in which the city could enter into contracts, and that "any other methods of contract formation—even though not explicitly prohibited by the statutes—are invalid." (Id. at p. 1094.) The court specifically found that the ordinance obligating the city attorney to approve contracts as to form created the broader requirement that all contracts must be in writing. (Id. at p. 1093.)

Under the doctrine of Home Rule, general California law only applies to a charter city like Riverside if (a) there is a conflict between general law and the city charter, and (b) the issue is one of statewide concern such that the charter must give way to general law. (See, e.g., Johnson v Bradley (1992) 4 Cal 4th 389.) Because the City's Charter Section 702 appears not to conflict with general law on the issue of oral contracts, it may be that a court would find Mezzetta's holding applicable to the City. Without even relying on Mezzetta as binding precedent, a court might nevertheless find the logic of Mezzetta's reading of the City of American Canyon's ordinance persuasive in analyzing the City of Riverside's Charter.

There is some possibility, therefore, that a court might conclude that the Riverside City Charter prohibits oral contracts. This would be a matter of first impression for a court with regard to a charter city like Riverside. Even were we to conclude that the City Attorney formed oral contracts during the Audit Period, which conclusion we do not reach, we can not offer any guess as to the likelihood of whether a court would find such a manner of contracting to violate California law.

V. CONCLUSION

Based on our extensive review of a limited set of documents, we find no evidence that the former City Attorney violated the City Charter or any City policy or procedure during the Audit Period with regard to the procurement of outside legal counsel. The former City Attorney appears to have followed best practices in the engagement of outside legal counsel to the extent he maintained an appropriately sized panel of outside law firms in a variety of areas of

legal specialty. While the record is incomplete, we think it more likely than not that best practices were not followed in the documentation of the engagement of outside counsel, and in particular in the memorializing of hourly rates applicable to work by outside counsel on every specific matter. But that finding does not lead to the conclusion that the City overpaid for legal services during the Audit Period.

Respectfully submitted,



Steven D. Miller

- Table of Exhibits
- Exhibits A through K