

MEMORANDUM

TO: Central Florida Expressway Authority Board
Laura Kelley, Executive Director

FROM:  Joseph L. Passiatore, General Counsel

DATE: October 1, 2015

SUBJECT: Cost Saving Analysis for Right of Way Legal Services

The attached August 28, 2015 memo from right of way counsel, Shutts & Bowen LLP, sets forth a request and justification for additional funding of \$6.5M in order to complete the firm's condemnation work on the Wekiva Parkway.

This memo was presented to the Right of Way Committee on September 23rd and the Committee unanimously passed a motion to recommend a one year contract renewal and additional funding of six million dollars (\$6,000,000.00).

The amount of the funding request combined with the fact that right of way counsel ultimately reports to the Board, warrants a discussion by the Board relative to the future use of outside counsel for the acquisition of right of way for CFX projects.

CONTRACT STATUS

In addition to the Shutts & Bowen contract, there are other expiring legal services contracts and additional funding decisions which need to be made by the Board.

In particular, the following events have or are about to occur:

- 1) As noted above, the funding for the contract with **Shutts & Bowen LLP** has been depleted. This firm is handling Sections 203, 204, 205 and 206 of the Wekiva project as well as the closings with Farmland Reserve, Suburban Land Reserve and All Aboard Florida for S.R. 528 right of way. The current contract amount is \$5,035,000.

As of July 13, 2015 the amount of expert's fees and costs incurred and booked against the contract was \$2,222,830.30. The total legal fees and costs incurred by Shutts & Bowen is \$2,714,988.90. Together these amounts total \$4,937,819.20 and left a balance of only \$97,180.80 in relation to the not-to-exceed contract amount.

- 2) The current third one year renewal of the **Winderweedle, Haines, Ward & Woodman, P.A. ("WHWW")** contract will expire on October 30, 2015. This firm was originally retained in August 2007 and is primarily handling 29 parcels in Sections 201, 202 and 204 of the Wekiva Parkway project, the Mattamy easement transfer to All Aboard Florida ("AAF") and surplus property transactions. There is currently \$342,627.99 remaining in contract balance.
- 3) The funding for the contract with **Lowndes, Drosdick, Doster, Kantor & Reed, P.A. ("LDDKR")** has been depleted. This firm is handling the four Project Orlando parcels at the Kelly Park interchange and vicinity. These parcels have been acquired by order of taking, but are set for one week valuation trial in late March 2016. The CFX appraisals total \$12,234,500 and the owner's appraisals will be furnished on October 15th. The property owner has already filed and lost one appeal over the taking of parcel 267. The total contract amount is \$450,000, but the current balance is only \$5,578.38.
- 4) **Mateer & Harbert** was hired to acquire the Carlsbad, Bal Bay and Neo parcels on S.R. 528 and the firm has successfully obtained purchase agreements on all three parcels. Closings with the owners and All Aboard Florida are currently being scheduled. The original contract amount was \$930,500.00, and as of August 31st there was a remaining balance of roughly \$850,000.

As our office has previously informed the Board, among the reasons these contracts need additional funding are the accelerated time frame of the TIFIA loan, the fact that the firms contract directly with the experts to preserve work product privilege, the unanticipated heavy workload generated by the multi-modal corridor and, at least in some Wekiva cases, overly litigious counsel for property owners.

As part of our office's effort to limit costs, we previously reassigned eight Wekiva Parkway Project parcels from the private firms and kept the S.R. 417/528 interchange parcel for in-house handling.

COST ANALYSIS

The question has been raised as to whether this work could be performed more efficiently and at a lower cost using in-house attorneys. For the most part, the current standard rate is \$250 an hour for partners and \$200 for associates. Obviously government lawyers are paid less on an hourly basis, but burden must be added to their hourly rate.

If the Board were inclined to absorb this function in-house in order to lessen reliance on outside counsel, I would recommend additional in house staffing of two senior attorneys

with litigation experience, one paralegal and one legal secretary. Staffing at a lesser level is an option, but it would be inadequate to absorb the lion's share of the 100 parcels currently in litigation. (67 for **Shutts**, 29 for **WHWW** and 4 for **LDDKR**.)

The market rate for senior government condemnation litigators is approximately \$95,000-\$140,000 commensurate with qualifications and experience. An experienced paralegal would be \$45,000 - \$60,000. A legal secretary would require another \$35,000 - \$45,000. Assuming the high end of these salaries, the total would be \$385,000. Further assuming a burden rate of 40%, the annual total is \$539,000.00.

Thus, based upon the assumption that the Wekiva parcels can be resolved in 3 years, the total in-house cost excluding expert fees and costs, is approximately \$1.6M over the three year period.

Evaluating this cost solely against the \$6M request, and again using the 3 year horizon, the cost of outside counsel, excluding expert fees at roughly 30%, totals \$1.4M per year or \$4.2M over the three year period.

Another basis of comparison would be to calculate a private attorney billing at a \$250 hourly rate multiplied times 2000 hours which equals \$500,000 per year. The same government attorney earning \$140,000 per year with burden of 40% would cost CFX \$196,000.00.

LOGISTICAL AND QUALITATIVE ANALYSIS

At this point, it must be noted that even with this additional staffing there would still be a need albeit reduced, for outside counsel involvement during a transition period. There are 18 trials with significant ranges in dollar value currently set for 2015 and 2016 including the Project Orlando cases. Changing trial counsel mid-stream most likely is not in CFX's best interests and the trial courts are not likely to grant continuances.

Moreover, even an expedited recruiting and hiring process would last through the end of November 2015 with the earliest start date being in January of next year. Office and equipment accommodations for the new personnel would need to be prioritized.

Lastly, in making an organizational change of this magnitude, the question arises as to CFX's need for future right of way acquisition services. Currently CFX is experiencing a heavy acquisition workload due to both the Wekiva Parkway and the S.R. 528 multi modal corridor.

The question is whether in 2-3 years the demand will be constant to justify the expanded in house legal staff. Discussion with the Engineering and Finance Departments concerning the need for right of way on projects in the Five Year Plan indicates that the S.R. 408 eastern extension will be the next project to generate significant right of way

acquisition. Assuming a 2-3 year time frame for development and approval of the PD&E would mean that there would be additional work at about the time the Wekiva Parkway parcels are finally completed.

OPTIONS

Ultimately how these legal services should be delivered is a quintessential policy decision for the Board and there are many different options available to it including the following:

- 1) Continue on with the status quo arrangement of utilizing the private firms with the existing in-house staff taking cases as workload allows;
- 2) Begin the full-fledged transition to an in-house acquisition and condemnation section in the legal department authorizing the General Counsel to immediately commence the hiring process for the four new positions as outlined above with the Finance and HR Departments making the necessary budget and manning table adjustments;
- 3) Authorize a phased transition by hiring just one condemnation lawyer and one paralegal to begin the process of reassigning cases in-house while still utilizing outside counsel on a more limited basis and revisiting the issue in February before the **Shutts'** contract expires.

REQUESTED ACTIONS

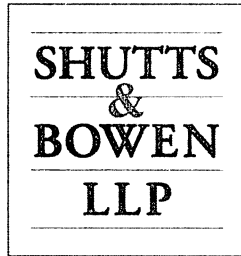
Whichever option the Board chooses, there is an immediate need to do the following:

- 1) Approve Supplemental Amendment No. 3 listed as Item 19 on the consent agenda to provide \$2M additional funding to the **Shutts'** contract for the duration of the current term until February 27, 2016;
- 2) Authorize extension of the **WHWW** contract currently set to expire on November 1, 2015 for a period of four months until February 27, 2016 with no additional funding added to the contract;
- 3) Authorize the preparation of Supplemental Amendment No. 4 to the **LDDKR** contract to be brought to the Right of Way Committee on October 28th and the Board on November 12th providing legal and expert cost funding sufficient to complete the Project Orlando parcels trial next year.

Chairman Cadwell will lead the discussion on this item and our office will be available to answer questions at the October 8th Board meeting.

JLP/ml

Attachment: Shutts & Bowen's August 28th memo



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MEMORANDUM

TO: Laura Kelley, Executive Director CLIENT-MATTER NO.: 19125
Joseph L. Passiatore, General Counsel

FROM: Kenneth W. Wright, Esq.
David A. Shontz, Esq.

DATE: August 28, 2015

RE: Request for Supplemental Agreement No. 2 to Shutts & Bowen LLP
General Right-of-Way Counsel Services - Contract No. 000930

As you are aware, on February 27, 2013, CFX (in its former structure as OOCEA) entered into a contract with Shutts & Bowen LLP for General Right-of-Way Counsel Services for a three-year period for a not-to-exceed amount of \$2,535,000 based on the hourly rates attached to the price proposal, with the possibility of two one-year renewals.

On or about November 19, 2014, CFX entered into supplemental agreement no. 1 with Shutts & Bowen increasing the not-to-exceed amount of the contract by \$2,500,000, to a total of \$5,035,000. As part of supplemental agreement no. 1, Shutts & Bowen voluntarily agreed to lower its hourly rates from those previously agreed to under the original price proposal.

Please keep in mind that included in the not-to-exceed amount are the all of the fees and costs of experts retained by Shutts & Bowen, on behalf of the CFX, directly related to the right-of-way acquisitions for the Wekiva Parkway parcels.

Additionally, the Shutts & Bowen invoices to date have also included nearly \$580,000 in fees and costs arising out legal services requested by CFX on the All Aboard Florida matter and the Innovation Way/Beachline Interchange project, neither of which was anticipated to be included in the General Right-of-Way Counsel Services at the time of the initial contract.

Below is a summary of the work completed and significant accomplishments since February 27, 2013:

- **89 parcels handled by Shutts & Bowen for Wekiva Parkway (429-203, 204, 205 and 206), consisting of 648 property interests as follows:**

- 423-203: 261 property interests acquired
- 429-204: 142 property interests acquired
- 429-205: 55 property interests acquired/set for OT to be acquired
- 429-206 190 property interests acquired/set for OT to be acquired
- 24 suits filed in Orange and Lake Counties, which also consists of the 67 separate Parcels currently in litigation as follows:
 - 11 parcels are currently set for trial through the end of 2016
 - 56 parcels are being litigated, but not yet set for trial
- Approximately 440 expert reports completed for the 89 parcels (first offer appraisal report, order of taking appraisal, date of value appraisal, engineering reports, land planning reports, business damage reports, etc.):
 - All expert reports are complete except approximately 20 updated appraisal reports through the date of value. Most, if not all expert fees going forward will be for litigation support and trial testimony.

Please find set forth below an outline of the typical work necessary post-order of taking through a jury trial conclusion, including post judgment work and expert fees for litigation support:

- I. **Discovery** (written discovery, depositions of fact witnesses and experts, rebuttal, review of documents after production)
- II. **Motions** (dispositive and non-dispositive, attend hearings, etc.)
- III. **Mediation** (Prepare for and attend)
- III. **Pre-Trial Conference** (Witness and exhibit lists, motions in limine)
- IV. **Trial Preparation**
- V. **Trial Attendance** (5-7 day trials, after hour witness and client conferences, research, jury instructions, trial order compliance)
- VI. **Experts** (Preparation, reports)
- VII. **Post Trial/Judgment** (Motions to tax fees and costs, apportionment hearings, etc.)

Over the next 60 days, we will be completing the remaining Order of Takings for the final parcels in 205 and 206 which will result in additional fees and costs being incurred. Additionally, although taking a case through trial including expert's fees and post judgment work could be as much as \$300,000, it is likely that we will be successful in resolving many of the

remaining 67 parcels presently being litigated without the need for a trial (though 11 parcels are currently set for trial through the end of 2016). In providing you with the requested range of legal and expert fees and costs going forward, we would estimate the minimum incurred for the remaining 67 parcels to be \$5,000,000; however, in the unlikely event that all of the cases in connection with the 67 parcels were to go to trial, these fees and costs could be as much as \$20,000,000.

As of July 13, 2015, the amount of legal fees and costs incurred by Shutts & Bowen is \$2,714,988.90. The amount of expert's fees and costs incurred and booked against the Shutts & Bowen contract for the same time period is \$2,222,830.30. Together they total \$4,937,819.20, leaving a balance of only \$97,180.80 in relation to the not-to-exceed contract amount.

Accordingly, Shutts & Bowen is requesting a supplemental agreement no. 2 to increase the not-to-exceed amount of the contract by another \$6,500,000.