



BOARD OF PORT COMMISSIONERS

SEPTEMBER 28, 2016

STANDARD AGENDA ITEM 2

APPROVAL OF PROFESSIONAL
SERVICES AGREEMENT FOR SPECIAL
LEGAL SERVICES

**VENTURA PORT DISTRICT
BOARD COMMUNICATION**

STANDARD AGENDA ITEM 2
Meeting Date: September 28, 2016

TO: Board of Port Commissioners
FROM: Brian Pendleton, Business Operations Manager
SUBJECT: Approval of Professional Services Agreement for Special Legal Services

RECOMMENDATION:

That the Board of Port Commissioners authorize funding in the amount of \$8,500 to retain outside legal services provided by *Plauché & Carr, LLP* to analyze and report on leasing alternatives related to the Shellfish Grant.

SUMMARY:

The Ventura Port District, in collaboration with the Ventura Shellfish Enterprise (VSE), was awarded a two year, approximately \$300,000 Sea Grant (\$265,000 funding directly to the District) to contract with qualified consultant(s) that will enable development of a permitting strategy and all necessary permitting components required for sustainably cultivated shellfish production to be landed at Ventura Harbor.

There has been significant progress made in Task 1 of the Shellfish Grant, which is the research and development of a permitting strategy as outlined above. However, it has become evident that the scope and funding allocated from the Sea Grant for Task 1 legal services is insufficient. Given that the State California Department of Fish and Wildlife (“CDFW”) has issued very few leases for offshore aquaculture over the past two decades (primarily renewals), there is a lack of clarity as to what leasing structures may be available to this District, or other government entities, and cooperatives such as the VSE.

BACKGROUND:

Plauché & Carr, LLP is a Seattle-based law firm with a practice focused on environmental, land use, and natural resource-based issues. *Plauché & Carr, LLP* has represented a number of non-profit, private, and governmental entities regarding environmental and regulatory matters ranging from regulatory compliance/permitting, to administrative litigation, to litigation in state and federal courts, to conservation land acquisition. On October 14, 2015 the District selected *Plauché & Carr, LLP* and Robert Smith as lead counsel to provide the Task 1 legal services for the Shellfish Grant.

For this additional task, Robert Smith will also serve as lead counsel. Mr. Smith is an attorney with ten years’ experience working in California on land use and environmental issues, on behalf of both private and public clients. During his previous employment at two Los Angeles-based firms, Robert advised and represented numerous clients regarding compliance with the California Environmental Quality Act (“CEQA”) and National Environmental Policy Act (“NEPA”) and represented several coastal cities and private clients before the California Coastal Commission (“CCC”), California Department of Fish and Wildlife (“CDFW”), Los Angeles County, and U.S. Army Corps of Engineers (“Corps”).

The Shellfish Grant contemplated the Ventura Port District, as a member of VSE would hold all entitlements for a group of offshore aquaculture leases that will in turn be subleased to individual producer-fishermen for shellfish farming. However State regulations are silent on subleasing, instead providing guidance only for assignments of lease. CDFW is reviewing these leasing requirements and evaluating options while seeking input from potential lessees. Mr. Smith will provide a report with an analysis of likely alternatives that CDFW may permit, and

important considerations of each alternative for the District. Mr. Smith will present the findings of his report to the Commission.

As a follow up task, Mr. Smith can assist the District in preparing draft lease documents and negotiating with CDFW. However, staff believes it is premature to authorize this work which is preliminarily estimated at \$10,000.

FISCAL IMPACT:

The additional legal services for *Plauché & Carr, LLP* are not to exceed \$8,500. The District has funds available for the professional services.

ATTACHMENT:

Attachment 1 – *Plauché & Carr, LLP* Letter of Engagement

PLAUCHÉ & CARR

LLP



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June 17, 2016

Ventura Port District
Attn: Oscar F. Peña, General Manager
1603 Anchors Way
Ventura, CA 93001

Re: Engagement of Plauché & Carr LLP Legal Services

Dear Mr. Peña:

We are pleased that you have selected Plauché & Carr LLP to represent you. We look forward to a valued relationship with you and successfully achieving your goals. This letter constitutes our agreement setting forth the terms of our representation.

Scope of Our Representation

Our client in this matter will solely be the Ventura Port District (“Client”). We do not represent and will not be deemed to have an attorney-client relationship with any of Client’s current or future parents, subsidiaries, shareholders, members, partners, employees, directors, joint venturers, or other affiliates or constituents solely on account of our representation of Client in this matter or any future matters.

Our services will include generally providing advice regarding potential transactional options for formation and operation of a shellfish enterprise project (“Project”), including but not limited to (1) preparing a memorandum describing potential leasing and/or subleasing options from the California Fish and Game Commission for the Client and/or other potential entities, and outlining potential project management and operational alternatives, including the potential advantages and risks associated with each option; (2) preparing a presentation on the memorandum and available options for the Board of Port Commissioners; (3) one in-person meeting with the Board of Port Commissioners to discuss available transactional and management options; and (4) discussing such options with Client’s staff and addressing staff revisions and questions prior to the in-person meeting. The objective of the representation is to advise the Client regarding the alternatives legally available to obtain control of the Project site, identify a variety of alternatives available to the Client concerning its role in management and operation of the Project, and identify the potential legal risks, resource demands, and potential benefits of each option.

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This letter will apply to such services, unless superseded by another written agreement. Our representation is limited to the specific services that you request and that we have agreed to undertake.

Roles of Attorney and Client

Our responsibilities under this agreement are to provide legal counsel and assistance to you in accordance with this letter, and to provide statements to you that clearly state the basis for our fees and charges. We will not disclose confidential information of yours to any other client, even where that information might have some bearing on their interests. Likewise, we will not disclose the confidences of any other client to you, even where that information might have some bearing on your interests, and you agree that we are under no obligation to do so. You also agree to keep us informed of developments related to this representation and to pay our statements in a timely manner, as further described below. To allow us to conduct a conflicts check, you represent that you have identified to us all persons and entities that are or may become involved in this matter, including all such persons or entities that are affiliated with you. You also agree to notify us if you become aware of any other persons or entities that are or may become involved in this matter. During the course of this engagement, we may express opinions or beliefs to you about the effectiveness of various courses of action or about the results that might be anticipated. Such statements are expressions of opinion only, and should not be construed as promises or guarantees.

Your Obligations about Fees and Billings

Client and Plauché & Carr LLP have agreed to a budget of Eight Thousand Five Hundred Dollars (\$8,500) for the scope of work described above, which will be inclusive of our attorneys' fees for services rendered and a maximum of \$1,000 in costs and expenses (for example, travel expenses, copying costs, etc.) incurred by us in performing such scope of work. For any travel related cost or expense greater than \$500.00, including, without limitation, travel expenses, lodging expenses, meal expenses, and per diem expenses, we agree to obtain your prior written consent before such cost or expense is incurred. Client shall be responsible for expenses in excess of the amount provided under the budget provided, however, we agree to obtain your prior written consent before such expense is incurred, which such consent shall be in your sole and absolute discretion. Plauché & Carr LLP provides its clients with monthly invoices for legal services performed and expenses incurred. Each monthly invoice reflects both professional and other fees for services rendered through the end of the prior month, as well as expenses incurred on the client's behalf that have been processed by the end of the prior month. Processing of some expenses may be delayed until the next month and billed thereafter. This matter will be billed at our public agency rate, established in the attached 2016 Billing Rates. Plauché & Carr LLP reserves the right to revise its Billing Rates; however, during the initial term of this Agreement, defined as the last date as this Agreement is signed through July, 2017, Robert Smith's Billing Rates will remain as provided in the 2016 Billing Rates. Monthly payments will be paid within 30 days of receipt of our monthly invoice, up to and not exceeding the amount of the budget.

New and unanticipated issues that require legal counsel may arise. We will continue to evaluate these issues as they arise and, if we anticipate that such issues will require efforts beyond the scope of this fee arrangement, we will discuss those with you separately, and we agree not to perform any work beyond the scope of such fee arrangement without your prior written approval.

We will continue to monitor the amount of time we expend on the matters covered pursuant to this agreement. If either Client or Plauché & Carr LLP requests a modification to this agreement based on a substantial change in the amount of work required, the other party will give good faith consideration to that request. While we will endeavor to keep you informed in an ongoing basis of the level of effort on these matters, you should always feel free to contact us with any questions or concerns in that regard. We believe that such open communication is a critical aspect of a successful attorney-client relationship.

From time-to-time clients have questions about the format of the bill or description of work performed. If you have any questions, please ask them when you receive the bill, so we may address them on a current basis.

Disputes and Arbitration

Should any dispute arise that cannot be resolved between us, whether in tort, contract or otherwise, arising out of or relating to the relationship between Client, its affiliates or successors (“Client Arbitration Parties”) and Plauché & Carr LLP, its attorneys or staff or any of their successors (the “Plauché & Carr Arbitration Parties”) we both agree to submit the dispute to binding arbitration. By agreeing to arbitrate, you are agreeing to waive your right to a jury trial. Any issue concerning the location of the arbitration, the extent to which any dispute is subject to arbitration, the applicability, interpretation, or enforceability of this agreement shall be resolved by the arbitrator; provided, however, notwithstanding anything contained in this Engagement Letter to the contrary, any and all issues or disputes between the parties shall be governed by California law and venue shall at all times be held in Ventura County. Arbitration shall be conducted pursuant to the California Arbitration Act, Cal. Code Civ. Proc. § 1280 *et seq.* All aspects of the arbitration shall be treated as confidential and neither the parties nor the arbitrator may disclose the content or results of the arbitration, except as necessary to comply with legal or regulatory requirements. The result of the arbitration shall be binding on the parties and the judgement of the arbitrator’s award may be entered in any court having jurisdiction.

Conflicts

The RPC defines whether a past or present relationship with any party prevents us from representing you. Without your consent, we will not represent any other party to the matter we undertake for you, nor any other matter substantially related to the same. As with any other client and any other matter, you will have our complete loyalty with respect to any such matter. However, it is possible that during the time we are representing you, some of our current or future clients may ask us to represent them in matters in which you are involved as another party. Both our own prudent business conduct, and the interests of our other clients, call for us to seek to retain the ability to take unrelated matters for all of our clients. We thus ask you in connection with this engagement to consent in advance to our acceptance of future matters (including litigation matters)

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adverse to Client, provided that those matters are not substantially related to the work that we have done for you. By entering into this agreement, you consent to such adverse representations. Thus, for example, you agree that we would be able to take a new lawsuit or transactional matter for one of our current or future clients, adverse to Client so long as the adverse matter is not substantially related to the work we have done for you. This consent also includes being adverse to you in any regulatory, administrative, legislative or rulemaking proceeding. We take very seriously our obligations to maintain the confidentiality of information we receive from all our clients, including Client and any other clients covered by this consent. Accordingly, we will continue to maintain the confidences of both Client and our other clients.

To also assure mutuality of trust, we maintain a conflict of interest index. Your name will be included in our list of clients to ensure we comply with the RPC with respect to your representation. Based on information you have provided us, we have checked the following names against our conflict of interest index: Ventura Port District, Ev Ashworth, Oscar F. Peña, Brian Pendleton, Jim Friedman, Greg Carson, Bruce Smith, Nikos Valance. Based on that check, we have not identified any conflicts and we can represent the client(s) referenced above. Please review the list to see if any other persons or entities should be included. If you do not tell us to the contrary, we will assume that this list is complete and accurate. We request that you update this list for us if you become aware of any changes in the future, including those caused by changes to the scope of our representation, as described herein.

Limitations on Liability

Plauché & Carr LLP is a limited liability partnership (LLP). Similar to the corporate form of business organization, the LLP form generally limits the liability of the individual partners of the firm to the capital they have invested in the firm for claims arising from services performed by the firm. Our form of organization as an LLP will not diminish the ability to recover damages from the firm or from any individuals who directly caused the loss.

New Matters

When we are engaged by a new client on a particular matter, we are often later asked to work on additional matters. Such new matters may be subject to a new, signed supplement to this agreement, but if no revised agreement is executed, the same terms apply for all future matters unless revised in writing. Similarly, unless specifically noted in this agreement, this agreement does not cover and is not a commitment by either of us to undertake any appeals or collection procedures. Any such future work would also have to be agreed upon in a signed supplement.

Electronic Communication

E-mail, Extranet and other forms of electronic communication are increasingly important business tools, and we make appropriate use of them in communication with our clients. However, there are risks associated with them. While we have no reason to believe that our own e-mail or other electronic communication systems are not secure, you should be aware that the information sent or stored electronically might be accessed by third parties. We may when appropriate, communicate with you by e-mail unless you ask us not to. Please note that e-mail can be subject to delays and nondelivery; you should confirm with us that we have received and read your e-mail

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communications. We have measures in place to protect against sending and receiving viruses, but we cannot guarantee that these will be completely effective.

Civility in Litigation

In litigation, courtesy is customarily honored with opposing counsel, such as extensions to file pleadings or responses to other deadlines, when such courtesies do not jeopardize a specific client interest, such as an external business deadline. In our experience, the reciprocal extension of such courtesies saves our clients' time and money. By signing this letter, you will be confirming your approval of this practice in your case.

Termination of this Agreement

Our relationship with you will be deemed concluded when we have completed our agreed-upon services which presumptively shall have occurred at any time when we have performed no work on your behalf for six consecutive months. You, of course, have the right to end our services at any time. If you do so, you will be responsible for the payment of fees and costs accrued but not yet paid, plus interest, and any reasonable fees and costs in transferring the case to you or your new counsel. By the same token, we reserve the right to terminate our services to you at any time consistent with the requirements of the Rules of Professional Conduct, upon written notice or order of the court. If we terminate our services to you, we will provide a limited amount of work to transition the matter to another attorney. Such termination could happen if you fail to pay our fees and costs as agreed, fail to cooperate with us in this matter, or if we determine we cannot continue to represent you for ethical or practical concerns. Your obligations for fees and charges accrued prior to termination shall survive termination of this engagement.

Client Files

In the course of your representation, we will maintain a file in which we may place correspondence, agreements, governmental filings, disclosures, pleadings, transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to your representation ("Client File"). The Client File shall be and remain your property. You agree that the documents containing our attorney work product, mental impressions or notes and drafts of documents shall be and remain our property and shall not be considered part of your Client File. In addition, electronic documents such as e-mail and documents prepared on our word processing system (but excluding printed copies thereof), and databases shall be and remain our property and shall not be considered part of your Client File. You agree that we may enact and implement reasonable retention policies for such electronic documents and that our firm has discretion to delete such documents. Upon completion of a specific project, your original Client File for that project shall be available to be taken by you. We will be entitled to make copies if we choose. If you do not take possession of the Client File at the conclusion of the project, we will retain your files for seven years. After seven years, we may have your files destroyed. If you would like your files maintained for more than seven years or returned, you must make separate arrangements with us.

Entire Agreement

You and we understand that this letter and the Standard Form Contract for Professional Services Agreement between the parties constitute the entire agreement pertaining to the engagement of Plauché & Carr LLP, and that it shall not be modified by any policies, procedures, guidelines or correspondence from you or your representative unless agreed to in writing by Plauché & Carr LLP; provided, however, in the event of any conflict between this letter and the Professional Services Agreement, Section 22 of the Professional Services Agreement shall control.

Establishing the Attorney-Client Relationship

We have agreed to begin work on this matter on your behalf. If this engagement letter meets with your approval, please sign and date one of the original letters and return it to us in the enclosed, self-addressed, stamped envelope. Please keep the other original for your records. Return of a signed letter gives us notice that you agree with these terms of our representation. If you do not return a signed engagement letter by July 5, 2016, we will assume that you do not wish to have us continue our legal representation of the above-referenced client(s) in this matter and our representation will end.

If you have any questions at any time about our services or billings, please do not hesitate to call us. We look forward to working with you.

Very truly yours,



Robert M. Smith

RMS:tt
Enclosures

AGREED AND ACCEPTED

Ventura Port District

By: _____

Dated: _____

Title: _____

ATTACHMENT 1

PLAUCHÉ & CARR LLP

2016 Hourly Billing Rates

	Public Agency (Aquaculture)
Samuel (“Billy”) W. Plauché	\$ 375.00
Peter Dykstra	\$ 300.00
Amanda M. Carr	\$ 275.00
Robert M. Smith	\$ 275.00
Jesse G. DeNike	\$ 215.00
J. Matthew Moore	\$ 215.00
Jessica F. Anderson	\$ 175.00
Paralegal	\$ 75.00 - \$ 100.00