




Staff Report

City of Manhattan Beach

TO: Honorable Mayor Montgomery and Members of the City Council

THROUGH:  David N. Carmany, City Manager

FROM: Clay J. Curtin, Management Analyst 

DATE: July 5, 2011

SUBJECT: Update from the Ad Hoc City Attorney Selection Subcommittee and Consideration of the Recommended Evaluation Process.

RECOMMENDATION:

Staff recommends that the City Council discuss and approve the selection process developed by the Ad Hoc City Attorney Selection Subcommittee.

FISCAL IMPLICATION:

There is no fiscal implication associated with the staff recommendation.

BACKGROUND:

At its May 17, 2011, meeting, the City Council appointed Councilmembers Howorth and Lesser to the Ad Hoc City Attorney Selection Subcommittee. The subcommittee was tasked with developing a Request for Proposals for City Attorney Services ("RFP") and a process for selecting a City Attorney.

The subcommittee held publicly noticed meetings to gather public input regarding the RFP on May 24, 2011, and May 31, 2011. It then worked with staff to revise the document based on input and comments made by subcommittee members and the public. Key points in the revised RFP include emphasizing the City priorities of legal compliance, open government, risk mitigation, and management of legal expenses. Based on direction received from the City Council at its City Attorney Study Session on May 2, 2011, the RFP was structured to encourage proposals from individuals or law firms who would be independent contractors and not City employees.

Following its approval by City Council on June 7, 2011, the RFP was distributed and publicly advertised for over three (3) weeks. The document was directly shared with approximately thirty (30) municipal law firms, listed online with the League of California Cities' Western City magazine, numerous online municipal associations, and advertised in *The Beach Reporter*. Proposals from prospective legal service providers were due July 1, 2011. A total of twelve (12) proposals were received. All proposals received in response to this request for proposals will be reviewed by the subcommittee for compliance with the specifications of the request for proposals.

DISCUSSION:

In approving the RFP on June 7, 2011, the City Council requested that the subcommittee return to the City Council to discuss how the proposals received in response to the RFP should be evaluated and to review how the selection process should be conducted. The tentative timeline for the process is included with this report (Attachment A).

Evaluation Process

The subcommittee held publicly noticed meetings on June 21, 2011, and June 28, 2011, to gather public input on how responses to the RFP should be evaluated. Based on those meetings the subcommittee proposes to conduct an initial “paper-screening” of the responses whereby all of the proposals received would be available for public review and comment. Any member of the public would be able to provide input and comments during a future subcommittee meeting, tentatively scheduled for July 14, 2011. Following public input, the subcommittee would make a report to the full City Council at its July 19, 2011, meeting in which it would include copies of all proposals received and recommend three to five attorneys or law firms it suggests should be interviewed by the full City Council. Individual councilmembers would have an opportunity to suggest any attorney or firm they believe should be added to the list for interviews.

Interviews

The interviews would be held in closed session July 20 – 28, 2011, by the full City Council, as allowed under the Brown Act, during which the attorneys and/or law firm representatives who are interviewed would be asked to formally present their proposals and respond to questions. The subcommittee will develop a list of suggested questions to serve as a starting point for initial discussion with all attorneys and/or law firm representatives. Time would be provided for individual councilmembers to ask further questions and conduct follow-up interviews with any candidate, as needed. Each councilmember would rank interviewees using a “forced choice chart” similar to the example included with this report (Attachment B).

Selection

At the conclusion of the interview process, the City Council would reconvene on August 2, 2011 to select the attorney or firm to be designated as the City Attorney. The selected attorney or firm would be invited to negotiate a retainer agreement, including scope of service, retention rates, etc. with staff. The final contract would be discussed and awarded at the next regularly scheduled City Council meeting on September 6, 2011.

Cost Control

The RFP was structured to encourage City Attorney proposals from individuals and/or law firms who would be independent contractors and not City employees based on the assumption the City would realize a cost savings. Simultaneous with reviewing RFP proposals, the subcommittee shall also work with staff in developing cost control measures to monitor legal expenditures and ensure this assumption is correct.

Legal Memorandum

In preparation for its June 28, 2011, meeting, the subcommittee requested legal clarification on certain issues pertaining to the City Attorney selection process based on questions raised by members of the public. A staff report addressing these concerns was prepared in consultation with

the law firm Liebert Cassidy Whitmore and is included with this report (Attachment C).

Attachments:

- A. Proposed Timeline for Selection of City Attorney Services
- B. Forced Choice Chart
- C. June 28, 2011, Staff Report to the Ad Hoc City Attorney Selection Subcommittee

Proposed Timeline for Selection of City Attorney Services

May 17, 2011	Formation of a subcommittee and discussion by City Council of priorities for inclusion into a revised request for proposal for City Attorney Services. Announcement of the application process for community members to join the subcommittee.
May 31, 2011	Community meeting to discuss the City Attorney position and receive public comment and input into the process. The subcommittee would work with staff to revise the request for proposal specifications, based on City Council priorities and public input, for the City Council's review and approval.
June 7, 2011	City Council review and approval of the revised request for proposal specifications and consideration of the appointment of community members to the subcommittee to assist with evaluation of the bids and development of recommendations to the full City Council.
June 8, 2011 to July 1, 2011	Request for Proposals for City Attorney Services publically advertised.
July 1, 2011	Bid proposals due.
July 7-14, 2011	Subcommittee review and evaluation of proposals (paper-screening).
July 19, 2011	Subcommittee recommendation of finalists to the full City Council.
July 20-28, 2011	City Council interviews of finalists .
August 2, 2011	Selection by the full City Council of the attorney or firm to be designated as the City Attorney. The designee would then be asked to negotiate a retainer agreement.
September 6, 2011	Discussion and Award of the final contract by the full City Council.

FORCED CHOICE CHART

1.	1.	1.	1.	1.	1.	1.	1.
	2.	2.	2.	2.	2.	2.	2.
		3.	3.	3.	3.	3.	3.
			4.	4.	4.	4.	4.
				5.	5.	5.	5.
					6.	6.	6.
						7.	7.
							8.

Directions for completing the chart:

1. After the first interview, write the name of the person in the top white left-hand corner box (labeled #1).
2. After the second interview, you will be “forced” to decide which person is your first choice and which person is your second choice. Write the name of your first choice in the second column, white box marked #1; write the name of your second choice in the second column, white box marked #2.
3. As each new person is interviewed, continue to re-rank the candidates and write names in the appropriate columns/boxes.
4. At the end of the interviews, you will have identified the top candidate for the position and the ranking for the others in priority order.

Signature: _____ Date: _____



Agenda Item #: _____

Staff Report

City of Manhattan Beach

TO: City Attorney Selection Ad-Hoc Subcommittee

THROUGH: David N. Carmany, City Manager

FROM: Vince Mastrosimone, Senior Management Analyst

DATE: June 28, 2011

SUBJECT: City Attorney Selection Process

BACKGROUND:

The City issued a request for proposal (“RFP”) to law firms who wish to serve as the City Attorney. We have been asked to provide answers to six specific questions. Each question and answer is set forth below.

DISCUSSION:

1. Does the Manhattan Beach Municipal Code, or any other law, prohibit the use of a contract City Attorney and/or contract City Prosecutor?

No. There is no provision in the Municipal Code that prohibits the City from using a contract City Attorney and/or a contract City Prosecutor. State law specifically provides that the city council in a general law city may appoint a city attorney. Government Code section 36505. The Municipal Code likewise provides for appointment of a City Attorney. The Municipal Code provides in Section 2.08.160:

The City Council may appoint a City Attorney who shall serve as legal counsel to the City and advise City officials in all legal matters pertaining to City business. The City Attorney shall not be a member of the classified service and shall report to and serve at the pleasure of the City Council. The City Attorney shall also serve as City Prosecutor.

The City Council may appoint either an individual to serve in that position full time as a City employee or may designate an individual lawyer or law firm to fulfill these duties on a contract basis. There is a wide practice among California cities of engaging attorneys from private law firms to serve as city attorneys. This is particularly true of smaller and medium-sized cities. The practice of cities contracting out to private firms for specialized legal services is very well-established. According to statistics collected by the League of California Cities, city councils directly appoint the city attorney in 464 of California’s 478 incorporated cities. Of those, approximately two-thirds are contract city attorneys from outside firms; the remaining one-third are hired as in-house city attorneys.

This answer is not affected by Proposition H, dating from 1996. That Proposition among other things changed the City Clerk position from being elective to appointive. When implementing the change, the City took the occasion to include in the Municipal Code language describing that the City Attorney position is appointive as well. The language currently appears in section 2.08.160. At the time it was implemented, the City had an appointed City Attorney as a full-time employee. Under the authorities discussed above, neither these legislative materials, nor the past practice of having an in-house City Attorney, should require the City to have an appointed City Attorney as a full-time employee.

2. Does the City Council have the authority to change the Municipal Code?

Yes. The City Council may change the Municipal Code by ordinance. Government Code §§ 36931 *et seq.* set forth the procedures, including notification procedures, for implementing ordinances. The Municipal Code is the compilation of the operative provisions of the ordinances enacted by the City Council.

3. Does the City Council have the authority to directly hire a City Attorney (which includes their preference for contract or in-house)?

Yes.

The Government Code authorizes the City Council to appoint a City attorney. It makes clear that it is the City Council's role to do so:

“The city council . . . may appoint a city attorney . . .” Cal. Gov. Code § 36505. Cal. Gov. Code § 36506 (“appointive officers and employees . . . hold office during the pleasure of the city council.”). Cal. Gov. Code § 41804 (“The city attorney shall receive such compensation as is allowed by the legislative body.”).

4. Does the evaluation of proposals received in response to a request for proposal for City Attorney Services qualify as a closed-session item for the *Ad Hoc City Attorney Selection Subcommittee*? Including interviews as part of the selection process? For the full *City Council*?

The Ad Hoc City Attorney Selection Subcommittee is not subject to the meeting formalities under the Brown Act, so the subcommittee members may meet without conducting a noticed “closed session.” The Ad Hoc Subcommittee is comprised of just two Councilmembers (less-than-a-quorum of the Council) and is only advisory to the City Council. The committee has been tasked with developing a process and recommendation for selecting a new city attorney. Such working subcommittees are exempt from the Brown Act meeting formalities; an ad hoc subcommittee is treated under the Brown Act the same as any gathering of less than a majority of members. The Ad Hoc City Attorney Selection Committee has chosen to hold open and public meetings in order to solicit public participation.

The ad hoc subcommittee is exempt from the Brown Act as a qualifying advisory committee. It has two Council members on it, less than a quorum. These are the only members of the committee. The ad hoc subcommittee may conduct *interviews in private* without members of the public present, for the same reason.

The full Council may go into closed session to evaluate proposals and interview candidates. Although the Brown Act requires that all meetings of the legislative body of a local agency be open and public, this requirement is subject to exceptions in certain circumstances as defined by statute. One that is applicable is the provision allowing closed session to address “personnel matters.” Government Code § 54957(b)(1) provides that “nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to consider the appointment, *employment*, evaluation of performance, discipline, or dismissal of a *public employee*” The Government Code provides further: “For the purposes of this subdivision, the term ‘employee’ shall include an officer or an *independent contractor* who functions as an *officer* or an employee” Cal. Gov. Code § 54957(b)(4) .

5. Does the City need to notify the respondents to the RFP for City Attorney Services before making their bid responses public?

There is no requirement that the City notify respondents that their bid responses will be made public. The bid responses are public records that would have to be disclosed in response to a California Public Records Act Request.

It would be good to advise RFP respondents that the City plans to make their RFP responses public. This will safeguard against disclosure of any information that the responding party would wish to keep confidential.

6. To whom does the City Attorney owe his/her loyalty?

An attorney owes a duty of loyalty to the client. The Rules of Professional Conduct that govern California lawyers provide that when representing any organizational client, whether a corporation or a municipality, the lawyer must treat the organization as the client, acting through the highest officer, employee, or constituent part overseeing the particular issue. Therefore, under applicable authorities, the City Attorney’s client is the City, not individual Councilmembers, officers, or employees. Indeed, Municipal Code section 2.08.160 states that “The City Council may appoint a City Attorney who shall serve as *legal counsel to the City* and advise City officials in all legal matters pertaining to City business.”

The California Government Code provides: “The city attorney shall advise the city officials in all legal matters *pertaining to city business*.” Cal. Gov. Code § 41801. The language confirms that the city attorney is not expected to advise City officials in their individual capacity; however, the City Attorney does advise all city officers and employees in their official capacity when they act on behalf of the City.