

**SB-331 Audit Review –  
Contract City Attorney Services  
Proposed Agreement Amendment**

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**COSTA MESA, CALIFORNIA**



**June 1, 2018**

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## 1. INTRODUCTION AND OVERVIEW

This section summarizes the key provisions of the existing agreement with Jones & Mayer to provide legal services to the City of Costa Mesa, a summary of the key provisions of the proposed amendment, and a summary of the City's expenditures for legal services. This report presents the results and findings of the SB-331 review conducted regarding the procurement of City Attorney services contemplated by the City of Costa Mesa. This review was conducted to ensure the City was in compliance with the provision of the state statutes *et seq.* regarding the review of contracts that was imposed by the passage of SB-331 and codified at Public Contract Code sections 22175. In part, the relevant sections of the legislation impose the following requirements on certain contracts to be entered into by municipalities that are subject to the requirements (i.e. – those that have adopted certain legislation commonly referred to as COIN legislation).

22178. (a) This chapter shall apply to any contracts with a value of at least two hundred fifty thousand dollars (\$250,000), and to any contracts with a person or entity, or related person or entity, with a cumulative value of at least two hundred fifty thousand dollars (\$250,000) within the fiscal year of the city, county, city and county, or special district, being negotiated between the city, county, city and county, or special district, and any person or entity that seeks to provide services or goods to the city, county, city and county, or special district, in the following areas: accounting, financing, hardware and software maintenance, health care, human resources, human services, information technology, telecommunications, janitorial maintenance, legal services, lobbying, marketing, office equipment maintenance, passenger vehicle maintenance, property leasing, public relations, public safety, social services, transportation, or waste removal.

(b) The city, county, city and county, or special district shall designate an unbiased independent auditor to review the cost of any proposed contract. The independent auditor shall prepare a report on the cost of the contract and provide the report to all parties and make it available to the public before the governing body takes any action to approve or disapprove the contract. The report shall comply with the following:

(1) The report shall include a recommendation regarding the viability of the contract, including any supplemental data upon which the report is based, and shall determine the fiscal impacts attributable to each term and condition of the contract.

(2) The report shall be made available to the public at least 30 days before the issue can be heard before the governing body and at least 60 days before any action to approve or disapprove the contract by the governing body.

Any proposed changes to the contract after it has been approved by the governing body shall adhere to the same approval requirements as the original contract. The changes shall not go into effect until all of the requirements of this subdivision are met.

- (c) The city, county, city and county, or special district shall disclose all offers and counteroffers to the public within 24 hours on its Internet Web site.
- (d) Before approving any contract, the city, county, city and county, or special district shall release a list of names of all persons in attendance, whether in person or by electronic means, during any negotiation session regarding the contract, the date of the session, the length of the session, the location where the session took place, and any pertinent facts regarding the negotiations that occurred in that session.
- (e) Representatives of the governing body shall advise the governing body of all offers, counteroffers, information, or statements of position discussed by the contracting person or entity and city, county, city and county, or special district representatives participating in negotiations regarding any contract.
- (f) Each governing body member and staff members of governing body offices shall disclose publicly all verbal, written, electronic, or other communications regarding a subject matter related to the negotiations or pending negotiations they have had with any official or unofficial representative of the private entity within 24 hours after the communication occurs.
- (g) A final governing body determination regarding approval of any contract shall be undertaken only after the matter has been heard at a minimum of two meetings of the governing body wherein the public has had the opportunity to review and comment on the matter.

The Matrix Consulting Group was requested pursuant to its agreement with the City of Costa Mesa to serve as an unbiased independent auditor to review the cost of the proposed contract, prepare a report on the cost of the contract and provide a report to the City. The report was to include the following:

- A recommendation regarding the viability of the contract, including any supplemental data upon which the report is based, and shall determine the fiscal impacts attributable to the terms and conditions of the contract.

The following section summarizes the key findings of the overall assessment of this RFP and the response received. Documents utilized in conducting this review include the following:

- Current retainer agreement with Jones & Mayer,
- Amendment number 1 to retainer agreement with Jones & Mayer,
- Costa Mesa bidding exception ordinance,
- City Council Agenda Report with City Analysis of legal services alternatives, and
- City Council Action Report for closed session.

Additionally, independent research was conducted to validate selected data provided in the City of Costa Mesa's City Analysis of legal services alternatives.

## 2. SUMMARY OF EXISTING CITY ATTORNEY CONTRACT AND HISTORICAL SERVICE PROVISION EXPENDITURES FOR LEGAL SERVICES

This section summarizes the key provisions of the existing agreement with Jones & Mayer to provide legal services to the City of Costa Mesa, a summary of the key provisions of the proposed amendment, and a summary of the City's expenditures for legal services over the last five years.

### 1. SUMMARY OF CURRENT JONES & MAYER AGREEMENT.

The City of Costa Mesa has had a long-standing contractual arrangement with Jones & Mayer to provide contract City Attorney legal services to the City of Costa Mesa. Jones & Mayer has served as City Attorney since 2004. On March 1, 2011, the agreement was amended with an effective date of March 1, 2011 with the following key terms and contractual obligations:

- Thomas P. Duarte, of Jones & Mayer, was designated and appointed as Contract City Attorney for Costa Mesa. Harold W. Potter, also of Jones & Mayer, was designated and appointed as Contract Assistant City Attorney.
- The term of the contract had an effective date of commencement on March 1, 2011 with no termination date. The term continued until terminated (as detailed in the contract) or amended.
- A scope of work was included outlining the key services to be provided as Contract City Attorney including, but limited to:
  - Attendance at regularly scheduled and special City Council meetings and City Council study sessions.
  - Provision of legal regularly scheduled on-site during regularly scheduled office hours at City Hall at least four (4) hours per week or as otherwise mutually agreed.
  - Attending other meetings at City Hall as required by the City Council or City Manager.
  - Advising the City Council; appointed Commissions, Committees, and Boards; City staff; and other City officials on all legal matters pertaining to City business.
  - Preparing, reviewing and approving as to form, contracts, agreements, resolutions, ordinances, and all other standard City documents.
  - Preparing such written and oral legal opinions as requested by the City.

- Performing other routine legal services as required by the City Council or City Manager.
  - Providing in-house training to City staff on issues pertaining to civil liability, personnel and labor, and other issues as identified by and requested by the City Council or the City Manager.
  - Reviewing and approving as to form and content all proposed adverse personnel actions as requested by City staff and directed by the City Manager.
  - Performing all work related to advising staff on, and prosecuting, all violations of the City's municipal code.
  - Representing the City and the City's officials, officers, and employees in litigation and administrative proceedings as directed by the City Council or the City Manager.
  - Making recommendations concerning the selection of outside legal counsel on appropriate matters and supervising such outside legal counsel handling transactional or litigation matters of behalf of the City.
- The City retained the right, at its sole option, to retain other legal counsel for litigation and other specialized legal matters including, but not limited to, the activities of the Redevelopment Agency, cable television, solid and hazardous waste, and workers' compensation. This reservation of rights does not preclude the City from assigning these matters to Jones & Mayer if desired.
  - Compensation under the agreement consisted of the following rates:
    - **Basic Services:** Legal services to be billed at the rate of \$177 per hour for all legal services and \$100 per hour for paralegal services.
    - Litigation fees to be billed separately and at the rate of \$177 per hour for attorney time and \$100 per hour for paralegal time
- Billing rates to be adjusted annually (effective November 1 of each year commencing in 2011 based upon the lesser of: (1) any increase in the cost of living based upon the Consumer Price Index increase for the prior year utilizing the standard as established by the Bureau of Labor Statistics of the U.S. Department of Labor for all urban consumers in the Los Angeles-Anaheim-Riverside area, or another mutually agreed upon index based on comparable data should the Consumer Price Index established by the Bureau of Labor Statistics be unavailable; or (2) the percentage increase in actual labor costs of Jones & Mayer for the prior year.
- **Litigation Expenses:** Jones & Mayer to be reimbursed for direct out-of-pocket expenses actually and necessarily incurred in the course of providing legal

services under this Agreement including court costs, jury fees, service costs, witness fees, deposition costs, reporters' fees, title reports, photographs, diagrams, maps and similar expenses.

## **2. SUMMARY OF PROPOSED AMENDMENT TO JONES & MAYER AGREEMENT.**

The City of Costa Mesa is seeking to amend the agreement with Jones & Mayer in the following manner:

- Designate Tarquin Preziosi as Assistant City Attorney and allow the City Attorney to designate other Jones & Mayer attorneys as deputy city attorneys.
- Increase hourly rates as follows:
  - Attorney services from \$177 to \$225 per hour.
  - Paralegal services from \$100 to \$125 per hour.
  - Allows annual adjustments to the billing rates effective on the anniversary date of the amendment in accordance with the following:

“The billing rates set forth herein shall be adjusted annually (effective as of the anniversary date of this agreement) to reflect any increase in the cost of living based on the Consumer Price Index increase for the prior year utilizing the standard as established by the Bureau of Labor Statistics of the U.S. Department of Labor for all urban consumers in the Los Angeles-Riverside-Orange County area, or another mutually agreed upon index based upon comparable data should the Consumer Price Index established by the Bureau of Labor Statistics be unavailable.”
- Minor modifications to remove references to “Duarte” and replace with “City Attorney” and removing references to “CEO/City Manager” and replacing with “City Manager”.

The principal change contemplated in the amendment to the agreement is the increase in hourly rates. No increase has been implemented since 2011.

## **3. 5 YEAR SUMMARY OF LEGAL SERVICES EXPENDITURES FOR THE CITY OF COSTA MESA.**

The following table summarizes the legal expenditures for the City of Costa Mesa over the last five years. This table shows the amounts paid to Jones & Mayer (the firm whose contract amendment is the subject of this review) and a total for all other firms.

Fiscal Year	Legal Services Expenditures		
	Jones & Mayer	Other Law Firms	Total
2012-13	\$1,463,682	\$908,559	\$2,372,241
2013-14	\$1,779,013	\$945,272	\$2,724,285
2014-15	\$1,651,899	\$499,079	\$2,150,978
2015-16	\$1,913,736	\$822,867	\$2,736,603
2016-17	\$2,372,096	\$607,528	\$2,979,624
<b>5 year total expenditures</b>	<b>\$9,180,426</b>	<b>\$3,783,305</b>	<b>\$12,963,731</b>
<b>Annual Avg.</b>	<b>\$1,836,085</b>	<b>\$756,661</b>	<b>\$2,592,746</b>

Over the prior 5 year period, legal services for Jones & Mayer represent an annual average expenditure of \$1,836,085 per year representing approximately 70.1% of total annual expenditures for legal services.

The following table shows a five year history of the expenditures for Jones & Mayer broken down by the type of service provided in four categories: general fund non-litigation, litigation, successor agency, and housing authority.

Fiscal Year	Legal Service Category				Total
	General Fund Non-Litigation	Litigation	Successor Agency	Housing Authority	
2012-13	\$835,612	\$623,841	\$4,229	\$0	\$1,463,682
2013-14	\$1,134,604	\$642,779	\$0	\$1,630	\$1,779,013
2014-15	\$1,002,993	\$648,817	\$0	\$89	\$1,651,899
2015-16	\$1,019,687	\$870,879	\$0	\$23,170	\$1,913,736
2016-17	\$1,195,129	\$1,136,654	\$0	\$40,313	\$2,372,096
<b>Annual Avg.</b>	<b>\$1,037,605</b>	<b>\$784,594</b>	<b>\$846</b>	<b>\$13,040</b>	<b>\$1,836,085</b>

General fund non-litigation services had a five year annual average cost of \$1,037,605 representing, on average, 56.5% of the legal services expenditures to Jones & Mayer.

Finally, the following table shows only general fund non-litigation legal services for Jones & Mayer over the same five year period and the annual change in the total expenditures year over year.



<b>Fiscal Year</b>	<b>General Fund Non-Litigation Legal Services</b>	<b>Annual Percent Change over Prior Year</b>
2012-13	\$835,612	-
2013-14	\$1,134,604	35.8%
2014-15	\$1,002,993	-11.6%
2015-16	\$1,019,687	1.7%
2016-17	\$1,195,129	17.2%
<b>Annual Average</b>	<b>\$1,037,605</b>	

Over the five year period, the average annual expenditure on general fund legal services averaged \$1,035,605. Annual expenditures varied from year to year with annual increases ranging from a high of 35.8% to a low of -11.6%.

### 3. ANALYSIS OF COSTS ASSOCIATED WITH THE PROPOSED AMENDMENT

Since the proposed amendment was developed without having gone through a formal bidding process, as allowed since attorney services are excluded from the requirement for bidding by the City of Costa Mesa Code of Ordinances, as outlined in Section 2-165 which in section 2-165 (b) (4) exempts from the bidding requirement the following services: “Professional services contracts for accountants, **attorneys**, architects, engineers, surveyors, and construction managers subject to section 4526 through 4529.5 and 37103 of the Government Code.” (emphasis added). Section 37103 of the Government Code states that a “a legislative body may contract with any specially trained and experience person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, **legal**, or administrative matters. It may pay such compensation to these experts as it deems proper.” (emphasis added). Since no formal bidding process was conducted, no data was available to evaluate reasonableness of the proposed rates based upon competitive market conditions.

Therefore, in evaluating the potential cost impact of the proposed amendment to the legal services contract with Jones & Mayer, an analysis was conducted to determine the reasonableness and the estimated annual impact of the proposed amendment based upon two approaches: (1) the hourly rates that would be in place had annual increases been implemented as allowable under the current contract, and (2) the calculation of the annual cost impact of the new rates to the City based upon estimated hours billed. Since detailed data regarding the actual number of hours billed annually for services was not readily or easily available, an estimate of annual hours was calculated to provide a maximum annual increase. The annual hours billed annual varies depending upon the actual services requested but utilizing a constant number of hours between the old rates and new rates enables a cost comparison to be developed – that shows the impact of the change in rates.

#### 1. ANALYSIS OF HOURLY RATE BASED UPON CPI ESCALATION.

Since the adoption of the legal services contract amendment with Jones & Mayer in 2011 which established hourly rates of \$177 per hour for attorney services and \$100 per hour for paralegal services, no increases in those rates have occurred. Had the annual rate adjustment allowable by the agreement been implemented, the following table shows what the current rates would have been had an increase been implemented annually. For CPI data, the CPI-U for Los Angeles-Riverside-Orange County was utilized.

The following table shows what the annual hourly rate for legal services could have been under the existing Jones & Mayer contract had the provision of the agreement allowing for an annual increase in November of each year been implemented using the CPI-U method outlined in the agreement.

Date	Hourly Rate Adjustment		
	Attorney Rate	Paralegal Rate	CPI-U Adjustment
2011 (at signing)	\$177.00	\$100.00	
Nov-11	\$182.33	\$103.01	3.01%
Nov-12	\$186.19	\$105.19	2.12%
Nov-13	\$186.98	\$105.64	0.42%
Nov-14	\$189.39	\$107.00	1.29%
Nov-15	\$192.49	\$108.75	1.64%
Nov-16	\$196.00	\$110.73	1.82%
Nov-17	\$203.01	\$114.70	3.58%

As shown, hourly rates under the contract would have increased to approximately \$203 per hour for attorney services (an increase of \$26.01 per hour over seven years) and \$115 per hour for paralegal services (an increase of \$14.70 per hour over 7 years) if an annual increase had been implemented annually to the maximum level allowable under the CPI methodology outlined in the agreement.

The current increase proposed for the hourly rates represent an increase in the hourly rate for attorney and paralegal services of 27.1% and 25% respectively. Had the annual increases been implemented each year, these hourly rates would have increased by 14.7% between 2011 and November 2017. The proposed rates of \$225 per hour for attorney services and \$125 per hour for paralegal services are 10.7% and 8.9% above the rates that would have been in effect in November 2017 if annual increases had been implemented.

Based upon data provided by the City of Costa Mesa from a comparative study, a comparison of the Costa Mesa hourly rate for attorney services was compared to designated benchmark communities as shown in the following table.

Hourly Rate Comparison	
Community	Attorney Hourly Rate
Buena Park	\$200 / hour
Irvine	\$215 / hour
Tustin	\$218 / hour
<b>Costa Mesa (current)</b>	<b>\$177 / hour</b>
<b>Costa Mesa (calculated if all annual increases implemented)</b>	<b>\$203 / hour</b>
<b>Costa Mesa Proposed</b>	<b>\$225 / hour</b>

The current hourly rate of \$177 per hour is well below the comparable rates in these communities as shown in the following table. The calculated rate if all allowable annual increases been implemented in the City of Costa Mesa would place the City (at \$203 per hours) just slightly above Buena Park (\$200) and below Irvine (\$215) and Tustin (\$218). The proposed hourly rate of \$225 per hour would place the City of Costa Mesa above the rates paid by all three of these benchmark communities.

## 2. ESTIMATED ANNUAL IMPACT OF PROPOSED RATE.

Data regarding the annual number of hours charged for legal services by Jones & Mayer was not readily and easily available. Development of the data would have required manually review and data compilation from monthly invoices. However, an estimate can be developed based upon total amounts expended through the calculation of the maximum number of annual hours expended on the provision of legal services.

The assumptions utilized in conducting this calculation, and their limitations, are noted below:

- The estimate assumes all expenses incurred were direct legal services billed at the attorney rate. Since no breakdown of actual hours billed, this estimate was used to provide one method of comparing potential costs increases. However, it will represent a maximum costs impact (overstating the true impact) due to the following reasons:
  - Not all hours billed will be at the attorney level. Some hours would be billed by paralegals. This assumption will slightly overstate the total impact of the proposed increase.
  - Some expenses incurred, especially related to litigation expenditures, were not for professional services time but also included reimbursable expenses – overstating the fiscal impact.

- The estimate assumes a constant level of effort (in terms of hours billed annually) between the two fiscal years. Actual hours billed annually varies significantly depending on the work requested of the attorneys and based upon the number and extent of litigation efforts. However, this approach allows a method of seeing only the impact of the cost increase.

Expenditure Type	2016-17 Expenditures	Estimated Hours	Calculated Hourly Rate (CPI)		Proposed Hourly Rate (from amendment)		Difference Between Proposed Rate and Calculated Rate
			Estimated Cost Impact Using Calculated Hourly Rate	Difference From Existing Rate	Estimated Cost Impact Using Proposed Hourly Rate	Difference from Current Rates	
General Fund Non-Litigation	\$1,195,129	6,752.14	\$1,370,752	\$175,623	\$1,519,232	\$324,103	\$148,480
Litigation	\$1,136,654	6,421.77	\$1,303,684	\$167,030	\$1,444,899	\$308,245	\$141,215
Successor Agency	\$0	-	\$0	\$0	\$0	\$0	\$0
Housing Authority	\$40,313	227.76	\$46,237	\$5,924	\$51,245	\$10,932	\$5,008
<b>Total</b>	<b>\$2,372,096</b>	13,401.67	\$2,720,673	\$348,577	\$3,015,376	\$643,280	\$294,703

Based upon the assumption above, the City of Costa Mesa could incur a maximum total of a \$642,280 increase due to the new rates if all services billed had been for attorney services. As noted, this amount was calculated based several assumptions that tend to overinflate this estimate; namely, that all expenses incurred were for professional services (excluding the fact that some portion was for expenses) and that all hours billed were for attorney services (while it is known some were for paralegal services). Absent data on actual hours billed, this approach is the easiest to best quantify the maximum total impact of the contract amendment.

Had the City implemented annual increases each year in the rates under the agreement, the additional increase due to the hourly rate increase– using the same assumptions listed above – would be only \$294,703 over the amount that would have been incurred on the calculated rates.

#### 4. FINDINGS AND CONCLUSIONS.

The following findings and conclusions were developed regarding the impact of the proposed increase in rates proposed in the agreement amendment:

- Rates for contractual attorney services have not been increased since the 2011 agreement amendment.
- Had the provision for annual increases been implemented each year, the current hourly rates for attorney and paralegal services would have increased from \$177 and \$100 to \$203.01 and \$114.70 respectively (an increase of 14.7%).
- The proposed rate adjustments to \$225 per hour for attorney services and \$125 per hour for paralegal services represent a 27.1% and 25% increase respectively over the current rates. The proposed rates would represent only a 10.7% increase in attorney rates and an 8.9% increase in the paralegal rates over the levels that would have been in place had annual increases been implemented according to CPI adjustments.
- The impact of the proposed rate increases will represent a 27.1% increase in expenditure for each attorney hour billed and a 25% increase in expenditure for each paralegal hour billed.
- The proposed rates in the amendment would place the hourly rate for attorney services, at \$225 per hour, above the rate currently paid by selected benchmark communities – which are currently at the following levels: Buena Park - \$200 / hour; Irvine - \$215 / hour; and Tustin - \$218 / hour.
- If the entire expenditure level in 2016-17 of \$1,195,129 for general fund non-litigation services were assumed to be attorney professional time, this would equal approximately 6,752 hours. The new rates would increase this amount to \$1,519,232 or an increase of \$324,103 (27.1%). This is the maximum amount of the potential increase as not all hours billed are for attorney time. Some of those hours would be for paralegal work which are billed at a lower rate reducing the total potential annual increase to the City.

**APPENDIX A - CPI-U****Los Angeles-Riverside-Orange County, CA, all urban consumers, not seasonally adjusted**

<b>Year</b>	<b>Jan</b>	<b>Feb</b>	<b>Mar</b>	<b>Apr</b>	<b>May</b>	<b>Jun</b>	<b>Jul</b>	<b>Aug</b>	<b>Sep</b>	<b>Oct</b>	<b>Nov</b>	<b>Dec</b>	<b>Annual</b>
<b>2007</b>	212.584	214.760	216.500	217.845	218.596	217.273	217.454	217.330	217.697	218.696	219.943	219.373	217.338
<b>2008</b>	220.918	221.431	223.606	224.625	226.651	229.033	229.886	228.484	227.449	226.159	222.229	219.620	225.008
<b>2009</b>	220.719	221.439	221.376	221.693	222.522	223.906	224.010	224.507	225.226	225.264	224.317	223.643	223.219
<b>2010</b>	224.610	224.620	225.483	225.916	226.438	225.877	225.991	226.373	226.048	226.794	225.941	226.639	225.894
<b>2011</b>	228.652	229.729	232.241	233.319	233.367	232.328	231.303	231.833	233.022	233.049	232.731	231.567	231.928
<b>2012</b>	233.441	234.537	236.941	236.866	237.032	236.025	235.776	237.222	238.104	240.111	237.675	236.042	236.648
<b>2013</b>	238.015	239.753	239.995	239.043	239.346	239.223	238.920	239.219	239.611	239.940	238.677	238.742	239.207
<b>2014</b>	239.857	241.059	242.491	242.437	243.362	243.528	243.727	243.556	243.623	243.341	241.753	240.475	242.434
<b>2015</b>	239.724	241.297	243.738	243.569	246.093	245.459	247.066	246.328	245.431	245.812	245.711	245.357	244.632
<b>2016</b>	247.155	247.113	247.873	248.368	249.554	249.789	249.784	249.700	250.145	251.098	250.185	250.189	249.246
<b>2017</b>	252.373	253.815	254.525	254.971	255.674	255.275	256.023	256.739	257.890	258.883	259.135	259.220	256.210