

THE NORTHWEST SEAPORT ALLIANCE
MEMORANDUM

MANAGING MEMBERS
ACTION ITEM

Item No.	<u>8C</u>
Date of Meeting	<u>January 4, 2023</u>

DATE: December 19, 2022

TO: Managing Members

FROM: John Wolfe, CEO

Sponsor: Dana Henderson, General Counsel

Project Manager: Dana Henderson, General Counsel

SUBJECT: Increase in authority for Phillips Burgess Legal Fees

A. ACTION REQUESTED

Request Managing Members authorization for the First Amendment to Contract #071641 with the Phillips Burgess firm to add \$50,000 of contract authorization.

B. SYNOPSIS

In December 2022, the Managing Members approved a settlement with SSA over the Terminal 30 Substation dispute (“Dispute”) for \$3M to be paid to the NWSA. The Dispute was settled pending Managing Members’ approval on the first day of arbitration.

Once final bills had been submitted for attorneys’ fees, and legal costs including expert fees, final arbitration preparation, and costs of depositions and related transcripts, it became clear that the legal expenses incurred to handle the Dispute up to and including arbitration total in excess of the contract previously approved on executive authorization. The projected total amount of legal fees was taken into consideration and expected when the settlement was recommended for approval by the Managing Members, though the actual amount was then unknown. Additional funds are needed to complete payment to NWSA’s litigation counsel and close out this contract.

C. BACKGROUND

In January 2022, the Phillips Burgess firm hired a long-time Port of Tacoma and NWSA transactional lawyer Ralph Klose who had deep institutional knowledge of

NWSA and of South Harbor properties. As result of this hire, NWSA sought to continue to retain Mr. Klose's services for the NWSA and signed contract #071641 with the firm for an amount within the CEO's delegated authority. Under this contract, the Phillips Burgess firm was to provide on-call legal services to NWSA when not in conflict with their support of the Port of Tacoma for an amount not to exceed \$300,000.

Matters assigned to the Phillips Burgess firm under this contract on behalf of the NWSA included transactional support for a variety of issues and deals including: BNSF lease; PRS surplus and related agreements; research and preparation for WWL/Glovis/AWC transactions; agreement with the Puyallup Tribe for the "3rd Berth" lease; and various issues relating to the West Sitcum lease.

Additionally, a matter assigned to Mr. Klose included the initial analysis and support of the T30 Lease in light of contractual interpretation dispute with the tenant over the Terminal 30 failed substation. The Terminal 30 tenant SSA triggered dispute resolution process with the NWSA in 2021, claiming it was NWSA's responsibility to pay all expenses relating to the T30 substation failure in late 2020. With Mr. Klose's advice and guidance, NWSA strongly disputed SSA's position and countered, seeking SSA's payment of NWSA's temporary expenses and contribution towards replacement of the substation. Because of Mr. Klose's prior support of the NWSA in analyzing and researching the contractual implications of the T30 Lease, the Phillips Burgess firm was then hired to litigate the Dispute with SSA so as to take advantage of some efficiencies and to build on the firm's prior work.

Throughout 2022, the Parties prepared this matter for arbitration, including extensive discovery, multiple depositions, witness preparation, expert opinions. On first day of arbitration, parties resolved dispute for \$3M to be paid to NWSA; two weeks prior to the arbitration, SSA had not made any sort of a settlement offer, so thorough preparation for arbitration was necessary. The Managing Members approved this settlement in December 2022. When recommending the settlement, all costs and fees for the Terminal 30 dispute were not yet known and had not been finalized, but General Counsel included an estimate of all attorney's fees and costs in analyzing SSA's settlement offer and ultimately recommending the \$3M settlement to the Managing Members.

Legal costs relating to the Terminal 30 Dispute are the reason Contract #071641 has exceeded executive authorization; had a separate contract been established just for the Dispute, no additional authorization would be needed. Including all costs and fees, the Terminal 30 dispute expenses totaled \$246,078.10; costs and fees for other legal fees unrelated to Terminal 30 total \$100,342.50. An additional \$46,421.00 is needed to complete all remaining payments to the firm and close out

this contract, though a contract amendment authorization of \$50,000 is requested in the event there are any stray bills or fees outstanding.

D. ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS

- **No Action Alternative:** Do not approve this additional funding, which is not recommended because it would mean that counsel for the litigation and related vendors would not be paid in full.
- **Recommended Action:** Approve the requested additional funding.

E. ATTACHMENTS TO THIS REQUEST

Presentation

F. PREVIOUS ACTIONS OR BRIEFINGS

- Managing Members' meeting of December 3, 2022 approving the \$3M settlement to NWSA.