

COMMISSION AGENDA

Item No. 4D

Meeting: 9/26/19

DATE: September 16, 2019

TO: Port Commission

FROM: Eric Johnson, Executive Director

Project Manager: Lou Paulsen, Director, Strategic Operations & Risk Management

SUBJECT: Defense and indemnification in the cause of the Superior Court of the State of Washington in and for Pierce County, Case No. 16-2-10303-6, *State of Washington (Plaintiff) v. Economic Development Board for Tacoma-Pierce County, Tacoma-Pierce County Chamber, John Wolfe, in his official capacity as Chief Executive Officer for the Port of Tacoma, Connie Bacon, Don Johnson, Dick Marzano, Don Meyer and Clare Petrich, in their official capacities as Commissioners for the Port of Tacoma (Defendants)* and/or any companion state court action.

A. ACTION REQUESTED

Request authorization for defense and indemnification to be provided to the then Chief Executive Officer of the Port of Tacoma and the then current members of the Commission in Cause No. 16-2-10303-6, *State of Washington v. Economic Development Board for Tacoma-Pierce County, Tacoma-Pierce County Chamber, John Wolfe, in his official capacity as Chief Executive Officer for the Port of Tacoma, Connie Bacon, Don Johnson, Dick Marzano, Don Meyer and Clare Petrich, in their official capacities as Commissioners for the Port of Tacoma*, and/or any companion state court action.

B. BACKGROUND

The Washington State Legislature has long recognized that elected officials, public employees and agents of public entities may, on occasion, be subject to lawsuits arising from actions (or inactions) taken during the course of their duties. For this reason, RCW 53.08.208 (*Actions against officer, employee, or agent — Defense and costs provided by port district — Exception*) provides that the public agency may lawfully cover defense costs for public officials when acting in good faith and as part of their official duties:

Whenever any action, claim, or proceeding is instituted against any person who is or was an officer, employee, or agent of a port district established under this title arising out of the performance or failure of performance of duties for, or employment with any such district, the commission of the district may grant a request by such person that the attorney of the district's choosing be authorized to defend said claim, suit or proceeding, and the costs of defense, attorney's fees, and any obligation for payment arising from such action may be paid from the district's funds: PROVIDED, That costs of defense and/or judgment or settlement against such person shall not be paid in any

case where the court has found that such person was not acting in good faith or within the scope of his or her employment with or duties for the district.

As expressed in Washington State Law, Port districts are authorized to indemnify their officers, employees and agents by paying defense costs and even judgments in proper cases (see RCW 53.08.208; also RCW 4.96.041). The law generally requires a determination of good faith as a condition of indemnity (See *State v. Hermann*, 89 Wn.2d 349, 572 P.2d 713 (1977); AGO 61-62 No. 71; AGO 63-64 No. 118; AGO 63-64 No.124; also, letter from Deputy Attorney General Philip H. Austin to Senator Quigg, dated February 10, 1982).

In the aforementioned litigation filed by the State of Washington, the then Chief Executive Officer and the then Port Commissioners were named as parties.

The Commission is asked to approve this authorization any time a Port employee or a Port Commissioner is named as an individual in litigation. The Commission authorized similar, unrelated actions in October of 2010 and October of 2014.

C. FINANCIAL SUMMARY

The Port maintains Public Officials Legal Liability insurance coverage as an element of its casualty insurance program. The coverage is subject to a self-insured retention. The action now requested of the Commission will not increase the Port's cost of defense.

D. NEXT STEPS

Port Staff recommends the Commission grant defense and indemnification for the then current Chief Executive Officer and its then current individual members of the Commission by its approval of the following action:

The Commission finds that in the Complaint in Cause No. 16-2-10303-6, *State of Washington v. Economic Development Board for Tacoma-Pierce County, et al.*, and/or any companion state court action, in which the Chief Executive Officer and the then Port of Tacoma Commissioners were named as parties individually, that the Chief Executive Officer and the Commission members were acting in good faith and within the scope and course of their employment by, or activities on behalf of, the Port of Tacoma. The Commission approves the representation, defense and indemnification of the aforementioned individuals by the Port in this litigation, subject to and consistent with the terms of RCW 53.08.208.