

**Resolution 2011-12: 38**

**Amendment to Harter Secrest & Emery LLP Agreement**

**By Board Member**

WHEREAS, the Rochester School Facilities Modernization Program Act ("the Act") established the Rochester Joint Schools Construction Board ("RJSCB"), a seven voting member board consisting of equal representation by the City of Rochester ("City") and the Rochester City School District ("District"), as well as a member jointly selected by the City and the District; and

WHEREAS, under the Act, the RJSCB has certain enumerated powers to act as agent for the District, the City, or both; and

WHEREAS, the RJSCB issued a Request for Proposal (RFP) for a law firm to provide legal services to the RJSCB; and

WHEREAS, pursuant to the award criteria in the RFP, the RJSCB, on August 28, 2009, by Resolution 2009-2010: 2, selected Harter Secrest & Emery LLP to provide legal services and authorized the Chair of the RJSCB ("Chair") to enter into a Legal Services Agreement with Harter Secrest & Emery LLP; and

WHEREAS, subsequent to the execution of the Agreement and specifically starting for the fiscal year July 1, 2011 – June 30, 2012, the funding structure for the RJSCB's operating expenses and its budget was modified in such a way that the RJSCB's operating budget is now funded by the Rochester City School District ("the District") as a line item in the District's annual budget, with the District providing the approved funding directly to the RJSCB and the RJSCB then administering the funds itself; and

WHEREAS, the RJSCB has developed its own budget for the administration of its operating funds for this fiscal year, including a specific amount allocated for legal fees, and the RJSCB will develop similar budgets for future fiscal years; and

WHEREAS, the RJSCB's MWBE and Services Procurement Committee (the "Committee") has recommended that Harter Secrest & Emery's Agreement should be amended accordingly to reflect the changes to the funding structure related to the RJSCB's operating expenses and its budget; and

WHEREAS, the Committee discussed this recommendation at its November 3, 2011 meeting and after due deliberation, it approved the proposed amendments to the Agreement, a copy of which is attached;

**THEREFORE, BE IT RESOLVED:**

1. The proposed amendment to the Agreement Between the Board and Harter Secrest & Emery LLP in the form presented with this Resolution is hereby approved; and
2. The RJSCB's Chair is hereby authorized in the name and on behalf of the RJSCB to execute an amendment to the Agreement that is consistent with this approval and in a form acceptable to the Chair upon the advice of the Executive Director.

**Second by Board Member**

## **AMENDED AND RESTATED AGREEMENT FOR LEGAL SERVICES**

This Agreement is made this \_\_\_ day of November, 2011 by and between **THE ROCHESTER JOINT SCHOOLS CONSTRUCTION BOARD ("RJSCB")**, having its principal office located at 690 St. Paul Street Facility, Rochester, New York, hereinafter referred to as "**RJSCB**," and **HARTER SECREST & EMERY LLP**, with offices located at 1600 Bausch & Lomb Place, Rochester, New York, hereinafter referred to as "**CONTRACTOR**".

**WHEREAS**, the RJSCB was established pursuant to New York legislation, enacted as the City of Rochester and the Board of Education of the City School District of the City of Rochester School Facilities Modernization Program Act ("Facilities Modernization Program Act"), with the RJSCB to act as agent to the Rochester City School District ("**DISTRICT**") and the City of Rochester ("**CITY**"); and

**WHEREAS**, the RJSCB issued a Request for Proposal ("**RFP**") for a law firm to provide legal services to the RJSCB; and

**WHEREAS**, pursuant to the award criteria in the RFP, the RJSCB, by Resolution No. 2009-10:2, adopted on August 28, 2009, selected Harter Secrest & Emery LLP to provide legal services and authorized the Chair of the RJSCB ("**Chair**") to enter into a Legal Services Agreement with Harter Secrest & Emery LLP; and

**WHEREAS**, the RJSCB and the **DISTRICT** recently modified the funding structure for the RJSCB's operating expenses and budget; and

**WHEREAS**, the parties desire to amend this Agreement to conform it to the above funding changes;

**NOW, THEREFORE**, it is mutually covenanted and agreed by and between the parties hereto as follows:

### **SECTION ONE. DESCRIPTION OF SERVICES**

**CONTRACTOR** shall provide legal services to the RJSCB, through the Chair of the RJSCB, or his designee, by providing, upon the request of the Chair, advice, assistance or representation to the RJSCB, in matters involving the implementation of such components of the RJSCB's powers and duties under the Facilities Modernization Program Act as the RJSCB may elect to engage **CONTRACTOR**.

While any particular matter referred under this Agreement may be addressed by one or more partners or associates of **CONTRACTOR** available for the project, and having the appropriate subject matter expertise and experience, it is understood and agreed that the partner responsible for the services under this Agreement, and its administration, shall be Peter Abdella, Esq.

While this Agreement is made between the RJSCB and **CONTRACTOR**, the parties acknowledge that, since the RJSCB acts as agent for the **DISTRICT** and the **CITY**, and the **DISTRICT** and the **CITY** have certain powers and duties under the Facilities Modernization Program Act, that this Agreement contains certain provisions that require the involvement of the **DISTRICT** and the **CITY**, and that this Agreement may be subject to the provisions of a cooperative agreement as may be entered into among the RJSCB, the **DISTRICT** and the **CITY**.

**SECTION TWO. TERM**

This Agreement shall be deemed to commence on the date last executed and to continue through the completion of Phase 1, subject to budget appropriations, or until the Agreement is terminated as provided by Section Three, *infra*.

**SECTION THREE. TERMINATION**

The RJSCB may terminate this Agreement upon written notice to CONTRACTOR, unless such termination is for cause, in which event the RJSCB may terminate this Agreement without notice. CONTRACTOR may terminate this Agreement with the consent of the RJSCB, or by order of a court of competent jurisdiction.

**SECTION FOUR. FEES**

(A) The RJSCB shall make payment, in complete satisfaction of all services rendered hereunder performed by the professional staff of the CONTRACTOR as follows:

(1) General services. A blended rate for partners of \$250 per hour, a blended rate for associates of \$200 per hour, and blended rate for paralegals of \$100 per hour will apply. General services would include general corporate advice, drafting of governance documents, attendance at RJSCB meetings and committee meetings, contract negotiation with the program manager and architect, and other related services.

(2) Special services. For more specialized services, such as litigation and land use approvals, the CONTRACTOR's customary billing rates will apply, but with a 10% discount.

(3) Borrower's counsel. The CONTRACTOR's legal services associated with the financing for the construction projects would be handled on a customary flat fee basis, subject to the approval of the RJSCB's financial advisor.

It is further agreed that the RJSCB shall not be billed for travel time or expenses, without the prior approval of the Chair. The Chair may authorize reasonable out of pocket costs for that travel. In the event that other professional members or employees of the firm not described in the above categories are employed in the course of this case, the billing rates for such individuals shall be mutually agreed upon, by the parties, in writing prior to the performance of billable services. The rates set forth in this Agreement shall pertain for the entire period of the representation, unless adjusted by mutual Agreement, in writing. There shall be no charge or expense to the RJSCB for secretarial, clerical, administrative or other time incurred in preparation, execution or delivery of bills; nor, without the prior consent of the Chair shall there be a charge or expense to the RJSCB for reports made in response to requests of auditors.

(B) In no event, shall the amount billed under this Agreement to, or paid by the RJSCB, exceed the approved budgeted amount for legal fees for the RJSCB (for each fiscal year of July 1-June 30), inclusive of travel and related expenses. Any increases to the budgeted amount for legal fees shall be subject to express written approval by the RJSCB.

**SECTION FIVE.**

**DISBURSEMENTS**

RJSCB agrees to pay CONTRACTOR for all reasonably necessary disbursements made in connection with this matter. Photocopies shall be charged at the rate of twelve cents (.12) per page, or at the standard charge of CONTRACTOR'S firm, whichever is less. Express mail shall be charged to RJSCB only when required by emergency time limitations not caused by CONTRACTOR, and only with the prior consent of RJSCB. No other expenses or disbursements in excess of ONE HUNDRED (\$100.00) DOLLARS shall be allowed without the prior approval of the Chair.

CONTRACTOR shall consult with and obtain the consent of the Chair prior to retaining experts, or other ancillary services. Upon receipt of reports or statements for such experts or other ancillary services, CONTRACTOR shall review same, and forward them to the Chair within ten (10) days of receipt with a recommendation for payment, in whole or in part. CONTRACTOR shall, prior to retaining experts or ancillary services, advise the provider that payment will be made by the RJSCB, subject to the RJSCB'S standard review and auditing procedures.

**SECTION SIX.**

**BILLING**

a. Payment by the RJSCB for the sums herein contracted shall be made upon submission of itemized bills approved by the Chair and subject to audit by the RJSCB'S Auditor. Bills shall be submitted on a monthly basis.

b. Each bill shall set forth in itemized fashion the identity of the attorney or paralegal performing the services requested, a brief description of each such service; the date(s) of such service(s); the number of hours worked; the hourly rate for such service(s) for each individual; and any out-of-pocket expenses. Receipts over \$25.00 for all disbursements shall be attached to the statements. Individual time and disbursement records customarily maintained by CONTRACTOR for billing evaluation and review purposes shall be made available to the Chair and/or the RJSCB's Auditor upon reasonable request.

**SECTION SEVEN.**

**COPIES OF DOCUMENTS**

CONTRACTOR agrees to provide the RJSCB, upon request, copies of correspondence, memoranda and other materials (irrespective of medium) received or prepared by CONTRACTOR in connection with this matter.

**SECTION EIGHT.**

**REPORTS**

A. Contract for Representation: Within forty-five (45) days after undertaking services required by this Agreement, or such other time as the parties may agree upon, CONTRACTOR shall provide to the Chair a report outlining CONTRACTOR'S evaluation or preliminary evaluation of the matter; recommendations for action; and estimated costs, including attorney's fees and disbursements, as appropriate.

B. During the course of representation, at the request of the Chair, CONTRACTOR shall provide updates (written or oral, at the option of the Chair) for any matter or matters assigned to it, which shall include estimates of the anticipated cost of each remaining aspect of the matter; the general status; evaluation for the matter, including, but not limited to, strengths and weaknesses that have been

discovered; changes in applicable case law, statutes or regulations and increases or decreases in anticipated costs.

C. On or before February 1 of each calendar year, or such other date as the parties may agree, CONTRACTOR shall make its best estimate as to which files are likely to continue into the RJSCB fiscal year beginning on July 1, and shall provide to the Chair, for purposes of budget preparation, a statement, itemized by file outlining the nature and extent of work reasonably anticipated for the coming fiscal year, and a reasonable range of expenses, including legal fees, attributable to that projected work. Periodically, at other such times as the parties may agree, there shall be a conference between the parties regarding the status and progress of any case.

#### SECTION NINE. CONTRACT NOT ASSIGNABLE

CONTRACTOR agrees that it will not assign, transfer, convey, encumber, grant any security interest in, sublet or otherwise dispose of this Agreement or its right, title or interest therein, nor any part hereof, nor any money which is or will become due and payable hereunder, without the prior written consent of the RJSCB.

#### SECTION TEN. INDEPENDENT CONTRACTOR

CONTRACTOR, in accordance with its status as an independent contractor, covenants and agrees that it will conduct itself consistent with such status, and will not claim to be an officer or employee of the RJSCB by reason of this Agreement, or make any claim, demand or application to, or for any right or privilege applicable to an employee of the RJSCB, including, but not limited to, Workers' Compensation coverage, Unemployment Insurance benefits, Social Security coverage, or Retirement Membership credit.

#### SECTION ELEVEN. WORKERS' COMPENSATION

CONTRACTOR shall obtain and maintain during the term of this Agreement such insurance as is required by the Workers' Compensation Law of the State of New York, if applicable to CONTRACTOR. CONTRACTOR shall provide proof to the RJSCB, duly subscribed by an insurance carrier, that such Workers' Compensation coverage has been secured.

#### SECTION TWELVE. COMPLIANCE WITH ALL LAWS

In performing services required by this agreement, CONTRACTOR, and its agents or employees shall strictly comply with all Federal, State and local laws, rules and regulations applicable to the performance of the services, including laws banning discrimination against any person due to such person's race, color, creed, sex, disability or national origin. Furthermore, each and every provision of law required to be inserted in this agreement shall be deemed so inserted, and this Agreement shall be read and enforced as if such provisions were so inserted.

#### SECTION THIRTEEN. DEFENSE & INDEMNIFICATION

CONTRACTOR shall defend, indemnify and hold harmless the RJSCB, the CITY and the DISTRICT and their officers, employees, agents and representatives against any and all claims, suits and liability of whatever nature, arising from CONTRACTOR'S negligent or intentionally wrongful acts or omissions, solely at CONTRACTOR'S expense. Nothing in this paragraph shall be construed, however, as constituting a guarantee or warranty of specific result or outcome in any matter.

**SECTION FOURTEEN.            AUDIT**

**CONTRACTOR shall provide to the RJSCB immediately upon the RJSCB'S demand, without prior notice during normal business hours, access to and copies of any books, records and papers, including computer tapes, disks, programs, or other electronic media, pertinent to performance of the services under this Agreement within three (3) years after the termination of this Agreement, at no cost to the RJSCB.**

**SECTION FIFTEEN.            CONTRACT DEEMED EXECUTORY**

**This Agreement shall be deemed executory only to the extent of funds appropriated by the RJSCB and available for the purposes of this Agreement, and no liability on account thereof shall be incurred by the RJSCB beyond the amount of such funds. It is understood and agreed that neither this Agreement, nor any representation by any public officer or employee creates any legal, moral or equitable obligation on the part of the RJSCB to request, appropriate or make additional funds available for the purposes of this Agreement.**

**SECTION SIXTEEN.            LAW AND VENUE**

**This Agreement shall be governed by and under the laws of the State of New York. In the event that a dispute arises between the parties, venue for the resolution of such dispute shall be a New York State court of competent jurisdiction sitting in Monroe County, New York.**

**SECTION SEVENTEEN.        NO WAIVER**

**In the event that the terms and conditions of this Agreement are not strictly enforced by the RJSCB or by CONTRACTOR, such non-enforcement shall not act as, or be deemed to act as, a waiver or modification of this Agreement, nor shall such non-enforcement prevent the RJSCB or the CONTRACTOR from enforcing each and every term of this Agreement thereafter.**

**SECTION EIGHTEEN.        SEVERABILITY**

**If any provision of this Agreement is held invalid by a court of law, the remainder of this Agreement shall not be affected thereby, if such remainder would then continue to conform to the laws of the State of New York.**

**SECTION NINETEEN.        NOTICES**

**Any and all notices or other communications required to be given under this Agreement by one party to another shall, unless otherwise provided herein be in writing and delivered in person or by first-class United States mail, postage pre-paid. Notice shall be deemed given upon delivery if given in person or upon deposit in an official receptacle of the United States Postal Service.**

**SECTION TWENTY.         EXTENT OF AGREEMENT**

**This Agreement constitutes the entire and integrated agreement between the parties and supersedes any and all prior proposals, negotiations and agreements, whether written or oral. Any modification or amendment to this Agreement shall be void unless it is in writing and subscribed by the party against whom the modification or amendment is sought to be enforced.**

