



Board of Administration Agenda Item 11

March 15, 2017

Item Name: Fiduciary Counsel Interviews

Program: Board of Administration

Item Type: Action

Recommendation

Interview the two finalists for contracts to serve as CalPERS' external fiduciary counsel and select one or both of them.

Executive Summary

The purpose of this item is to provide the Board with information about the two firms who have been selected for Board interviews, and for the Board to interview and select the firm or firms to be awarded contracts to serve as CalPERS' external fiduciary counsel.

Strategic Plan

This agenda item supports Goals A and B of the 2012-2017 Strategic Plan in seeking to improve long-term pension and health benefit sustainability, and in cultivating a high-performing, risk-intelligent and innovating organization.

Background

CalPERS' History of Retaining External Fiduciary Counsel

The Board has reserved the power to select CalPERS' external fiduciary counsel, and has retained external fiduciary counsel since at least 1990. Historically, fiduciary counsel has advised the Board and staff on a variety of issues involving fiduciary liability and responsibility. These issues have focused on the Board's and staff's fiduciary duty to CalPERS members and issues involving the application of California Constitution article XVI, section 17 (as amended by voter initiative Proposition 162) and other trust law principles to various situations. CalPERS' external fiduciary counsel responds to requests for legal opinions and advice from the CalPERS' Board and staff, directed through CalPERS' General Counsel. In-house counsel provide technical assistance to fiduciary counsel, serve as liaison to CalPERS' staff, and monitor outside counsel billing practices and responsiveness to client needs. CalPERS pays outside counsel for actual work performed, in arrears, subject to annual contract maximums.

The Board last selected external fiduciary counsel in October 2014. The firm selected was Klausner Kaufmann Jensen & Levinson. In August 2016, the Klausner firm resigned that engagement. Thereafter, the Board President authorized the General Counsel to retain interim fiduciary counsel while the Legal Office solicited and evaluated proposals for a more permanent engagement. The objective of this agenda item is for the Board to reestablish its primary control over the selection of fiduciary counsel.

Reasons for Retaining External Fiduciary Counsel

When the Board and staff do not themselves possess all of the expertise they need to carry out their fiduciary duties, the Board and staff are permitted (or required) to consult with experts in the field. Just as the Investment Committee and the Investment Office rely on outside consultants and experts, the Board and staff may occasionally require the expert advice of external fiduciary counsel when complex fiduciary issues arise.

Fiduciary legal representation is a specialized area of the law that is difficult to replicate internally. Because the firms that concentrate in this area represent other public pension plans as well, they are able to provide a more comprehensive perspective than can the Legal Office. In addition, they provide an independent opinion on fiduciary matters that can be particularly helpful on controversial issues.

All public pension systems with which staff has spoken employ external fiduciary counsel. Accordingly, the retention of external fiduciary counsel appears to be the industry norm and a best practice. CalPERS would be an outlier if it did not retain external fiduciary counsel.

Legal Services Contracts are Exempt from Competitive Bidding Requirements

Contracts for legal services are handled differently from other CalPERS contracts because they are exempt from competitive bidding requirements under California law (Cal. Public Contract Code section 10335.5). Despite this exemption, CalPERS has historically requested proposals from potential candidates to encourage competition among firms, to obtain competitive pricing of legal services, and to create a diverse pool of providers. Pursuant to the terms of CalPERS' standard solicitations for legal services, selections are based on an evaluation of written proposals and interviews, with no formal scoring of the proposals. In most other solicitations for legal services, the Legal Office evaluates written proposals and conducts interviews to select outside counsel in various areas of legal specialty. However, in the case of CalPERS' external fiduciary counsel, the Board has reserved for itself the authority to select the firm or firms to serve in this capacity.

This Solicitation

CalPERS released a solicitation for these services in August 2016 (Solicitation). Attachment 1 is a copy of the Solicitation. Thirteen firms submitted proposals. In early November 2016, the Board President and another Board Member selected by the Board President (Controller Yee) met with Legal Office staff to review and evaluate the proposals. Although the group considered a number of factors in evaluating the firms, the most significant were the firm's experience and expertise in advising public pension plans on fiduciary issues; the individual credentials and expertise of the firms' proposed lead attorneys; whether the firms' proposed lead attorneys are located in California and admitted to the California Bar; CalPERS' prior experience (if any) with the firms; and the reasonableness of the firms' proposed fees. As a result of this review, the group collectively and unanimously recommended that the Board interview two firms, Nossaman LLP and Seyfarth Shaw LLP.

Analysis

The Board's interviews will provide an opportunity for the Board to meet and evaluate the finalists personally. A summary of each finalist's proposal is included as Attachment 2. A complete copy of each finalist's proposal and sample interview questions will be provided to the Board separately.

Each interview is scheduled for 30 minutes. The firms have been asked to make a presentation of no longer than 10 minutes at the beginning of the interview, with the remaining 20 minutes to be used for questions and answers. As mentioned above, because contracts for legal services are exempt from state law competitive bidding requirements, the selection of the firm or firms to be awarded contracts does not need to be based on a formal scoring procedure. Accordingly, staff recommends that instead of assigning scores to the firms following the interviews, the Board discuss the candidates and select the firm or firms to be awarded contracts.

Budget and Fiscal Impacts

The cost for these services will vary based on the fees proposed by the firm (or the fees negotiated by staff) and the services actually performed.

Benefits and Risks

The benefit of engaging external fiduciary counsel includes the ability to obtain legal advice from firm(s) who specialize in this area of the law. Aside from the fees that will be incurred in engaging external counsel, no risks of engaging external counsel have been identified.

The risk of not engaging outside fiduciary counsel is that the Board and staff may not have the benefit of highly specialized expertise in connection with the primary duty of the Board and staff – the fiduciary duty to our members.

Attachments

Attachment 1 – Copy of Solicitation for Outside Fiduciary Counsel

Attachment 2 – Summary of Proposals from Each Finalist

Matthew G. Jacobs
General Counsel

Marcie Frost
Chief Executive Officer