

**CITY OF SANTA FE  
LEGAL SERVICES AGREEMENT  
BETWEEN  
GALLAGHER & KENNEDY, P.A.  
AND THE CITY OF SANTA FE**

**THIS AGREEMENT** is made and entered into this 14<sup>th</sup> day of November, 2018 by and between the City of Santa Fe, New Mexico, a municipal corporation (hereinafter referred to as the "City"), and Gallagher & Kennedy, P.A., whose address is 1239 Paseo de Peralta, Santa Fe, New Mexico 87501 (hereinafter referred to as the "Contractor").

**RECITALS**

**WHEREAS**, the City desires to engage the Contractor to render legal services for the term of this Agreement and the Contractor is willing to provide such services; and

**WHEREAS**, the City intends that the Contractor will act on behalf of and in service to the City in an official capacity.

**NOW THEREFORE**, in consideration of the premises and mutual obligations herein, the parties hereto do mutually agree as follows:

1. **Scope of Services.** The Contractor shall provide the following legal representation and other legal services (hereinafter the "Services") in conjunction and association with the City Attorney in the following case:

Assist the City in its claims for recovery of sums from the State of New Mexico, Taxation and Revenue Department, for unlawful reductions of distributions and transfers of gross receipts tax revenue collected by the State on behalf of the City.

2. **Time of Performance.** Services of the Contractor shall commence upon execution of this Agreement and shall continue through June 30, 2020. The Services shall be undertaken and completed in such sequence as to assure their expeditious completion in light of the purposes of this Agreement.

3. **Contingent Fee Structure and Costs.** For purposes of this Agreement "Amounts Recovered" or "Recovery" means all sums the City receives from the State of New Mexico as a result of the Contractor's representation of the City in this matter. The Contractor's Contingency Fee in this matter will be as follows:

**A. Contingent Fee if Recovery Obtained by Alternative Dispute Resolution.** If defendants agree to or are required to enter into alternative dispute resolution through mediation, arbitration, or an administrative process within one (1) year from the date that an action is filed, and the matter is resolved and Contractor receives payment of its fee within twenty-four (24) months from the date that the action is filed, then the Contractor will receive a contingent fee equal to ten percent (10%) of all Amounts Recovered by the City up to four million dollars (\$4,000,000.00). The Contractor shall receive three percent (3%) of only the Amounts Recovered by the City in excess of four million dollars (\$4,000,000.00). For example, if the total Recovery is five million dollars, the Contractor will receive ten percent of the first four million dollars of the Amount Recovered, *i.e.*, the first portion of the fee is four hundred thousand dollars, and the Contractor will receive three percent of the Amount Recovered over four million dollars, *i.e.*, three percent of the additional one million dollars, *i.e.*, the second portion of the fee is thirty thousand dollars, for a total fee of four hundred thirty thousand dollars.

**B. Contingent Fee if Recovery Obtained Prior to the Commencement of Trial.** If the conditions of paragraph A above do not apply and the City obtains a Recovery based upon resolution of the matter prior to the commencement of trial, then the contingent fee shall be twelve and one-half percent (12.5%) of all Amounts Recovered by the City up to four million dollars (\$4,000,000.00). In addition, the Contractor shall receive five percent (5%) of the Amounts Recovered over four million dollars (\$4,000,000.00). For example, if the total Recovery is five million dollars, the Contractor will receive twelve and one-half percent of the first four million dollars of the Amount Recovered, *i.e.*, the first portion of the fee is five hundred thousand dollars, and the Contractor will receive five percent of the Amount Recovered over four million dollars, *i.e.*, five percent of the additional one million dollars, *i.e.*, the second portion of the fee is fifty thousand dollars, for a total fee of five hundred fifty thousand dollars.

**C. Contingent Fee for Recovery Obtained After Commencement of Trial.** If the City obtains a Recovery based upon resolution of the matter after the commencement of a trial, then the Contractor will receive a contingent fee equal to fifteen percent (15%) of the Amounts Recovered for the City up to four million dollars (\$4,000,000.00). In addition, the Contractor shall receive ten percent (10%) of the Amounts Recovered over four million dollars (\$4,000,000.00). For example, if the total Recovery is five million dollars, the Contractor will receive fifteen percent of the first four million dollars of the Amount Recovered, *i.e.*, the first portion of the fee is six hundred thousand dollars, and the Contractor will receive ten percent of the Amount Recovered over four million dollars, *i.e.*, ten percent of the additional one million dollars, *i.e.*, the second portion of the fee is one hundred thousand dollars, for a total fee of seven hundred thousand dollars.

**D. Fee in the Event of Class Action.** If an action is certified as a class action or the fee to the Contractor is otherwise subject to the application to, review or and/or approval by the court, then the City agrees that the Contractor may apply for or otherwise seek approval of, and City will not object to, fees in amounts up to, but not exceeding, amounts based upon application of the applicable percentages stated above.

**E. Costs.** The City shall reimburse the Contractor for the costs of the action, including but not limited to expert witness fees, court filing and other fees, court reporter fees, and reasonable travel expenses consistent with the City's guidelines, but the amount of costs the City is obligated to pay shall be capped not to exceed sixty thousand dollars (\$60,000.00). All such costs incurred and paid by the Contractor shall be billed to City on a monthly basis and paid by the City. No such costs shall be deducted from the amount of any Recovery for purposes of the determination of the Contractor's fees. If additional municipalities or counties join in the action, it shall be appropriate for all of the municipalities or counties who are part of the action to share certain costs. In that event, a cost-sharing agreement will be needed so that the costs can be appropriately allocated to each party and the Contractor can bill and obtain reimbursement of each municipality's or county's share of such costs. In order to minimize out-of-pocket costs of the action, to the extent practicable, the City will provide reasonable support services, including internal analysis of information relating to the tax transactions and information obtained and used to determine the amounts due to the City.

**F. Costs Exceeding Cap.** The Contractor shall not bill the City for any costs it incurs that are attributable to the City that exceed sixty thousand dollars (\$60,000.00). This Cap amount applies to and includes the costs described in both Parts E and G of this Section.

**G. Costs for New Mexico Municipal League.** The New Mexico Municipal League (NMML), on behalf of its members including the City, has incurred certain costs and fees to develop the information needed to pursue these claims. In order to use this information, the City may enter into an agreement with the NMML for reimbursement of a portion of such costs and fees. If such reimbursement is deducted from any Recovery obtained by the City, then for purposes of calculating the Contractor's fee, such amount will not be deducted from the amount of the Recovery.

**H. Additional Municipalities and Counties as Parties.** The City reserves the right to permit additional municipalities or counties to join in the action to be filed by Contractor on behalf of City, provided that as a condition of joining the action, any municipality or county that joins shall be required to agree to pay its reasonable share of costs. The City will not unreasonably withhold permission for additional municipalities and counties to join.

**I. Fees if Non-Monetary Recovery.** In the event of a compromise that would achieve a benefit for the City that is reasonably related to the Contractor's representation of the City, and which substantially diminishes the City's Recovery and the amount of the fee due to the Contractor as provided above, the City and the Contractor agree to negotiate reasonable compensation to the Contractor for the prospective benefit. The City and the Contractor contemplate that a possible basis for compromise and settlement of this matter could include prospective benefits that might not consist of payments that would constitute a Recovery as defined above, such as legislation changing the future limitations on reductions or adjustments to distributions and transfers

of gross receipts tax revenue to City in consideration for the City's agreement to compromise its claims for sums due to past actions by the State. In determining the fee due, the parties shall consider the amount of revenue to the City that will be derived from the prospective benefits, the amount of the contingent fee that would have been derived applying the percentages above to the prospective benefits received by the City over a five year period after the settlement. The negotiated fee may be paid over the five-year period of the anticipated benefits, with adjustments over that period to reflect any subsequent changes. Or, if prospective benefits cannot be reasonably quantified, the parties shall consider, if reasonable, the amount of the fee that would have been earned based upon the time spent by the Contractor timekeepers on the matter at the Contractor's standard rates multiplied by 1.5, in consideration of the Contractor's acceptance of representation on a contingent fee basis. For purposes of this paragraph, the amount of the Recovery with respect to prospective benefits shall be based on the net present value of the City's prospective benefits.

**J. Gross Receipts Taxes.** Any applicable gross receipts taxes shall be computed and added to the fee due to the Contractor under this Agreement.

**K. Fee Arbitration.** Any dispute regarding fees under this Agreement shall be resolved through the State Bar of New Mexico Fee Arbitration program.

**L. Appropriations.** The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the City for the performance of this Agreement. If sufficient appropriations and authorization are not made by the City, this Agreement shall terminate upon written notice being given by the City to the Contractor. The City's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final.

#### **4. Interest of Contractor.**

**A.** The Contractor agrees that it presently has no direct or indirect interest and shall not acquire any direct or indirect interest which conflicts in any manner or degree with the performance of the Services required to be performed under this Agreement. The Contractor further agrees that no person having any such conflict of interest will be employed to perform the Services.

**B.** The Contractor hereby agrees to report to the City Attorney in writing, any situation in which the Contractor or a member of the Contractor's firm may be asserting a position contrary to that of the City. Such situations include but are not limited to instituting suit against the City, any of its employees or departments, regardless of whether a technical conflict exists under the Canons of Ethics or Disciplinary Rules or whether the subject matter of the litigation to be instituted is related to the Contractor's representation of the City under this Agreement.

Upon notification of such a conflict, the City Attorney will inform the Contractor in writing within ten (10) days of receipt of the notification that the City will or declines to

waive the potential conflict. If the conflict is waived, the Contractor or firm may proceed with representation in the conflict situation, informing the City Attorney should any relevant change of circumstances occur. If waiver of the conflict is denied, the Contractor is obligated under the provisions of this Agreement to cease its efforts in the conflict situation.

If the Contractor refuses to cease representation, or if the Contractor fails to notify the City of potential conflict, the City may terminate this Agreement upon one (1) day's notice. The Contractor agrees to compensate the City for any costs incurred by the City to obtain alternate representation, including but not limited to the cost of paying substitute counsel to become familiar with the case to a level at which the Contractor withdrew from representation and attorneys' fees incurred by the City in obtaining the assistance of alternate counsel.

The City is entitled to withhold payment of the final billing submitted by the Contractor to cover the cost of obtaining substitute representation, as provided above. After securing alternate counsel, the City will provide a summary of costs incurred by this counsel and will pay any applicable amounts remaining due to the Contractor.

**5. Records, Pleadings, and Case File.** Records, pleadings, legal research, and the case file shall be sent to the City Attorney at the conclusion of the case. Highly confidential documents such as attorney notes and client correspondence need not be returned.

**6. Reports Required.** The Contractor will keep a record of the time spent by each of its timekeepers, including a description of tasks performed, and will provide that record to the City along with its monthly statement for any costs of the action. The Contractor's initial record shall include time spent developing the cases prior to entering into a contract with the City, and the recorded time may differentiate between time attributable to work on behalf of only the City and time not attributable to any particular municipality or county. Within thirty (30) days after entering into this Agreement, the Contractor will provide the City Attorney with a brief analysis of the task to be undertaken and a plan for performing the tasks under the Agreement. With regard to the litigation, this will include an assessment of the relative merits of the parties' positions, and a litigation plan, including a proposed time schedule.

At the time of submission of any billing, the Contractor will also submit to the City Attorney an executive summary one to two page status report indicating the current status of the litigation or other project which is the subject of this Agreement, a brief summary of the activities undertaken for which the billing is being submitted, and a plan for future activities under the Agreement which the Contractor intends to perform during the next billing cycle.

7. **Audits and Inspections.** At any time during normal business hours and as often as the City may deem necessary, there shall be made available to the City for examination all of the Contractor's records with respect to all matters covered by this Agreement. The Contractor shall permit the City to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment and other data relating to all matters covered by this Agreement.

8. **Pleadings.** All documents submitted to the Court or opposing counsel shall be copied to the City Attorney. Pleadings other than routine pleadings, such as briefs and motions, will be submitted to the City Attorney for review and approval prior to filing. Failure to submit such pleadings to the City Attorney in advance of filing may constitute grounds for termination of the Agreement or for refusal to compensate the Contractor for all efforts expended in preparation of the pleading. A sample of the signature line for pleadings is:

**CITY OF SANTA FE:**

Erin K. McSherry, City Attorney  
200 Lincoln Avenue  
Santa Fe, New Mexico 87501  
(505) 955-6512

**CONTRACTOR:**

Dalva L. Moellenberg  
Anthony J. "T.J." Trujillo  
Gene F. Creely, II  
Gallagher & Kennedy, P.A.  
1239 Paseo Del Peralta  
Santa Fe, New Mexico 87501  
(505) 982-9523

9. **Renewals.** Any continuation or renewal of this Agreement shall be the subject of further negotiations between the parties.

10. **Termination by Parties.** This Agreement may be terminated by either of the parties when required by law or upon fifteen (15) days' notice of termination, whichever occurs first, or substitution of counsel. Notice of termination does not nullify obligations already incurred on the part of either party for performance or failure to perform to the date of termination, subject to the limits on total payment to be made as set forth in Paragraph 3 of this Agreement and subject to the City's entry of substituted counsel as set forth in Paragraph 4.B.

11. **Independent Contractors.** The Contractor, its officers, employees and agents are independent contractors performing services for the City and are not employees of the City or its departments, agencies or instrumentalities. The Contractor, its officers, employees and agents, shall not, as a result of this Agreement, accrue any leave, retirement, insurance, bonding, use of City vehicles, or any other benefits available to employees of the City, its agencies or instrumentalities.

12. **Assignment Prohibited.** The Contractor shall not assign or transfer any interest in this Agreement nor assign any claims for money due or to become due under this Agreement without the City's prior written approval.

13. **Subcontracting Prohibited.** The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the City's prior written approval.

14. **Indemnity.** The Contractor agrees to defend, indemnify and hold harmless the City, any of its departments, agencies, officers, or employees from all damages, claims or liabilities and expenses (including attorney's fees) arising out of or resulting in any way from the performance of professional services for the City in the Contractor's capacity as attorney for the City, and caused by any error, omission, or negligent act of the Contractor or any person employed by the Contractor, or of any others for whose acts the Contractor is legally liable. The indemnity required hereunder shall not be limited by reason of the specification of any particular insurance coverage in this Agreement.

15. **Release from Liability.** The Contractor, upon final payment of all amounts due under this Agreement, releases the City, its officers, employees and servants, the City, its departments, agencies, and instrumentalities from all liabilities, claims, and obligations whatsoever arising from or under this Agreement.

16. **Insurance.** The Contractor shall not commence work under this Agreement until any applicable insurance required in Exhibit A to this Agreement has been obtained and proper evidence of insurance has been submitted to the City.

17. **Discrimination Prohibited.** In performing the Services required hereunder, the Contractor shall not discriminate against any person on the basis of race, color, religion, gender, sexual preference, sexual orientation, national origin or ancestry, age, physical handicap, or disability as defined in the Americans with Disabilities Act of 1990, as currently enacted, or hereafter amended.

18. **ADA Compliance.** In performing the Services required hereunder, the Contractor agrees to meet all the requirements of the Americans with Disabilities Act of 1990, and all applicable rules and regulations (the "ADA"), which are imposed directly on the Contractor or which would be imposed on the City as a public entity. The Contractor agrees to be responsible for knowing all applicable requirements of the ADA and to defend, indemnify and hold harmless the City, its officials, agents and employees from and against any and all claims, actions, suits or proceedings of any kind brought against said parties as a result of any acts or omissions of the Contractor or its agents in violation of the ADA.

19. **Amendments.** This Agreement shall not be altered, changed, or amended except by written instrument executed by the parties hereto.

20. **Complete Agreement.** This Agreement incorporates all the agreements, covenants, and understandings between the parties concerning the subject matter hereof, and all such agreements, covenants, and understandings have been merged into this written Agreement. No prior agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this written Agreement.

21. **Interpretation.** This Agreement shall be interpreted, construed, and governed in accordance with New Mexico law.

22. **Approval Required.** This Agreement shall not become effective or binding until all required signatures have been obtained.

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**IN WITNESS WHEREOF**, the City and the Contractor have executed this Agreement as of the date first above written.

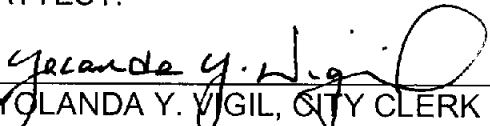
**CITY OF SANTA FE:**

APPROVED BY:

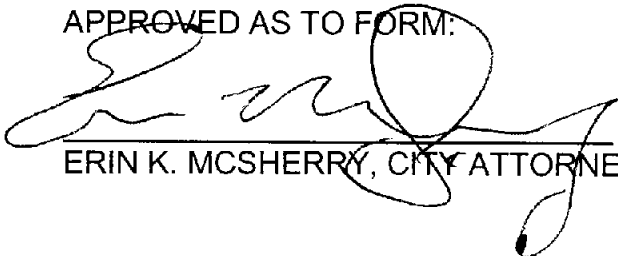
  
ALAN WEBBER, MAYOR

Date: 12/10/18

ATTEST:

  
YOLANDA Y. VIGIL, CITY CLERK  
cc mtg. 11/14/18

APPROVED AS TO FORM:

  
ERIN K. MCSHERRY, CITY ATTORNEY

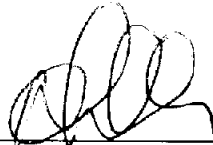
APPROVED:

  
MARY MCCOY, FINANCE DIRECTOR  
Business Unit/Line Item:

62102. 510200

**CONTRACTOR:**

GALLAGHER & KENNEDY, P.A.

  
DALVA L. MOELLENBERG  
MANAGING SHAREHOLDER

Date: 12/17/18

## EXHIBIT A

**Insurance.** The Contractor shall procure and maintain at its expense until final payment by the City for Services covered by this Agreement, insurance in the kinds and amounts hereinafter provided with insurance companies authorized to do business in the State of New Mexico, covering all operations under this Agreement, whether performed by it or its agents. Before commencing the Services and on the renewal of all coverages, the Contractor shall furnish to the City a certificate or certificates in form satisfactory to the City showing that it has complied with this Section. All certificates of insurance shall identify the City as an "additional insured" and shall provide that thirty (30) days' written notice be given to the Director of Finance, City of Santa Fe, 200 Lincoln Street, Santa Fe, New Mexico 87501, before a policy is canceled, materially changed, or not renewed. Various types of required insurance may be written in one or more policies. All coverages afforded shall be primary over any other valid and collectible insurance with respect to operations provided and a waiver of subrogation will be provided. Kinds and amounts of insurance required are as follows:

**A. Commercial General Liability Insurance.** A commercial general liability insurance policy with combined limits of liability for bodily injury or property damage as follows:

\$1,000,000	Per Occurrence
\$1,000,000	Policy Aggregate
\$1,000,000	Products Liability/Completed Operations
\$1,000,000	Personal and Advertising Injury
\$ 50,000	Fire - Legal
\$ 5,000	Medical Payments

Said policy of insurance must include coverage for all operations performed for the City by the Contractor, and contractual liability coverage shall specifically insure the hold harmless provisions of this Agreement.

**B. Automobile Liability Insurance.** An automobile liability policy with liability limits in amounts not less than \$1,000,000 combined single limit of liability for bodily injury, including death, and property damage in any one occurrence. Said policy of insurance must include coverage for the use of all owned, non-owned, hired automobiles, vehicles and other equipment both on and off work.

**C. Workers' Compensation Insurance.** Workers' Compensation Insurance for its employees in accordance with the provisions of the Workers' Compensation Act of the State of New Mexico.

**D. Professional Liability (Errors and Omissions) Insurance.**

Professional liability (errors and omissions) insurance in an amount not less than \$1,000,000 combined single limit of liability per occurrence with a general aggregate of \$1,000,000.

**E. Increased Limits.**

If, during the term of this Agreement, the City requires the Contractor to increase the maximum limits of any insurance required herein, an appropriate adjustment in the Contractor's compensation will be made.