

158  
**City of Las Cruces**<sup>®</sup>  
 PEOPLE HELPING PEOPLE

**Council Action and Executive Summary**

Item # 10

Resolution# 11-12-477

For Meeting of \_\_\_\_\_  
 (Ordinance First Reading Date)

For Meeting of April 2, 2012  
 (Adoption Date)

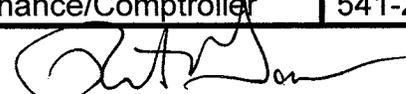
Please check box that applies to this item:

QUASI JUDICIAL                       LEGISLATIVE                       ADMINISTRATIVE

**TITLE:** A RESOLUTION AUTHORIZING CHANGE ORDER NUMBER ONE TO THE AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND CLIFTONLARSONALLEN, FORMERLY MEYNER + COMPANY, FOR THE RECOVERY OF GROSS RECEIPTS TAX PAID DURING THE CONSTRUCTION OF CERTAIN CITY FACILITIES FROM A CONTINGENCY FEE CONTRACT TO A FIXED FEE CONTRACT AND TO ADJUST THE FISCAL YEAR 2012 BUDGET.

**PURPOSE(S) OF ACTION:**

Authorization of a change order to a professional services contract.

<b>COUNCIL DISTRICT:</b> N/A		
<b><u>Drafter/Staff Contact:</u></b> Pat Degman	<b><u>Department/Section:</u></b> Finance/Comptroller	<b><u>Phone:</u></b> 541-2080
<b><u>City Manager Signature:</u></b>		

**BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:**

On September 7, 2010, the City of Las Cruces entered into a professional services agreement with Meyners + Company to recover gross receipts tax paid by the City during the construction of City Hall, the Convention Center, and the Regional Aquatic Center. Meyners + Company merged operations with another regional CPA firm, forming the entity CliftonLarsenAllen, which has continued the scope of work included in the original agreement. The original agreement stated that compensation would be contingent upon the collection of taxes and the set the compensation rate at 28% of refunded taxes. The professional services were estimated to cost up to \$83,000, depending on the total amount of gross receipts tax recovered. CliftonLarsenAllen has agreed to complete the scope of work for a fixed fee of \$60,000, saving the City up to \$23,000 in potential fees. Staff has reviewed the proposed change to the compensation clause and finds that the proposal is in the City's best interest.

**SUPPORT INFORMATION:**

1. Resolution 11-12-477

(Continue on additional sheets as required)

2. Exhibit "A" New Agreement with Revised Compensation Clause
3. Exhibit "B" Purchasing Manager's Request to Contract
4. Exhibit "C" Budget Adjustment
5. Attachment "A" Professional Services Agreement dated September 7, 2010

**SOURCE OF FUNDING:**

<b>Is this action already budgeted?</b>	Yes	<input type="checkbox"/>	See fund summary below
	No	<input checked="" type="checkbox"/>	If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/>	Expense reallocated from:
		<input checked="" type="checkbox"/>	Proposed funding is from a new revenue source (i.e. GRT Refund)
		<input type="checkbox"/>	Proposed funding is from fund balance in the (# and Fund Name) Fund.
<b>Does this action create any revenue?</b>	Yes	<input checked="" type="checkbox"/>	Funds will be deposited into this fund: <u>1000 General Fund</u> in the amount of approximately <u>\$237,600</u> for FY12.
	No	<input type="checkbox"/>	There is no new revenue generated by this action.

**BUDGET NARRATIVE**

The City has filed a claim with New Mexico Taxation and Revenue for a refund of approximately \$297,000 in gross receipts taxes. The claim is under review. The City expects to receive no less than 80% of the total amount claimed, making the refund approximately \$237,600. From this amount, the fixed fee of \$60,000 will be paid to CliftonLarsenAllen for their professional work on this claim.

**FUND EXPENDITURE SUMMARY:**

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
<i>General Fund</i>	<i>10100105-722190</i>	<i>\$60,000</i>	<i>\$0</i>	<i>\$0</i>	

(Continue on additional sheets as required)

**OPTIONS / ALTERNATIVES:**

1. Vote "Yes"; this will approve the Resolution, authorizing change order number one to the agreement for the recovery of gross receipts taxes.
2. Vote "No"; this will not approve the Resolution, leaving the City with a potential additional cost of up to \$23,000.
3. Vote to "Table" the Resolution and provide staff with further direction.

**REFERENCE INFORMATION:**

1. Purchase Resolution 09-10-535

(Continue on additional sheets as required)

**RESOLUTION NO. 11-12-477**

**A RESOLUTION AUTHORIZING CHANGE ORDER NUMBER ONE TO THE AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND CLIFTONLARSONALLEN, FORMERLY MEYNER + COMPANY, FOR THE RECOVERY OF GROSS RECEIPTS TAX PAID DURING THE CONSTRUCTION OF CERTAIN CITY FACILITIES FROM A CONTINGENCY FEE CONTRACT TO A FIXED FEE CONTRACT AND TO ADJUST THE FISCAL YEAR 2012 BUDGET.**

The City Council of the City of Las Cruces is informed that:

**WHEREAS**, on September 7, 2010, the City of Las Cruces entered into a professional services agreement with Meyners + Company to recover gross receipts tax paid during the construction of City Hall, the Convention Center, and the Regional Aquatic Center; and

**WHEREAS**, Meyners + Company merged operations with another regional CPA firm, forming the entity CliftonLarsonAllen, which has continued the scope of work included in the original agreement; and

**WHEREAS**, the original agreement stated that compensation would be contingent upon the collection of taxes and the set the compensation rate at 28% of refunded taxes; and

**WHEREAS**, CliftonLarsonAllen has now agreed to complete the scope of work for a fixed fee of \$60,000, saving the City up to \$23,000 in potential fees; and

**WHEREAS**, staff has reviewed the proposed change to the compensation clause and finds that the proposal is in the City's best interest.

**NOW, THEREFORE**, Be it resolved by the governing body of the City of Las Cruces:

(1)

THAT Change Order number one to the agreement between the City of Las Cruces and CliftonLarsonAllen for gross receipts tax recovery is authorized.

(II)

THAT City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

DONE AND APPROVED this \_\_\_\_\_ of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Mayor

ATTEST:

VOTE:

\_\_\_\_\_  
City Clerk

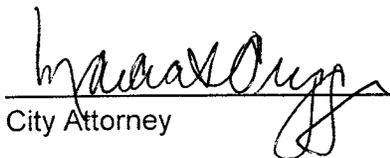
- Mayor Miyagishima: \_\_\_\_\_
- Councillor Silva: \_\_\_\_\_
- Councillor Smith: \_\_\_\_\_
- Councillor Pedroza: \_\_\_\_\_
- Councillor Small: \_\_\_\_\_
- Councillor Sorg: \_\_\_\_\_
- Councillor Thomas: \_\_\_\_\_

(SEAL)

Moved by: \_\_\_\_\_

Seconded by: \_\_\_\_\_

Approved as to Form:

AST  \_\_\_\_\_  
City Attorney

**DRAFT**

## PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT, made and entered into on this \_\_\_\_\_, 2012, by and between the City of Las Cruces, New Mexico, hereinafter called "CITY" and CliftonLarsonAllen LLP, formerly Meyners + Company LLC, of 500 Marquette NW, Suite 800, Albuquerque, NM 87102, hereinafter called "CONTRACTOR".

### 1. PROJECT DESCRIPTION

Historically, the State of New Mexico Taxation and Revenue Department has required governments to pay gross receipts tax on construction materials procured separately or through contractors performing services under municipal contracts for the construction of buildings. Regulation 3.2.1.11.K changed such tax obligations and, now, governmental entities may purchase certain construction items as tangible personal property, free of gross receipts tax including related amounts passed to the City by contractors performing on municipal construction projects. Additionally, for gross receipts tax paid by contractors on previous municipal construction projects, the regulation allows the contractors to claim a tax refund for such paid taxes. In light of the new regulation, the City seeks to benefit from the change by also seeking reimbursement from contractors who obtain tax refunds pursuant to the new regulation.

### 2. SCOPE OF SERVICES

In a satisfactory and proper manner, the CONTRACTOR shall perform SERVICES as proposed in response to the CITY'S RFP No. 09-10-535 Tax Recovery Professional Services, incorporated herein by reference and as set forth in Exhibit A, attached hereto and made a part of this Agreement.

### 3. APPROPRIATIONS

The terms of this Agreement are contingent on sufficient appropriations and authorization being made by the City Council for the performance of this Agreement. If sufficient appropriations and authorizations are not made by the City Council, this Agreement shall terminate upon written notice given by the CITY to CONTRACTOR. The CITY'S decision as to whether sufficient appropriations and authorizations exist shall be accepted by CONTRACTOR and shall be final.

### 4. COMPENSATION

The CITY shall compensate CONTRACTOR for the performance of SERVICES under this Agreement. Compensation will be a fixed fee of \$60,000 (sixty thousand dollars), plus applicable NMGRT, to be paid upon completion of this project. The project will be considered complete when New Mexico Taxation and Revenue has refunded qualified gross receipts taxes to the City from the construction of City Hall, the Convention Center, and the Regional Aquatic Center or notified the City that such taxes are not eligible for refund. CONTRACTOR shall complete the SERVICES upon receipt of an revised agreement.

CONTRACTOR is responsible for payment of State of New Mexico Gross Receipts Tax levied on the amounts payable under this Agreement. CONTRACTOR agrees to comply with all federal and state tax payments and report all items of gross receipts as income from the operations of its business.

#### 5. DEVOTION OF ADEQUATE TIME

CONTRACTOR will devote the necessary hours each week to the performance of projects that are required by the CITY and it will serve the CITY diligently and faithfully, and according to its best ability in all respects and will promote the best interests of the CITY.

#### 6. TERM AND SCHEDULE

This Agreement shall become effective from date of award for a period of 1 year and, pending mutual written agreement may be renewed yearly for an additional four one year terms.

CONTRACTOR shall perform the SERVICES in accordance with the time set forth as agreed upon by the CITY and CONTRACTOR. The refund application will be processed no later than 65 days from the beginning of the services on each project. If the refund is not granted within 120 days from the date of the filing, the CONTRACTOR will file a protest. The CITY will submit payment to the CONTRACTOR 30 days after receipt of the invoice. The CONTRACTOR will not bill the CITY until after the CITY has received payment for NMGRT recovered.

#### 7. EXTENSIONS, CHANGES, AND AMENDMENTS

This Agreement shall not be extended, changed, or amended except by instrument in writing executed by the parties. The CITY shall not be liable for payment of any extra services nor shall CONTRACTOR be obligated to perform any extra services except upon such written agreement. Such written approval shall indicate the date said extension, change, or amendment is effective and shall be signed by the parties to this Agreement. In the event that the parties cannot reach agreement as to a particular change, the issue shall be resolved pursuant to Article 21.

#### 8. CHANGES AND EXTRA SERVICES BY THE CITY

The CITY may make changes within the general scope of the SERVICES plus may also request CONTRACTOR to perform other extra services not incorporated within the Services set forth in this Agreement. If the CONTRACTOR is of the opinion that such change causes an increase or decrease in the cost and/or the time required for performing the changes or other services required by the City, CONTRACTOR shall so notify the CITY of that fact within five (5) business work days from the date of receipt of change by the CITY. The CITY shall provide written response to the CONTRACTOR within five (5) business work days from the date of receipt of CONTRACTOR'S written notification.

### 9. CHANGES AND EXTRA SERVICES BY THE CONTRACTOR

In the event a condition is identified by the CONTRACTOR which, in the opinion of the CONTRACTOR, changes the services, costs, and/or time required for performance under this Agreement, the CONTRACTOR shall provide written notification to the CITY within five (5) business work days of such identification. The CITY shall respond in writing to such notification within five (5) business work days from the date of receipt of CONTRACTOR'S notification.

### 10. DELAYS

In the event that performance of SERVICES is delayed by causes beyond reasonable control of CONTRACTOR, and without the fault or negligence of CONTRACTOR, the time and total compensation for the performance of the SERVICES may be equitably adjusted by written agreement to reflect the extent of such delay. CONTRACTOR shall provide the CITY with written notice of delay pursuant to Article 9 including therein a description of the delay and the steps contemplated or actually taken by CONTRACTOR to mitigate the effect of such delay. The CITY will make the final determination as to reasonableness of delays.

### 11. TERMINATION

This Agreement may be terminated by either party hereto upon fifteen (15) calendar days written notice in the event of substantial failure by the other party to perform in accordance with the terms of this Agreement through no fault of the terminating party. This Agreement may also be terminated by the CITY for its convenience or because the PROJECT has been permanently abandoned, but only upon fifteen (15) calendar days written notice to CONTRACTOR.

In the event of termination, CONTRACTOR shall be compensated for all services performed and costs incurred up to the effective date of termination for which CONTRACTOR has not been previously compensated.

Upon receipt of notice of termination from the CITY, CONTRACTOR shall discontinue the SERVICES unless otherwise directed and upon final payment from the CITY deliver to the CITY the required number of copies of all data, drawings, reports, estimates, summaries, and such other information and materials as may have been accumulated by CONTRACTOR in the performance of this Agreement, whether completed or in process.

### 12. RECORDS AND AUDITS

CONTRACTOR will maintain records indicating dates, length of time, and services rendered. The CITY has the right to audit billings both before and after payment, and contest any billing or portion thereof. Payment under this Agreement does not foreclose the CITY'S right to recover excessive or illegal payments.

### 13. DISCLOSURE AND OWNERSHIP OF DOCUMENTS, PRODUCTS, DESIGN, ELECTRONIC FILES

All technical data, electronic files, and other written and oral information not in the public domain or not previously known, and all information, electronic files, and data obtained, developed, or supplied by the CITY will be kept confidential and CONTRACTOR will not disclose to any other party, directly or indirectly, without the CITY'S prior written consent unless required by lawful order.

All technical data, electronic files, products developed, operational parameters, blueprints, and other information and work of the CONTRACTOR shall be the sole property of the CITY and shall be delivered to the CITY when requested and at the end of the Agreement.

### 14. INDEPENDENT CONTRACTOR

CONTRACTOR represents that it has, or will secure, at its own expense, all personnel required in performing the SERVICES under this Agreement. Such personnel shall not be employees of, nor have any contractual relationship with the CITY. CONTRACTOR, consistent with its status as an independent contractor, further agrees that its personnel will not hold themselves out as, nor claim to be officers or employees of the CITY by reason of this Agreement.

To the extent that CONTRACTOR employs any employees, CONTRACTOR shall be solely responsible for providing its own form of insurance for its employees and in no event shall CONTRACTOR'S employees be covered under any policy of the CITY.

CONTRACTOR'S retention hereunder is not exclusive. Subject to the terms and provisions of this Agreement: (i) CONTRACTOR is able, during the Term hereof, to perform services for other parties; and (ii) CONTRACTOR may perform for its own account other professional services outside the scope of this Agreement.

CONTRACTOR is and shall be an Independent Contractor and shall be responsible for the management of its business affairs. In the performance of the work under this Agreement, CONTRACTOR will at all times be acting and performing as an Independent Contractor, as that term is understood for federal and state law purposes, and not as an employee of the CITY. Without limitation upon the foregoing, CONTRACTOR shall not accrue sick leave, jury duty pay, retirement, insurance, bonding, welfare benefits, or any other benefits, which may or may not be afforded employees of the CITY. CONTRACTOR will not be treated as an employee for purposes of: Workers' Compensation benefits; the Federal Unemployment Tax Act; Social Security; other payroll taxes, federal or any state income tax withholding; or the employee benefit provisions described in the Internal Revenue Code of 1986, as amended. Neither the CITY, nor its agents or representatives, shall have the right to control or direct the manner, details or means by which CONTRACTOR accomplishes and performs its services. Nevertheless, CONTRACTOR shall be bound to fulfill the duties and responsibilities contained in the Agreement.

#### 15. NO JOINT VENTURE OR PARTNERSHIP

Nothing contained in this Agreement shall create any partnership, association, joint venture, fiduciary or agency relationship between CONTRACTOR and CITY. Except as otherwise specifically set forth herein, neither CONTRACTOR nor CITY shall be authorized or empowered to make any representation or commitment or to perform any act which shall be binding on the other unless expressly authorized or empowered in writing.

#### 16. ASSIGNMENT.

CONTRACTOR shall perform all the services under this Agreement and shall not assign any interest in this Agreement or transfer any interest in same or assign any claims for money due or to become due under this Agreement without the prior written consent of the CITY.

#### 17. INSURANCE

CONTRACTOR shall obtain and maintain insurance at its own cost and expense during the life of this Agreement, and shall require Subcontractors, if any, to maintain during the life of his subcontract:

- a. Professional Liability: \$1,000,000 per claim

CONTRACTOR shall furnish the CITY with a certificate(s) of insurance showing CONTRACTOR and Subcontractors, if any, have complied with this Article. The CONTRACTOR shall provide insurance certificates before work is to start on the project and shall provide the CITY thirty (30) days written notification of cancellation of such policies.

#### 18. INDEMNITY AND LIMITATION

CONTRACTOR shall indemnify, defend, and hold harmless the CITY from and against any and all claims, suits, actions, judgments, demands, losses, costs, expenses, damages, and liability caused solely by, resulting solely from, or arising solely out of the negligent acts, errors, or omissions of CONTRACTOR, its officers, employees, agents, or representatives in the performance of SERVICES under this agreement.

#### 19. APPLICABLE LAW

This Agreement and the rights and obligations of the parties shall be governed by and construed by the laws of the State of New Mexico applicable to Agreements between New Mexico parties made and performed in that state, without regard to conflicts of law principles. Venue shall be in the Third Judicial District, State of New Mexico.

CONTRACTOR shall abide and be governed by all applicable state law, CITY ordinances, and laws regarding the CONTRACTOR'S services or any work done pursuant to this Agreement.

#### 20. BREACH

In the event CONTRACTOR breaches any obligation contained in this Agreement, prior to instituting any action or dispute resolution procedure, the CITY shall give

CONTRACTOR written notice of such breach. In the event CONTRACTOR fails to remedy the breach within five (5) working days of receiving such written notice, the CITY, at its sole discretion, without any obligation to do so and in addition to other remedies available under applicable law, may remedy CONTRACTOR'S breach and recover any and all costs and expenses in so doing from CONTRACTOR.

#### 21. DISPUTE RESOLUTION

In the event that a dispute arises between CITY and CONTRACTOR under this Agreement or as a result of breach of this Agreement, the parties agree to act in good faith to attempt to resolve the dispute.

In the event of termination, CONTRACTOR shall be compensated for all services performed and costs incurred up to the effective date of termination for which CONTRACTOR has not been previously compensated.

Upon receipt of notice of termination from the CITY, CONTRACTOR shall discontinue the SERVICES unless otherwise directed and upon final payment from the CITY deliver to the CITY the required number of copies of all data, drawings, reports, estimates, summaries, and such other information and materials as may have been accumulated by CONTRACTOR in the performance of this Agreement, whether completed or in process.

22. NOTIFICATION

All notices required or permitted under this Agreement shall be in writing and shall be deemed sufficiently served if served by Registered Mail addressed as follows:

TO CITY: City of Las Cruces  
PO Box 20000  
Las Cruces, NM 88004  
ATTENTION: Finance Director

With Copies to: City Attorney  
Purchasing Manager

TO CONTRACTOR: CliftonLarsonAllen LLP  
Formerly Meyners + Company  
500 Marquette NW, Suite 800  
Albuquerque, NM 87102  
ATTENTION: Marcus J. Mims

23. SCOPE OF AGREEMENT

This Agreement incorporates all of the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof and that all such covenants, agreements, 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 agreement.

CliftonLarsonAllen, LLP

CITY OF LAS CRUCES

BY: \_\_\_\_\_  
PRINCIPAL

BY: \_\_\_\_\_  
PURCHASING MANAGER

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
CITY ATTORNEY

# PROFESSIONAL SERVICES AGREEMENT

## EXHIBIT A

## SERVICES

- The recovery of gross receipt tax will focus on City facility projects, including but not limited to:  
New City Hall: approximately \$30 million in construction cost  
Regional Aquatics Center: approximately \$16 million in construction cost  
Convention Center: approximately \$21 million in construction cost
- The CONTRACTOR shall be responsible for reviewing all necessary documents related to facility construction contracts awarded by the City from January 2007 to present.
- The CONTRACTOR shall provide a report of all relative tax payments paid by the City that would be subject to Regulation 3.2.1.11K for tax refund to the contractor, and, project tax payments on current and future work based upon existing and future project design specifications and plans.
- The CONTRACTOR shall develop and implement a process to maximize the recovery from contractors of tax payments made by the City.

# **PROFESSIONAL SERVICES AGREEMENT**

## **EXHIBIT B**

### **SCHEDULE**

The CONTRACTOR shall perform the SERVICES upon receipt of a written Notice to Proceed from the CITY, following the approval of this contract by the City Council.

The CONTRACTOR shall initiate the SERVICES necessary to fulfill the requirements outlined in EXHIBIT A.

The CONTRACTOR will submit the application for a refund no later than 65 days from the beginning of SERVICES of each project.

The CONTRACTOR will file a protest if a refund is not granted within 120 days from the date of the original filing.

The CONTRACTOR will work with the various vendors to get ensure the CITY receives payment.

The CONTRACTOR shall provide a monthly status report to the CITY, outlining the progress made on the recovery of gross receipts tax on each facility. The monthly report shall be due to the Finance Director by the 10th of the following month.

172

**CITY OF LAS CRUCES****PURCHASING MANAGER'S REQUEST FOR CHANGE ORDER**

For Meeting of: April 2, 2012

Resolution No.: 11-12-477

**Change Order to Existing Contract For  
Tax Recovery Professional Services**

The Las Cruces City Council is provided the following information concerning this request:

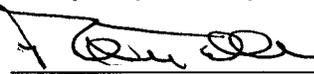
**BID/RFP SOLICITATION INFORMATION:**

1. Original Bid/RFP & Due Date: **RFP 09-10-535/ June 2, 2010**
2. Description of Bid/RFP: **Tax Recovery Professional Services**
3. Contract Award: **Resolution No. 09-10-535/September 7, 2010**
4. Contract Revision:
 

Previous Contract Award Amount:	<b>28% contingency</b>
Change Order Amount:	<b>\$60,000.00</b>
New Contract Amount:	<b>\$60,000.00</b>
5. Contractor: **Clifton/Larsen/Allen (formerly Meyners + Company)**
6. Using Department: **Finance**
7. Contract Duration: **September 6, 2012**

**PROCUREMENT CODE COMPLIANCE:**

The City of Las Cruces Procurement Code was administered in the conduct of this procurement and approval to change the above contract is hereby requested pursuant to **Section 24-228.**

  
Purchasing Manager

1/3/23/2012  
Date

**CONFIRMATION OF FUND ENCUMBRANCE:**

REQUISITION OR PURCHASE ORDER NUMBER:

TBD

**CITY OF LAS CRUCES  
ADOPTED BUDGET FY 2011/2012**

FUND				
General Fund 1000				
	FY 2010/11 Preliminary*	FY 2011/12 Adopted	Adjustment	FY 2011/12 Adjusted
<b>BEGINNING BALANCE</b>	\$ 17,278,821	18,384,852		18,384,852
<b>REVENUES</b>				
Gross Receipts Taxes	\$ 55,902,400	56,694,000		56,694,000
Property Taxes	9,239,902	9,297,552		9,297,552
Franchise Fees	2,877,683	2,696,773		2,696,773
Administrative Transfers	3,203,689	3,094,361		3,094,361
Police Fines	899,113	908,104		908,104
Subdivision Fees	276,626	284,925		284,925
All Other Revenues	6,264,430	5,756,805	237,600	5,994,405
<b>TOTAL REVENUES</b>	\$ 78,663,843	78,732,520	237,600	78,970,120
<b>TOTAL RESOURCES</b>	\$ 95,942,664	97,117,372	237,600	97,354,972
<b>EXPENDITURES</b>				
Administration	\$ 1,833,753	2,658,675	60,000	2,718,675
Community & Cultural Services	5,551,366	5,569,819		5,569,819
Community Development	1,739,511	1,723,177		1,723,177
Facilities	11,745,527	162,651		162,651
Financial Services	3,032,915	3,107,138		3,107,138
Fire	9,049,496	8,889,319		8,889,319
Human Resources	943,614	1,426,312		1,426,312
Information Technology	2,897,306	3,780,334		3,780,334
Judicial	1,110,106	1,544,524		1,544,524
Legal	1,431,285	1,193,226		1,193,226
Legislative	732,134	831,107		831,107
Parks & Recreation	0	9,434,843		9,434,843
Police	18,818,638	18,858,310		18,858,310
Public Works	5,734,968	6,504,990		6,504,990
Transportation	0	3,272,861		3,272,861
Reserves	1,206,656	2,279,653		2,279,653
Transfers	11,723,476	12,022,467		12,022,467
<b>Total General Fund Expenditures</b>	\$ 77,550,751	83,259,406	60,000	83,319,406
Adjustment due to change in accruals.	(7,061)	0		0
<b>ENDING BALANCE</b>	\$ 18,384,852	13,857,966	177,600	14,035,566
<b>Required 1/12th Reserve</b>	6,462,563	6,938,284	5,000	6,943,284
<b>UN-RESERVED ENDING BALANCE</b>	\$ 11,922,289	6,919,682	172,600	7,092,282

\*Preliminary actual as of November 19, 2011



## PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT, made and entered into on this Sept. 7, 2010, by and between the City of Las Cruces, New Mexico, hereinafter called "CITY" and Meyners + Company LLC of 500 Marquette NW, Suite 800, Albuquerque, NM 87102, hereinafter called "CONTRACTOR".

### 1. PROJECT DESCRIPTION

The City seeks maximum reimbursement of gross receipts tax from construction material suppliers and contractors who obtain tax refunds pursuant to Regulation 3.2.1.11.K.

### 2. SCOPE OF SERVICES

In a satisfactory and proper manner, the CONTRACTOR shall perform SERVICES as proposed in response to the CITY'S RFP No. 09-10-535 Tax Recovery Professional Services, incorporated herein by reference and as set forth in Exhibit A, attached hereto and made a part of this Agreement.

### 3. APPROPRIATIONS

The terms of this Agreement are contingent on sufficient appropriations and authorization being made by the City Council for the performance of this Agreement. If sufficient appropriations and authorizations are not made by the City Council, this Agreement shall terminate upon written notice given by the CITY to CONTRACTOR. The CITY'S decision as to whether sufficient appropriations and authorizations exist shall be accepted by CONTRACTOR and shall be final.

### 4. COMPENSATION

The CITY shall compensate CONTRACTOR for the performance of SERVICES under this Agreement. Compensation is contingent upon collection of taxes and is based upon a percentage of reimbursed taxes plus applicable NMGRT. CONTRACTOR will be compensated at 19% of the gross receipts tax recovered by the CITY on current projects, and 28% on past projects. Current projects are projects for which amounts unpaid under the contract are sufficient to allow deductions of gross receipts in amounts that permit the total gross receipts tax savings to be recovered without filing requests for refunds. Past projects are projects for which insufficient amounts are owed under the contract to allow deductions of gross receipts in amounts that permit the total gross receipts tax savings to be recovered, requiring preparation and filing of a request for refund in order to effectuate the calculated tax savings. CONTRACTOR will bill the CITY on a monthly basis for out of pocket expenses and the bill will be paid Net 30.

CONTRACTOR is responsible for payment of State of New Mexico Gross Receipts Tax levied on the amounts payable under this Agreement. CONTRACTOR agrees to

comply with all federal and state tax payments and report all items of gross receipts as income from the operations of its business.

#### 5. DEVOTION OF ADEQUATE TIME

CONTRACTOR will devote the necessary hours each week to the performance of projects that are required by the CITY and it will serve the CITY diligently and faithfully, and according to its best ability in all respects and will promote the best interests of the CITY.

#### 6. TERM AND SCHEDULE

This Agreement shall become effective from date of award for a period of 1 year and, pending mutual written agreement may be renewed yearly for an additional four one year terms.

CONTRACTOR shall perform the SERVICES in accordance with the time set forth as agreed upon by the CITY and CONTRACTOR. The refund application will be processed no later than 65 days from the beginning of the services on each project. If the refund is not granted within 120 days from the date of the filing, the CONTRACTOR will file a protest. The CITY will submit payment to the CONTRACTOR 30 days after receipt of the invoice. The CONTRACTOR will not bill the CITY until after the CITY has received payment for NMGRT recovered.

#### 7. EXTENSIONS, CHANGES, AND AMENDMENTS

This Agreement shall not be extended, changed, or amended except by instrument in writing executed by the parties. The CITY shall not be liable for payment of any extra services nor shall CONTRACTOR be obligated to perform any extra services except upon such written agreement. Such written approval shall indicate the date said extension, change, or amendment is effective and shall be signed by the parties to this Agreement. In the event that the parties cannot reach agreement as to a particular change, the issue shall be resolved pursuant to Article 21.

#### 8. CHANGES AND EXTRA SERVICES BY THE CITY

The CITY may make changes within the general scope of the SERVICES plus may also request CONTRACTOR to perform other extra services not incorporated within the Services set forth in this Agreement. If the CONTRACTOR is of the opinion that such change causes an increase or decrease in the cost and/or the time required for performing the changes or other services required by the City, CONTRACTOR shall so notify the CITY of that fact within five (5) business work days from the date of receipt of change by the CITY. The CITY shall provide written response to the CONTRACTOR within five (5) business work days from the date of receipt of CONTRACTOR'S written notification.

#### 9. CHANGES AND EXTRA SERVICES BY THE CONTRACTOR

In the event a condition is identified by the CONTRACTOR which, in the opinion of the CONTRACTOR, changes the services, costs, and/or time required for performance under this Agreement, the CONTRACTOR shall provide written notification to the CITY

within five (5) business work days of such identification. The CITY shall respond in writing to such notification within five (5) business work days from the date of receipt of CONTRACTOR'S notification.

#### 10. DELAYS

In the event that performance of SERVICES is delayed by causes beyond reasonable control of CONTRACTOR, and without the fault or negligence of CONTRACTOR, the time and total compensation for the performance of the SERVICES may be equitably adjusted by written agreement to reflect the extent of such delay. CONTRACTOR shall provide the CITY with written notice of delay pursuant to Article 9 including therein a description of the delay and the steps contemplated or actually taken by CONTRACTOR to mitigate the effect of such delay. The CITY will make the final determination as to reasonableness of delays.

#### 11. TERMINATION

This Agreement may be terminated by either party hereto upon fifteen (15) calendar days written notice in the event of substantial failure by the other party to perform in accordance with the terms of this Agreement through no fault of the terminating party. This Agreement may also be terminated by the CITY for its convenience or because the PROJECT has been permanently abandoned, but only upon fifteen (15) calendar days written notice to CONTRACTOR.

In the event of termination, CONTRACTOR shall be compensated for all services performed and costs incurred up to the effective date of termination for which CONTRACTOR has not been previously compensated.

Upon receipt of notice of termination from the CITY, CONTRACTOR shall discontinue the SERVICES unless otherwise directed and upon final payment from the CITY deliver to the CITY the required number of copies of all data, drawings, reports, estimates, summaries, and such other information and materials as may have been accumulated by CONTRACTOR in the performance of this Agreement, whether completed or in process.

#### 12. RECORDS AND AUDITS

CONTRACTOR will maintain records indicating dates, length of time, and services rendered. The CITY has the right to audit billings both before and after payment, and contest any billing or portion thereof. Payment under this Agreement does not foreclose the CITY'S right to recover excessive or illegal payments.

#### 13. DISCLOSURE AND OWNERSHIP OF DOCUMENTS, PRODUCTS, DESIGN, ELECTRONIC FILES

All technical data, electronic files, and other written and oral information not in the public domain or not previously known, and all information, electronic files, and data obtained, developed, or supplied by the CITY will be kept confidential and CONTRACTOR will not disclose to any other party, directly or indirectly, without the CITY'S prior written consent unless required by lawful order.

All technical data, electronic files, products developed, operational parameters, blueprints, and other information and work of the CONTRACTOR shall be the sole property of the CITY and shall be delivered to the CITY when requested and at the end of the Agreement.

#### 14. INDEPENDENT CONTRACTOR

CONTRACTOR represents that it has, or will secure, at its own expense, all personnel required in performing the SERVICES under this Agreement. Such personnel shall not be employees of, nor have any contractual relationship with the CITY. CONTRACTOR, consistent with its status as an independent contractor, further agrees that its personnel will not hold themselves out as, nor claim to be officers or employees of the CITY by reason of this Agreement.

To the extent that CONTRACTOR employs any employees, CONTRACTOR shall be solely responsible for providing its own form of insurance for its employees and in no event shall CONTRACTOR's employees be covered under any policy of the CITY.

CONTRACTOR'S retention hereunder is not exclusive. Subject to the terms and provisions of this Agreement: (i) CONTRACTOR is able, during the Term hereof, to perform services for other parties; and (ii) CONTRACTOR may perform for its own account other professional services outside the scope of this Agreement.

CONTRACTOR is and shall be an Independent Contractor and shall be responsible for the management of its business affairs. In the performance of the work under this Agreement, CONTRACTOR will at all times be acting and performing as an Independent Contractor, as that term is understood for federal and state law purposes, and not as an employee of the CITY. Without limitation upon the foregoing, CONTRACTOR shall not accrue sick leave, jury duty pay, retirement, insurance, bonding, welfare benefits, or any other benefits, which may or may not be afforded employees of the CITY. CONTRACTOR will not be treated as an employee for purposes of: Workers' Compensation benefits; the Federal Unemployment Tax Act; Social Security; other payroll taxes, federal or any state income tax withholding; or the employee benefit provisions described in the Internal Revenue Code of 1986, as amended. Neither the CITY, nor its agents or representatives, shall have the right to control or direct the manner, details or means by which CONTRACTOR accomplishes and performs its services. Nevertheless, CONTRACTOR shall be bound to fulfill the duties and responsibilities contained in the Agreement.

#### 15. NO JOINT VENTURE OR PARTNERSHIP

Nothing contained in this Agreement shall create any partnership, association, joint venture, fiduciary or agency relationship between CONTRACTOR and CITY. Except as otherwise specifically set forth herein, neither CONTRACTOR nor CITY shall be authorized or empowered to make any representation or commitment or to perform any act which shall be binding on the other unless expressly authorized or empowered in writing.

16. ASSIGNMENT.

CONTRACTOR shall perform all the services under this Agreement and shall not assign any interest in this Agreement or transfer any interest in same or assign any claims for money due or to become due under this Agreement without the prior written consent of the CITY.

17. INSURANCE

CONTRACTOR shall obtain and maintain insurance at its own cost and expense during the life of this Agreement, and shall require Subcontractors, if any, to maintain during the life of his subcontract:

- a. Professional Liability: \$1,000,000 per claim

CONTRACTOR shall furnish the CITY with a certificate(s) of insurance showing CONTRACTOR and Subcontractors, if any, have complied with this Article. The CONTRACTOR shall provide insurance certificates before work is to start on the project and shall provide the CITY thirty (30) days written notification of cancellation of such policies.

18. INDEMNITY AND LIMITATION

CONTRACTOR shall indemnify, defend, and hold harmless the CITY from and against any and all claims, suits, actions, judgments, demands, losses, costs, expenses, damages, and liability caused solely by, resulting solely from, or arising solely out of the negligent acts, errors, or omissions of CONTRACTOR, its officers, employees, agents, or representatives in the performance of SERVICES under this agreement.

19. APPLICABLE LAW

This Agreement and the rights and obligations of the parties shall be governed by and construed by the laws of the State of New Mexico applicable to Agreements between New Mexico parties made and performed in that state, without regard to conflicts of law principles. Venue shall be in the Third Judicial District, State of New Mexico.

CONTRACTOR shall abide and be governed by all applicable state law, CITY ordinances, and laws regarding the CONTRACTOR'S services or any work done pursuant to this Agreement.

20. BREACH

In the event CONTRACTOR breaches any obligation contained in this Agreement, prior to instituting any action or dispute resolution procedure, the CITY shall give CONTRACTOR written notice of such breach. In the event CONTRACTOR fails to remedy the breach within five (5) working days of receiving such written notice, the CITY, at its sole discretion, without any obligation to do so and in addition to other remedies available under applicable law, may remedy CONTRACTOR'S breach and recover any and all costs and expenses in so doing from CONTRACTOR.

21. DISPUTE RESOLUTION

In the event that a dispute arises between CITY and CONTRACTOR under this Agreement or as a result of breach of this Agreement, the parties agree to act in good faith to attempt to resolve the dispute.

In the event of termination, CONTRACTOR shall be compensated for all services performed and costs incurred up to the effective date of termination for which CONTRACTOR has not been previously compensated.

Upon receipt of notice of termination from the CITY, CONTRACTOR shall discontinue the SERVICES unless otherwise directed and upon final payment from the CITY deliver to the CITY the required number of copies of all data, drawings, reports, estimates, summaries, and such other information and materials as may have been accumulated by CONTRACTOR in the performance of this Agreement, whether completed or in process.

22. NOTIFICATION

All notices required or permitted under this Agreement shall be in writing and shall be deemed sufficiently served if served by Registered Mail addressed as follows:

TO CITY:                      City of Las Cruces  
   PO Box 20000  
   Las Cruces, NM 88004  
   ATTENTION: Finance Director

With Copies to:              City Attorney  
   Purchasing Manager

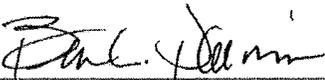
TO CONTRACTOR:            Meyners & Company  
   500 Marquette NW, Suite 800  
   Albuquerque, NM 87102  
   ATTENTION: Marcus J. Mims

23. SCOPE OF AGREEMENT

This Agreement incorporates all of the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof and that all such covenants, agreements, 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 agreement.

MEYNER + COMPANY, LLC

THE CITY OF LAS CRUCES

BY:   
PRINCIPAL

BY:   
PURCHASING MANAGER

DATE: 8/13/10

DATE: 9/13/2010

APPROVED AS TO FORM:

  
CITY ATTORNEY  
09/07/10

# EXHIBIT A

## SERVICES

- The recovery of gross receipt tax will focus on City facility projects, including but not limited to:  
New City Hall: approximately \$30 million in construction cost  
Regional Aquatics Center: approximately \$16 million in construction cost  
Convention Center: approximately \$21 million in construction cost
- The CONTRACTOR shall be responsible for reviewing all necessary documents related to facility construction contracts awarded by the City from January 2007 to present.
- The CONTRACTOR shall provide a report of all relative tax payments paid by the City that would be subject to Regulation 3.2.1.11K for tax refund to the contractor, and, project tax payments on current and future work based upon existing and future project design specifications and plans.
- The CONTRACTOR shall develop and implement a process to maximize the recovery from contractors of tax payments made by the City.

## **EXHIBIT B**

### **SCHEDULE**

The CONTRACTOR shall perform the SERVICES upon receipt of a written Notice to Proceed from the CITY, following the approval of this contract by the City Council.

The CONTRACTOR shall initiate the SERVICES necessary to fulfill the requirements outlined in EXHIBIT A.

The CONTRACTOR will submit the application for a refund no later than 65 days from the beginning of SERVICES of each project.

The CONTRACTOR will file a protest if a refund is not granted within 120 days from the date of the original filing.

The CONTRACTOR will work with the various vendors to ensure the CITY receives payment.

The CONTRACTOR shall provide a monthly status report to the CITY, outlining the progress made on the recovery of gross receipts tax on each facility. The monthly report shall be due to the Finance Director by the 10th of the following month.