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City of Las Cruces[®]
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Council Action and Executive Summary

Item # 9 Ordinance/Resolution# 14-066

For Meeting of _____
 (Ordinance First Reading Date)

For Meeting of October 7, 2013
 (Adoption Date)

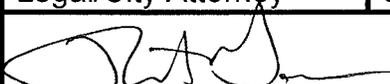
Please check box that applies to this item:

QUASI JUDICIAL LEGISLATIVE ADMINISTRATIVE

TITLE: A RESOLUTION APPROVING THE FIRST AMENDMENT TO THE ASSET PURCHASE AGREEMENT BETWEEN THE CITY OF LAS CRUCES, THE COUNTY OF DONA ANA, AND PHC-LAS CRUCES, INC. CONCERNING MEMORIAL MEDICAL CENTER.

PURPOSE(S) OF ACTION:

To approve amendments to an agreement.

COUNCIL DISTRICT: N/A		
Drafter/Staff Contact: Monica Campbell	Department/Section: Legal/City Attorney	Phone: 541-2128
City Manager Signature:		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

At a special meeting on May 13, 2004, the City Council approved the lease agreement (for the real property), an asset purchase agreement (for the sale of certain assets) and an escrow agreement, known collectively as the "Agreement", concerning the lease by PHC-Las Cruces, Inc. of Memorial Medical Center ("Hospital"). The Agreement was formally entered into on May 19, 2004.

The implementation of the Affordable Care Act and other changes in the operation of the Hospital and the delivery of healthcare services required a review of the Agreement. The review centered on the asset purchase agreement ("APA") in reference to capital expenditures by the Hospital and of certain funds held in the warranty escrow account.

The first amendment to the APA contemplates that 1) the APA be amended so that the Hospital as lessee will make annual capital expenditures to enhance healthcare services in the amount of two percent of net patient revenue, and 2) the APA be amended so that upon execution of the first amendment to the agreement, the parties shall mutually authorize the release of all funds currently held in the warranty escrow account.

(Continue on additional sheets as required)

SUPPORT INFORMATION:

1. Resolution.
2. Exhibit "A". First Amendment to Asset Purchase Agreement by and Between the County of Dona Ana, New Mexico (the "County") and the City of Las Cruces, New Mexico (the "City") (collectively, "Lessors") and PHC-Las Cruces, Inc. ("Lessee").

SOURCE OF FUNDING:

Is this action already budgeted? N/A	Yes	<input type="checkbox"/>	See fund summary below
	No	<input type="checkbox"/>	If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/>	Expense reallocated from: _____
	<input type="checkbox"/>	Proposed funding is from a new revenue source (i.e. grant; see details below)	
	<input type="checkbox"/>	Proposed funding is from fund balance in the _____ Fund.	
Does this action create any revenue? N/A	Yes	<input type="checkbox"/>	Funds will be deposited into this fund: _____ in the amount of \$ _____ for FY ____.
	No	<input type="checkbox"/>	There is no new revenue generated by this action.

BUDGET NARRATIVE:

N/A

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
N/A	N/A	N/A	N/A	N/A	N/A

OPTIONS / ALTERNATIVES:

1. Vote "Yes"; this will approve the first amendment to the asset purchase agreement.
2. Vote "No"; this will not approve the first amendment to the asset purchase agreement which will leave the original Agreement in force and effect.
3. Vote to "Amend"; this will require further negotiations by the parties.
4. Vote to "Table"; this may require further negotiations by the parties.

REFERENCE INFORMATION:

N/A.

RESOLUTION NO. 14-066

A RESOLUTION APPROVING THE FIRST AMENDMENT TO THE ASSET PURCHASE AGREEMENT BETWEEN THE CITY OF LAS CRUCES, THE COUNTY OF DONA ANA, AND PHC-LAS CRUCES, INC. CONCERNING MEMORIAL MEDICAL CENTER.

The City Council is informed that:

WHEREAS, at a special meeting on May 13, 2004, the City Council approved the lease agreement (for the real property), an asset purchase agreement (for the sale of certain assets) and an escrow agreement, known collectively as the "Agreement", concerning the lease by PHC-Las Cruces, Inc. of Memorial Medical Center ("Hospital"); and

WHEREAS, the Agreement was formally entered into on May 19, 2004; and

WHEREAS, the implementation of the Affordable Care Act and other changes in the operation of the Hospital and the delivery of healthcare services required a review of the Agreement; specifically, a review of items in the asset purchase agreement ("APA") in reference to capital expenditures by the Hospital and of certain funds held in the warranty escrow account.

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

(I)

THAT the APA is amended so that the Hospital as lessee will make annual capital expenditures to enhance healthcare services in the amount of two percent of net patient revenue, as shown more particularly in Exhibit "A" attached hereto.

(II)

THAT the APA is further amended so that upon execution of the first amendment to the Agreement, the parties shall mutually authorize the release of all funds currently

held in the warranty escrow account, and accomplish other obligations, as shown more particularly in Exhibit "A" attached hereto.

(III)

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

DONE AND APPROVED on this _____ day of _____, 2013.

APPROVED:

Mayor

ATTEST:

City Clerk

(SEAL)

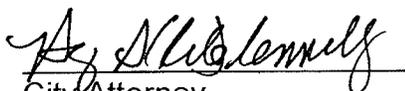
VOTE:

Mayor Miyagishima: _____
Councillor Silva: _____
Councillor Smith: _____
Councillor Pedroza: _____
Councillor Small: _____
Councillor Sorg: _____
Councillor Thomas: _____

Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:



City Attorney

**FIRST AMENDMENT TO ASSET PURCHASE AGREEMENT
BY AND BETWEEN THE COUNTY OF DOÑA ANA, New Mexico (the "County") AND
THE CITY OF LAS CRUCES, New Mexico (the "City") (collectively, "LESSORS") AND
PHC-LAS CRUCES, INC. ("LESSEE")**

This First Amendment to the Asset Purchase Agreement between Lessors and Lessee (the "Amendment"), is made effective as of the _____ day of _____, 2013.

WHEREAS, Lessors and Lessee entered into that certain Asset Purchase Agreement (the "Agreement") and Lease Agreement (the "Lease") dated as of May 19, 2004 as part of a transaction concerning the long-term lease of Memorial Medical Center in Las Cruces, New Mexico by Lessee from Lessors; and

WHEREAS, the implementation of the Affordable Care Act and other changes in the delivery of healthcare services have necessitated a review of certain provisions contained in the Agreement regarding the operation by Lessee of the Hospital as contemplated by the Agreement; and

WHEREAS, the parties also desire to release certain funds held in an escrow account described in Article 10 of the Agreement generally described as the Representations and Warranties Escrow Account (the "Escrow Account"), which funds are currently subject to the terms of a Forbearance Agreement entered into between the parties to the Agreement.

WHEREAS, the parties desire to amend the Agreement, as more particularly described below.

NOW THEREFORE, the Agreement is hereby amended as follows:

1. Covenants of Lessee. The Covenants of Lessee contained in Article 6 of the Agreement regarding capital expenditures are hereby amended as follows:

Section 6.6(b): The language in Section 6.6(b) of the Agreement regarding annual capital expenditures is deleted in its entirety and the following new Section 6.6(b) is substituted therefor:

Lessee shall commit to making annual capital expenditures in connection with healthcare services provided in Doña Ana County, New Mexico in an amount equal to two percent of net patient revenue (less bad debt expense) as set forth in the annual financial statements of Lessee, based on a rolling average over the remaining term of the Lease, commencing with calendar year 2014. Lessee shall present to Lessors annually a report that summarizes the capital expenditures made by Lessee since the execution of this First Amendment. The parties agree that Lessee has met its obligations under Section 6.6(b) of the Agreement from the effective date of the Agreement through the effective date of this First Amendment.

- 2. Release of Escrow Funds. Upon execution of this First Amendment, the parties shall mutually authorize the release of all funds currently held in the Escrow Account, after payment of any fees, to be disbursed equally to the City Of Las Cruces and the County of Dona Ana, as provided for in the Agreement. The Forbearance Agreement executed by the parties in 2011 shall be terminated by mutual agreement. In releasing the funds contained in the Escrow Account, it is acknowledged by all parties that claims could be made by the Pension Benefit Guaranty Corporation against any of the parties to the Agreement and nothing in this Amendment shall release any party from any claims that may be made against it arising out of any alleged underfunding of the pension plan of Memorial Medical Center, Inc.
- 3. Full Force and Effect. Except as specifically amended herein, all terms and conditions of the Agreement shall remain in full force and effect, except as otherwise amended in writing.

IN WITNESS WHEREOF, this Amendment is executed by Facility and Contractor as of the date and year first above written.

LESSORS:

The County of Doña Ana, New Mexico

By: _____

Title: _____

The City of Las Cruces, New Mexico

By: _____

Title: _____

Approved as to Form:

City Attorney

LESSEE:

PHC-Las Cruces, Inc.

By: _____

Title: _____

Date: _____