

**CITY OF LA VISTA
MAYOR AND CITY COUNCIL REPORT
SEPTEMBER 17, 2013 AGENDA**

Subject:	Type:	Submitted By:
PROFESSIONAL SERVICES AGREEMENT — ALLIXA CONSULTING, INC. - AMEMDED	◆ RESOLUTION ORDINANCE RECEIVE/FILE	BRENDA S. GUNN CITY ADMINISTRATOR

SYNOPSIS

A resolution has been prepared to approve an amended professional services agreement with Allixa Consulting, Inc., of Maitland, FL for an audit of the Telecommunications Occupation Taxes and franchise fees collected by the City.

FISCAL IMPACT

Contingency fee basis. City will pay 35% of the gross amount of any payments for retroactive, current, or prospective funds for up to two (2) years. The City will pay 45% if Allixa is obligated to hire and pay for an attorney for collection action.

RECOMMENDATION

Approval.

BACKGROUND

City Council approved the professional services agreement with Allixa Consulting, Inc., of Maitland, FL at the July 2, 2013 meeting.

The original agreement did not have language for the review of franchise fees and this has created an obstacle in obtaining that information.

There are no changes to the fees. Changes, which are redlined, are on pages 1 and 2 of the agreement.

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF LA VISTA, NEBRASKA, APPROVING AN AMENDED PROFESSIONAL SERVICES AGREEMENT WITH ALLIXA CONSULTING, INC., MAITLAND FLORIDA ON A CONTINGENCY FEE BASIS.

WHEREAS, the City Council of the City of La Vista has determined that an audit of the Telecommunications Occupation Taxes collected by the City is necessary; and

WHEREAS, the City Council has determined that it is necessary to amend the agreement to add franchise fees collected by the City; and

WHEREAS, Allixa Consulting, Inc. has provided a proposal to prepare such an audit; and

WHEREAS Subsection (C) (9) of Section 31.23 of the La Vista Municipal Code requires that the City Administrator secures Council approval prior to authorizing any purchase over \$5,000.00.

NOW, THEREFORE, BE IT RESOLVED, that the Mayor and City Council of La Vista, Nebraska approve an amended agreement with Allixa Consulting, Inc., Maitland, Florida, on a contingency fee basis and the Mayor hereby is, authorized to execute same on behalf of the City in form and content satisfactory to the City.

PASSED AND APPROVED THIS 17TH DAY OF SEPTEMBER, 2013.

CITY OF LA VISTA

Douglas Kindig, Mayor

ATTEST:

Pamela A. Buethe, CMC
City Clerk

ALLIXA CONSULTING, INC.
CONTINGENT FEE PROFESSIONAL SERVICES AGREEMENT
(AMENDED)

This Professional Services Agreement ("Agreement") is made and entered into by and between Allixa Consulting, Incorporated, a Florida corporation having its principal place of business at 1003 Kewannee Trail, Maitland FL 32751 ("Allixa"), and the City of La Vista, 210 West Mission Ave, La Vista, Nebraska 68005 (the "City").

Section 1 - Scope of Services

1. Allixa is pleased to confirm our understanding of the nature and limitations of the services we will provide to the City. Subject to the following terms and conditions, Allixa shall provide professional consulting services ("Services") in substantial accordance with the following statements.
2. Allixa has been hired to review the telecommunication occupation tax payments and franchise fees (collectively the "payments") paid by ~~five-six~~ (56) of the telecommunication providers and by Cox Communications (collectively the "Companies") maintained in the City's right-of-way for the five (5) years ended June 30, 2013. A list of the Companies is included as Attachment A. Allixa will identify the ~~telecommunication occupation tax payments ("payments")~~ previously paid to the City, and prioritize the reviews based on the dollar amount of annual payments to the City. Allixa and the City will then determine which Companies should be reviewed.
3. The purpose of each review is to analyze the payments and determine whether any additional amounts are due to the City for underpayment or nonpayment of past, present, and future payments, or any other monies or revenue owed to the City that were not properly attributed to the City. Allixa will perform the following procedures for each review:
 - a. Contact City's staff and obtain documentation required to kick-off the project.
 - b. If required, execute a non-disclosure agreement with the Company in order to obtain any documentation deemed confidential.
 - c. Prepare an initial data request for the City and each of the Company requesting information related to the review period. During the course of the project, if needed, prepare and submit additional data requests to the Company.
 - d. Provide to the City status updates/meetings concerning each review on a regular basis via phone, email, or in person throughout the course of these projects.
 - e. Review the City's ordinances, municipal code, federal and Nebraska state law, franchise agreements and contracts between City and the Company to analyze the definition of revenues and to determine whether or not there are additional amounts due to the City.
 - f. Verify whether the Company's reported ~~taxable~~ revenues utilize a consistent methodology during the review period and in accordance with the City's Municipal Code.
 - g. Identify any exempt revenues and determine if it meets the City's requirements for exempt status.
 - h. Identify each revenue type or source that the Company did not include in the determination of the amounts remitted to the City during the review period.

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- i. Summarize the ~~taxable~~ revenues reported by the Company to the City, and reconcile the ~~taxable~~ revenues to the payments to the City.
- j. Submit draft and final reports to the City. The reports will include the determination of the any underpayment or nonpayment and any applicable interest charges and fees.
- k. Assist City with collection and negotiation of amount due to the City as a result of the review.

Section 2 – Resource Commitment from the City

4. The City agrees to cooperate with Allixa and agrees to provide Allixa with copies of the following documentation in order to proceed with each review: 1) ordinance, municipal code, franchise agreement, and transfer agreement; 2) rate cards and fee schedules; 3) copies of payments and any supporting documentation; 4) true-up and/or settlement payments; 5) relevant correspondence related to the payments; and 6) any other relevant information that may impact our analysis.
5. The City shall designate Allixa as an authorized agent for the purposes of authorizing Allixa to work with the Companies and Nebraska Department of Revenue when or if necessary.
6. Allixa will require full access to City records and Company records to complete these reviews and City will use its authority as necessary to provide information and procure data from Companies.
7. The City, at its sole cost, agrees to provide reasonable facilities, if needed, for Allixa staff to work on the City's premises as may be required for the performance of the Services set forth in this Agreement.
8. The City, at its sole cost, will assign a designated employee to be the primary contact during the review process. The designated employee will also be the final decision maker for the City as it relates to the reviews, and will be in contact with Allixa staff on a regular basis.
9. The City's staff will be available for meetings and participation with the Companies, if needed, to properly verify tax records and recover funds. Lack of participation of City staff, especially at critical milestones during a review, may adversely affect the project timeline and successful recovery of funds.
10. City understands that each Company is a separate entity that is not controlled by Allixa and therefore Allixa cannot predict all the steps or actions that a Company will take to limit its responsibility or accountability during the review.

Section 3 – Timeline and Schedule

11. The first review start date is expected to be within thirty (30) days from the date of this Agreement unless changed and approved by the City. Review status updates/meetings will be held regularly via phone or email throughout the course of the reviews between Allixa and the City.
12. Each review is expected to last at least six (6) months. Each subsequent review will begin after payment terms and obligations have been met from previously completed reviews,

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and Allixa has received final payment from the City. However, overlapping reviews may take place at the sole discretion of Allixa. Timelines are set at the sole discretion of Allixa. The above time estimate assumes a timely and complete response from the Company. If data is incomplete or not provided timely, it may impact our anticipated schedule. We will notify the City if our schedule is affected.

Section 4 - Payment Terms

13. City shall compensate Allixa with the fees set forth in this Agreement on a contingency basis. All contingency fees paid to Allixa are based on the gross amount of either a negotiated settlement by Allixa and agreed to by the City or on an order or decision of a court or other adjudicated tribunal. The City will pay Allixa within ten (10) days of receipt of any payments remitted to and collected by the City as a result of any work performed by Allixa, whether or not the project has been completed.
14. The City and Allixa agree and understand that the gross amounts received by the City from the Company may be the result of negotiations between the City, Allixa and the Company. The negotiated settlement may be a different gross amount than was quantified in any report prepared by Allixa. Allixa has the right to review and evaluate any payments received from the Company to verify that Allixa has received its correct contingency fee.
15. If City negotiates, abates, cancels, amends, or waives, without Allixa's written consent, any right to payment or other consideration, the City shall pay to Allixa applicable contingency fees for the total said review determination at the rates set forth below and for the following sixty (60) months. If City later implements during the subsequent sixty (60) months any action the City initially declined based on Allixa's findings, including for reviews identified on Attachment A, Allixa will be entitled to its portion of the savings and/or recoveries over the following sixty (60) months at the contingency fee rates set forth in 16 and 17 below.
16. Contingency Fees without Attorney Costs – If the City elects to incur the costs associated with hiring either an in-house or outside attorney to assist the City and Allixa in recovering any monies, the City shall pay Allixa a contingency fee equal to thirty-five (35) percent of the gross amount of any payments for retroactive, current, or prospective funds for up to two (2) years, and fair market value for any other consideration or compensation recovered for or by the City from any reviewed Company. The City may not reflect the costs associated with hiring an attorney or any other costs in determining the amount due to Allixa.
17. Contingency Fees with Attorney Costs - If Allixa is obligated to hire and pay for an attorney for collection action, the City shall pay Allixa a contingency fee equal to forty-five (45) percent of the gross amount of any payments for retroactive, current, or prospective funds for up to two (2) years, and fair market value for any other consideration or compensation recovered for or by the City from any reviewed Company.
18. If payment of all or any part of the gross amount to be received will be deferred (such as in the case of an annuity, a structured settlement, or periodic payments), the "total gross amount received," for purposes of calculating Allixa's contingency fees, will be the initial lump-sum payment plus the present value, as of the time of the settlement, final arbitration award, or final judgment, of the gross amount of payments to be received thereafter. If the

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payment is insufficient to pay Allixa's fees in full, the balance will be paid from subsequent payments of the recovery before any distribution to the City.

Section 5 - Confidential Information

19. Each party acknowledges that either party may have access to information belonging to the other which is proprietary, private and highly confidential ("Confidential Information"). Each party, on behalf of itself and its employees, agrees not to disclose to any third party any Confidential Information to which it may have access while performing its obligations hereunder without the written consent of the disclosing party. Confidential Information does not include: (i) written information legally acquired by either party prior to the negotiation of this Agreement, (ii) information which is or becomes a matter of public knowledge, (iii) information released under the Freedom of Information Act, and (iv) information which is or becomes available to the recipient party from third parties where such third parties have no confidentiality obligations to the disclosing party.

Section 6 - Termination

20. This Agreement shall be effective from the date first written above and shall continue thereafter until terminated upon 30 days written notice by City or Allixa. Termination for any cause or under any provision of this Agreement shall not prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to either party. The provisions set forth above in Section 4 (Payment Terms), Section 5 (Confidential Information), and below in Section 9 (Assignment) shall survive termination of this Agreement.

Section 7 – Ownership of Materials

21. All work performed by Allixa with respect to the Services or any supporting or related documentation shall be owned by Allixa. Upon completion of the Work, or upon termination of this Agreement pursuant to Section 6 of this Agreement, all products and materials, including software, collected and prepared by Allixa pursuant to this Agreement, shall remain the property of Allixa.

Section 8 – Notices

22. Any notice made in accordance with this Agreement shall be sent by certified mail or by overnight express mail:

if to Allixa Consulting, Inc.:

Garth Ashpaugh
Allixa Consulting, Inc.
1003 Kewannee Trail
Maitland, FL 32751

if to the City:

Brenda S. Gunn
City Administrator
City of La Vista
8116 Park View Boulevard
La Vista, NE 68128

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Section 9 - Assignment

23. Neither party may assign this Agreement or any of its rights hereunder without the prior written consent of the other party hereto.

Section 10 - Entire Agreement

24. This Agreement, with its schedules and attachments, contains the entire Agreement between the parties hereto with respect to the matters specified herein. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision hereof. This Agreement shall not be amended except by a written amendment executed by the parties hereto. This Agreement shall be construed in accordance with the laws of the State of Nebraska and the parties hereby consent to the jurisdiction of the courts of the State of Nebraska.

Section 11 - Dispute Resolution

25. Any dispute arising under this Agreement shall be resolved through mediation and arbitration. The parties agree to first attempt to resolve the dispute informally with the help of a mutually agreed upon mediator. If the parties cannot agree on a mediator or fail to arrive at a mutually satisfactory solution through mediation within ten (10) days following the mediation, the parties agree to submit their dispute to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall take place in Lincoln, Nebraska.
26. The arbitration shall be conducted by an impartial arbitrator chosen by mutual agreement of the parties or if the parties are unable to agree on a single arbitrator within ten (10) days of first demand for arbitration, the parties agree to allow the American Arbitration Association to choose an impartial arbitrator for the parties.
27. The arbitrator shall have the authority to permit discovery to the extent such arbitrator deems appropriate. The arbitrator shall have no power to add or detract from the agreements of the parties and may not make any ruling or award that does not conform to the terms and conditions of this Agreement. The decision of the arbitrator shall be final and binding on the parties and may be entered and enforced in any court of competent jurisdiction by either party.
28. The prevailing party in the arbitration proceedings shall be awarded reasonable expenses such as attorney fees, expert witness costs, travel expenses, and any other expenses incurred in connection with the proceedings,. Allixa, as a Florida entity, shall have the right to be represented by Florida counsel, if they wish, and have the travel expenses of their counsel taxed if they are the prevailing party.

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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in duplicate originals by their duly authorized representatives as of the date set forth below. This letter agreement shall be deemed executed and accepted on the date it is signed by the City.

The Parties hereby indicate their assent this _____ day of _____, 2013.

ALLIXA CONSULTING, INC.

By: _____
Name: _____
Title: _____
Date: _____

CITY OF LA VISTA, NEBRASKA

By: _____
Name: _____
Title: _____
Date: _____

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ATTACHMENT "A"

1. OMAHA CELLULAR TELEPHONE COMPANY - Tax ID 47-0697818 1 C/O Tax Partners, LLC, 3100 Cumberland Blvd., Ste. 900, Atlanta, GA 30339 (877) 829-4141
2. COX NEBRASKA TELCOM, LLC - Tax ID 58-2327135 1 C/O Tax Partners, LLC, 3100 Cumberland Blvd., Ste. 900, Atlanta, GA 30339 (877) 829-4141
3. SPRINT SPECTRUM, L.P. - Tax ID 48-1165245 6500 Sprint Pkwy, Mailstop, HL-5ATTX, Overland Park, KS 66251 (B. Tertichny)
4. SPRINT NEXTEL, 6500 Sprint Parkway, Overland Park, KS 66251
5. NEW CINGULAR WIRELESS PCS LLC - Tax ID 223330080 1 C/O Tax Partners, LLC, 3100 Cumberland Blvd., Ste. 900, Atlanta, GA 30339 (877)-829-4141
6. COX COMMUNICATIONS OMAHA, L.L.C., Public Affairs Department, 11505 W Dodge Road, Omaha Nebraska 68154
7. CRICKET COMMUNICATIONS, INC., 5887 Copley Drive, San Diego, CA 92111-7906