



**INCORPORATED COUNTY OF LOS ALAMOS  
SERVICES AGREEMENT**

**THIS SERVICES AGREEMENT** is made and entered into by and between the **Incorporated County of Los Alamos**, an incorporated county of the State of New Mexico ("County"), and **Gallagher & Kennedy, P.A.** a professional corporation ("Contractor"), to be effective for all purposes November 14, 2018.

**RECITALS**

**WHEREAS**, the County 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 County intends that the Contractor will act on behalf of and in service to the County 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 ("Services") in conjunction and association with the County Attorney in the following case:

Assist the County 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 County.

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 County receives from the State of New Mexico as a result of the Contractor's representation of the County 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 County up to four million dollars (\$4,000,000.00). The Contractor shall receive three percent (3%) of only the Amounts Recovered by the County 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 County 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 County 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 County 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 County 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 County agrees that the Contractor may apply for or otherwise seek approval of, and County 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 County 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 County's guidelines, but the amount of costs the County 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 County on a monthly basis and paid by the County. 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 County 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 County.

**F. Costs Exceeding Cap.** The Contractor shall not bill the County for any costs it incurs that are attributable to the County that exceed sixty thousand dollars (\$60,000).

**G. Costs for New Mexico Municipal League.** The New Mexico Municipal League (NMML), on behalf of its members, has incurred certain costs and fees to develop the information needed to pursue these claims. In order to use this information, the County 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 County, 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 County reserves the right to permit additional municipalities or counties to join in the action to be filed by Contractor on behalf of County, 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 County will not unreasonably withhold permission for additional municipalities and counties to join.

**I. Fees if Non-Monetary Recovery.** The County 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 County in consideration for the County's agreement to compromise its claims for sums due to past actions by the State. In the event of such a compromise that would achieve a benefit for the County that is reasonably related to the Contractor's representation of the County, and which substantially diminishes the County's Recovery and the amount of the fee due to the Contractor as provided above, the County and the Contractor agree to negotiate reasonable compensation to the Contractor for the prospective benefits. In determining the fee due, the parties shall consider the amount of revenue to the County 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 County over a five year period after the settlement, and 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 County'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.** Notwithstanding any other provisions in this Agreement, the terms of this Agreement are contingent upon the County Council of the County making the appropriations necessary for the payment of costs of the action up to the cap amount of \$60,000.00. If sufficient appropriations and authorizations are not made by the County Council, the County's agreement to reimburse Contractor for costs may be terminated at the end of the County's then current fiscal year upon written notice given by the County to the Contractor. Such event shall not constitute an event of default. All payment obligations of the County and all of its interest in this Agreement will cease upon the date of termination. The County'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 County 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 County. Such situations include but are not limited to instituting suit against the County, 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 County under this Agreement.

Upon notification of such a conflict, the County Attorney will inform the Contractor in writing within ten (10) days of receipt of the notification that the County 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 County 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 County of potential conflict, the County may terminate this Agreement upon one (1) day's notice. The Contractor agrees to compensate the County for any costs incurred by the County 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 County in obtaining the assistance of alternate counsel.

The County 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 County 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 County 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 County 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 County and the recorded time may differentiate between time attributable to work on behalf of only the County and time not attributable to any particular municipality or county. Within thirty (30) days after entering into this Agreement, the Contractor will provide the County 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 County 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 County may deem necessary, there shall be made available to the County for examination all of the Contractor's records with respect to all matters covered by this Agreement. The Contractor shall permit the County 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 County Attorney. Pleadings other than routine pleadings, such as briefs and motions, will be submitted to the County Attorney for review and approval prior to filing. Failure to submit such pleadings to the County 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:

**INCORPORATED COUNTY OF LOS ALAMOS:**

J. Alvin Leaphart, County Attorney  
1000 Central Ave., Suite 340  
Los Alamos, New Mexico 87544  
(505) 662-8020

**CONTRACTOR:**

Dalva L. Moellenberg  
Anthony 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) day's 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 County'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 County and are not employees of the County 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 County vehicles, or any other benefits available to employees of the County, 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 County'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 County's prior written approval.

14. **Indemnity.** The Contractor agrees to defend, indemnify and hold harmless the County, 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 County in the Contractor's capacity as attorney for the County, 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 County, its officers, employees and servants, the County, 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 County.

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 ("ADA"), which are imposed directly on the Contractor or which would be imposed on the County 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 County, 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.

**IN WITNESS WHEREOF,** the parties have executed this Agreement on the date(s) set forth opposite the signatures of their authorized representatives to be effective for all purposes on the date first written above.

**ATTEST**

**INCORPORATED COUNTY OF LOS ALAMOS**

\_\_\_\_\_  
**NAOMI D. MAESTAS**  
**COUNTY CLERK**

BY: \_\_\_\_\_  
**HARRY BURGESS** **DATE**  
**COUNTY MANAGER**

**Approved as to form:**

\_\_\_\_\_  
**J. ALVIN LEAPHART**  
**COUNTY ATTORNEY**

**GALLAGHER & KENNEDY, P.A., A PROFESSIONAL  
COPORATION**

BY: \_\_\_\_\_  
**DALVA L. MOLLENBERG** **DATE**  
**MANAGING SHAREHOLDER**

## EXHIBIT A

**Insurance.** The Contractor shall procure and maintain at its expense until final payment by the County 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 County a certificate or certificates in form satisfactory to the County showing that it has complied with this Section. All certificates of insurance shall provide that thirty (30) day's written notice be given to the County Manager, County of Los Alamos, 1000 Central Avenue, Los Alamos New Mexico 87544 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 with respect to operations 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 County 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 County requires the Contractor to increase the maximum limits of any insurance required herein, an appropriate adjustment in the Contractor's compensation will be made.