

EC-21-356




Mayor Timothy M. Keller

CITY OF ALBUQUERQUE
Albuquerque, New Mexico
Office of the Mayor

INTER-OFFICE MEMORANDUM 5/7/2021

TO: Cynthia Borrego, President, City Council

FROM: Timothy M. Keller, Mayor 

SUBJECT: Approval of the Risk Agreement for FY22 Outside Counsel Legal Services between Peifer, Hanson & Mullins P.A. and the City of Albuquerque

Transmitted herewith for City Council consideration and approval is a proposed Agreement for FY22 Outside Counsel Legal Services between Peifer, Hanson & Mullins P.A. and the City of Albuquerque for continuing representation of the City and/or City officials in the following Risk Management cases:

Courtney Foster and Matthew Kiscaden v. COA; D-202-CV-2019-06610, Risk No. 18-14148
and other Risk or Legal matters as assigned


The Agreement is for Two Hundred Thousand Dollars.

Council approval is required pursuant to § 5-5-19, Approval of Contracts, ROA 1994 of the City's Public Purchasing Ordinance. I am forwarding this Agreement for your consideration and action.

SUBJECT: Approval of the Risk Agreement for FY22 Outside Counsel Legal Services between Peifer, Hanson & Mullins P.A. and the City of Albuquerque

Approved:

Approved as to Legal Form:

 5/24/21

Sarita Nair Date
Chief Administrative Officer

DocuSigned by:
Esteban A. Aguilar 5/13/2021 | 1:04 PM MDT
7961D98D046F4DB...

Esteban A. Aguilar, Jr. Date
City Attorney

ds
km

Recommended:

DocuSigned by:
Jeannette Chavez 5/13/2021 | 4:56 AM MDT
6383AC185C845E...

Jeannette Chavez Date
Risk Manager

Cover Analysis

1. What is it?

Approval of the Agreement for FY22 Outside Counsel Legal Services between Peifer, Hanson, Mullins, & Baker P.A. and the City of Albuquerque

2. What will this piece of legislation do?

This piece of legislation provides the approval required by § 5-5-19, Approval of Contracts, ROA 1994 of the City's Public Purchasing Ordinance and allows the continuation of representation in the Risk Management cases assigned to the Legal Department.

3. Why is this project needed?

This is needed to continue with the litigation process for the cases referenced. These cases were referred to outside counsel for the special expertise of the firm and workload management.

4. How much will it cost and what is the funding source?

This Agreement is Two Hundred Thousand Dollars. The Risk Management liability program funds this Legal Services Agreement.

5. Is there a revenue source associated with this Plan? If so, what level of income is projected?

N/A

FISCAL IMPACT ANALYSIS

TITLE: FY22 Outside Counsel for Legal Services Agreement between Peifer, Hanson & Mullins P.A., and the City of Albuquerque R: EC O:
 FUND: 705
 DEPT: Finance and Admin Svc

- No measurable fiscal impact is anticipated, i.e., no impact on fund balance over and above existing appropriations.
- (If Applicable) The estimated fiscal impact (defined as impact over and above existing appropriations) of this legislation is as follows:

	Fiscal Years			
	2021	2022	2023	Total
Base Salary/Wages				-
Fringe Benefits at				-
Subtotal Personnel	-	-	-	-
Operating Expenses		-		-
Property		-	-	-
Indirect Costs	-	-	-	-
Total Expenses	\$ -	\$ -	\$ -	\$ -
[x] Estimated revenues not affected				
[] Estimated revenue impact				
Revenue from program				0
Amount of Grant		-	-	
City Cash Match				
City Inkind Match				
City IDOH	-	-	-	-
Total Revenue	\$ -	\$ -	\$ -	\$ -

These estimates do not include any adjustment for inflation.

* Range if not easily quantifiable.

Number of Positions created

COMMENTS: This piece of legislation provides the approval required by § 5-5-19, Approval of Contracts, ROA 1994 of the City's Public Purchasing Ordinance and allows the continuation of representation in the Risk Management cases assigned to the Legal Department.

COMMENTS ON NON-MONETARY IMPACTS TO COMMUNITY/CITY GOVERNMENT:

PREPARED BY: Krystle Hernandez

APPROVED:

DocuSigned by: Alan P. Gutowski 5/12/2021 | 3:52 PM MDT | 5/12/2021 | 3:21 PM MDT | 5/13/2021 | 7:21 AM MDT | 5/17/2021 | 1:04 PM MDT
 CD78BE9533434F3... A9E3AEB405C14CD... 03FCD26AD26748C... 7961D99D046F4DB...

FISCAL ANALYST

DIRECTOR (date)

REVIEWED BY:

DocuSigned by: Jayne Aranda 5/17/2021 | 9:32 AM MDT | 5/17/2021 | 11:18 AM MDT | 5/17/2021 | 12:31 PM MDT
 540A07D83A354C7... BD22ED7BFD9344E... E02C282349CC47D...

EXECUTIVE BUDGET ANALYST

BUDGET OFFICER (date)

CITY ECONOMIST

**CITY OF ALBUQUERQUE
LEGAL SERVICES AGREEMENT
BETWEEN
PEIFER, HANSON, MULLINS & BAKER P.A.
AND THE CITY OF ALBUQUERQUE**

THIS AGREEMENT, made and entered into, upon the date of the last signature below, by and between the City of Albuquerque, New Mexico, a municipal corporation (hereinafter referred to as the "City"), and Peifer, Hanson, Mullins & Baker P.A., a New Mexico professional corporation, whose address is 20 First Plaza Center NW # 725, Albuquerque, New Mexico 87102-5805 (hereinafter referred to as the "Contractor").

RECITALS

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

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

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

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

Courtney Foster and Matthew Kiscaden on their behalf and on behalf of similarly situated persons, v City of Albuquerque; 1:19-cv-00270-scy-KBM
And other Risk or Legal Matters, as assigned.

2. **Time of Performance.** Services of the Contractor shall commence 07/01/2021 and shall continue through 06/30/2022. 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. **Compensation and Method of Payment.**

A. **Compensation.** The City agrees to pay the Contractor up to the amount of Two Hundred Thousand and No/100 Dollars (\$200,000.00), for Services performed (the "Compensation"), plus reimbursement of expenses as provided in Section 3.C. below and any applicable gross receipts taxes on such amounts. Such amounts shall constitute full and complete compensation for the Contractor's Services under this Agreement. Both Parties shall be responsible for assuring that the Contractor does not bill for Services in an amount exceeding the contract amount. The Contractor shall provide monthly ledger reports to the City Attorney identifying the total amount the Contractor has billed for Services under this Agreement. The required monthly ledger

reports can be included in the Contractor's monthly invoice. If at any time the Contractor determines that payment for Services may exceed the contract amount, the Contractor shall notify the City Attorney's Office in writing.

The parties understand that the Compensation limitation of \$200,000 in this Agreement is not a representation by the Contractor that the case can be defended for a total sum equal to or less than that amount, but instead represents the maximum amount the City can pay under this Agreement without further approval of the City Council. Contractor has made no estimate of total costs and expenses and is unable to do so at this preliminary stage of the litigation.

B. Method of Payment. The Compensation shall be payable at the following rates for professional services, which rates are **exclusive of gross receipts taxes: Attorney services = \$350 per hour; paralegals = \$115 per hour.** Any applicable gross receipt taxes will be computed and added as a separate item to the billing

C. Reimbursement of Expenses. The following necessary expenses incurred in connection with the Services provided hereunder shall be reimbursed, if approved by the City in advance and billed at actual cost: motel, hotel, car rental, taxi, or other accommodations or modes of transportation; computer research; expert witness fees; court house parking and long-distance telephone calls. Copies shall be billed at \$0.15 per page and mileage for approved in-state travel shall be billed at then current IRS mileage rates. Travel time shall be billed at no greater than one-half of the traveling party's hourly rate. **Any other costs, such as food or meals with clients, are not a reimbursable expense.** The Contractor shall attach copies of all receipts, bills, statements and charges for which reimbursement is requested to its billing. Any applicable gross receipts taxes will be computed and added as a separate item to the billing.

D. Invoices and Payments. Compensation and expense reimbursements shall be paid to the Contractor monthly upon receipt by the City Legal Department of a properly documented invoice for payment as determined by the budgetary and fiscal guidelines of the City and in accordance with subsection E. below, and on the condition that the Contractor has accomplished the Services to the satisfaction of the City.

E. Time Records. The Contractor shall maintain detailed time records which set forth each service rendered in each matter, the person rendering such service, the hourly rate, the time expended in rendering such service, and the date such service was rendered. The City has the right to audit billings both before and after payment, to contest any billing or portion thereof. When the Contractor submits billings for payment pursuant to this Agreement, each billing will specify the amount billed for that reporting period and will indicate the total amount billed to that date under the terms of the Agreement.

F. Appropriations. Notwithstanding any other provisions in this Agreement, the terms of this Agreement are contingent upon the City Council of the City of Albuquerque making the appropriations necessary for the performance of this Agreement. If sufficient appropriations and authorizations are not made by the City Council, this Agreement may be terminated at the end of the City's then current fiscal year upon written notice given by the City to the Contractor. Such event shall not constitute an event of default. All payment obligations of the City and all of its interest in this Agreement will cease upon the date of termination. The City's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final.

G. Responsibility to Monitor Contract Billing. Both Parties shall be responsible for assuring that the Contractor does not bill for Services in an amount exceeding the contract amount. The Contractor shall provide monthly ledger reports to the City Attorney identifying the total amount the Contractor has billed for Services under this Agreement. The required monthly ledger reports can be included in the Contractor's monthly invoice. If at any time the Contractor determines that payment for Services may exceed the contract amount, the Contractor shall notify the City Attorney's Office in writing.

4. Interest of Contractor.

A. It is understood and agreed by the parties that Contractor from time to time represents the Albuquerque Journal and its affiliated publications and companies with regard to first amendment and open government issues and that nothing in this agreement is intended to preclude Contractor from continuing that representation, even when the interests of the Albuquerque Journal or its affiliates are adverse to those of the City. To that end, the City agrees that it waives any conflict of interest that might arise from the Contractor's representation of the Albuquerque Journal or its affiliates in matters involving the first amendment or open government matters (including, but not limited to matters arising from press access, the inspection of public records act, or the open meetings act). Apart from these matters, the Contractor represents and warrants that any conflicts will be addressed as required by the Rules of Professional Responsibility.

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

Upon notification of such a conflict, the City Attorney will inform the Contractor in writing within ten (10) days of receipt of the notification that the City will or declines to waive the potential conflict. If the conflict is waived, the Contractor or firm may proceed with representation in the conflict situation, informing the City Attorney should any

relevant change of circumstances occur. If waiver of the conflict is denied, the Contractor is obligated under the provisions of this Agreement to cease its efforts in the conflict situation.

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

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

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

6. Reports Required. Within thirty (30) days after entering into this Agreement, the Contractor will provide the City Attorney with a brief analysis of the task to be undertaken and a plan for performing the tasks under the Agreement. With regard to the litigation, this will include an assessment of the relative merits of the parties' positions, and a litigation plan, including a proposed time schedule.

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

7. Audits and Inspections. At any time during normal business hours and as often as the City may deem necessary, there shall be made available to the City for examination all of the Contractor's records with respect to all matters covered by this Agreement. The Contractor shall permit the City to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment and other data relating to all matters covered by this Agreement. The Contractor understands and will comply with the City's Accountability in Government Ordinance, §2-10-1 et seq. and Inspector General Ordinance, §2-17-1 et seq. R.O.A. 1994, and also agrees to provide requested information and records and appear as a witness in hearings for the City's Board of Ethics and Campaign Practices pursuant to Article XII, Section 8 of the Albuquerque City Charter.

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

CITY OF ALBUQUERQUE
Esteban A. Aguilar, Jr., City Attorney
Post Office Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500

Peifer, Hanson, Mullins & Baker P.A.
20 First Plaza Center NW #725
Albuquerque, NM 87102
Attorney for City of Albuquerque

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

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

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

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

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

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

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

16. 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.

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

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

19. 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.

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

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

22. Electronic Signatures: Authenticated electronic signatures are legally acceptable pursuant to Section 14-16-7 NMSA 1978. The Parties agree this First Supplemental Agreement may be electronically signed and that the electronic signatures appearing on the agreement are the same as handwritten signatures for the purposes of validity, enforceability, and admissibility.

THIS SPACE INTENTIONALLY LEFT BLANK

EXHIBIT A

Insurance. The Contractor shall procure and maintain at its expense until final payment by the City for Services covered by this Agreement, insurance in the kinds and amounts hereinafter provided with insurance companies authorized to do business in the State of New Mexico, covering all operations under this Agreement, whether performed by it or its agents. Before commencing the Services and on the renewal of all coverages, the Contractor shall furnish to the City a certificate or certificates in form satisfactory to the City showing that it has complied with this Section. All certificates of insurance shall provide that thirty (30) days' written notice be given to the Risk Manager, Department of Finance and Administrative Services, City of Albuquerque, P.O. Box 470, Albuquerque, New Mexico 87103, 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. N/A

B. Automobile Liability Insurance. N/A

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

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

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