

**CITY OF LA VISTA
MAYOR AND CITY COUNCIL REPORT
JULY 2, 2013 AGENDA**

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

SYNOPSIS

A resolution has been prepared to approve a professional services agreement with Allixa Consulting, Inc., of Maitland, FL for an audit of the Telecommunications Occupation Taxes 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

Several Nebraska cities are working together to utilize the professional services of Garth Ashpaugh, Allixa Consulting to review the telecommunication occupation tax payments of our major cellular carriers to determine whether any additional amounts are due to the City for underpayment or nonpayment of past, present and future telecommunication occupation tax payments, or any other monies or revenue owed to the City that were not properly attributed to the City. Mr. Ashpaugh worked on behalf of the City of Lincoln in their recent efforts to collect from various providers. *(Copies of related Lincoln Journal Star articles are attached).* The proposed agreement was recently executed by the City of Bellevue.

RESOLUTION NO. _____

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF LA VISTA, NEBRASKA, APPROVING A 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, 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 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 Administrator in consultation with the City Attorney.

PASSED AND APPROVED THIS 2ND DAY OF JULY, 2013.

CITY OF LA VISTA

Douglas Kindig, Mayor

ATTEST:

Pamela A. Buethe, CMC
City Clerk

ALLIXA CONSULTING, INC.
CONTINGENT FEE PROFESSIONAL SERVICES AGREEMENT

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 Kewanee 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 paid by five (5) of the telecommunication providers (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 telecommunication occupation tax payments and determine whether any additional amounts are due to the City for underpayment or nonpayment of past, present, and future telecommunication occupation tax 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 taxable 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 La Vista 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 underpayment or nonpayment of telecommunication occupation tax payments 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 telecommunication occupation tax payments and any supporting documentation; 4) true-up and/or settlement payments; 5) relevant correspondence related to the telecommunication occupation tax; 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, 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, 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 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.

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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. 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
4. SPRINT SPECTRUM, L.P. - Tax ID 48-1165245 6500 Sprint Pkwy, Mailstop, HL-5ATTX, Overland Park, KS 66251 (B. Tertichny)

JournalStar.com

City sues Sprint over occupation tax

SEPTEMBER 21, 2012 6:00 AM • BY NANCY HICKS / LINCOLN JOURNAL STAR

Lincoln has sued Sprint PCS for failing to pay all the city's telecommunications occupation tax.

In the lawsuit, filed in U.S. District Court in early September, Lincoln said an audit of taxes paid by Sprint between 2005 and 2009 revealed that occupation taxes have not been paid on "certain components of gross receipts."

But a Sprint spokesman said the company and city disagree over what the city's occupation tax covers.

In the suit, Lincoln says it cannot determine exactly what is owed because Sprint has failed to provide all the "applicable information," but that the amount exceeds \$100,000.

A Sprint spokesman said the city has a much broader interpretation of the ordinance than does the company.

"The city's 6 percent tax is on the service we provide customers in Lincoln," according to an email from John Taylor with Sprint Nextel Corporation public affairs.

"The city is seeking to collect this tax not just on telecommunication services but also on the handset and broadband cards, car chargers, phone cases and other accessories we sell, plus handset insurance and repair charges. The city is also seeking to apply its tax to the state's USF (universal service fund) and E911 fees."

"Sprint believes the city's much broader interpretation of the law is incorrect and, if successful, would leave consumers in Lincoln with higher wireless bills," Taylor said.

Two other telecommunications companies, Verizon and Windstream, last year both settled lawsuits with Lincoln over unpaid occupation tax.

In the Verizon settlement, the company agreed to pay \$1.7 million and the city agreed the occupation tax does not apply to certain items, including ring tones, games and other items downloaded onto phones.

Under the \$1.25 million Windstream settlement, the company will contribute almost \$550,000 of its \$1.25 million settlement to the Centennial Mall Project.

JournalStar.com

City gets \$406,000 in Cricket settlement

MARCH 29, 2013 4:05 PM • BY NANCY HICKS / LINCOLN JOURNAL STAR

Cricket Communications Inc. will pay the city \$406,188 under a settlement for alleged unpaid telecommunications occupation tax.

The settlement is the third the city has reached with telecommunication companies that it says did not pay all the city's telecommunication taxes.

Verizon agreed to pay the city \$1.7 million in July 2011, and Windstream agreed to a \$1.25 million settlement in fall 2011, including \$550,000 that went to the Centennial Mall project.

The Cricket settlement will go into the city's cash reserve fund. The fund is similar to a savings account the city can use to preserve services during economic downturns.

The city sued both Verizon and Windstream in February 2010, contending the two companies owed back occupation taxes, based on a city audit.

The city alleged the companies did not pay the occupation tax on everything the city ordinance covered.

A lawsuit against Sprint over similar issues is still in court, according to Jocelyn Golden, an assistant city attorney.

The city also is auditing several other telecommunication companies, she said.

The Cricket settlement ends the dispute over the alleged unpaid telecommunication taxes, covering tax, interest and penalties from 2005 through 2012.

Neither Cricket nor the city admit that their positions are in error, according to the settlement, which was reported to the City Council as part of the March 25 meeting.

The settlement prohibits the city and company from making any public comment.

One paragraph of the settlement's stipulated facts has been deleted from the document provided to the Journal Star.

The state Legislature ended the city's 6 percent telecommunications occupation tax on equipment, including cellphones, beginning Jan. 1 of this year.

Since then, the city estimates it's losing \$60,000 to \$80,000 a month, based on the first month of collections after the law took effect. The loss could be more, said City Finance Director Steve Hubka, because not all companies have implemented the change.

JournalStar.com

City suing Windstream, Verizon over taxes

FEBRUARY 18, 2010 10:15 PM • BY MATT OLBERDING / LINCOLN JOURNAL STAR

The city of Lincoln is suing **Windstream Inc.** and **Verizon Wireless** over what it alleges are unpaid occupation taxes dating back to 2001.

City officials would not comment on the lawsuits, which were filed last month in Lancaster County District Court.

According to court documents, the city audited the telecommunication occupation taxes paid from January 2001 to December 2006 by Windstream, Verizon Wireless and Alltel, and found that the taxes "have not and are not being remitted on certain components of gross receipts."

Alltel was included because it was Lincoln's landline telephone provider until Windstream acquired it in July 2006, and it was the dominant wireless phone service provider in Lincoln until Verizon Wireless acquired that portion of the business last year.

The lawsuits do not list the amounts the city is alleging Windstream and Verizon owe; however, they could be substantial.

Last summer, when Mayor Chris Beutler laid out his fiscal year 2010 budget, he proposed a handful of new ideas that he said would largely be funded with revenue the city was expecting as a result of the telecommunications tax audit, including creating a rainy day fund, establishing a trust fund that would be matched with private donations to maintain such Lincoln icons as Sunken Gardens, and helping pay for a new development services center at city hall.

Beutler said at the time that it was not clear how much money the city might receive.

David Avery, a spokesman for Windstream, said the company was "surprised and disappointed" the city filed the lawsuit.

Avery said the city notified Windstream about the audit in 2007.

"Windstream has worked diligently and in good faith with the city's auditor since that time to provide all information requested in a timely manner and has had good discussions with the city on the proper application of the tax ordinance in question," he said.

"However, we understand that the city and Windstream have a legitimate professional dispute regarding the interpretation of the applicable tax law, and we look forward to defending our position and continuing to work to bring this matter to a close."

Avery said Windstream collected and remitted to the city more than \$21 million from its Lincoln customers from 2001 to 2009 "for all applicable products and services we believe are covered under the city's telecommunication occupation tax."

Despite the demands in the lawsuit, he said Windstream has received no formal demand from the city to pay any additional money.

Windstream filed a motion this week to move the suit to federal court.

Karen Smith, a spokeswoman for Verizon Wireless, said the company is reviewing the lawsuit and has not yet filed a response.

Reach Matt Olberding at 473-2647 or ormolberding@journalstar.com.