

C-5274

**PROFESSIONAL SERVICES AGREEMENT
WITH HINDERLITER, DE LLAMAS & ASSOCIATES FOR
SALES AND USE TAX ANALYSIS AND APPEALS**

THIS AGREEMENT FOR PROFESSIONAL SERVICES ("Agreement") is made and entered into as of this 27th day of November, 2012 ("Effective Date") by and between the CITY OF NEWPORT BEACH, a California municipal corporation and charter city ("City"), and Hinderliter, de Llamas & Associates, a California corporation ("Consultant"), whose address is 1340 Valley Vista Drive, Suite 120, Diamond Bar, CA 91765, and is made with reference to the following:

RECITALS

- A. City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of City.
- B. City desires to engage Consultant to analyze City's sales and use tax data, and liaise with the State Board of Equalization ("SBOE") on City's behalf ("Project").
- C. Consultant possesses the skill, experience, ability, background, certification and knowledge to provide the professional services described in this Agreement.
- D. The principal member of Consultant for purposes of Project shall be Andrew Nickerson.
- E. City has solicited and received a proposal from Consultant, has reviewed the previous experience and evaluated the expertise of Consultant, and desires to retain Consultant to render professional services under the terms and conditions set forth in this Agreement.

NOW, THEREFORE, it is mutually agreed by and between the undersigned parties as follows:

1. TERM

The term of this Agreement shall commence on the Effective Date, and shall terminate on October 18, 2013 unless terminated earlier as set forth herein.

2. SERVICES TO BE PERFORMED

City and Consultant acknowledge that the above Recitals are true and correct and are hereby incorporated by reference into this Agreement. Consultant shall diligently perform all the services described in the Scope of Services attached hereto as Exhibit A and incorporated herein by reference ("Services" or "Work"). The City may elect to delete certain Services within the Scope of Services at its sole discretion.

3. TIME OF PERFORMANCE

3.1 Time is of the essence in the performance of Services under this Agreement and Consultant shall perform the Services in accordance with the schedule included in Exhibit A. In the absence of a specific schedule, the Services shall be performed to completion in a diligent and timely manner. The failure by Consultant to strictly adhere to the schedule set forth in Exhibit A, if any, or perform the Services in a diligent and timely manner may result in termination of this Agreement by City.

3.2 Notwithstanding the foregoing, Consultant shall not be responsible for delays due to causes beyond Consultant's reasonable control. However, in the case of any such delay in the Services to be provided for the Project, each party hereby agrees to provide notice within two (2) days of the occurrence causing the delay to the other party so that all delays can be addressed.

3.3 Consultant shall submit all requests for extensions of time for performance in writing to the Project Administrator (as defined in Section 6 below) not later than ten (10) calendar days after the start of the condition that purportedly causes a delay. The Project Administrator shall review all such requests and may grant reasonable time extensions for unforeseeable delays that are beyond Consultant's control.

3.4 For all time periods not specifically set forth herein, Consultant shall respond in the most expedient and appropriate manner under the circumstances, by fax, hand-delivery or mail.

4. COMPENSATION TO CONSULTANT

4.1 City shall pay Consultant for the Services on a contingency basis in accordance with the provisions of this Section and the Schedule of Billing attached hereto as Exhibit B and incorporated herein by reference. Consultant's compensation for all Work performed in accordance with this Agreement, including all reimbursable items and subconsultant fees, shall not exceed **One Hundred Twenty Thousand Dollars and 00/100 (\$120,000.00)** without prior written authorization from City. No billing rate changes shall be made during the term of this Agreement without the prior written approval of City.

4.2 Consultant shall submit quarterly invoices to City describing the Work performed the preceding calendar quarter. Consultant's bills shall include a brief description of the Services performed and/or the specific task in the Scope of Services to which it relates, the calendar quarter the Services were performed, the number of hours spent on all Work billed on an hourly basis, and a description of any reimbursable expenditures. City shall pay Consultant no later than thirty (30) days after approval of the monthly invoice by City staff.

4.3 City shall reimburse Consultant only for those costs or expenses specifically identified in Exhibit B to this Agreement, or specifically approved in writing in advance by City.

4.4 Consultant shall not receive any compensation for Extra Work performed without the prior written authorization of City. As used herein, "Extra Work" means any

Work that is determined by City to be necessary for the proper completion of the Project, but which is not included within the Scope of Services and which the parties did not reasonably anticipate would be necessary at the execution of this Agreement. Compensation for any authorized Extra Work shall be paid in accordance with the Schedule of Billing Rates as set forth in Exhibit B.

5. PROJECT MANAGER

5.1 Consultant shall designate a Project Manager, who shall coordinate all phases of the Project. This Project Manager shall be available to City at all reasonable times during the Agreement term. Consultant has designated Andrew Nickerson to be its Project Manager. Consultant shall not remove or reassign the Project Manager or any personnel listed in Exhibit A or assign any new or replacement personnel to the Project without the prior written consent of City. City's approval shall not be unreasonably withheld with respect to the removal or assignment of non-key personnel.

5.2 Consultant, at the sole discretion of City, shall remove from the Project any of its personnel assigned to the performance of Services upon written request of City. Consultant warrants that it will continuously furnish the necessary personnel to complete the Project on a timely basis as contemplated by this Agreement.

5.3 If Consultant is performing inspection services for City, the Project Manager and any other assigned staff shall be equipped with a cellular phone to communicate with City staff. The Project Manager's cellular phone number shall be provided to the City.

6. ADMINISTRATION

This Agreement will be administered by the Finance Department. Evelyn Tseng, Revenue Manager or her designee, shall be the Project Administrator and shall have the authority to act for City under this Agreement. The Project Administrator or her designee shall represent City in all matters pertaining to the Services to be rendered pursuant to this Agreement.

7. CITY'S RESPONSIBILITIES

To assist Consultant in the execution of its responsibilities under this Agreement, City agrees to provide access to and upon request of Consultant, one copy of all existing relevant information on file at City. City will provide all such materials in a timely manner so as not to cause delays in Consultant's Work schedule.

8. STANDARD OF CARE

8.1 All of the Services shall be performed by Consultant or under Consultant's supervision. Consultant represents that it possesses the professional and technical personnel required to perform the Services required by this Agreement, and that it will perform all Services in a manner commensurate with the highest professional standards. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized by one (1) or more first-class firms performing similar work under similar circumstances.

8.2 All Services shall be performed by qualified and experienced personnel who are not employed by City. By delivery of completed Work, Consultant certifies that the Work conforms to the requirements of this Agreement; all applicable federal, state and local laws; and the highest professional standard.

8.3 Consultant represents and warrants to City that it has, shall obtain, and shall keep in full force and effect during the term hereof, at its sole cost and expense, all licenses, permits, qualifications, insurance and approvals of whatsoever nature that is legally required of Consultant to practice its profession. Consultant shall maintain a City of Newport Beach business license during the term of this Agreement.

8.4 Consultant shall not be responsible for delay, nor shall Consultant be responsible for damages or be in default or deemed to be in default by reason of strikes, lockouts, accidents, acts of God, or the failure of City to furnish timely information or to approve or disapprove Consultant's Work promptly, or delay or faulty performance by City, contractors, or governmental agencies.

9. HOLD HARMLESS

9.1 To the fullest extent permitted by law, Consultant shall indemnify, defend and hold harmless City, its City Council, boards and commissions, officers, agents and employees (collectively, the "Indemnified Parties") from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including, without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever (individually, a Claim; collectively, "Claims"), which may arise from or in any manner relate (directly or indirectly) to any breach of the terms and conditions of this Agreement, any Work performed or Services provided under this Agreement including, without limitation, defects in workmanship or materials or Consultant's presence or activities conducted on the Project (including the negligent and/or willful acts, errors and/or omissions of Consultant, its principals, officers, agents, employees, vendors, suppliers, consultants, subcontractors, anyone employed directly or indirectly by any of them or for whose acts they may be liable or any or all of them).

9.2 Notwithstanding the foregoing, nothing herein shall be construed to require Consultant to indemnify the Indemnified Parties from any Claim arising from the sole negligence or willful misconduct of the Indemnified Parties. Nothing in this indemnity shall be construed as authorizing any award of attorney's fees in any action on or to enforce the terms of this Agreement. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by the Consultant.

10. INDEPENDENT CONTRACTOR

It is understood that City retains Consultant on an independent contractor basis and Consultant is not an agent or employee of City. The manner and means of conducting the Work are under the control of Consultant, except to the extent they are

limited by statute, rule or regulation and the expressed terms of this Agreement. No civil service status or other right of employment shall accrue to Contractor or its employees. Nothing in this Agreement shall be deemed to constitute approval for Consultant or any of Consultant's employees or agents, to be the agents or employees of City. Consultant shall have the responsibility for and control over the means of performing the Work, provided that Consultant is in compliance with the terms of this Agreement. Anything in this Agreement that may appear to give City the right to direct Consultant as to the details of the performance of the Work or to exercise a measure of control over Consultant shall mean only that Consultant shall follow the desires of City with respect to the results of the Services.

11. COOPERATION

Consultant agrees to work closely and cooperate fully with City's designated Project Administrator and any other agencies that may have jurisdiction or interest in the Work to be performed. City agrees to cooperate with the Consultant on the Project.

12. CITY POLICY

Consultant shall discuss and review all matters relating to policy and Project direction with City's Project Administrator in advance of all critical decision points in order to ensure the Project proceeds in a manner consistent with City goals and policies.

13. PROGRESS

Consultant is responsible for keeping the Project Administrator and/or his/her duly authorized designee informed on a regular basis regarding the status and progress of the Project, activities performed and planned, and any meetings that have been scheduled or are desired.

14. INSURANCE

Without limiting Consultant's indemnification of City, and prior to commencement of Work, Consultant shall obtain, provide and maintain at its own expense during the term of this Agreement or for other periods as specified in this Agreement, policies of insurance of the type, amounts, terms and conditions described in the Insurance Requirements attached hereto as Exhibit C, and incorporated herein by reference.

15. PROHIBITION AGAINST ASSIGNMENTS AND TRANSFERS

Except as specifically authorized under this Agreement, the Services to be provided under this Agreement shall not be assigned, transferred contracted or subcontracted out without the prior written approval of City. Any of the following shall be construed as an assignment: The sale, assignment, transfer or other disposition of any of the issued and outstanding capital stock of Consultant, or of the interest of any general partner or joint venturer or syndicate member or cotenant if Consultant is a partnership or joint-venture or syndicate or cotenancy, which shall result in changing the control of Consultant. Control means fifty percent (50%) or more of the voting power, or

twenty-five percent (25%) or more of the assets of the corporation, partnership or joint-venture.

16. SUBCONTRACTING

The subcontractors authorized by City, if any, to perform Work on this Project are identified in Exhibit A. Consultant shall be fully responsible to City for all acts and omissions of any subcontractor. Nothing in this Agreement shall create any contractual relationship between City and any subcontractor nor shall it create any obligation on the part of City to pay or to see to the payment of any monies due to any such subcontractor other than as otherwise required by law. The City is an intended beneficiary of any Work performed by the subcontractor for purposes of establishing a duty of care between the subcontractor and the City. Except as specifically authorized herein, the Services to be provided under this Agreement shall not be otherwise assigned, transferred, contracted or subcontracted out without the prior written approval of City.

17. OWNERSHIP OF DOCUMENTS

17.1 Each and every report, draft, map, record, plan, document and other writing produced (hereinafter "Documents"), prepared or caused to be prepared by Consultant, its officers, employees, agents and subcontractors, in the course of implementing this Agreement, shall become the exclusive property of City, and City shall have the sole right to use such materials in its discretion without further compensation to Consultant or any other party. Consultant shall, at Consultant's expense, provide such Documents to City upon prior written request.

17.2 Documents, including drawings and specifications, prepared by Consultant pursuant to this Agreement are not intended or represented to be suitable for reuse by City or others on any other project. Any use of completed Documents for other projects and any use of incomplete Documents without specific written authorization from Consultant will be at City's sole risk and without liability to Consultant. Further, any and all liability arising out of changes made to Consultant's deliverables under this Agreement by City or persons other than Consultant is waived against Consultant and City assumes full responsibility for such changes unless City has given Consultant prior notice and has received from Consultant written consent for such changes.

18. COMPUTER DELIVERABLES

All written documents shall be transmitted to City in formats compatible with Microsoft Office and/or viewable with Adobe Acrobat.

19. CONFIDENTIALITY

All Documents, including drafts, preliminary drawings or plans, notes and communications that result from the Services in this Agreement, shall be kept confidential unless City expressly authorizes in writing the release of information.

20. INTELLECTUAL PROPERTY INDEMNITY

The Consultant shall defend and indemnify City, its agents, officers, representatives and employees against any and all liability, including costs, for infringement or alleged infringement of any United States' letters patent, trademark, or copyright, including costs, contained in Consultant's Documents provided under this Agreement.

21. RECORDS

Consultant shall keep records and invoices in connection with the Services to be performed under this Agreement. Consultant shall maintain complete and accurate records with respect to the costs incurred under this Agreement and any Services, expenditures and disbursements charged to City, for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to Consultant under this Agreement. All such records and invoices shall be clearly identifiable. Consultant shall allow a representative of City to examine, audit and make transcripts or copies of such records and invoices during regular business hours. Consultant shall allow inspection of all Work, data, Documents, proceedings and activities related to the Agreement for a period of three (3) years from the date of final payment to Consultant under this Agreement.

22. WITHHOLDINGS

City may withhold payment to Consultant of any disputed sums until satisfaction of the dispute with respect to such payment. Such withholding shall not be deemed to constitute a failure to pay according to the terms of this Agreement. Consultant shall not discontinue Work as a result of such withholding. Consultant shall have an immediate right to appeal to the City Manager or his/her designee with respect to such disputed sums. Consultant shall be entitled to receive interest on any withheld sums at the rate of return that City earned on its investments during the time period, from the date of withholding of any amounts found to have been improperly withheld.

23. ERRORS AND OMISSIONS

In the event of errors or omissions that are due to the negligence or professional inexperience of Consultant which result in expense to City greater than what would have resulted if there were not errors or omissions in the Work accomplished by Consultant, the additional design, construction and/or restoration expense shall be borne by Consultant. Nothing in this Section is intended to limit City's rights under the law or any other sections of this Agreement.

24. CITY'S RIGHT TO EMPLOY OTHER CONSULTANTS

City reserves the right to employ other Consultants in connection with the Project.

25. CONFLICTS OF INTEREST

25.1 The Consultant or its employees may be subject to the provisions of the California Political Reform Act of 1974 (the "Act"), which (1) requires such persons to disclose any financial interest that may foreseeably be materially affected by the Work performed under this Agreement, and (2) prohibits such persons from making, or participating in making, decisions that will foreseeably financially affect such interest.

25.2 If subject to the Act, Consultant shall conform to all requirements of the Act. Failure to do so constitutes a material breach and is grounds for immediate termination of this Agreement by City. Consultant shall indemnify and hold harmless City for any and all claims for damages resulting from Consultant's violation of this Section.

26. NOTICES

26.1 All notices, demands, requests or approvals, including any change in mailing address, to be given under the terms of this Agreement shall be given in writing, and conclusively shall be deemed served when delivered personally, or on the third business day after the deposit thereof in the United States mail, postage prepaid, first-class mail, addressed as hereinafter provided. All notices, demands, requests or approvals from Consultant to City shall be addressed to City at:

Attn: Evelyn Tseng, Revenue Manager
Finance Department
City of Newport Beach
3300 Newport Boulevard
PO Box 1768
Newport Beach, CA 92658
Phone: 949-644-3141
Fax: 949-723-3539

26.2 All notices, demands, requests or approvals from City to Consultant shall be addressed to Consultant at:

Attn: Andrew Nickerson
Hinderliter, de Llamas & Associates
1240 Valley Vista Dr., Suite 200
Diamond Bar, CA 91765
Phone: 909-861-4335
Fax: 909-861-7726

27. CLAIMS

Unless a shorter time is specified elsewhere in this Agreement, before making its final request for payment under this Agreement, Consultant shall submit to City, in writing, all claims for compensation under or arising out of this Agreement. Consultant's acceptance of the final payment shall constitute a waiver of all claims for compensation under or arising out of this Agreement except those previously made in writing and identified by Consultant in writing as unsettled at the time of its final request

for payment. The Consultant and the City expressly agree that in addition to any claims filing requirements set forth in the Agreement, the Consultant shall be required to file any claim the Consultant may have against the City in strict conformance with the Tort Claims Act (Government Code sections 900 *et seq.*).

28. TERMINATION

28.1 In the event that either party fails or refuses to perform any of the provisions of this Agreement at the time and in the manner required, that party shall be deemed in default in the performance of this Agreement. If such default is not cured within a period of two (2) calendar days, or if more than two (2) calendar days are reasonably required to cure the default and the defaulting party fails to give adequate assurance of due performance within two (2) calendar days after receipt of written notice of default, specifying the nature of such default and the steps necessary to cure such default, and thereafter diligently take steps to cure the default, the non-defaulting party may terminate the Agreement forthwith by giving to the defaulting party written notice thereof.

28.2 Notwithstanding the above provisions, City shall have the right, at its sole and absolute discretion and without cause, of terminating this Agreement at any time by giving no less than seven (7) calendar days prior written notice to Consultant. In the event of termination under this Section, City shall pay Consultant for Services satisfactorily performed and costs incurred up to the effective date of termination for which Consultant has not been previously paid. On the effective date of termination, Consultant shall deliver to City all reports, Documents and other information developed or accumulated in the performance of this Agreement, whether in draft or final form.

28.3 Within thirty (30) days of the termination of this Agreement, City shall pay Consultant the amounts due for any unpaid invoices. City shall also pay Consultant any audit fees for those tax revenues received by the City as a result of Consultant's work during the term of the Agreement pursuant to the process described in Exhibit B, Schedule of Billing Rates.

29. STANDARD PROVISIONS

29.1 Compliance with all Laws. Consultant shall at its own cost and expense comply with all statutes, ordinances, regulations and requirements of all governmental entities, including federal, state, county or municipal, whether now in force or hereinafter enacted. In addition, all Work prepared by Consultant shall conform to applicable City, county, state and federal laws, rules, regulations and permit requirements and be subject to approval of the Project Administrator and City.

29.2 Waiver. A waiver by either party of any breach, of any term, covenant or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein, whether of the same or a different character.

29.3 Integrated Contract. This Agreement represents the full and complete understanding of every kind or nature whatsoever between the parties hereto, and all

preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions herein.

29.4 Conflicts or Inconsistencies. In the event there are any conflicts or inconsistencies between this Agreement and the Scope of Services or any other attachments attached hereto, the terms of this Agreement shall govern.

29.5 Interpretation. The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of the Agreement or any other rule of construction which might otherwise apply.

29.6 Amendments. This Agreement may be modified or amended only by a written document executed by both Consultant and City and approved as to form by the City Attorney.

29.7 Severability. If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

29.8 Controlling Law and Venue. The laws of the State of California shall govern this Agreement and all matters relating to it and any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange, State of California.

29.9 Equal Opportunity Employment. Consultant represents that it is an equal opportunity employer and it shall not discriminate against any subcontractor, employee or applicant for employment because of race, religion, color, national origin, handicap, ancestry, sex, age or any other impermissible basis under law.

29.10 No Attorney's Fees. In the event of any dispute or legal action arising under this Agreement, the prevailing party shall not be entitled to attorney's fees.

29.11 Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original and all of which together shall constitute one (1) and the same instrument.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the dates written below.

APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE

Date: 10/31/12

By: [Signature] (for)
Aaron C. Harp
City Attorney
mb 10-31

CITY OF NEWPORT BEACH,
a California municipal corporation

Date: 11/9/2012

By: [Signature]
Dave Kiff
City Manager

ATTEST:

Date: 11-29-12

By: [Signature]
Leilani I. Brown
City Clerk

CONSULTANT: Hinderliter, de Llamas &
Associates, a California corporation

Date: 11-16-12

By: [Signature]
Andrew Nickerson
President

Date: 11-16-12

By: [Signature]
Jeffrey Schmehr
Chief Financial Officer



[END OF SIGNATURES]

- Attachments: Exhibit A – Scope of Services
Exhibit B – Schedule of Billing Rates
Exhibit C – Insurance Requirements

**EXHIBIT A
SCOPE OF SERVICES**

1. SCOPE OF SERVICES: GENERAL SCOPE

1.1 Consultant shall assist City in recovering all revenue to which it is entitled from the City's major sources of general fund revenue. This process includes:

- a. Reviewing the applicable provisions of the City's municipal code and ordinances;
- b. Working with staff to enhance current revenues and to recover revenues lost from possible errors or omissions;
- c. Evaluating the revenue generating elements of the City's economic base, such as land parcels, major buildings and various users;
- d. Meeting with designated City officials as necessary to review and discuss findings and recommendations.

2. SCOPE OF SERVICES: SALES AND USE TAX

2.1 Consultant shall represent the City for the purpose of examining records pertaining to sales and use tax in order to identify and confirm errors or omissions that may result or are already resulting in deficient payments to the City.

2.2 Consultant's initial and periodic taxable nexus field audits shall include a physical canvassing and evaluation of sales and use tax generating businesses located in the City to detect misallocations. Consultant's field audit shall focus on those businesses located in the City from which the City has not been receiving sales and use tax revenue or appear to be under-reporting revenues.

2.3 Consultant's field audits shall facilitate the identification and correction of improperly registered permits for companies including, but not limited to, wholesalers, contractors, processors, manufacturers and other non-retail businesses having potential point-of-sale use tax operations in the City.

2.4 For each error/omission identified and confirmed, Consultant shall prepare documentation to the City and State Board of Equalization to substantiate and facilitate recovery of revenue due from prior periods (plus applicable interest and penalties) and prevent deficiencies in current and future years.

2.5 Consultant shall prepare and forward to the appropriate parties Petitions for Re-allocation (Form BOE-549-L) and AB990 submittals and all other requests for corrective action and revenue recovery.

2.6 Consultant shall monitor City's business and sales tax programs and revenues.

2.7 Consultant shall identify opportunities to maximize business and sales tax revenues.

2.8 Consultant shall review City purchases to identify opportunities for the City to capture the current local allocation on purchases subject to use tax and the local district tax where applicable. In this regard, Consultant shall prepare the documentation to facilitate the City's election of such taxes, including assistance in preparing and filing the City tax returns.

2.9 Consultant shall review City's sales and use tax paid purchases to determine which purchases are exempt from California sales and use taxes. Consultant shall prepare refund claims for exempt purchases, including the legal basis for the exemption and documentation that sales tax was paid on the purchases. Consultant shall work with the vendor to process refund. Consultant shall prepare and provide status reports each calendar quarter for refund claims and verify additional revenue received by the City.

2.10 Consultant shall perform an annual vendor survey, utilizing City's chart of accounts, in order to identify self accrual opportunities.

2.11 Consultant shall prepare all information necessary to correct any identified allocation errors.

2.12 Each calendar quarter, Consultant shall prepare, at a minimum, analysis of sales tax receipts, projections and adjustments on City's sales and use tax trends in relationship to the surrounding market region, as well as by individual businesses, business type and geographic areas specified by the City. Consultant shall provide sales and use tax revenue forecasting and cash flow forecast accounting for the triple-flip.

2.13 Consultant shall provide City with specialized charts and data tables, presentation data and presenters for public meetings and events, if requested, and provide the City with business specific revenue estimates and economic development consulting. Each calendar quarter, Consultant shall provide a summary of economic news that is one quarter more current than the most current sales tax data availability for the City's use in making projections.

2.14 Consultant shall provide current and historical sales tax data on sales tax remittances at with the following data types:

Fiscal year and calendar quarter of remittance (to understand trends in cash received);

Fiscal year and calendar quarter of revenue earned (to understand trends in economic activity);

High level economic sector and more detailed subsector identifier and/or four-digit NAICS code and SBOE category if possible to facilitate comparisons;

Top sales generators and the revenue generated by each, ranked in descending order according to the amount of sales and use tax produced;

Analysis of sales tax by business category, including comparisons to statewide and other comparable averages; ranked in descending order according to the amount of sales and use tax produced;

Major business analysis, including analysis of reporting and accounting aberrations that could distort revenue patterns;

Address, organized into geocode or other neighborhood designation

Geographic performance and trends for areas specified by the City;

Name of owner or permit holder.

Data may be provided in a proprietary software system maintained by the Consultant or through a non-proprietary system. In either case, data shall be provided in a format allowing the City to export data into an Excel compatible format, allowing for integration of various databases. Contractor shall provide City staff with training on the use system. Data in the system shall be updated each calendar quarter as soon as possible following receipt from SBOE. Consultant shall provide geographical data mapping capability in its proprietary system or else provide City staff with address data in a format which would allow staff to export and map data.

2.15 Consultant shall conduct technical research and analysis to support the City in securing adoption of clarifying administrative rules, resolutions, ordinance revisions, regulatory amendments and legislation to facilitate correction and prevention of these errors and/or omissions, including:

a. Providing ongoing consultation services to the City regarding interpretation of sales and use tax data, sales and use tax revenue estimation and other requests related to sales and use tax;

b. Assisting in defining specific geographic areas for which the City would have an interest in knowing the Sales and Use Tax produced (e.g., within Redevelopment Agency or enterprise zone boundaries).

2.16 Consultant shall provide policy, regulatory and legislative technical support services to the City in conjunction with the Sales and Use Tax program with the intent of preventing and/or correcting misallocations and/or deficiencies.

2.17 Consultant shall provide both computer files and written reports to the City as follows:

a. A database with all sales tax producers in Newport Beach in a format compatible with the City's computer operating system. This database, at minimum, will include names, addresses, social security numbers or federal employer

identification numbers where available, sellers permit numbers and sales tax allocations for each business.

b. Updates to the database using the information obtained from the SBOE. Perform updates of sales tax permit records and distribution reports each calendar quarter. Perform monthly updates of registration control information.

2.18 Consultant shall provide City and SBOE with reports addressing each taxpayer reporting error. Consultant shall respond to negative findings by SBOE with timely reconfirmation documentation in order to preserve the City's original Dates of Knowledge. Consultant shall also coordinate corrective action with taxpayers and SBOE and represent the City before state officials, boards, commissions and committees for the purpose of correcting sales tax distribution errors that have deprived the City of revenue to which it is entitled. This includes representing the City at hearings before the SBOE related to incorrect allocations of tax.

2.19 Consultant shall provide City employees with training and assistance when requested by City on the fundamentals of sales and use tax and on programs to maximize these revenues through the encouragement of taxpayer options to take out direct payment permits, or self-accrue use tax to the City.

2.20 Consultant shall serve as the City's new resource and provide assistance, resolution, and follow-up services on sales and use tax related questions including budget projections, legislative and regulation issues and economic development.

2.21 Consultant shall provide, not less than on a quarterly basis, AB990 and Form BOE-549 correction status and aging reports. Aging reports will include all active and non-active accounts for which the Consultant has received payment.

2.22 Consultant shall prepare petition letters and any supporting information for submittal, and include the tracking of petitions in the quarterly aging reports. Petitions shall include appeals of negative and positive fund transfers as well as appeals of BOE-549-L allocations.

2.23 Consultant shall remain attentive to any future proposed changes to regulatory language in SBOE regulations related to the situs-based allocation of sales tax revenues and the formal practicing rules, which govern how Consultant pursues the collection of revenues; and take action, subject to City review and approval, on measures that threaten or delay revenue cash flows to the City. This could include attending legislative hearings and explaining to the City the potential effect of proposed legislation on the City.

2.24 Consultant shall meet in person with City staff at least quarterly, upon request by the City.

**EXHIBIT B
SCHEDULE OF BILLING RATES**

Definitions

Revenue: all new sales and new use tax revenue received by the City, including reimbursement from the sales and use tax compensation fund outlined in Section 97.68 of the Revenue and Taxation Code, as a result of audit and recovery work performed by the Consultant

Quarter: calendar quarter, e.g., January 1 through March 31.

Date of Knowledge: the date Consultant notifies SBOE of a misallocation.

Date of Correction: the date the City receives the first regular quarterly payment from SBOE for a correction on a misallocation identified by Consultant.

SBOE: State Board of Equalization

Fees Payable

1. City shall pay to Consultant a flat fee of 15% of Revenue, subject to the terms and conditions in this Exhibit B.
2. The fee shall be paid for Revenue received for the Quarter in which the Date of Correction falls and all applicable prior Quarters back to and including the three Quarters prior to the Date of Knowledge Quarter.
3. The 15% fee shall be paid for Revenue received in the eight consecutive Quarters beginning with the Quarter in which the Date of Correction falls.
4. Fees shall be invoiced only after completion of the audit, submittal of petitions to the SBOE and receipt of Revenues by the City.
5. Cumulative fees for any single audit case submitted by Consultant and resolved at the SBOE Allocation Group level shall not exceed \$50,000. Audit cases that are resolved at the SBOE Appeals Division or at the Board Hearing level will be charged the 15% contingency fee and will be not be subject to the \$50,000 cap.
6. Commencing with the ninth Quarter following the Date of Correction Quarter, 100% of all Revenue shall be paid to and retained by the City and there shall be no further fees payable to Consultant under the terms of this Agreement.

7. The fee constitutes the full reimbursement to Consultant and covers all direct and indirect costs incurred by the Consultant under this Agreement. This includes all salaries of Consultant's employees, travel expenses and service contracting costs as well as the software to be delivered to the City under this Agreement.

Exclusions

The 15% fee does not apply to sales and use tax reallocations initiated and completed by SBOE staff.

EXHIBIT C

1. INSURANCE REQUIREMENTS – PROFESSIONAL SERVICES

1.1 Provision of Insurance. Without limiting Consultant's indemnification of City, and prior to commencement of Work, Consultant shall obtain, provide and maintain at its own expense during the term of this Agreement, policies of insurance of the type and amounts described below and in a form satisfactory to City. Consultant agrees to provide insurance in accordance with requirements set forth here. If Consultant uses existing coverage to comply and that coverage does not meet these requirements, Consultant agrees to amend, supplement or endorse the existing coverage.

1.2 Acceptable Insurers. All insurance policies shall be issued by an insurance company currently authorized by the Insurance Commissioner to transact business of insurance in the State of California, with an assigned policyholders' Rating of A- (or higher) and Financial Size Category Class VII (or larger) in accordance with the latest edition of Best's Key Rating Guide, unless otherwise approved by the City's Risk Manager.

1.3 Coverage Requirements.

1.3.1 Workers' Compensation Insurance. Consultant shall maintain Workers' Compensation Insurance, statutory limits, and Employer's Liability Insurance with limits of at least one million dollars (\$1,000,000) each accident for bodily injury by accident and each employee for bodily injury by disease in accordance with the laws of the State of California, Section 3700 of the Labor Code.

1.3.1.1 Consultant shall submit to City, along with the certificate of insurance, a Waiver of Subrogation endorsement in favor of City, its officers, agents, employees and volunteers.

1.3.2 General Liability Insurance. Consultant shall maintain commercial general liability insurance, and if necessary umbrella liability insurance, with coverage at least as broad as provided by Insurance Services Office form CG 00 01, in an amount not less than one million dollars (\$1,000,000) per occurrence, two million dollars (\$2,000,000) general aggregate. The policy shall cover liability arising from premises, operations, products-completed operations, personal and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract) with no endorsement or modification limiting the scope of coverage for liability assumed under a contract.

1.3.3 Automobile Liability Insurance. Consultant shall maintain automobile insurance at least as broad as Insurance Services Office form CA 00 01 covering bodily injury and property damage for all activities of the Consultant arising out of or in connection with Work to be performed under this Agreement, including coverage for any owned, hired, non-owned or rented vehicles, in an amount not less than one million dollars (\$1,000,000) combined single limit each accident.

1.3.4 Professional Liability (Errors & Omissions) Insurance. Consultant shall maintain professional liability insurance that covers the Services to be performed in connection with this Agreement, in the minimum amount of one million dollars (\$1,000,000) per claim and in the aggregate. Any policy inception date, continuity date, or retroactive date must be before the effective date of this agreement and Consultant agrees to maintain continuous coverage through a period no less than three years after completion of the services required by this agreement.

1.4 Other Insurance Requirements. The policies are to contain, or be endorsed to contain, the following provisions:

1.4.1 Waiver of Subrogation. All insurance coverage maintained or procured pursuant to this agreement shall be endorsed to waive subrogation against City, its elected or appointed officers, agents, officials, employees and volunteers or shall specifically allow Consultant or others providing insurance evidence in compliance with these requirements to waive their right of recovery prior to a loss. Consultant hereby waives its own right of recovery against City, and shall require similar written express waivers from each of its subconsultants.

1.4.2 Additional Insured Status. All liability policies including general liability, excess liability, pollution liability, and automobile liability, but not including professional liability, shall provide or be endorsed to provide that City and its officers, officials, employees, and agents shall be included as insureds under such policies.

1.4.3 Primary and Non Contributory. All liability coverage shall apply on a primary basis and shall not require contribution from any insurance or self-insurance maintained by City.

1.4.4 Notice of Cancellation. All policies shall provide City with thirty (30) days notice of cancellation (except for nonpayment for which ten (10) days notice is required) or nonrenewal of coverage for each required coverage.

1.5 Additional Agreements Between the Parties. The parties hereby agree to the following:

1.5.1 Evidence of Insurance. Consultant shall provide certificates of insurance to City as evidence of the insurance coverage required herein, along with a waiver of subrogation endorsement for workers' compensation and other endorsements as specified herein for each coverage. Insurance certificates and endorsement must be approved by City's Risk Manager prior to commencement of performance. Current certification of insurance shall be kept on file with City at all times during the term of this Agreement. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

1.5.2 City's Right to Revise Requirements. The City reserves the right at any time during the term of the Agreement to change the amounts and types of insurance required by giving the Consultant sixty (60) days advance written notice of

such change. If such change results in substantial additional cost to the Consultant, the City and Consultant may renegotiate Consultant's compensation.

1.5.3 Enforcement of Agreement Provisions. Consultant acknowledges and agrees that any actual or alleged failure on the part of the City to inform Consultant of non-compliance with any requirement imposes no additional obligations on the City nor does it waive any rights hereunder.

1.5.4 Requirements not Limiting. Requirements of specific coverage features or limits contained in this Section are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by any insurance. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all inclusive, or to the exclusion of other coverage, or a waiver of any type.

1.5.5 Self-insured Retentions. Any self-insured retentions must be declared to and approved by City. City reserves the right to require that self-insured retentions be eliminated, lowered, or replaced by a deductible. Self-insurance will not be considered to comply with these requirements unless approved by City.

1.5.6 City Remedies for Non Compliance If Consultant or any subconsultant fails to provide and maintain insurance as required herein, then City shall have the right but not the obligation, to purchase such insurance, to terminate this agreement, or to suspend Consultant's right to proceed until proper evidence of insurance is provided. Any amounts paid by City shall, at City's sole option, be deducted from amounts payable to Consultant or reimbursed by Consultant upon demand.

1.5.7 Timely Notice of Claims. Consultant shall give City prompt and timely notice of claims made or suits instituted that arise out of or result from Consultant's performance under this Agreement, and that involve or may involve coverage under any of the required liability policies.

1.5.8 Consultant's Insurance. Consultant shall also procure and maintain, at its own cost and expense, any additional kinds of insurance, which in its own judgment may be necessary for its proper protection and prosecution of the Work.