Staff Summary Report

Tempe

Council Meeting Date: May 28, 2009 **Agenda Item Number:** 24

SUBJECT: Request approval to renew public defender contracts for a one year period to provide services for indigent defendants in the Tempe Municipal Court.

DOCUMENT NAME: 20090528mclca01 **COURT ADMINISTRATION (0501-02)**

SUPPORTING DOCS: Yes

COMMENTS: The total cost of these contracts with overages shall not exceed $220,000

PREPARED BY: Louraine C. Arkfeld, Presiding Judge, 350-8614

REVIEWED BY: N/A

LEGAL REVIEW BY: Andrew B. Ching, City Attorney, 350-8575

FISCAL NOTE: Due to recognition of budget constraints, no further increases are requested

RECOMMENDATION: It is the Court's recommendation that the Council approve the attached one-year Public Defender contracts.

ADDITIONAL INFO: There are two full contracts (one for each of two full-time Criminal Divisions) and a half contract (for the Presiding Judge's half-time Criminal Division). The full contract specifies 400 cases for an annual amount of $50,000.00 and the half-contract specifies 200 cases for $25,000.00. This contract amount was raised in FY06/07 for the first time since FY99/00. The rate of $125.00 per case is one of the lowest per case rates in the Valley. The contracts allow for any overage to be paid at the same low per case rate. Since appointments are based on the applicants' indigency status, it is difficult to determine in advance the exact number of cases which will require a public defender appointment. The contract caseload again reached its maximum this year. However, we are already budgeted for any overage that would need to be paid. .

Our current contract Public Defenders (two full contracts, one half contract) are being recommended for renewal. All were originally selected at various times following an extensive application and review process by selection committees composed of both lawyer and citizen representation and have fulfilled expectations. They have covered their courtrooms and dockets very professionally. Evaluations by the judges who work with these defenders are that they have done an excellent job of representing their clients and working to keep the Court operating effectively and efficiently. Each attorney has promptly filed monthly reports as to the cases assigned, the work done on each case, and the status of the case. Few complaints have been received from their clients. All wish to continue with their contracts thereby assuring stable and consistent representation.

AGREEMENT NO.

THIS AGREEMENT is made and entered into by and between the CITY OF TEMPE, a municipal corporation, by and through the Presiding Judge of the City of Tempe, hereinafter referred to as "City", and Scott McAlister, an Attorney at Law, hereinafter referred to as "ATTORNEY."

R E C I T A T I O N S

Whereas, the City desires to provide competent private counsel for the representation of indigent defendants in the Municipal Court, and Scott McAlister is an Attorney at Law licensed to practice in the State of Arizona, therefore,

C O V E N A N T S

It is mutually covenanted and agreed as follows:

1. ATTORNEY shall represent all indigent defendants assigned to him/her by the Court consistent with paragraphs 4 and 18. For the purpose of receiving new case assignments, ATTORNEY may be assigned by the Presiding Judge to a specific courtroom or courtrooms. The Presiding Judge retains the right to reassign ATTORNEY to another courtroom or courtrooms for the purpose of receiving new case assignments at any time upon 30 days written notice. The Presiding Judge retains the right to assign cases to ATTORNEY prior to the initial Pretrial Disposition Conference. Notwithstanding this assignment, the Court retains the right to schedule ATTORNEY'S cases in any courtroom for trial, consistent with his or her court-appearance schedule in the assigned courtroom(s).

2. ATTORNEY shall represent assigned defendants at all court proceedings, including, but not limited to: pretrial disposition conferences; motions; evidentiary hearings; calendar calls; trials; sentencings; sentence reviews; revocation of probation hearings; special hearings; oral arguments; orders to show cause; jail court sessions, and appeals and special actions.

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5. ATTORNEY shall give precedence to court settings in the Tempe Municipal Court over civil cases and all other criminal cases in other courts, which do not have precedence as provided by the Arizona Rules of Criminal Procedure.

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is unable to appear at any Court session for any reason. Substitute counsel shall not be used routinely and in any event no more often than in approximately thirty percent (30%) of all court appearances in cases assigned to ATTORNEY. The name(s) of the responsible substitute attorney shall be on file with the Presiding Judge at all times during the term of this Agreement and such substitute must be approved by the Presiding Judge prior to the representation of indigent defendants in Court. Substitute counsel shall not conduct any jury trial or bench trial unless, pursuant to Rule 6.3, Arizona Rules Criminal Procedure, a motion for substitution of ATTORNEY is granted by the Court.

9. In the event that circumstances arise which may prevent ATTORNEY from providing effective assistance of counsel, or from otherwise accepting indigent appointments, the parties agree that the Presiding Judge and ATTORNEY shall confer and make reasonable efforts to reach agreement on a temporary modification of this Agreement.

10. The term of this Agreement shall begin July 1, 2009 and continue until June 30, 2010.

11. From July 1, 2009, to June 30, 2010, the City of Tempe will pay ATTORNEY, for all representation and work required pursuant to this Agreement, the amount of $50,000.00 (Fifty thousand dollars) annually. ATTORNEY shall submit a monthly invoice for payment to the Presiding Judge no later than the tenth day of the calendar month for which ATTORNEY is billing. Payment shall be made by the City within 30 days after receipt of the invoice by the Presiding Judge, except that payment may be withheld by the City pending ATTORNEY'S submission of the monthly statistical report required under paragraph 7 of this Agreement.

Any additional cases assigned above the agreed upon four hundred (400) shall be compensated for at the rate of one hundred twenty five dollars ($125) per case.

12. ATTORNEY shall maintain an office or make arrangements to use an office that is located in Maricopa County and which is capable of receiving clients and telephone calls and taking messages during regular business hours.

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Upon approval of the Judge presiding over the individual cases in question, the City shall pay all reasonable costs incurred in analyzing indigent defendants' second breath samples and in employing an expert to testify as to the results of this analysis, in employing other experts determined to be necessary by the Judge, for the costs of providing an interpreter to conduct client or witness interviews and for photocopy costs incurred in obtaining discoverable materials in possession of the Tempe Prosecutor's Office. The City may reimburse ATTORNEY for additional reasonable costs upon prior approval of the Presiding Judge.

Upon prior approval of the Presiding Judge, ATTORNEY shall be provided additional compensation at a rate not to exceed forty dollars ($40) per hour for cases involving defendants who, because of their mental condition, cause unusual problems or excessive additional work for ATTORNEY or for cases, which because of the complexity of facts, legal issues or proceedings, creates excessive additional work for ATTORNEY. The filing of an appeal or a complaint for Special Action shall not, by itself, support a decision to approve additional compensation.

14. The Presiding Judge may terminate this Agreement without cause with not less than thirty (30) days written notice to ATTORNEY by the Presiding Judge.

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In the event ATTORNEY is not providing representation consistent with the behavior set forth in paragraphs 4 and 18, or if the Presiding Judge determines that an emergency exists, the Presiding Judge may immediately suspend the ATTORNEY from further representation of contract defendants. The matter shall be referred to a Public Defender Review Committee for further investigation and action. The Public Defender Review Committee shall take action within a reasonable amount of time.

ATTORNEY must at all times remain an active member in good standing of the State Bar of Arizona. ATTORNEY must immediately inform the Presiding Judge of any changes in ATTORNEY'S membership status. Failure to maintain membership status and/or failure to promptly apprise the Presiding Judge of changes in status may result in immediate termination of this agreement.

15. If less than a full calendar month is included within

the contract term, at either the beginning of the contract term or at the end, the monthly compensation, as indicated in paragraph 11 of this agreement, will be prorated for that month at $236.67 per scheduled work day. At the end of the contract term, the Court may require ATTORNEY to continue to represent any indigent defendants to whom he or she has already been appointed and who have cases pending adjudication. If so required by the Court, ATTORNEY shall be compensated by the City at the rate of $40 per hour for all necessary preparation for and appearances at all Court proceedings beyond the contract term.

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17. In the event a case involves two or more defendants, the Court may assign a case to ATTORNEY even though the case was originally assigned to other counsel, when such assignment is necessary to avoid a conflict of interest.

18. The parties contemplate that some of the services required to be provided by the terms of this Agreement shall be performed by lawyers duly licensed to practice law in the State of Arizona, who are acting as the agents or employees of ATTORNEY. No such lawyer shall be employed in the performance of this Agreement without the prior approval of the Presiding Judge. Approval of the employment of such lawyers shall not be arbitrarily or unreasonably withheld or withdrawn. No such lawyer shall be employed by ATTORNEY in a manner inconsistent with paragraph 8 of this Agreement.

19. This Agreement shall be interpreted to avoid questions

of unethical conduct by ATTORNEY or Court. The parties shall conform to the Rules of Professional Conduct and Code of Judicial Conduct, as adopted in the State of Arizona.

20. Liability; Indemnity. Attorney covenants and agrees that City is to be free from liability and claim for damages by reason of any harm or injury to any person or persons, including Attorney, or property of any kind whatsoever and to whomsoever during the term of this Agreement or any extension hereof, Attorney hereby covenanting and agreeing to defend, indemnify and save harmless City from all liability, loss, costs and obligations on account of or arising out of any such injuries or losses, however occurring, except to the extent caused by the sole and gross negligence or willful misconduct of City, its agents, employees, or invitees. City agrees that Attorney shall have the right to contest the validity of any and all such claims and defend, settle and compromise any and all such claims of any kind or character and by whomsoever claimed, in the name of City, as Attorney may deem necessary, provided that the expenses thereof shall be paid by Attorney. The provisions of this Section shall survive the expiration or other termination of this Agreement.

21. Within 10 days of the commencement of this Agreement ATTORNEY shall provide the City with proof of malpractice coverage in an amount not less than $100,000 per claim/$300,000 aggregate. Insurance must remain in force during the term of the Agreement. Payments made pursuant to paragraph 11 may be withheld from ATTORNEY and the terms of this Agreement may be suspended by the City until proof of malpractice coverage is provided. In the event ATTORNEY'S insurance is terminated, ATTORNEY shall immediately notify the City and this Agreement shall be

terminated.

22. This Agreement is not intended to and will not constitute, create, give rise to, or otherwise recognize a joint venture, or relationship, partnership or formal business organization of any kind, and the rights, obligations, and relationship of the parties shall be that of agency independent contractor. The parties agree that neither the ATTORNEY nor any person supplied by the ATTORNEY in the performance of his or her obligations under this agreement are City employees, and that no rights of City civil service, retirement or personnel rules accrue to such persons. The ATTORNEY shall have total responsibility for all salaries, wages, bonuses, retirement, withholdings, workers' compensation, unemployment compensation, other employee benefits and all taxes and premiums appurtenant thereto concerning such persons and shall defend, indemnify and save and hold the City harmless from any and all claims arising from such responsibility.

23. The parties acknowledge that this Agreement is subject to cancellation by the City of Tempe pursuant to the provisions of A.R.S. 38-511.

24. ATTORNEY understands and acknowledges the applicability of the Immigration Reform and Control Act of 1986 (IRCA) and agrees to comply with the IRCA in performing this Agreement and to permit City to verify such compliance.

25. ATTORNEY shall not discriminate against any worker, employee or applicant, or any member of the public, because of race, color, religion, gender, gender identity, sexual orientation, national origin, familial status, age, or disability nor otherwise commit an unfair employment practice. ATTORNEY will take action to ensure that applicants are employed, and that

employees are dealt with during employment without regard to their race, color, religion, gender, gender identity, sexual orientation, national origin, familial status, age or disability. Such action shall include, but not be limited to, the following: Employment upgrading, promotion, demotion or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Attorney shall comply with all laws applicable to City services provided herein, including, but not limited to, Title II of the Americans with Disabilities Act.

26. ATTORNEY understands and acknowledges that this Agreement is for only the time period described and that no promises or assurances for an Agreement to provide representation to indigent defendants in Municipal Court beyond that time period have been made or inferred to the ATTORNEY.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed this_____day of _____, 2009.

City of Tempe, a municipal corporation

_____
Hugh Hallman, Mayor

_____
Louraine C. Arkfeld
Presiding Judge

ATTEST:

_____
City Clerk

_____
ATTORNEY

APPROVED AS TO FORM:

_____
City Attorney

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Hugh Hallman, Mayor

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Louraine C. Arkfeld
Presiding Judge

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ATTORNEY

APPROVED AS TO FORM:

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City Attorney

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7. ATTORNEY shall keep case logs, final disposition records, time sheets and written statistical reports as required by the Presiding Judge for the purpose of evaluating the performance of ATTORNEY. ATTORNEY shall provide to the Presiding Judge no later than 10 calendar days following the end of each month a monthly statistical report for the previous month in the form set forth in Attachment A, attached hereto. The Presiding Judge shall provide ATTORNEY with the necessary forms. The Presiding Judge reserves the right to revise the information required on the format of the monthly statistical form at any time. (Any such revision shall operate prospectively.) Failure to provide accurate and timely statistics may result in the City withholding payment to ATTORNEY pursuant to paragraph 11 of this agreement. The Court shall prepare a monthly discrepancy report indicating cases submitted and cases credited. ATTORNEY shall have thirty (30) days from the date of the report to request reevaluation of cases credited. After thirty (30) days, if no reevaluation has been requested, the cases will be counted as reported in the discrepancy report.

8. ATTORNEY agrees to provide substitute representation in Court or make suitable arrangements with the Court when ATTORNEY

is unable to appear at any Court session for any reason. Substitute counsel shall not be used routinely and in any event no more often than in approximately thirty percent (30%) of all court appearances in cases assigned to ATTORNEY. The name(s) of the responsible substitute attorney shall be on file with the Presiding Judge at all times during the term of this Agreement and such substitute must be approved by the Presiding Judge prior to the representation of indigent defendants in Court. Substitute counsel shall not conduct any jury trial or bench trial unless, pursuant to Rule 6.3, Arizona Rules Criminal Procedure, a motion for substitution of ATTORNEY is granted by the Court.

9. In the event that circumstances arise which may prevent ATTORNEY from providing effective assistance of counsel, or from otherwise accepting indigent appointments, the parties agree that the Presiding Judge and ATTORNEY shall confer and make reasonable efforts to reach agreement on a temporary modification of this Agreement.

10. The term of this Agreement shall begin July 1, 2009 and continue until June 30, 2010.

11. From July 1, 2009, to June 30, 2010, the City of Tempe will pay ATTORNEY, for all representation and work required pursuant to this Agreement, the amount of $25,000.00 (twenty-five thousand dollars) annually. ATTORNEY shall submit a monthly invoice for payment to the Presiding Judge no later than the tenth day of the calendar month for which ATTORNEY is billing. Payment shall be made by the City within 30 days after receipt of the invoice by the Presiding Judge, except that payment may be withheld by the City pending ATTORNEY'S submission of the monthly statistical report required under paragraph 7 of this Agreement.

Any additional cases assigned above the agreed upon two hundred (200) shall be compensated for at the rate of one hundred twenty five dollars ($125) per case.

12. ATTORNEY shall maintain an office or make arrangements to use an office that is located in Maricopa County and which is capable of receiving clients and telephone calls and taking messages during regular business hours.

13. ATTORNEY shall be responsible for normal and incidental costs incurred in the representation of indigent defendants assigned by the Court pursuant to this Agreement, including but not limited to: office space, telephones, transportation, parking, office supplies, office overhead, secretarial services, photocopies, printing and binding.

Upon approval of the Judge presiding over the individual cases in question, the City shall pay all reasonable costs incurred in analyzing indigent defendants' second breath samples and in employing an expert to testify as to the results of this analysis, in employing other experts determined to be necessary by the Judge, for the costs of providing an interpreter to conduct client or witness interviews and for photocopy costs incurred in obtaining discoverable materials in possession of the Tempe Prosecutor's Office. The City may reimburse ATTORNEY for additional reasonable costs upon prior approval of the Presiding Judge.

Upon prior approval of the Presiding Judge, ATTORNEY shall be provided additional compensation at a rate not to exceed forty dollars ($40) per hour for cases involving defendants who, because of their mental condition, cause unusual problems or excessive additional work for ATTORNEY or for cases, which because of the complexity of facts, legal issues or proceedings, creates excessive additional work for ATTORNEY. The filing of an appeal or a complaint for Special Action shall not, by itself, support a decision to approve additional compensation.

14. The Presiding Judge may terminate this Agreement without cause with not less than thirty (30) days written notice to ATTORNEY by the Presiding Judge.

ATTORNEY may terminate this Agreement with not less than thirty (30) days written notice to the Presiding Judge.

In the event ATTORNEY is not providing representation consistent with the behavior set forth in paragraphs 4 and 18, or if the Presiding Judge determines that an emergency exists, the Presiding Judge may immediately suspend the ATTORNEY from further representation of contract defendants. The matter shall be referred to a Public Defender Review Committee for further investigation and action. The Public Defender Review Committee shall take action within a reasonable amount of time.

ATTORNEY must at all times remain an active member in good standing of the State Bar of Arizona. ATTORNEY must immediately inform the Presiding Judge of any changes in ATTORNEY'S membership status. Failure to maintain membership status and/or failure to promptly apprise the Presiding Judge of changes in status may result in immediate termination of this agreement.

15. If less than a full calendar month is included within

the contract term, at either the beginning of the contract term or at the end, the monthly compensation, as indicated in paragraph 11 of this agreement, will be prorated for that month at $236.67 per scheduled work day. At the end of the contract term, the Court may require ATTORNEY to continue to represent any indigent defendants to whom he or she has already been appointed and who have cases pending adjudication. If so required by the Court, ATTORNEY shall be compensated by the City at the rate of $40 per hour for all necessary preparation for and appearances at all Court proceedings beyond the contract term.

16. ATTORNEY will not be required to pay for interpreter services for non-English speaking defendants for any in-court proceedings or for interviews conducted at the Court consistent with paragraph 13 of this agreement.

17. In the event a case involves two or more defendants, the Court may assign a case to ATTORNEY even though the case was originally assigned to other counsel, when such assignment is necessary to avoid a conflict of interest.

18. The parties contemplate that some of the services required to be provided by the terms of this Agreement shall be performed by lawyers duly licensed to practice law in the State of Arizona, who are acting as the agents or employees of ATTORNEY. No such lawyer shall be employed in the performance of this Agreement without the prior approval of the Presiding Judge. Approval of the employment of such lawyers shall not be arbitrarily or unreasonably withheld or withdrawn. No such lawyer shall be employed by ATTORNEY in a manner inconsistent with paragraph 8 of this Agreement.

19. This Agreement shall be interpreted to avoid questions

of unethical conduct by ATTORNEY or Court. The parties shall conform to the Rules of Professional Conduct and Code of Judicial Conduct, as adopted in the State of Arizona.

20. Liability; Indemnity. Attorney covenants and agrees that City is to be free from liability and claim for damages by reason of any harm or injury to any person or persons, including Attorney, or property of any kind whatsoever and to whomsoever during the term of this Agreement or any extension hereof, Attorney hereby covenanting and agreeing to defend, indemnify and save harmless City from all liability, loss, costs and obligations on account of or arising out of any such injuries or losses, however occurring, except to the extent caused by the sole and gross negligence or willful misconduct of City, its agents, employees, or invitees. City agrees that Attorney shall have the right to contest the validity of any and all such claims and defend, settle and compromise any and all such claims of any kind or character and by whomsoever claimed, in the name of City, as Attorney may deem necessary, provided that the expenses thereof shall be paid by Attorney. The provisions of this Section shall survive the expiration or other termination of this Agreement.

21. Within 10 days of the commencement of this Agreement ATTORNEY shall provide the City with proof of malpractice coverage in an amount not less than $100,000 per claim/$300,000 aggregate. Insurance must remain in force during the term of the Agreement. Payments made pursuant to paragraph 11 may be withheld from ATTORNEY and the terms of this Agreement may be suspended by the City until proof of malpractice coverage is provided. In the event ATTORNEY'S insurance is terminated, ATTORNEY shall immediately notify the City and this Agreement shall be

terminated.

22. This Agreement is not intended to and will not constitute, create, give rise to, or otherwise recognize a joint venture, or relationship, partnership or formal business organization of any kind, and the rights, obligations, and relationship of the parties shall be that of agency independent contractor. The parties agree that neither the ATTORNEY nor any person supplied by the ATTORNEY in the performance of his or her obligations under this agreement are City employees, and that no rights of City civil service, retirement or personnel rules accrue to such persons. The ATTORNEY shall have total responsibility for all salaries, wages, bonuses, retirement, withholdings, workers' compensation, unemployment compensation, other employee benefits and all taxes and premiums appurtenant thereto concerning such persons and shall defend, indemnify and save and hold the City harmless from any and all claims arising from such responsibility.

23. The parties acknowledge that this Agreement is subject to cancellation by the City of Tempe pursuant to the provisions of A.R.S. 38-511.

24. ATTORNEY understands and acknowledges the applicability of the Immigration Reform and Control Act of 1986 (IRCA) and agrees to comply with the IRCA in performing this Agreement and to permit City to verify such compliance.

25. ATTORNEY shall not discriminate against any worker, employee or applicant, or any member of the public, because of race, color, religion, gender, gender identity, sexual orientation, national origin, familial status, age, or disability nor otherwise commit an unfair employment practice. ATTORNEY will take action to ensure that applicants are employed, and that

employees are dealt with during employment without regard to their race, color, religion, gender, gender identity, sexual orientation, national origin, familial status, age or disability. Such action shall include, but not be limited to, the following: Employment upgrading, promotion, demotion or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Attorney shall comply with all laws applicable to City services provided herein, including, but not limited to, Title II of the Americans with Disabilities Act.

26. ATTORNEY understands and acknowledges that this Agreement is for only the time period described and that no promises or assurances for an Agreement to provide representation to indigent defendants in Municipal Court beyond that time period have been made or inferred to the ATTORNEY.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed this_____day of _____, 2009.

City of Tempe, a municipal corporation

_____
Hugh Hallman, Mayor

_____
Louraine C. Arkfeld
Presiding Judge

ATTEST:

_____
City Clerk

_____
ATTORNEY

APPROVED AS TO FORM:

_____
City Attorney

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