

CITY OF DANA POINT
AGENDA REPORT

Reviewed By:	
DH	X
CM	X
CA	X

DATE: NOVEMBER 6, 2007

TO: HONORABLE MAYOR AND CITY COUNCIL
DOUGLAS C. CHOTKEVYS, CITY MANAGER

FROM: MICHAEL A. KILLEBREW, DIRECTOR OF ADMINISTRATIVE SERVICES
SHELLEY VELEZ, PERSONNEL ANALYST

SUBJECT: PROFESSIONAL SERVICES AGREEMENT FOR THE ADMINISTRATION
OF FLEXIBLE SPENDING PLAN

RECOMMENDED ACTION:

That the City Council authorize the City Manager to enter into a Professional Services Agreement with Benefit Administration Corporation.

DISCUSSION:

On October 8, 1991, the City Council passed Resolution No. 91-10-08-03 adopting an Internal Revenue Code Section 125 Employee Flexible Spending Plan (Plan). In general, employees elect to fund their individual Plan accounts, pre-tax, through payroll withholdings. Employees can then get reimbursed for eligible expenses, such as out-of-pocket medical and dependent care expenses with those pre-tax dollars. Since 1991, the Plan has been administered in-house by the City's Administrative Services Department. With recent regulations regarding the protection of employees' personal medical information, increased number of City staff, and potential changes in IRS regulations relating to Flexible Spending Plans, staff is recommending that the City contract with a qualified company to administer the City's Plan.

Additionally, the Plan Document itself has not been updated since its adoption in 1991, and the City would require a qualified administrator to amend the Plan Document to ensure its compliance with all current regulations. The qualified administrator must also conduct specified nondiscrimination testing also required by the IRS.

Staff has surveyed a number of local cities with regard to their experience with Flexible Spending Plan administrators and recommends that the City enter into an agreement with Benefit Administration Corporation (BAC) to begin January 1, 2008 in coordination with the new benefit year.

FISCAL IMPACT:

BAC's estimated cost for administering the Flexible Spending Plan, updating the existing City Plan Document to comply with all current regulations, and to conduct the IRS mandated discrimination testing is approximately \$1,650.00. The necessary funds are included in the adopted FY08/09 budget.

ALTERNATIVE ACTIONS:

As determined by Council.

ACTION DOCUMENTS:**PAGE NO.**

A. [Professional Services Agreement between Benefit Administration Corporation \(BAC\) and the City of Dana Point](#) 3

SUPPORTING DOCUMENTS:

None.

ACTION DOCUMENT A**CITY OF DANA POINT
AGREEMENT FOR ADMINISTRATION SERVICES**

THIS AGREEMENT, is made as of _____, 2007, and effective as of January 1, 2008, between the City of Dana Point, a municipal corporation ("City"), and Benefit Administration Corporation ("Consultant") for the administration of the City's Flexible Benefits Plan (the "Plan"). In consideration of the mutual covenants and conditions set forth herein, the parties agree as follows:

1. SERVICES

(a) Subject to the supervision and direction of the City, Consultant will act as the Contract Administrator ("Administrator") of the Plan, including any amendments thereto, in accordance with the terms of the Plan and this Agreement. All of the provisions of the Plan are hereby incorporated by this reference. The administration of the Plan includes, but is not limited to, the monitoring and processing of claims, employee election forms, employee education, and enrollment.

(b) Consultant is not responsible for any outside audits of the Plan required by the IRS. The City will contract for the performance of such audits.

2. TERM

(a) This Agreement shall commence on January 1, 2008 and shall remain and continue in effect until the termination of the Plan and the payment of all benefits and preparation of all final reports thereafter, unless sooner terminated pursuant to the provisions of this Agreement. Following termination of the Plan, the Agreement shall automatically terminate once all benefits have been paid and final reports prepared.

(b) Notwithstanding the above, Section 9 of this Agreement shall survive the term of this Agreement.

3. PERFORMANCE

Consultant shall at all times faithfully, competently and to the best of its ability, experience, and talent, perform all tasks described herein. Consultant acknowledges and understands that the services and work contracted for under this Agreement require specialized skills and abilities and that, consistent with this understanding, Consultant's services and work shall be held to a heightened standard of quality. Consultant represents it holds the necessary skills and abilities to satisfy the heightened standard of quality as set forth in this Agreement, and City relies upon the skills and abilities of Consultant. Consultant shall perform the work and services under this Agreement in

accordance with such heightened standard of quality and in accordance with the accepted standards of the professional disciplines involved in the services described herein.

4. **CITY MANAGEMENT**

The City Manager, or his or her designee, shall represent City in all matters pertaining to the performance of this Agreement, and shall periodically review Consultant's performance hereunder, but not including the authority to enlarge tasks to be performed by or change the compensation due to Consultant.

5. **COOPERATION BY CITY**

(a) The City shall provide Consultant in a timely manner with the information necessary to administer the Plan, including employee census data.

(b) From time to time, in the sole discretion of the City Manager or his or her designee, the City shall advance funds to Consultant for the payment of claims ("Advanced Funds"). Any income earned on the Advanced Funds shall be the property of the City and shall be applied by Consultant toward administration fees and bank charges, if any. The Advanced Funds shall only be used for the purposes of the Plan and this Agreement.

6. **PAYMENT**

(a) The fees due Consultant for acting as Administrator shall be determined according to Exhibit A as amended from time to time by mutual agreement of the parties. Additionally, the City is responsible for: (i) all bank and printing charges specifically identified as utilized for the administration of the Plan and which contain thereon the name and/or logo of the City; (ii) postage for special mailings sent for purposes of the administration of the Plan; and (iii) reasonable additional fees for any Plan redesign work requested in writing by the City. Administration costs shall be reduced by any forfeiture adjustments as calculated by Consultant.

(b) Consultant will submit invoices monthly for actual services performed. Invoices shall be submitted on or about the first business day of each month, or as soon thereafter as practical, for services provided in the previous month. Payment shall be made within thirty (30) days of receipt of each invoice as to all non-disputed fees. If the City disputes any of Consultant's fees it shall give written notice to Consultant within thirty (30) days of receipt of an invoice of any disputed fee set forth on the invoice.

(c) Consultant shall not be compensated for any services rendered in connection with its performance of this Agreement which are in addition to those set forth in the Plan or this Agreement, unless such additional services are authorized in advance and in writing by the City Manager. Consultant shall be compensated for any additional services in the amounts and in the manner as agreed to by City Manager and Consultant at the time City's written authorization is given to Consultant for the performance of said services.

7. **TERMINATION OF AGREEMENT**

(a) Either party may terminate the Agreement for any reason, with or without cause, upon sixty (60) days' written notice to the other party.

(b) The City may immediately terminate the Agreement for cause, without notice, in the event Consultant breaches any term of this Agreement.

(c) Consultant may terminate the Agreement upon fifteen (15) days' written notice in the event the City fails to advance funds sufficient for the payment of claims when due, unless such funds are provided within the 15-day notice period.

(d) Upon termination of the Agreement, Consultant shall apply Advanced Funds in its possession toward the payment of benefits to employees and, if any Advanced Funds remain after the payment of benefits to employees, to its administrative fees and expenses incurred in furtherance of this Agreement. The remainder, if any, of such funds shall be refunded to the City.

(e) Upon termination of the Agreement, Consultant will submit an invoice to the City pursuant to Section 6, and the City shall pay or dispute fees pursuant to Section 6.

(f) Except as otherwise provided herein and prior to the termination date of this Agreement, this Agreement may be terminated at any time by written consent of both the City and the Consultant.

8. **REVIEW OF DOCUMENTS**

Consultant shall maintain complete and accurate records with respect to enrollment, claims, benefits, costs, expenses, receipts, and other such information required by the City that relate to the performance of services under this Agreement. Consultant shall maintain adequate records of services provided in sufficient detail to permit an evaluation of services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. Consultant shall provide free access to the representatives of the City or its designees at reasonable times to such books and records; shall give the City the right to examine and audit said books and records; shall permit the City to make transcripts there from as necessary; and shall allow inspection of all work, data, documents, proceedings, and activities related to this Agreement. Such records, together with supporting documents, shall be maintained for a period of at least three (3) years after receipt of final payment.

9. **INDEMNIFICATION BY CONTRACTOR**

(a) Indemnification. To the fullest extent permitted by law, Consultant shall protect, indemnify, defend and hold harmless City and any and all of its officials, employees, and agents from and against any and all losses, liabilities, damages, and costs and expenses

(including liability for claims, suits, negligent actions, arbitration proceedings, administrative proceedings, regulatory proceedings, losses, expenses or costs of any kind, whether actual, alleged or threatened, including attorney's fees and costs, court costs, interest, defense costs, and expert witness fees) where the same arise out of, are a consequence of, or are in any way attributable to, in whole or in part, the negligent actions or failure to act of Consultant, its officers, agents, employees or sub-consultants, or any entity or individual that Consultant shall bear the legal liability thereof.

(b) Sub-consultant Indemnification. Consultant agrees to obtain executed indemnity agreements with provisions identical to those set forth in this section from each and every sub-consultant or any other person or entity involved by, for, with or on behalf of Consultant in the performance of this Agreement. In the event Consultant fails to obtain such indemnity obligations from others as required herein, Consultant agrees to be fully responsible according to the terms of this section. Failure of City to monitor compliance with these requirements imposes no additional obligations on City and will in no way act as a waiver of any rights hereunder. This obligation to indemnify and defend City as set forth herein is binding on successors, assigns or heirs of Consultant and shall survive the termination of this Agreement or this section.

(c) Exceptions. Consultant does not assume any responsibility, risk or liability or obligation for the general policy direction of the Plan, the adequacy of funding thereof, or any breach of duty by parties other than Consultant. Consultant is not in any way to be deemed insurer, underwriter or guarantor with respect to any benefits payable under the Plan.

10. **INSURANCE REQUIREMENTS**

Consultant shall maintain prior to the beginning of and for the duration of this Agreement insurance coverage as specified in Exhibit B attached to and part of this Agreement.

11. **INDEPENDENT CONSULTANT**

(a) Consultant is and shall at all times remain as to the City a wholly independent contractor. The personnel performing the services under this Agreement on behalf of Consultant shall at all times be under Consultant's exclusive direction and control. Neither City nor any of its officers, employees, or agents shall have control over the conduct of Consultant or any of Consultant's officers, employees, or agents, except as set forth in this Agreement. Consultant shall not at any time or in any manner represent that it or any of its officers, employees, or agents are in any manner officers, employees, or agents of the City. Consultant shall not incur or have the power to incur any debt, obligation, or liability whatever against City, or bind City in any manner.

(b) No employee benefits shall be available to Consultant in connection with the performance of this Agreement. Except for the fees paid to Consultant as provided in the Agreement, City shall not pay salaries, wages, or other compensation to Consultant for performing services hereunder for City. City shall not be liable for compensation or

indemnification to Consultant for injury or sickness arising out of performing services hereunder.

12. **LEGAL RESPONSIBILITIES**

The Consultant shall keep itself informed of State and Federal laws and regulations which in any manner affect those employed by it or in any way affect the performance of its service pursuant to this Agreement. The Consultant shall at all times observe and comply with all such laws and regulations. The City, and its officers and employees, shall not be liable at law or in equity occasioned by failure of the Consultant to comply with this Section.

13. **UNDUE INFLUENCE**

Consultant declares and warrants that no undue influence or pressure is used against or in concert with any officer or employee of the City of Dana Point in connection with the award, terms or implementation of this Agreement, including any method of coercion, confidential financial arrangement, or financial inducement. No officer or employee of the City of Dana Point will receive compensation, directly or indirectly, from Consultant, or from any officer, employee or agent of Consultant, in connection with the award of this Agreement or any work to be conducted as a result of this Agreement. Violation of this Section shall be a material breach of this Agreement entitling the City to any and all remedies at law or in equity.

14. **NO BENEFIT TO ARISE TO LOCAL EMPLOYEES**

No member, officer, or employee of City, or their designees or agents, and no public official who exercises authority over or responsibilities with respect to the Project during his/her tenure or for one year thereafter, shall have any interest, direct or indirect, in any agreement or sub-agreement, or the proceeds thereof, for work to be performed in connection with the Project performed under this Agreement.

15. **RELEASE OF INFORMATION/CONFLICTS OF INTEREST**

(a) All information gained by Consultant in performance of this Agreement shall be considered confidential and shall not be released by Consultant without City's prior written authorization. Consultant, its officers, employees, agents, or sub-consultants, shall not without written authorization from the City Manager or unless requested by the City Attorney, voluntarily provide declarations, letters of support, testimony at depositions, response to interrogatories, or other information concerning the work performed under this Agreement or relating to any project or property located within the City. Response to a subpoena or court order shall not be considered "voluntary" provided Consultant gives City notice of such court order or subpoena.

(b) Consultant shall promptly notify City should Consultant, its officers, employees, agents, or sub-consultants be served with any summons, complaint, subpoena, notice of

19. **GOVERNING LAW**

The City and Consultant understand and agree that the laws of the State of California shall govern the rights, obligations, duties, and liabilities of the parties to this Agreement and also govern the interpretation of this Agreement. Any litigation concerning this Agreement shall take place in the municipal, superior, or federal district court with jurisdiction over the City of Dana Point.

20. **ENTIRE AGREEMENT**

This Agreement contains the entire understanding between the parties relating to the obligations of the parties described in this Agreement. All prior or contemporaneous agreements, understandings, representations, and statements, oral or written, are merged into this Agreement and shall be of no further force or effect. Each party is entering into this Agreement based solely upon the representations set forth herein and upon each party's own independent investigation of any and all facts such party deems material.

21. **SEVERABILITY**

The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of the other provisions of this Agreement.

22. **NO PRESUMPTION REGARDING DRAFTER OF THIS AGREEMENT**

The parties acknowledge and agree that the terms and provisions of this Agreement have been negotiated and discussed between the parties and their attorneys, and this Agreement reflects their mutual agreement regarding the same. Because of the nature of such negotiations and discussions, it would be inappropriate to deem any party to be the drafter of this Agreement, and therefore, no presumption for or against validity or as to any interpretation hereof, based upon the identity of the drafter shall be applicable in interpreting or enforcing this Agreement.

23. **ATTORNEY'S FEES**

If any action at law or suit in equity, including an action for declaratory relief, is brought by either party with respect to this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, in addition to any other relief to which it may be entitled, and such amount may be added to, and made a part of, such judgment.

24. **AUTHORITY TO EXECUTE THIS AGREEMENT**

The person or persons executing this Agreement on behalf of Consultant warrants and represents that he/she has the authority to execute this Agreement on behalf of the Consultant and has the authority to bind Consultant to the performance of its obligations hereunder.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed the day and year first above written.

CITY OF DANA POINT

BENEFIT ADMINISTRATION CORPORATION

By: _____
Douglas C. Chotkevys, City Manager

By: _____
(Signature)

ATTEST:

(Typed/Printed Name)

By: _____
Kathy Ward, City Clerk

Its: _____
(Title)

APPROVED AS TO FORM:

By: _____
(Signature)

A. Patrick Munoz, City Attorney

(Typed/Printed name)

Its: _____
(Title)

FEE SCHEDULE

SET-UP FEES	No Cost
ENROLLMENT FEES (OPTIONAL)	
Generic Enrollment Materials	No Cost
Customized Enrollment Materials	At Cost
First year	No cost
Subsequent years	\$75 per meeting (Plus reasonable travel costs)
ADMINISTRATION FEE	
Premium Accounts Per Participant Per Month	No charge
Spending Accounts Per Participant Per Month	\$5.00 Each
Minimum Fee Per Year	\$600.00
Government Reporting Per Year, if required	\$250.00
Nondiscrimination Testing Per Year, if requested	\$75.00/hr.
EXTRAORDINARY SERVICES (Pre-approved by City)	
Consulting	\$150.00/Hour
Plan Documentation	\$150.00/Hour
Administrative	\$75.00/Hour

NOTE: A participant utilizing both spending accounts is billed at the rate of \$5.00 per month.

EXHIBIT B**INSURANCE REQUIREMENTS**

(a) Contractor shall provide commercial general liability insurance coverage for the performance of its obligations under this Agreement in a form and type acceptable to City in the coverage amount of \$ 1,000,000. Contractor shall add the City and its officers, agents and employees as additional insureds under the required insurance. Contractor shall provide worker's compensation insurance as required by law. The City may require that Contractor provide additional types and forms of insurance at City's sole and reasonable discretion based upon the nature of the services to be provided under the Agreement. Insurance shall be placed with carriers authorized and admitted to do business in the State of California with a current A.M. Best's rating of A- or better and a financial size of VII or greater. The Certificate of Liability Insurance shall be submitted on Accord form 25-S in the amounts listed above and said certificate shall be modified to require that the City be given thirty (30) days written notice by certified mail of any cancellation or reduction in available limits or changes in the terms of coverage.

(b) Deductibles and Self-Insured Retention. Any deductibles in excess of ten percent (10%) or self-insured retention must be declared to and approved by the City Manager. At the option of the City Manager, either the insurer shall reduce or eliminate such deductibles or self-insured retentions as respect to the City, its officers, officials, employees, agents, and volunteers; or the Consultant shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.

(c) The general liability policy is to contain, or be endorsed to contain, the following provisions:

- (1) For any claims related to this project, the Consultant's insurance coverage shall be primary insurance as respect to the City, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, agents, or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.
- (2) Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its officers, officials, employees, agents, or volunteers.
- (3) The Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability, and there shall be no cross liability exclusions that

preclude coverage for suits between Consultant and City or between City and any other insured. Consultant expressly waives any claim against City for any covered act or event, and Consultant's insurance policy shall not prevent such waiver. The limits of insurance required herein shall in no way limit the liability of the party providing the insurance. In addition, if the coverage or limits available to Consultant exceed that required by this Agreement, and the loss incurred by the additional insured exceeds the amount required by this Agreement, it is the parties' intent that all such additional coverage and limits available will apply irrespective of the specific coverage or limits required herein.

(d) Consultant shall immediately furnish to City certificates of insurance or endorsements, satisfactory to City, evidencing the insurance coverage above required prior to the commencement of performance of services hereunder. These certificates or endorsements shall provide that such insurance is the minimum, is in no way limited by any provision herein, and allows for the application of all coverage available to the additional insureds. Certificates of insurance and/or endorsements may not contain any exculpatory wording that mitigates the responsibilities of Consultant or the insurer.

(e) Consultant agrees to provide immediate notice to City of any claim or loss likely to involve City or its employees or agents which exceeds \$2,500 or is likely to exceed that amount.

(f) Consultant agrees to require that all parties, including but not limited to sub-consultants and additional consultants or professional services with whom Consultant enters into contracts or whom Consultant hires pursuant to or in any way related to the performance of this Agreement, provide the insurance coverage required here, at a minimum. Consultant agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this Section. Consultant acknowledges and agrees that upon request, all agreements with sub-consultants and others engaged in the project contemplated by this Agreement will be submitted to City for review. Consultant agrees and acknowledges that such contracts may require modification as to the insurance requirements necessary to properly protect City.