



BROADBAND FIBER OPTICS/INTERNET SYSTEMS SERVICES AGREEMENT

Project No: RFP # _____

Agreement No: _____

Commodity Code Number(s): _____

Location: _____



Distribution to:

- District Representative (original)
- Contractor (Original)
- PSFA BDCP Project Manager (copy)
- PSFA BDCP Manager (copy)
- PSFA Contracts Administrator (copy)
- Other _____

This Agreement entered into this _____ day of _____, 20____,
by and between

(NAME) SCHOOL DISTRICT
 (ADDRESS 1)
 (ADDRESS 2)
 (CITY/TOWN), NM (ZIP CODE)
 Telephone: (505) (PHONE)
 Fax: (505) (FAX NUMBER)

(NAME OF FIRM)
 (ADDRESS 1)
 (ADDRESS 2)
 (CITY/TOWN), NM (ZIP CODE)
 Telephone: (505) (PHONE)
 Fax: (505) (FAX NUMBER)
 Federal ID:
 CRS Number:

PRICING AND SERVICES AGREEMENT

FOR:

School Broadband Connectivity/E-rate
Product & Services



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THIS AGREEMENT is made and entered into by and between the

_____,
hereinafter referred to as the "Owner or Agency," and

_____,
hereinafter referred to as the "Contractor,"

and is effective as of the date set forth below upon which it is executed by the both parties.

IT IS AGREED BETWEEN THE PARTIES:

That the intent and purpose that this Agreement (inclusive of all associated pricing and services) is to establish an Agreement for E-rate Program/Services and Projects for use by, and benefit of the Owner, in support of the State of New Mexico's E-rate Public Schools & Libraries Program for E-rate eligible educational entities of the State of New Mexico.

The Contractor has the experience, organization, human resources and financial and technical ability to provide the work/services.

This Agreement by this reference, incorporates to the same extent as if they were set out verbatim herein, the specifications and requirements of RFP # _____, its associated Addendums, Attachment # _____, and Volume II Cost Proposal submitted by the Contractor.

This Services/Pricing Agreement is for an initial term of one (1) year with options to extend the term an additional three (3) years, in one year increments for a maximum term of four (4) years. Agreements may be extended by the Owner on a yearly basis.

Services provided/performed under this Agreement shall be performed at:

_____,
and, if applicable, at Contractor's location at

_____,
between the hours of 8:00 a.m. and 5:00 p.m. Mountain Time Monday through Friday, excluding applicable State and Federal holidays.

1.0 Scope of Work.

The Contractor shall perform and provide the Services and Products contained in **Exhibit A** of RFP No: _____ in accordance with the Terms, Conditions, Requirements, Specifications, Standard of this Agreement, RFP No: _____, the applicable provisions of the Contractor's Proposals and such other services necessary for or incidental to the performance of this Agreement. Any conflict between the contents of the Contractor's Proposal and the general or specific provisions of this Agreement and RFP # _____, the general or specific provision of this Agreement and RFP # _____ shall prevail.



The Contractor shall provide qualified personnel (*qualified by applicable education, knowledge, or experience*) skilled in performing and completing all the services required to be provided under this Agreement. The Contractor's principal, on any project, shall possess at least 3 years of supervisory/management hands-on experience in the technical area being serviced.

The Contractor shall provide all applicable and appropriate Certificates of Insurance, Licenses, and all other applicable Certification for the work/service before the commencement of the work.

A. The Contractor shall provide and perform all necessary, required components and services for the delivery of the services and products specified in RFP _____, for the effective implementation, integration, delivery or, as applicable, the establishment of the services intended to be provided by the products and services.

Contractor agrees to be bound by, and at its own cost, comply with all federal, state and local laws, ordinances and regulations (hereinafter collectively referred to as "laws") applicable to the services provided under this Agreement

B. Extension of /or Additional Services

Any services exceeding the scope of work and cost of this Agreement and the approved initial **Purchase Order**, shall be mutually agreed to in advance by Owner and the Contractor, and shall be authorized by an approved **Amendment to this Agreement** prior to the Contractor proceeding with any additional work. Amendments to the Proposal may form the basis of an additional **Purchase Order** to cover additional services, or in an amendment to the existing purchase order, depending on circumstances and approval by the Owner. It is the Contractor's responsibility to inform Owner in advance and in a timely manner when it is anticipated that any additional services will require modifications due to changes in the work. Owner is not responsible for work performed without the proper documentation and an approved amended purchase document.

C. Investigation of Site and Project Conditions

Contractor represents that, prior to submittal of the Proposal for the RFP and this Agreement, it has/will take all steps reasonably necessary to ascertain the nature and location of the Work and that it has investigated and satisfied itself as to the general and local conditions which can affect the Work or its cost. In the event that the Owner furnishes the Contractor with any information about such matters, Contractor acknowledges that any reliance on such information will be at its own risk and that the Owner does not warrant the correctness or accuracy of the information. Contractor represents that it has examined all Contract/Agreement Documents and familiarized itself with the Project, the laws, rules, and regulations relating to the Project; the environmental considerations affecting the Project and the Work; and the character of equipment and facilities needed preliminary to and during Work performance.

No allowance will be made to Contractor for not having made such examination and review, or for requirements which a reasonable examination, inquiry, or review would



have disclosed. Except to the extent equitable adjustments may be made for differing site conditions if: (1) the contractor did not know, or could not have known about the actual condition found at the site; (2) the contractor could not reasonably have anticipated the actual condition at the site from inspection or general experience; (3) the actual condition varied from the norm in similar contracting work; (4) the contract indicated the conditions that the contractor could expect to find at the site; (5) the conditions indicated in the contract differed materially from the actual conditions; (6) the actual conditions were reasonably unforeseeable based upon all the information available to the contractor at the time of the proposal; (7) the contractor acted as a reasonably prudent contractor in interpreting the contract documents; and (8) the contractor incurred additional costs as a result of the difference between the expected conditions and the actual conditions. Contractor will complete the work for the compensation stated in this Contract/Agreement and assume complete responsibility for the conditions (including subsurface or otherwise latent conditions) existing at the site and its surroundings.

Contractor's obligation hereunder may include but not be limited to the location of all utilities that may affect or interfere with Contractor's Work. Contractor shall obtain all utility locates for all areas of its work and shall fully protect, and as necessary or required, maintain in operation all utilities at all times.

D. The Contractor shall comply with all laws, ordinances, and regulations (Federal, State, City, or otherwise) covering work of this character.

E. The Contractor must be eligible to, and shall participate in the E-Rate Program and has the responsibility to educate itself about the Program requirements and timelines. The Schools and Libraries Division (SLD) of the Universal Service Administration (USAC) will hold the Contractor to statements made in applications, registrations, certifications and invoice forms. For more information on E-Rate participation and procedures go to www.sl.universalservice.org.

F. Performance Measures.
RESERVED

2.0 Compensation.

A. This is a Fixed-Prices Agreement.

If the work to be performed under this Agreement will be funded/paid for in part by and through the Federal Communication Commission (FCC) E-rate Program by USAC, the Owner shall pay the non-discounted share Contractor for services satisfactorily rendered pursuant to the Scope of Work set-forth in this agreement, inclusive of all expenses, an amount not to exceed _____
(\$ _____), excluding New Mexico gross receipts taxes.



A.1. If it is not intended for the work to be performed under this Agreement to be funded/paid for in part directly by and through the Federal Communication Commission (FCC) E-rate Program by USAC, the Owner shall pay the Contractor for services satisfactorily rendered pursuant to the Scope of Work set-forth in this agreement, inclusive of all expenses, an amount not to exceed

_____)
\$ _____), excluding New Mexico gross receipts taxes.

A.2. The New Mexico Gross Receipts tax to be levied on the **Firm-Fixed-Price** total amount payable by the District under this Agreement shall be at the rate of _____ % and shall be paid by Owner to the Contractor. The total **Firm-Fixed-Price** amount payable to the Contractor under this Agreement, including gross receipts tax shall not exceed _____
(\$ _____).

If the work performed under this Agreement is to be directly funded/paid in part under FCC/USAC E-rate Funding, it shall be the Contractor's responsibility to submit invoices directly to USAC for the discount share of the approved eligible services. Contractor hereby affirms that it meets, is fully knowledgeable and capable of all applicable FCC/USAC E-rate billing/invoicing requirements.

Contractor shall be responsible for paying any and all taxes levied on amounts payable under this Agreement. For those taxes enumerated on Contractor invoices payable by District, the Contractor will pay the taxing governmental agencies with funds received from Owner for tax payment of said invoices. If an applicable Governmental Authority Tax Rate changes, during the life of this Agreement, Owner shall amend this Agreement to cover government taxing authority's changes in applicable Tax Rates costs.

The amount set forth in Paragraph A.2 of this Article 2.0 is the maximum amounts and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated. The parties do not intend for Contractor to continue to provide services without compensation when the total compensation amount is reached. Contractor is responsible for notifying the Owner when the services provided under this Agreement reach the total compensation amount.

In no event shall Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided. Owner shall receive all invoices no later than 30 days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date CANNOT BE PAID.

B. Contractor shall be responsible for paying any taxes levied on amounts payable under this Agreement.



C. **INVOICING/COMPENSATION SCHEDULE:**

Subject to the condition precedent set forth in this Agreement, Owner will make progress payments to Contractor. The progress payment amounts shall be based on the Owner and Contractor agreed upon Work Breakdown Structure (WBS) with assigned Schedules of Value (SOV) submitted by the Contractor within two (2) weeks after award of this Agreement. The maximum monthly compensation amount under this Agreement shall not exceed the value established under the submitted WBS/SOV, *excluding New Mexico Gross Receipts Tax*, for the portion of the Work performed and completed in the preceding month in accordance with monthly invoices prepared by Contractor and as approved by Owner.

The specified payable amount shall be based on and paid for satisfactory completion of services under this agreement. For services contained in the WBS/SOV that are not satisfactorily completed, payment shall be payable for the portion satisfactorily completed.

Contractor must submit detailed statements accounting for all services performed, goods obtained, and expenses incurred. Invoices must be supported by approved purchase order or equivalent document and invoice by the supplier, evidencing the propriety of each claim for payment. Contractor shall certify that labor charges to the contract are direct charges and shall maintain records of wages, dates worked, and hours worked to support the certifications. If the Owner finds that the statement, services, goods, or expenses are not acceptable, within 30 days after the date of receipt of (i) written notice from the Contractor that payment is requested, and (ii) all supporting documentation, the Owner shall provide the Contractor a letter of exception explaining the defect or objection to the statement, services, goods, or expenses, and outlining steps the Contractor may take to provide remedial action. Upon the Owner's certification that the statement, supporting documentation, services, goods, or expenses have been received and accepted, Owner shall tender payment to the Contractor within 30 days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the Owner shall not incur late charges, interest, or penalties, for failure to make payment within the time specified herein.

It is anticipated that some or all of the District's costs under this Agreement shall be eligible for the "E-Rate" discount under the Federal Communications Commission (FCC) Universal Service Provision. Accordingly, contingent upon the District's receipt of a funding commitment decision letter (FCDL) from SLD/USAC and both District's and Contractor's compliance with all the SLD/USAC guidelines, vendor shall offer an SLD/USAC discounted invoice payment option. In providing the two-tier billing system or discounted invoice payment option, Contractor will be required to recover its compensation for the approved E-Rate eligible discounted services, which can be from twenty percent (20%) up to eighty five percent (85%), directly from the Schools and Libraries Division ("SLD") of the Universal Service Administration Company ("USAC") in accordance with procedures established by the FCC and SLD/USAC. The Contractor's invoices will itemize/breakdown the costs of all E-Rate eligible products



and/or services from all non-E-Rate eligible products and /or services. To determine which items are eligible, visit the SLD/ USAC E-Rate eligible services list <http://www.usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx>.

C-1. Exclusion of Liability for E-Rate Funding

The District shall have no liability for the E-Rate Portion of any costs incurred by the Contractor's invoice if one of the following occurs:

a. Products or services billed to the SLD are deemed ineligible pursuant to any event, including but not limited to an audit, after the SLD has reimbursed the Offeror for products or services that were previously considered eligible.

b. The vendor fails to adhere properly to SLD guidelines (e.g., missing a filing deadline for invoicing to the SLD), or is subject to the FCC "Red Light Rule" and subsequently is not paid by the SLD.

3.0 Term.

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY Owner. This Agreement shall terminate on the date of _____ unless terminated pursuant to paragraph 4 (Termination), or paragraph 5 (Appropriations). In accordance with Section 13-1-150 NMSA 1978, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978.

Contractors under this Contract are awarded a twelve (12) month Term. The District reserves the right to extend the terms and conditions of this Agreement for an additional three (3) years in one (1) year increments based on need for continuation of services, the performance and services rendered under the original term of the Agreement.

If the Primary Contractor/principal providers of all services associated with the work, services, or products assigned/specified in this Agreement is released from its obligations by the District for any reason (prior to the expiration of its tenure), the Second Ranked finalist in the RFP process may be moved to the vacated position, to complete the contractual term as outlined in its proposal.

The District reserves the right to review any Contractor's performance at any time as it relates to reliability, service, delivery, or invoice discrepancies and possibly elevate the "Secondary Ranked" RFP Contractor to the "Primary" position if deemed in the best interest of the District. In the event the District is compelled to replace the "Primary" provider with the "Secondary" due to default on the part of the "Primary", The District shall have the absolute right to deduct from any monies due the vendor or that may thereafter become due to the contact, the difference between the amount due and the actual cost of services to be replaced or substituted.



Failure by a Contractor to provide or perform the services as specified in the Agreement may result in the Contractor being prohibited from doing business with District or the State of New Mexico for a period up to two years.

SURVIVAL CLAUSE: All duties and responsibilities of the Contractor under this Agreement which, either expressly or by their nature, extend into the future, shall extend beyond and survive the end of the contract term or cancellation of this Agreement.

4.0 Termination/Suspension.

A. **Termination.** This Agreement may be terminated by either of the parties hereto upon written notice delivered to the other party at least thirty (30) days prior to the intended date of termination. Except as otherwise allowed or provided under this Agreement, the Agency's sole liability upon such termination shall be to pay for acceptable work performed prior to the Contractor's receipt of the notice of termination, if the Agency is the terminating party, or the Contractor's sending of the notice of termination, if the Contractor is the terminating party; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor if the Contractor becomes unable to perform the services contracted for, as determined by the Agency or if, during the term of this Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of state funds or due to the Appropriations paragraph herein. ***THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE STATE'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.***

B. **Termination Management.** Immediately upon receipt by either the Agency or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the Agency; 2) comply with all directives issued by the Agency in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the Agency shall direct for the protection, preservation, retention or transfer of all property titled to the Agency and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the Agency upon termination and shall be submitted to the agency as soon as practicable.

C. **Agreement Suspension.** Owner may order the Contractor in writing to suspend, delay or interrupt all or any part of the Contract Work for such period of time as may be determined to be appropriate. If such suspension, delay or interruption is unreasonable, then Contractor may be entitled to an equitable adjustment. The short/incidental/reasonable stoppage of the Contract Work shall not be deemed suspension, delay, or interruption of work.

The Contract price shall not be adjusted for any suspension, delay or interruption to the extent that the performance of the Contract is, was or would have been so suspended, delayed or interrupted by the fault or neglect of the Contractor, by a cause for which the Contractor is responsible, or by



a cause for which the Contractor is entitled only to a time extension under this Contract.

5.0 Appropriations.

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico or a Funding Commitment Decision Letter (FCDL) from Universal Service Administration (USAC) for this Agreement. If sufficient appropriations and authorization are not made by the Legislature or USAC, this Agreement shall terminate immediately upon written notice being given by the Owner to the Contractor. The Owner's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Owner proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

6.0 Status of Contractor.

The Contractor and its agents and employees are independent contractors performing professional services or labor for the Agency and are not employees of the District or the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the District or the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the District or the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

Certification. Contractor shall furnish to Owner(s), upon request, any certification required to be furnished by any provision of this Agreement or Order issued hereunder, including any clauses incorporated by reference herein, and any certificate required by this Agreement, any law, ordinance or regulation with respect to contractor's compliance with the terms and provisions of such law, ordinance, regulation, or this Agreement.

7.0 Subcontracting and Assignment.

Contractor shall not subcontract any portion of the Work without the prior written approval of the Owner of the lower-tier subcontractor and the form, terms and conditions of the lower-tier subcontract. Contractor shall not assign this Contract, or any of its rights hereunder, without the prior written approval of the Owner. No assignment or subcontracting, even with the Owner's approval, shall relieve Contractor of any obligations hereunder, or create any contractual relationship between such lower-tier subcontractor and the Owner. Any lower-tier subcontractor shall assume unto Owner all of the obligations of Contractor as they relate to such portion of the sublet Work.

8.0 Release.

Final payment of the amounts due under this Agreement shall operate as a release of the Agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.



9.0 Confidentiality.

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Agency.

Contractor shall be responsible for ensuring that all reports and analysis of any type which are developed by or communicated to Contractor or any of its affiliates in performing the Work and all information, oral, electronic or written, obtained by Contractor in connection with this Contract from the Owner shall not be disclosed unless prior written approval from the Owner is obtained. This obligation of Contractor shall survive the expiration, suspension, or termination of this Contract. This obligation of confidentiality shall not apply to information: (a) that is previously known, or available, to Contractor on an unrestricted and non-confidential basis; (b) that is, or becomes a part, of the public domain through a third party; (c) that is any obligation of confidentiality; or (d) that must be disclosed pursuant to legal requirements to which Contractor is subject if such disclosure is mandatory upon Contractor and failure to so disclose would subject Contractor to civil or criminal penalties.

10. Product of Service -- Copyright.

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the Agency no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

11. Conflict of Interest; Governmental Conduct Act.

A. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement.

B. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978. Without in anyway limiting the generality of the foregoing, the Contractor specifically represents and warrants that:

1) in accordance with Section 10-16-4.3 NMSA 1978, the Contractor does not employ, has not employed, and will not employ during the term of this Agreement any Agency employee while such employee was or is employed by the Agency and participating directly or indirectly in the Agency's contracting process;

2) this Agreement complies with Section 10-16-7(A) NMSA 1978 because (i) the Contractor is not a public officer or employee of the State; (ii) the Contractor is not a member of the family of a public officer or employee of the State; (iii) the Contractor is not a business in which a public officer or employee or the family of a public officer or employee has a substantial interest; or (iv) if the Contractor is a public officer or employee of the State, a member of the family of a public officer or employee of the State, or a business in which a public



officer or employee of the State or the family of a public officer or employee of the State has a substantial interest, public notice was given as required by Section 10-16-7(A) NMSA 1978 and this Agreement was awarded pursuant to a competitive process;

3) in accordance with Section 10-16-8(A) NMSA 1978, (i) the Contractor is not, and has not been represented by, a person who has been a public officer or employee of the State within the preceding year and whose official act directly resulted in this Agreement and (ii) the Contractor is not, and has not been assisted in any way regarding this transaction by, a former public officer or employee of the State whose official act, while in State employment, directly resulted in the Agency's making this Agreement;

4) this Agreement complies with Section 10-16-9(A) NMSA 1978 because (i) the Contractor is not a legislator; (ii) the Contractor is not a member of a legislator's family; (iii) the Contractor is not a business in which a legislator or a legislator's family has a substantial interest; or (iv) if the Contractor is a legislator, a member of a legislator's family, or a business in which a legislator or a legislator's family has a substantial interest, disclosure has been made as required by Section 10-16-9(A) NMSA 1978, this Agreement is not a sole source or small purchase contract, and this Agreement was awarded in accordance with the provisions of the Procurement Code;

5) in accordance with Section 10-16-13 NMSA 1978, the Contractor has not directly participated in the preparation of specifications, qualifications or evaluation criteria for this Agreement or any procurement related to this Agreement; and

6) in accordance with Section 10-16-3 and Section 10-16-13.3 NMSA 1978, the Contractor has not contributed, and during the term of this Agreement shall not contribute, anything of value to a public officer or employee of the Agency.

C. Contractor's representations and warranties in Paragraphs A and B of this Article 12 are material representations of fact upon which the Agency relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to the Agency if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to the Agency and notwithstanding anything in the Agreement to the contrary, the Agency may immediately terminate the Agreement.

D. All terms defined in the Governmental Conduct Act have the same meaning in this Article 11(B).

OCI Attachment 2014 is attached to this Contract and is incorporated herein to the same extent as if it has been set out verbatim in this Article 11.

12. Amendment.

A. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.



B. If Owner proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Contractor shall, within thirty (30) days of receipt of the proposed Amendment, have the option to terminate the Agreement, pursuant to the termination provisions as set forth in Article 4 herein, or to agree to the reduced funding.

Owner may at any time, by written notice, and without in any way invalidating this Agreement, make changes within the general scope of this Agreement in any one or more of the following: (i) description of services to be performed; (ii) time of performance; (iii) place of performance of the services; (iv) drawings, designs or specifications; or (v) method of delivery or packaging of Deliverables.

13. Merger.

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

14. Penalties for violation of law.

The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

15. Equal Opportunity Compliance.

The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

16. Governing Law and Venue.

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.



17. Workers Compensation.

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Agency.

18. Records and Financial Audit.

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Agency, the Department of Finance and Administration and the State Auditor. The Agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Agency to recover excessive or illegal payments

19. Indemnification.

The Contractor shall defend, indemnify and hold harmless the Agency and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the Agency and the Risk Management Division of the New Mexico General Services Department by certified mail.

20. New Mexico Employees Health Coverage.

A. If Contractor has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the term of the contract, Contractor certifies, by signing this agreement, to have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.

B. Contractor agrees to maintain a record of the number of employees who have (a) accepted health insurance; (b) declined health insurance due to other health insurance coverage already in place; or (c) declined health insurance for other reasons. These records are subject to review and audit by a representative of the state.



C. Contractor agrees to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information:

<http://www.hsd.state.nm.us/LookingForAssistance/centennial-care-overview.aspx>.

21. Employee Pay Equity Reporting

Contractor agrees if it has ten (10) or more New Mexico employees OR eight (8) or more employees in the same job classification, at any time during the term of this contract, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. If contractor has (250) or more employees contractor must complete and submit the PE250 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. For contracts that extend beyond one (1) calendar year, or are extended beyond one (1) calendar year, contractor also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within thirty (30) days of the annual contract anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the contract, whichever comes first. Should contractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor agrees to provide the required report within ninety (90) days of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter. Contractor also agrees to levy this requirement on any subcontractor(s) performing more than 10% of the dollar value of this contract if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Contractor further agrees that, should one or more subcontractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor will submit the required report, for each such subcontractor, within ninety (90) days of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal. Contractor shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the applicable subcontractor(s) in accordance with the schedule contained in this paragraph. Contractor acknowledges that this subcontractor requirement applies even though contractor itself may not meet the size requirement for reporting and be required to report itself. Notwithstanding the foregoing, if this Contract was procured pursuant to a solicitation, and if Contractor has already submitted the required report accompanying their response to such solicitation, the report does not need to be re-submitted with this Agreement.

22. Insurance Requirements:

Prior to any work/services to be performed for any project under this agreement, the Contractor shall submit Contractor's proof of insurance via Certificate of Insurance.

The Contractor will, at its sole expense, secure and maintain and will file with the Owner proper and acceptable evidence of the following described insurance, which coverage shall (1) be secured with an insurance company acceptable to the Owner, (2) be issued as a primary policy



not contributing with and not in excess of any primary and/or excess coverages carried by the Owner and (3) contain loss payable clauses satisfactory to the Owner for applicable coverages.

Such coverage shall be provided without interruption or lapse of any kind regardless of the reason for the same. Subcontractor shall ensure that the policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the Owner shall not be effective (1) for such period as the laws of the State in which this contract is to be performed prescribe or (2) until 30 days after the insurer or Contractor gives written notice to the Owner, whichever period is longer.

i. Worker's Compensation Insurance and Employer's Liability Insurance.

Worker's compensation insurance and employer's liability insurance in compliance with the laws of all applicable jurisdictions and any other coverages that may apply where the work is performed covering all employees engaged in the performance of the Work associated in this Agreement and any project hereunder, including coverage for Employer's Liability for:

- a. Bodily Injury by Accident - \$500,000 each accident
- b. Bodily Injury by Disease - \$500,000 each employee
- c. Bodily Injury by Disease - \$500,000 policy limit

ii. Commercial Liability Insurance. with minimum limits as follows:

- a. Each Occurrence Limit - \$1,000,000 combined single limit for bodily injury and property damage liability.
- b. Med Expense (Any one person) - \$10,000.
- c. Personal and advertising injury limit - \$1,000,000.
- d. Products-Completed Operations Aggregate Limit - \$2,000,000
- e. General Aggregate Limit (other than Products-Completed Operations) - \$2,000,000. This policy shall be endorsed to have the General Aggregate limit apply on a "per project basis".

iii. Automobile Liability Insurance. *(Note: May be a Combined Insurance Policy)* Automobile liability insurance covering any auto (owned, non-owned and hired vehicles) with limits of not less than \$1,000,000 (each occurrence), for bodily injury (per person) not less than \$1,000,000, bodily injury (per accident) not less than \$1,000,000, and property damage liability resulting from any one accident not less than \$1,000,000.

iv. Excess/Umbrella Liability Insurance. Excess/Umbrella insurance in an amount not less than \$3,000,000 combined single limit for any one occurrence, and \$3,000,000 aggregate. This policy is to provide no less than the same coverage described in Paragraphs i, ii, and iii above, and is to be in excess of required primary limits of liability.

v. Pollution Insurance *(this policy shall be applicable only to services/work involving hazardous materials).* Pollution insurance in an amount not less than \$2,000,000



combined single limit for any one occurrence, and \$5,000,000 annual aggregate. The policy shall include endorsements for abatement of all hazardous materials including, but not limited to, asbestos and lead containing materials.

- vi. **Professional Liability Insurance.** Professional liability insurance in an amount not less than \$1,000,000 per claim with a \$2,000,000 annual aggregate. Insurance will be maintained in force for a period of three (3) years after substantial completion of the project.
- vii. All liability insurance shall insure performance by the Subcontractor of the indemnification provisions under Article 19 of the Agreement.
- viii. The minimum policy limits required in this Article are exclusive of costs of defense. The Contractor's obligation to procure and maintain the insurance required in this Article 22, subparagraphs i-viii above is not in derogation of, nor in substitution for Contractor's obligation to protect, defend, indemnify and save the Owners harmless under those provisions or under the Indemnification clause, it being understood that Contractor's obligation to protect, defend, indemnify and save the Owners harmless are not dependent upon nor limited to the amount or availability of insurance proceeds.
- ix. **Additional Insured.** The Owner shall be listed as additional insured on the Contractor's policies for all liability insurance, except worker compensation and professional liability, required under the terms of this Agreement, and such liability insurance policies, including all primary policies and any excess/umbrella policies shall be primary to any primary and/or excess/umbrella liability insurance carried by the Owner.
- x. **Waiver of Subrogation.** All policies shall be endorsed to provide that underwriters and insurance companies of the Contractor shall not have any rights to subrogate against the Owner or the State of New Mexico.
- xi. **Certificates and Policies.** The Subcontractor shall furnish certificates of insurance evidencing compliance with the foregoing requirements, including the per project general aggregate, as a condition of initial prequalification as well as a condition of continued prequalification for the Contract period. Each Certificate will provide that:
"All coverage provided by this certificate is primary and non-contributory."

Premiums Responsibility. All policies shall be endorsed to provide that there will be no recourse against the Owner for payment of the Contractor's premiums.

23. Invalid Term or Condition.

If any provision of this Agreement is unenforceable to any extent, the remainder of this subcontract, or any application of that provision to any persons or circumstances other than those



as to which it is held unenforceable, will not be affected by that unenforceability and will be enforceable to the fullest extent permitted by law.

24. Enforcement of Agreement.

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

25. Notices.

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the Owner:

To the Contractor: [insert name, address and email].

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26. Authority.

If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represents and warrants that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year last executed by either party hereto as indicated below.

By: _____
Contractor

Dated: _____

By: _____
District/Owner

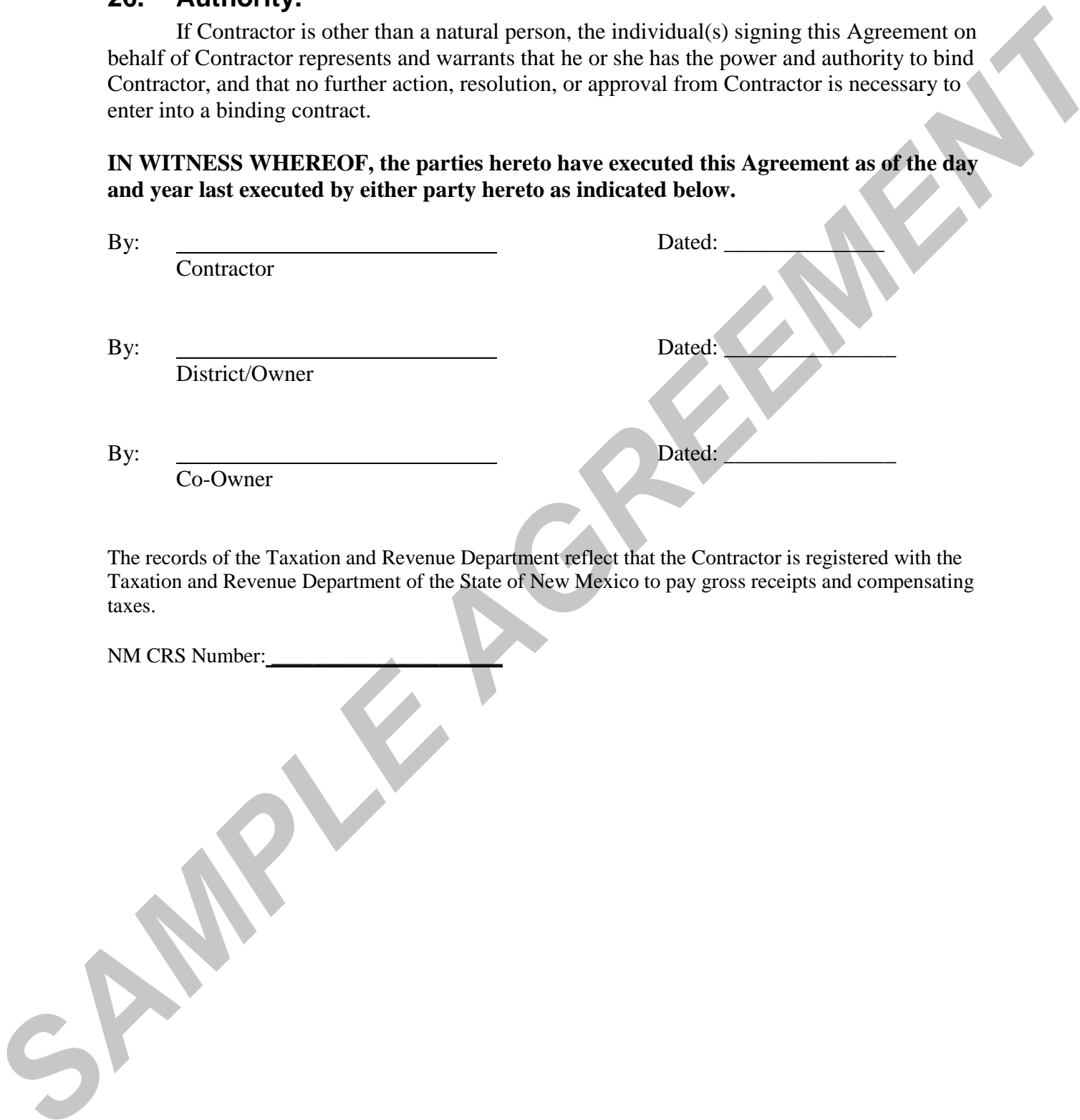
Dated: _____

By: _____
Co-Owner

Dated: _____

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

NM CRS Number: _____





OCI Attachment 2014

New Mexico Public School Facilities Authority

ORGANIZATIONAL CONFLICTS OF INTEREST - SPECIAL CLAUSE (January 2014)

- (a) Purpose. The Public School Facilities Authority's (PSFA) primary purpose of this clause is to aid in ensuring that the Contractor (1) is not biased because of its past, present, or currently planned interests (financial, sub-contractual, organizational, or otherwise) which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.
- (b) Scope. The restrictions described herein shall apply to performance or participation by the Contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as "Contractor") in the activities covered by this clause as a prime Contractor, Contractor, cosponsor, joint venturer, consultant, or in any similar capacity.
- (i) The Contractor shall be ineligible to participate in any capacity in PSFA contracts, subcontracts, or proposals (solicited or unsolicited) which stem directly from the Contractor's performance of work under this contract. Furthermore, unless so directed in writing by the PSFA Authorized Representative, the Contractor shall not perform any technical consulting or management support services work under this contract on any of its products or services or the products or services of another firm if the Contractor is or has been substantially involved in their development or marketing
 - (ii) If the Contractor under this contract prepares a complete or essentially complete statement of work or specifications to be used in competitive acquisitions, the Contractor shall be ineligible to perform or participate in any capacity in any contractual effort that is based on such statement of work or specifications. The Contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by PSFA, in which case the restriction in this subparagraph shall not apply.
 - (iii) Nothing in this paragraph shall preclude the Contractor from offering or selling its standard commercial items to PSFA.
- (1) Access to and use of information.
- (i) If the Contractor, in the performance of this contract, obtains access to information, such as PSFA plans, policies, reports, studies, financial plans, confidential internal data, or data which has not been released or otherwise made available to the public, the Contractor agrees that without prior written approval of the PSFA it shall not: (a) use such information for any private purpose unless the information has been released or otherwise made available to the public; (b) compete for work for the PSFA based on such information for a period of one (1) year after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first; (c) submit an unsolicited proposal to PSFA which is based on such



information until one year after such information is released or otherwise made available to the public; and (d) release such information unless such information has previously been released or otherwise made available to the public by the PSFA.

- (ii) In addition, the Contractor agrees that to the extent it receives or is given access to proprietary data, data protected by state or federal law, or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.
- (iii) The Contractor shall have, subject to patent, data, and security provisions of this contract, the right to use technical data it first produced after the requirements of the instant subcontract have been met.

(c) Disclosure after award.

- (1) The Contractor agrees that if after award it discovers an organizational conflict of interest with respect to this contract, it shall disclose the conflict in writing to PSFA that shall include a description of the action, which the Contractor has taken or proposes to take to avoid or mitigate such conflicts.

PSFA may, however, terminate the contract for convenience if it deems such termination to be in the best interest of PSFA.

- (2) In the event that the Contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict, PSFA may terminate the contract for default.

(d) Lower-tier subcontracts.

- (1) The Contractor shall include this clause, including this paragraph, in subcontracts of any tier which involve performance or work of the type specified in (b)(1) above or access to information of the type covered in (b)(2) above. The terms "subcontract", "Contractor" and "PSFA Authorized Representative" shall be appropriately modified to preserve the PSFA/Government's rights.

- (2) If a lower-tier subcontract is to be issued for evaluation services or activities, technical consulting or management support services work, the Contractor shall obtain for the PSFA a disclosure statement or representation from each intended Contractor or consultant. The Contractor shall not enter into any lower-tier subcontract nor engage any consultant unless the PSFA shall have first notified the Contractor that there is little or no likelihood that an organizational conflict of interest exists or that despite the existence of a conflict of interest the award is in the best interest of PSFA.

- (e) Remedies. For breach of any of the above restrictions or for nondisclosure or misrepresentation of any relevant facts required to be disclosed concerning this contract, PSFA may terminate the subcontract for default, disqualify the Contractor for subsequent related contractual efforts and pursue such other remedies as may be permitted by law or this contract.



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- (f) Waiver. Requests for waiver under this clause shall be directed in writing to the PSFA and shall include a full description of the requested waive and the reasons in support thereof. If it is determined to be in the best interests of PSFA, the PSFA may grant such a waiver in writing.

Modifications. Prior to a contract modification when the statement of work is modified to add new work, the period of performance is significantly increased, or the parties to the subcontract are changed, PSFA will request and Contractor is required to submit either an organizational conflict of interest disclosure or representation or an update of the previously submitted disclosure or representation.

SAMPLE AGREEMENT