



Services and Pricing Agreement
For
Design Professional/Engineering
Products and Services
2019 Edition, Version 1
STEP III of III

(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:

Project/RFP No: \_\_\_\_\_

Professional Services Contract/Agreement No: \_\_\_\_\_

Commodity Code Number(s): \_\_\_\_\_

Location: \_\_\_\_\_

Distribution to:

- District Representative (original)
Design Professional (original)
PSFA RFM (copy)
PSFA Contracts Administrator (copy)
Other \_\_\_\_\_



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**Public School Facilities Authority  
Agreement**

(3-0) PRO SERVICES A-E Contract 2019 Ed V1 04-2019 (SM)

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**Public School Facilities Authority  
Agreement**

(3-0) PRO SERVICES A-E Contract 2019 Ed V1 04-2019 (SM)

THIS AGREEMENT is made and entered into by and between the \_\_\_\_\_, and the **Public School Facilities Authority** hereinafter referred to collectively as “Owner or Owners”, and \_\_\_\_\_, hereinafter referred to as the "Design Professional/Engineer,” and is effective as of the date set forth below upon which it is executed by the both parties.

*(As identified as a party to the Agreement, whether this Agreement is for the services of an “Engineer, Architects, Surveyor, or Design Professionals”, the terms “Consultant, Contractor, Provider, “Engineer, Architects, Surveyor or Design Professionals “are herein-after used interchangeably and shall be deemed synonymous for the intent and purpose of this Agreement).*

**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 \_\_\_\_\_ Services and Projects for use by, and benefit of the Owners.

The Design Professional/Engineer 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 RFQ # \_\_\_\_\_, its associated Documents, Addendums, Attachment # \_\_\_\_\_, and Volumes I and II of Technical and Cost Proposals submitted by the Design Professional.

Services provided/performed under this Agreement shall be performed at: \_\_\_\_\_ and, if applicable, at Design Professional/Engineer’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 Design Professional's Services and Responsibilities.**

The Design Professional/Engineer shall perform and provide the Services and Products contained in **the Scope of Work (SOW) (Exhibit A)** of this Agreement and in accordance with the Terms, Conditions, Requirements, Specifications, Standard of this Agreement, and RFQ # \_\_\_\_\_, the applicable provisions of the Design Professional/Engineer’s Proposals and such other services necessary for or incidental to the performance of this Agreement. Any conflict between the contents of the Design Professional/Engineer’s Proposal and the general or specific provisions of this Agreement and solicitation # \_\_\_\_\_, the general or specific provision of this Agreement and RFQ # \_\_\_\_\_ shall prevail.



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The Design Professional/Engineer shall provide all applicable and appropriate Certificates of Insurance, Licenses, and all other applicable Certifications for the work/service before the commencement of any work or services.

**1.0.1 Basic Services**

Included as basic architectural services are 1) programming, 2) schematic design, 3) design development, 4) construction documents, 5) assistance in bidding and negotiation, 6) construction administration and 7) post-construction services, all of which are further outlined in the attached Scope of Work (SOW) Exhibit A and Exhibit A- Part B 2019 Ed Ver.1 located at: [http://nmpsfa.org/files/3-A\\_ Exhibit\\_A\\_Part\\_B-AE\\_FV\\_5-2019.docx](http://nmpsfa.org/files/3-A_ Exhibit_A_Part_B-AE_FV_5-2019.docx).

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

**1.0.1.1 Investigation of Site and Project Conditions**

Design Professional/Engineer represents that, prior to submittal of the Proposal for the RFQ 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 Design Professional/Engineer with any information about such matters, Design Professional 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. Design Professional/Engineer 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 Design Professional 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 Design Professional did not know, or could not have known about the actual condition found at the site; (2) the Design Professional 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 Design Professional 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 Design Professional at the time of the proposal; (7) the Design Professional acted as a reasonably prudent Design Professional in interpreting the contract documents; and (8) the Design Professional incurred additional costs as a result of the difference between the expected conditions and the actual conditions.



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Design Professional 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.

Design Professional obligation hereunder may include but not be limited to the location of all utilities that may affect or interfere with Design Professional's Work. Design Professional 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.

### **1.0.2 Design Professional's Duties/Responsibilities**

**Point of Contact.** In addition to the duties and responsibilities defined throughout this Agreement Owner(s) and Design Professional/Engineer, to ensure prompt responses, shall designate a Single Point of Contact (SPOC) for each of the following areas: 1) Administrative/Technical & Billing Matter and 2) Contractual Matters. Once the SPOCs are designated, if any change occur the Owner(s) or Design Professional/Engineer (as applicable) will provide written notice of the change.

**1.0.3 Owner's (PSFA) Standard Documents and Guide Specifications.** The Design Professional shall use the Owner's standard documents (or such other documents specifically approved by the Owner) and guide specifications in developing the procurement requirements, including the Contract Documents for the Project. Such materials shall not be modified unless approved by the Owners. All Documents shall be submitted for review/approval by Owner prior to issue.

**1.0.3.1 Formatting Protocol.** Early planning organization of design work and all Project cost estimates are to follow Construction Specifications Institute (CSI) UniFormat™ convention. Project Manual is to follow CSI MasterFormat™ convention. Plan documents are to follow U.S. National CAD Standard (NCS) convention. All documents that are a part of this Project are to be archival able in electronic format selected by the Owner.

**1.0.4 Meeting/Phone Records:** The Design Professional shall prepare a written record of each site visit, meeting, or conference, either telephonic or in person, and shall furnish this record within five working days to the Owners. The written record will include the subject, the names of participants, an outline of discussion, and the recommendations or conclusions reached.

### **1.0.5 Standard of Care and Coordination**

The Design Professional affirms that it shall ensure that its employees and consulting professionals possess the experience, knowledge, skills, and character necessary to qualify them individually for the services they are designated to be performed by them under this Agreement. All services shall be performed in accordance with the highest standards accorded their respective profession.

The Design Professional affirms that it shall ensure and compel participation, coordination and cooperation, by Design Professional and all consulting professionals, in the development of the Construction Documents so that the components of the Project are coordinated:



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1. To prevent conflicting design information within the Construction Documents that could cause unnecessary delay or expense during the Construction Phase, and to prevent Project design conflicts with the site, existing facilities, traffic and pedestrian routing, and the general area of the Project; and,
2. So that the Project will proceed and function in the manner planned and intended.

**1.0.5.1** The Design Professional is completely responsible for the professional quality, technical accuracy, and coordination of all drawings, specifications, and other work or materials produced and furnished by their staff and that of its consultants/subcontractors, and will be required, at no additional cost to the Owners, to correct or revise any errors or deficiencies in their work, notwithstanding any review, approval, acceptance, or payment by the Owners. This responsibility continues after final payment is made to the Design Professional. Further, the Contractor shall be liable to the Owners for damages to the Owners caused by negligent performance, errors, or omissions by the Design Profession.

**1.0.5.2 Interdisciplinary Coordination Meetings.** The Design Professional shall, as a process in the provision of Basic Services, hold Mandatory Interdisciplinary Coordination Meetings and compel the attendance of all appropriate consulting professionals, at suitable times during the development of the Project Documents.

**1.0.5.3 Coordination with Other Owner's Contractors.** The Design Professional shall participate and coordinate with other separate contractors, the Owner's own forces and consultants, and the Owner in reviewing and coordinating their work when directed to do so. The Design Professional shall make any revisions to the schedule deemed necessary after a joint review with the Owner and mutual agreement as a process in the provision of Basic Services.

**1.0.6** The Design Professional shall provide and perform all necessary, required components and services for the delivery of the services and products specified in RFQ #\_\_\_\_\_, for the effective implementation, integration, delivery or, as applicable, the establishment of the services intended to be provided by the products and services.

**1.0.7 Code Compliance.** The Design Professional affirms that the design shall be in compliance with Federal and State codes, regulations and laws applicable to the Work including, but not limited to, the New Mexico Building Code and New Mexico Fire Code. In all cases, the New Mexico Building Code shall govern in the event of any conflict. The Design Professional's responsibility shall not extend to unwritten policies or interpretations of Officials that are not clearly defined by the Codes, Regulations or Laws.

**1.0.8** Design Professional/Engineer 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

**1.0.9 MATERIALS AND WORKMANSHIP**

Design Professional/Engineer expressly warrants that all items, materials, and work furnished by Design Professional/Engineer under this contract will strictly conform to the contract documents.



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All the Work shall be performed with workmanship consistent with sound practice, and all items and materials shall be new (unless otherwise provided in the contract documents), free from defects, of merchantable quality, and fit for the purposes intended. Design Professional/Engineer shall require that the installation of all materials in strict accordance with installation or application instructions and procedures set forth by the material manufacturer. Installation or application by any other method shall not be permitted or accepted, unless specifically allowed herein. If required by the Agency, Design Professional/Engineer shall supply satisfactory evidence of the kind and quality of the items and materials specified, purchased or otherwise supplied by Design Professional/Engineer. If the scope of the Contract Work includes installation of materials, products, or equipment furnished by others, it shall be the responsibility of the Design Professional/Engineer to ensure that the items so provided and thereupon handle, store and installed, unless otherwise provided in the Contract Documents, with such skill and care as to ensure satisfactory proper installation and full functionality for the intended purpose.

**1.0.9.1** The Design Professional shall comply with all laws, ordinances, and regulations (Federal, State, City, or otherwise) covering work of this character.

**1.0.10 Contractual & Projects Reporting/Communications.** Contract and Project documentation communication utilizing the PSFA Internet/Web based Construction Information Management System (CIMS) system is a requirement of providing Services under this Agreement. The Consultant shall, if needed, and within **seven (7) days** of the establishment of this agreement, schedule PSFA training of project personnel on the use of PSFA-CIMS. The Consultant shall utilize PSFA-CIMS for project management during development of the Contract Documents and for project administration during construction of the Project. Each party shall:

1. Create all contractual communications through the PSFA-CIMS and load all reports and meeting notes and any other pertinent project information into PSFA-CIMS;
2. Have access to the Internet and an Internet e-mail address, of their own choice, and provide to the PSFA the names, positions, and e-mail addresses of the individual (*one license per firm*) who will have access to the PSFA-CIMS;
3. Have adequate computing hardware to run PSFA-CIMS as follows:
  - a. Supported Browsers: Internet Explorer™ 11.0 or later, Google Chrome™ v 29.0.1 or later, Mozilla Firefox™ 35.0.1 or later, Safari™ 6.0.4 or later, Safari for iOS™ mobile v6.1 or later
  - b. Operating Systems Windows 7 or later & OS X v10.8 or later
  - c. Recommended Display Resolution 1080x1024 or higher, Minimum Display Resolution 1024x768
  - d. CPU 1.4 GHz or Greater
  - e. Connection ISDN, T1, or DSL RAM 512 MB or higher
  - f. Ram – 1024 MB/1 GB or higher
4. Agree that use of this PSFA-CIMS software will not replace or change any contractual responsibilities; and, have installed Adobe Acrobat 7.0 or higher, PDF converter or equal; and may optionally have, but not required to have, as a benefit to sending images to the Design Professional, PSFA, or Owner as an attachment instead of faxing or mailing, an





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attached scanner minimum 800x600 pixels and a digital camera minimum resolution of one (1) mega pixels.

**1.0.11** For PSFA-CIMS information or installation and use of the PSFA-CIMS or for scheduling training contact the PSFA-CIMS administrator at (505) 843-6272 or e-mail your questions to [techsupport@nmpsfa.org](mailto:techsupport@nmpsfa.org) and include PSFA-CIMS support in the subject line

**1.0.12** Performance Measures.  
RESERVED

**2.0 Compensation.**

A. This is a Fixed-Prices Agreement.

The services to be provided under this Agreement will be paid by the District to the Design Professional/Engineer 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. 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 \_\_\_\_\_%, for the total NMGRT amount of \_\_\_\_\_ (\$ \_\_\_\_\_) that shall be paid by Owner to the Design Professional/Engineer. The total **Firm-Fixed-Price** amount payable to the Design Professional/Engineer under this Agreement, including gross receipts tax shall not exceed \_\_\_\_\_ (\$ \_\_\_\_\_).

**2.0.1 Design Professional/Engineer shall inform Owners, in writing, whether its company/organization reports its receipts, for Gross Receipts and/or Compensating Taxes purposes, as a “cash-basis” taxpayer or an “accrual basis” taxpayer.**

**2.0.2** Design Professional/Engineer shall be responsible for paying any and all taxes levied on amounts payable under this Agreement. For those taxes enumerated on Design Professional/Engineer invoices payable by District, the Design Professional/Engineer 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 can amend this Agreement to cover government taxing authority’s changes in applicable Tax Rates costs.

**2.0.3** The amount set forth in Paragraph A.1 of this Article 2.0 is the maximum amounts and not a guarantee that the work assigned to be performed by Design Professional/Engineer under this Agreement shall equal the amount stated. The parties do not intend for Design Professional/Engineer to continue to provide services without compensation when the total compensation amount is reached. Design Professional/Engineer is responsible for notifying the Owner when the services provided under this Agreement reach the total compensation amount.



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**2.0.4** In no event shall Design Professional/Engineer 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.

**2.0.5** If/when this Agreement is terminated, Owner shall receive all invoices, from the Design Professional/Engineer 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.

**2.0.6** Design Professional/Engineer shall be responsible for paying any taxes levied on amounts payable under this Agreement.

**2.0.7 INVOICING/COMPENSATION SCHEDULE:**

Subject to the condition precedent set forth in this Agreement, Owner will/may make progress payments to Design Professional/Engineer. The progress payment amounts shall be based on the Owner and Design Professional/Engineer agreed upon Work Breakdown Structure (WBS) with assigned Schedules of Value (SOV) submitted by the Design Professional/Engineer 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 Design Professional/Engineer and as approved by Owner.

**2.0.8** The specified payable amount shall be based on and paid for satisfactorily 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.

**2.0.9** Design Professional/Engineer 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. Design Professional/Engineer 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 Design Professional/Engineer that payment is requested, and (ii) all supporting documentation, the Owner shall provide the Design Professional/Engineer a letter of exception explaining the defect or objection to the statement, services, goods, or expenses, and outlining steps the Design Professional/Engineer 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 Design Professional/Engineer 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.



### 3.0 Term.

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY Owner(s). 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.

**3.0.1** Design Professional/Engineers under this Contract are awarded a \_\_\_\_\_ month/year Term, commencing on the date of \_\_\_\_\_. The District reserves the right to extend the terms and conditions of this Agreement based on need for continuation of services, the performance and services established under the original term of the Agreement.

**3.0.2** If the Primary Design Professional/Engineer/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.

**3.0.3** The District reserves the right to review any Design Professional/Engineer's performance at any time as it relates to reliability, service, delivery, or invoice discrepancies and possibly elevate the "Secondary Ranked" RFP Design Professional/Engineer 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.

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

**3.0.5** SURVIVAL CLAUSE: All duties and responsibilities of the Design Professional/Engineer 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.

**4.0.1** 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 Design Professional/Engineer's receipt of the notice of termination, if the Agency is the terminating party, or the Design Professional/Engineer's sending of the notice of termination, if the Design Professional/Engineer 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 Design Professional/Engineer shall submit an invoice for such



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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 Design Professional/Engineer if the Design Professional/Engineer becomes unable to perform the services contracted for, as determined by the Agency or if, during the term of this Agreement, the Design Professional/Engineer 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 DESIGN PROFESSIONAL/ENGINEER'S DEFAULT/BREACH OF THIS AGREEMENT."

**4.0.2 Termination Management.** Immediately upon receipt by either the Agency or the Design Professional/Engineer of notice of termination of this Agreement, the Design Professional/Engineer 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 Design Professional/Engineer with contract funds shall become property of the Agency upon termination and shall be submitted to the agency as soon as practicable.

**4.0.3 Agreement Suspension.** Owner may order the Design Professional/Engineer 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 Design Professional/Engineer 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.

**4.0.4** 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 Design Professional/Engineer, by a cause for which the Design Professional/Engineer is responsible, or by a cause for which the Design Professional/Engineer is entitled only to a time extension under this Contract.

**4.0.5 Curing a Breach.** Either Party who receives a written Notice of Termination, of this Agreement, for a material breach by the other Party, the breaching Party will have the opportunity to cure such breach or breaches within the Thirty (30) day period specified in the notice. In the event a cure is not made within the Thirty (30) day period, this Agreement will terminate.

## **5.0 Appropriations.**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico to the Owner and PSFA for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature and/or the Owner or PSFA, this Agreement shall terminate immediately upon written notice being given by the Owner and/or PSFA to the Design Professional/Engineer. The Owner and/or PSFA's decision as to whether sufficient appropriations are available shall be accepted by the Design Professional/Engineer and



shall be final. If the Owner and PSFA propose an amendment to the Agreement to unilaterally reduce funding, the Design Professional/Engineer shall have the option to terminate the Agreement or agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

## **6.0 Status of Design Professional/Engineer.**

The Design Professional/Engineer 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 Design Professional/Engineer 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 Design Professional/Engineer acknowledges that all sums received hereunder are reportable by the Design Professional/Engineer for tax purposes, including without limitation, self-employment and business income tax. The Design Professional/Engineer agrees not to purport to bind the District or the State of New Mexico unless the Design Professional/Engineer has express written authority to do so, and then only within the strict limits of that authority.

## **7.0 Subcontracting and Assignment.**

### **7.0.1 Subcontracting**

The Design Professional/Engineer shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Owner. No such subcontract shall relieve the primary Design Professional/Engineer from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from the Owner.

### **7.0.2 Assignment**

Design Professional/Engineer shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the Owner.

## **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 Design Professional/Engineer in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Design Professional/Engineer without the prior written approval of the Agency.

Design Professional/Engineer shall be responsible for ensuring that all reports and analysis of any type which are developed by or communicated to Design Professional/Engineer or any of its affiliates in performing the Work and all information, oral, electronic or written, obtained by Design



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Professional/Engineer in connection with this Contract from the Owner shall not be disclosed unless prior written approval from the Owner is obtained. This obligation of Design Professional/Engineer 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 Design Professional/Engineer 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 Design Professional/Engineer is subject if such disclosure is mandatory upon Design Professional/Engineer and failure to so disclose would subject Design Professional/Engineer to civil or criminal penalties.

## **10.0 Product of Service -- Copyright.**

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

## **11.0 Conflict of Interest; Governmental Conduct Act.**

**11.0.1** The Design Professional/Engineer 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.

**11.0.2** The Design Professional/Engineer 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 Design Professional/Engineer specifically represents and warrants that:

- 1) in accordance with Section 10-16-4.3 NMSA 1978, the Design Professional/Engineer 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 Design Professional/Engineer is not a public officer or employee of the State; (ii) the Design Professional/Engineer is not a member of the family of a public officer or employee of the State; (iii) the Design Professional/Engineer 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 Design Professional/Engineer 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 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 Design Professional/Engineer is not, and has not been represented by, a person who has been a



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public officer or employee of the State within the preceding year and whose official act directly resulted in this Agreement and (ii) the Design Professional/Engineer 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 Design Professional/Engineer is not a legislator; (ii) the Design Professional/Engineer is not a member of a legislator's family; (iii) the Design Professional/Engineer is not a business in which a legislator or a legislator's family has a substantial interest; or (iv) if the Design Professional/Engineer 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 Design Professional/Engineer 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 Design Professional/Engineer 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.

**11.0.3** Design Professional/Engineer'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. Design Professional/Engineer shall provide immediate written notice to the Agency if, at any time during the term of this Agreement, Design Professional/Engineer learns that Design Professional/Engineer'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 Design Professional/Engineer'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.

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

**11.0.5** 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. (See also: *PSFA Government Conduct Act Policy* located at:

[http://www.nmpsfa.org/files/PSFA\\_Government\\_Conduct\\_Act\\_Policy\\_2018\\_Ver1\\_SMM.pdf](http://www.nmpsfa.org/files/PSFA_Government_Conduct_Act_Policy_2018_Ver1_SMM.pdf) )



## 12.0 Amendment.

### 12.0.1 Extension of /or Additional Services

Any services exceeding the scope of work and cost of this Agreement and the approved initial **Purchase Orders**, shall be mutually agreed to in advance by Owner and the Design Professional/Engineer, and shall be authorized by an approved **Amendment to this Agreement** prior to the Design Professional/Engineer 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 Design Professional responsibility to inform Owner in advance and in a timely manner (not more than five (5) business days) 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.

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

**12.0.2** If Owner proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Design Professional/Engineer 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.

**12.0.3** 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.

## 13.0 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.

## 14.0 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.

## 15.0 Equal Opportunity Compliance.

The Design Professional/Engineer 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 Design Professional/Engineer 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,





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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 Design Professional/Engineer is found not to be in compliance with these requirements during the life of this Agreement, Design Professional/Engineer agrees to take appropriate steps to correct these deficiencies.

## **16.0 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.

## **17.0 Workers Compensation.**

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

## **18.0 Records and Financial Audit.**

The Design Professional/Engineer 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

## **19.0 Indemnification.**

The Design Professional/Engineer 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 Design Professional/Engineer, its officers, employees, servants, sub-consultant or agents, or if caused by the actions of any client of the Design Professional/Engineer resulting in injury or damage to persons or property during the time when the Design Professional/Engineer or any officer, agent, employee, servant or sub-consultant 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 Design Professional/Engineer or any officer, agent, employee, servant or sub-consultant under this Agreement is brought against the Design Professional/Engineer, the Design Professional/Engineer 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.

## **20.0 New Mexico Employees Health Coverage.**

**20.0.1** If Design Professional/Engineer 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, Design Professional/Engineer certifies, by signing this agreement,



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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 Design Professional/Engineer and the State exceed \$250,000 dollars.

**20.0.2** Design Professional/Engineer 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.

**20.0.3** Design Professional/Engineer 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>.

## **21.0 Employee Pay Equity Reporting**

Design Professional/Engineer 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 Design Professional/Engineer has (250) or more employees Design Professional/Engineer 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, Design Professional/Engineer 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 Design Professional/Engineer not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, Design Professional/Engineer 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. Design Professional/Engineer also agrees to levy this requirement on any sub-consultant(s) performing more than 10% of the dollar value of this contract if said sub-consultant (s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Design Professional/Engineer further agrees that, should one or more sub-consultant not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, Design Professional/Engineer will submit the required report, for each such sub-consultant, within ninety (90 days) of that sub-consultant meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such sub-consultant, shall be due on the annual anniversary of the initial report submittal. Design Professional/Engineer 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 sub-consultant (s) in accordance with the schedule contained in this paragraph. Design Professional/Engineer acknowledges that this sub-consultant Professional/Engineer requirement applies even though Design Professional/Engineer 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 Design Professional/Engineer has already submitted the required report accompanying their response to such solicitation, the report does not need to be re-submitted with this Agreement.

## 22.0 Insurance Requirements:

The Design Professional shall not commence any work to be performed for any project under this agreement until the insurance and bonds required per this Agreement has been obtained and the proper certificates and riders or endorsements (or policies) have been submitted to the Owner. Each year that insurance is requires, it shall be the Design Professional obligation to ensure it is maintained.

The Design Professional/Engineer will, at its sole expense, secure and maintain and will file with the Owner proper and acceptable evidence of applicable insurance coverages.

Such coverage shall be provided without interruption or lapse of any kind regardless of the reason for the same. Design Professional/Engineer 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 Design Professional/Engineer 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.



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- 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 not less than three (3) years after substantial completion of the project.
- vii. **Property Insurance (Builder Risk).** Reserved
- viii. All liability insurance shall insure performance by the Design Professional/Engineer of the indemnification provisions under Article 19 of the Agreement.
- ix. The minimum policy limits required in this Article are exclusive of costs of defense. The Design Professional/Engineer'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 Design Professional/Engineer's obligation to protect, defend, indemnify and save the Owners harmless under those provisions or under the Indemnification clause, it being understood that Design Professional/Engineer'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.
- x. **Additional Insured.** The Owner shall be listed as additional insured on the Design Professional/Engineer'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.
- xi. **Waiver of Subrogation.** All policies shall be endorsed to provide that underwriters and insurance companies of the Design Professional/Engineer shall not have any rights to subrogate against the Owner or the State of New Mexico.
- xii. **Certificates and Policies.** The Design Professional/Engineer 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 Design Professional/Engineer's premiums.

### **23.0 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.

### **24.0 Enforcement of Agreement.**

**24.0.1** 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.

#### **24.0.2 CLAIMS.**

A claim is a demand or assertion made in writing by the Design Professional seeking an adjustment in the Agreement price and/or Agreement time, an adjustment or interpretation of the Agreement terms, or other relief arising under or relating to this Agreement, including the resolution of any matters in dispute between Owner and Design Professional in connection with the Project. In the event that Design Professional encounters a condition giving rise to a claim, the Design Professional shall immediately notify Owner in writing of such condition. No allowance for an extension of time or additional compensation shall be claimed by Design Professional unless Design Professional shall have timely notified Owner of the condition and made written request for such allowance within three (3) business days after such condition was encountered or should have been reasonably known by the Design Professional. No claim, dispute or controversy shall interfere with the progress and performance of Work required to be performed under this Agreement and Design Professional shall proceed as directed by Owner in all instances with its work under this Agreement.

**24.0.3** Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to the Agreement's Administrative Review/Resolution procedures/actions as a condition precedent to mediation, arbitration or the institution of legal or equitable proceedings by either party

#### **24.0.4 Claims' Agreement Administrative Review/Determination**

The Design Professional, prior to pursuing any claim, dispute or other matter in question arising out of or related to this Agreement, shall precedent to pursuing mediation, arbitration or the institution of legal or equitable proceedings by either party, shall avail itself of the following Claims' Agreement Administrative Review/Resolution Processes:

**24.0.4.1** All proposes claims shall be resultant from being rejected/denied via an applicable project full review process within the PSFA Internet/Web based Construction



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Information Management System (CIMS). A proposed claim/dispute shall also be process via CIMS.

**24.0.4.2** The Initial (1st) Level Review of any claim shall be submitted to the District Chief Procurement Officer (CPO) for determination. The submittal and shall be substantively documented with all information, reasonably necessary, to establish the facts in order to facilitate adequate review and to make a determination. The “Determination” will be render within Eight (8) Business Day of receipt of the Claim, unless the time is extended by the CPO, based on reasonable justification.

**24.0.4.3** The Second (2<sup>nd</sup>) Level Review, whether accepted or reject at Level One Review, will be reviewed by the District’s Administration who will either accept or rejected the Level 1 Determination, with a justification for the acceptance or rejection in writing. The “Determination” will be render within Eight (8) Business Day of receipt of the Claim, unless the time is extended based on reasonable justification.

**24.0.4.4** The Third (3<sup>rd</sup>) Level Review, whether accepted or reject at the Second (2<sup>nd</sup>) Level the Determination, will be reviewed by PSFA’s District Regional Review Committee, which consist of the Regional Field Manager (RFM), Central Coordinator, and Senior Regional Field Manager, who will either accept or rejected the Level 2 Determination, with a justification for the acceptance or rejection in writing. The “Determination” will be render within Eight (8) Business Day of receipt of the Claim, unless the time is extended based on reasonable justification.

**24.0.4.5** The Forth (4<sup>th</sup>) Level Review, whether accepted or reject at the Third (3<sup>rd</sup>) Level the Determination, will be reviewed by PSFA’s CPO who will either accept or rejected the Level 3 Determination, with a justification for the acceptance or rejection in writing. The “Determination” will be render within Eight (8) Business Day of receipt of the Claim, unless the time is extended based on reasonable justification.

**24.4.0.6** The Final Administrative Level Review, whether accepted or reject at the Forth (4<sup>th</sup>) Level the Determination, will be reviewed by PSFA’s Administrative Review Committee, which will consist of the Deputy Director, Staff Attorney and Executive Director, who will either accept or rejected the Level 4 Determination, with a justification for the acceptance or rejection in writing. The “Determination” will be render within Eight (8) Business Day of receipt of the Claim, unless the time is extended based on reasonable justification.

**24.0.5 Mediation.**

Subject to compliance with, and full rejection of a proposed Claim, under the provisions of 24.4, inclusive, of this Article 24, the Design Professional may submit the Claim for Mediation.

**24.0.5..1** Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party.



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**24.0.5.2** The parties shall make best efforts to resolve claims, disputes or other matters in question by mediation which, shall be in accordance with the procedures of the New Mexico Public Works Mediation Act (NMSA §13-4C-1 et seq.) except that before any party may select a mediator it must confer in good faith with the other party concerning the selection of a mutually acceptable mediator.

**24.0.5.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place mutually agreed upon. Settlement Agreements reached in mediation and signed by all parties involved in the dispute; shall be enforceable in any court having jurisdiction thereof.

**24.0.7 Force Majeure.** Neither Party shall be liable to the other Party, and each Party's performance under this Agreement shall be excused, if and to the extent that any failure or delay in such Party's performance of one or more of its obligations hereunder is caused by any of the following conditions, and such Party's performance of such obligations shall be excused and extended for and during the period of any such delay: act of God; fire, flood, shortages or unavailability or other delay in material delivery not resulting from the responsible Party's failure to timely place orders therefor; lack of or delay in transportation; government codes, ordinances, laws, rules, regulations or restrictions; war or civil disorder; strikes or other labor disputes; failure of a third party to grant or recognize an Underlying Right; inability of a Party to obtain rights of way, easements, building access or other rights from private property owners; inability of Lessor to obtain access to the Lessor System; or any other cause beyond the reasonable control of such Party (each a "**Force Majeure Event**"). The Party claiming relief under this Article shall notify the other in writing of the existence of the event relied on, the estimated duration and the cessation or termination of said event, and the Party claiming relief shall exercise all reasonable efforts to minimize the time of any such delay.

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**25.0 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 Design Professional/Engineer: [insert name, address, phone number and email].

\_\_\_\_\_





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**26.0 Authority.**

If Design Professional/Engineer is other than a natural person, the individual(s) signing this Agreement on behalf of Design Professional/Engineer represents and warrants that he or she has the power and authority to bind Design Professional/Engineer, and that no further action, resolution, or approval from Design Professional/Engineer 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: \_\_\_\_\_ Dated: \_\_\_\_\_  
Design Professional/Engineer – Print Name  
Print Title \_\_\_\_\_

By: \_\_\_\_\_ Dated: \_\_\_\_\_  
District/Owner – Print Name  
Print Title \_\_\_\_\_

By: \_\_\_\_\_ Dated: \_\_\_\_\_  
Co-Owner – Print Name  
Print Title \_\_\_\_\_

**If applicable:**

By: \_\_\_\_\_ Dated: \_\_\_\_\_  
Print Name \_\_\_\_\_  
PSFA CPO \_\_\_\_\_

The records of the Taxation and Revenue Department reflect that the Design Professional/Engineer 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 Design Professional/Engineer (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 Design Professional/Engineer and any of its affiliates or their successors in interest (hereinafter collectively referred to as "Design Professional/Engineer") in the activities covered by this clause as a prime Design Professional/Engineer, Design Professional/Engineer, cosponsor, joint venturer, consultant, or in any similar capacity.
- (i) The Design Professional/Engineer shall be ineligible to participate in any capacity in PSFA contracts, subcontracts, or proposals (solicited or unsolicited) which stem directly from the Design Professional/Engineer's performance of work under this contract. Furthermore, unless so directed in writing by the PSFA Authorized Representative, the Design Professional/Engineer 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 Design Professional/Engineer is or has been substantially involved in their development or marketing
- (ii) If the Design Professional/Engineer under this contract prepares a complete or essentially complete statement of work or specifications to be used in competitive acquisitions, the Design Professional/Engineer 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 Design Professional/Engineer 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 Design Professional/Engineer from offering or selling its standard commercial items to PSFA.
- (1) Access to and use of information.
- (i) If the Design Professional/Engineer, 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 Design Professional/Engineer agrees that without prior



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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 Design Professional/Engineer 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 Design Professional/Engineer 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 Design Professional/Engineer agrees that if after award it discovers an organizational conflict of interest with respect to this made in writing to PSFA that shall include a description of the action, which the Design Professional/Engineer 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 Design Professional/Engineer 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 Design Professional/Engineer 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", "Design Professional/Engineer" 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 Design Professional/Engineer shall obtain for the PSFA a disclosure statement or representation from each intended Design



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Professional/Engineer or consultant. The Design Professional/Engineer shall not enter into any lower-tier subcontract nor engage any consultant unless the PSFA shall have first notified the Design Professional/Engineer 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 Design Professional/Engineer for subsequent related contractual efforts and pursue such other remedies as may be permitted by law or this contract.
- (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 Design Professional/Engineer is required to submit either an organizational conflict of interest disclosure or representation or an update of the previously submitted disclosure or representation.



**EXHIBIT A**  
**TO**  
**AGREEMENT NUMBER \_\_\_\_\_**

**SCOPE OF WORK**

Type the SOW in the space below or attach the SOW to this Agreement. Please indicate in the space below that the SOW is attached. (The highlighted space(s) below will expand as needed.)

The selected Design Professional shall be responsible for all services described, and reasonably inferred, to fulfill the purpose, intent, and deliver the objectives of this procurement.

**Architect/Design Professional Basic Service**  
**SCOPE OF WORK**

(If any of the basic services listed below are not included in the architectural services, other factor shall be present before the owner may award the maximum allowable architectural rate.)

- (1) Programming phase - programming phase services
  - (a) Project administration
  - (b) owner-supplied data coordination
  - (c) Establishment of program goals and needs
  - (e) Determination of space area requirements
  - (f) Establishment of space relationships
  - (g) Site analysis for building location
  - (h) Site utility studies and reports
  - (i) Obtaining licensing agencies' or other regulatory entities' consultation/review
  - (j) Project budgeting
  - (k) Presentation to owner
  - (l) Obtaining approval of programming documents from owner
  
- (2) Schematic design phase - schematic design phase services
  - (a) Project administration
  - (b) Concept design for all applicable disciplines, including but not limited to:
    - (i) Architectural
    - (ii) Civil
    - (iii) Landscaping
    - (iv) Structural
    - (v) Mechanical
    - (vi) Electrical
    - (vii) Other (*See Other/Associated Services and Conditions – Listed Below*)
  - (c) Interim design presentation(s) to owner
  - (d) preliminary alternative materials and systems recommendations, including:
    - (i) life cycle maintenance briefing
    - (ii) feasibility of utilizing alternative energy sources



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- (e) statement of probable construction cost
  - (f) submittal and presentation of schematic design documents to owner
  - (g) obtaining approval of schematic design documents from owner
  - (h) other (list)
- (3) Design development phase - design development phase services
- (a) project administration
  - (b) finalization of design and selection of materials and systems for all applicable disciplines, including but not limited to:
    - (i) architectural
    - (ii) civil
    - (iii) landscaping
    - (iv) structural
    - (v) mechanical
    - (vi) electrical
    - (vii) other (*See Other/Associated Services and Conditions – Listed Below*)
  - (c) project scheduling
  - (d) statement of probable construction cost
  - (e) outline of specifications, including equipment and furnishings
  - (f) obtaining licensing agencies' or other regulatory entity's review and approvals, as required
    - (g) submittal and presentation(s) of design development documents to owner
    - (h) obtaining approval of design development documents from owner
    - (i) other (*See Other/Associated Services and Conditions – Listed Below*)
- (4) Construction document phase - construction documents phase services
- (a) project administration
  - (b) preparation of final bidding and construction documents for all applicable disciplines, including but not limited to:
    - (i) architectural
    - (ii) civil
    - (iii) landscaping
    - (iv) mechanical
    - (v) electrical
    - (vi) other (*See Other/Associated Services and Conditions – Listed Below*)
  - (c) detailed cost estimates
  - (d) obtaining licensing agencies' and other regulatory entities' reviews and approvals
  - (e) presentation(s) of bidding and construction documents to owner
  - (f) obtaining approval of bidding and construction documents from owner
- (5) Bidding phase - bidding phase services
- (a) project administration
  - (b) bidding documents distribution
  - (c) bidding inquiries review and disposition
  - (d) proposed substitution, pre-approval, or prequalification review and disposition
  - (e) issuance of addenda
  - (f) representation and assistance to owner at bid opening



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- (g) analysis of bids and recommendation on award of contract
  - (h) assistance to owner in preparation and execution of construction agreement
- (6) Construction administration phase - construction administration phase services
- (a) project administration
  - (b) administration of preconstruction conference
  - (c) periodic construction field observations
  - (d) administration of progress meetings
  - (e) review and disposition of
    - (i) submittals
    - (ii) change orders
    - (iii) contractor pay requests
    - (iv) other (*See Other/Associated Services and Conditions – Listed Below*)
  - (f) interpretation of documents
  - (g) monitoring of construction schedule
  - (h) coordination of applicable regulatory agency review and approvals
  - (i) determination of substantial and final completion
  - (j) project closeout, including:
    - (i) maintenance, operation, and start-up assistance
    - (ii) recording of construction and warranty documents
- (7) Post-construction - post-construction services
- (a) maintenance and operational troubleshoot
  - (b) eleven-month warranty review

**Other/Associated Services and Conditions**

When specifically identified/selected by the Owners, the following services shall be deemed part of and incorporated into the Basic Services, Responsibilities, & Requirements of the Design Professional.

(8)  **Owner HVAC & Controls Performance Assurance Program:** The Design Professional shall incorporate the elements and requirements of the HVAC & Controls Performance Assurance Program into all phases of the project. The Design Professional shall responsibly and fully participate in the program, and coordinate with the Owner's Performance Assurance Contractor (PAC) during all stages of the Project. The PAC will submit reports to the Design Professional after reviewing the HVAC & Controls Design at all phases of the Project. The Design Professional shall then review each PAC report and issue a response to the PAC and Owner indicating action(s) to be taken in response to the PAC comments, in written form no later than 14 working days after receipt of each report.

(9)  **ENERGY STAR:** This Project is required to qualify for the EPA ENERGY STAR, the Design Professional shall provide the professional and engineering services necessary for its design and construction to meet the related basic criteria indicated in this Project's Agreement.

The Design Professional shall coordinate with the Owner in developing an integrated design approach to establish an energy performance target that exceeds the ENERGY STAR rating of 75, generated from the U.S. EPA's Energy Performance Rating tool Target Finder, on



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the <http://www.energystar.gov/newbuildingdesign> web page. This approach shall be described as part of the Project Program Statement.

(10)  **Roofing Consultant:** The Design Professional shall responsibly, fully cooperate and coordinate with the Owner's Roofing Consultant during all stages of the Project which involve roof consultation, construction, or observation services. The State of New Mexico Public School Facilities Authority Roofing Program Handbook shall be followed by the Design Professional on the Project, when roofing is involved.

(11)  **Furnishings and Equipment.** If the Owner added this work as an additional provision to Statement/Scope of Work, the Design Professional shall provide all required work for design, selection, preparation of Construction Documents and bidding for the procurement of project related furniture, fixtures, and equipment. Related services shall be performed in accordance with the same requirements contained in these General Conditions for review and approval by Owner as indicated for Basic Services unless modified in writing by Owner. Following installation of furniture, fixtures and equipment, Design Professional shall inspect the installation and prepare a list for items requiring correction. Upon notification from the installer that all corrections have been made, Design Professional shall again inspect the site to confirm that corrections were properly done and to authorize final payment for the furniture, fixtures and equipment.