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STATE OF NEW MEXICO LIABILITY CERTIFICATE OF COVERAGE

Certificate of Coverage – Effective 07-01-2020

SECTION 1

I. PURPOSE AND NATURE OF THIS CERTIFICATE OF COVERAGE

This Certificate of Coverage must be construed in conformity with the corresponding Letter of Administration. This Certificate of Coverage does not provide insurance, but instead provides an explanation to the covered **Governmental Entities** and **Public Employees** of the State of New Mexico about the intent of the use of funds from the **Public Liability Fund**. This Certificate of Coverage shall be applied giving full effect to the intent of the **New Mexico Tort Claims Act**, NMSA § 41-4-1 et seq., as interpreted and determined in accordance with the Section V of this Certificate of Coverage. As the **Public Liability Fund** is not an insurer, it has no obligation to issue reservation of rights letters, nor does it have an obligation to provide separate counsel to a **covered party** in disputed coverage situations. Finally, failure to provide notice to a **covered party** of any covered dispute **shall not operate to waive any of the provisions of this Certificate of Coverage**.

II. COVERAGE DEFINED

- A. The **Public Liability Fund** will pay those sums for **ultimate net loss** that the **covered parties** become legally obligated to pay as damages because of the liabilities and waivers of immunity set forth in the **New Mexico Tort Claims Act**, caused by an **occurrence**, except as otherwise excluded under Section IV, below. The duty to defend under this Certificate of Coverage extends to liabilities and waivers of immunity expressly contained in the **New Mexico Tort Claims Act**. The duty to defend also extends to causes of action arising under the **New Mexico Fair Pay for Women Act**, **New Mexico Inspection of Public Records Act**, **New Mexico Whistleblower Protection Act**, and the **New Mexico Ethics Commission Act**. There is no general duty to defend other claims.
- B. The **Director**, acting on behalf of the General Services Department, Risk Management Division, through the **Public Liability Fund**, will have the right and the duty to defend the **covered party** against a claim or suit for damages covered under Section II, paragraph A, above. Such duty, however, shall cease upon final disposition of such claim or order issued by a court of competent jurisdiction.

III. COVERED PARTY

- A. **Governmental Entities** are **covered parties** under the Certificate of Coverage. Employees of covered **Governmental Entities**, acting within the scope of their duties, are **covered parties**. Other parties defined by NMSA Section 41-4-3 (F) as **Public Employees** of covered **Governmental Entities** are **covered parties**.
- B. Any other entity to which the General Services Department, Risk Management Division has issued a Certificate of Coverage is also a **covered party** under this Certificate of Coverage.
- C. Any **Public Employee** using an automobile owned or leased by a covered **Governmental Entity** or other Certificate of Coverage holder is also a **covered party** under this Certificate of Coverage.

IV. EXCLUSIONS

Without limiting the **Director's** power to make a written determination if this Certificate of Coverage applies to any claim. This Certificate of Coverage does not apply to:

A. **Procurement Violations/Bid Specifications/Cost Overruns**

- 1. Claims arising out of protests, estimates of probable costs or costs estimated being exceeded, faulty preparation of bid specifications, or plans, including architectural plans.
- 2. Mechanic's lien claims, stop notice claims, change order claims, or similar claims by contractors for the value of services or materials provided.

B. **Contractual Obligations**

Claims arising out of:

- 1. A failure to perform or breach of a contractual obligation; or
- 2. A failure to award a contract; or
- 3. A **covered party's** obligation to pay damages by reason of assumption of liability under contract or agreement. However, this exclusion does not apply to liability for damages the **covered party** would have in the absence of the contract or agreement.

C. **Employee Benefit Plans**

Benefits payable under any employee benefit plan.

D. **Fines, Penalties, and Punitive Damages**

Fines, sanctions, assessments, penalties, restitution, disgorgement, exemplary, or punitive damages. However, pursuant to Section 41-4-4 (C) of the **New Mexico Tort Claims Act**, this exclusion does not apply to exemplary or punitive damages awarded by a jurisdiction other than New Mexico against a Public Employee if such employee was acting within the scope of his employment.

Settlement agreements involving the **New Mexico Inspection of Public Records Act** require a **covered party's** contribution in an amount to be determined by the **Director**.

E. **Injunctive/Declaratory Relief**

Ultimate net loss arising out of relief or redress in any form other than money damages.

F. **Intentional Conduct**

Claims or damages caused by a **covered party's** expected or intentional conduct committed with malice, or willful or conscious disregard of New Mexico statutes or rights or safety of others. This exclusion does not apply to a **covered party** whose liability is based solely on its vicarious liability arising out of its relationship to one acting as described above.

G. **Abuse and Molestation**

Claims arising directly or indirectly, out of:

1. a **covered party's** actual or threatened abuse or molestation of any person while in the care, custody, or control of any **covered party**; or
2. the negligent employment, investigation, supervision, retention, or reporting to the proper authorities, or failure to so report, of a person for whom any **covered party** is or ever was legally responsible and whose conduct would be excluded by subparagraph G1., above.

H. **Land Use**

Claims arising out of or in connection with: land use regulation, land use planning, or the principles of eminent domain or condemnation proceedings.

I. **Pollution Cleanup**

Any loss, cost, or expense, including defense costs, arising out of any:

1. request, demand, or order that a **covered party** or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of **pollutants**; or

2. claim or suit by or on behalf of a governmental authority for damages because of testing, monitoring, cleaning, removing, containing, detoxifying or neutralizing, or in any way responding to, or assessing the effects of **pollutants**.

J. Property of a Covered Party

Property damage to:

1. property owned by or in the care, custody, or control of the **covered party**;
2. property rented to or leased to the **covered party** where it has assumed liability for damage to or destruction of such property; or
3. aircraft, watercraft, or any **vehicle** in the **covered party's** care, custody, or control.

K. Animals

Any loss, cost or expense, including defense costs, arising out of any injury or property damage caused by an animal, insect, or plant.

L. Reasonable Accommodations

Any expenses or costs incurred by a **covered party** arising from providing a reasonable accommodation to a disabled person, including any modification to premises or workspace to comply with the Human Rights Act or the Americans with Disabilities Act.

M. Restitution from Officials or Employees

Claims by a **covered party** against its own past or present elected or appointed officials, employees, or volunteers, where such claim seeks damages or restitution payable to the **covered party**.

N. Workers' Compensation/Employer's Liability

Claims for bodily injury to employees arising out of and in the course of employment by the **covered party** that is covered by the **Workers' Compensation Fund** and/or the workers' compensation laws of the State of New Mexico, of any other state, of the federal laws of the United States, or any similar laws.

O. Wages and Salaries (Compensation Package)

Damage awards arising out of claims for past or future salary or wage loss, including multipliers, benefits, retirement, insurance or claims for attorney fees by any potential, present, or former employee or official of the **covered party**, arising out of, but not limited to, employment-related practices, policies, acts, or omissions, including termination, coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person. This exclusion extends to claims of a spouse, child, parent, grandparent, brother, sister, or any other relative legally recognized in the State of New Mexico to have legal standing to

bring a cause of action, of that person as a consequence of injury to the person at whom any of the employment-related practices, policies, acts, or omissions described above are directed.

Settlement agreements incorporating damages as described above require a **covered party's** contribution in an amount to be determined by the **Director**.

V. **CONDITIONS**

A. **Covered Party's Duties in the Event of an Occurrence**

1. The **covered party** will notify the **Director** in writing as soon as practicable of an **occurrence** that is likely to result in a claim under this Certificate of Coverage. Such notice will include particulars sufficient to identify the **covered party** involved and, to the extent possible, information regarding the time, place, and circumstances of the **occurrence**, and the names and addresses of any witnesses.
2. The **covered party** shall provide to the **Director** written notice of any claim received by the **covered party** as soon as possible, but in no event more than (7) seven days from receipt.
3. The **covered party** shall cooperate with the **Director** and, upon request, assist in making settlement, in the conduct of suits, and in enforcing any right of contribution or indemnity against any person or organization who may be liable to **covered party**, and shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses.

B. **Right of the Director to Control Claim**

1. The **Director** has the right to control the defense and settlement of a claim covered under this Certificate of Coverage. The **Director** shall have the right to select the attorney or attorneys representing each **covered party** and such attorney or attorneys shall be directed by, and report to, the **Director** with regard to the defenses, procedural decisions, and settlement of a claim.
2. The **Director** shall also have the right to determine if separate legal representation is needed where there is more than one **covered party** involved in a suit.
3. The **Director** shall have the exclusive right to settle a claim for which proceeds are to be paid out or are payable out of the **Public Liability Fund**.

C. **Deductible**

Pursuant to Risk Management Division rules and procedures, the **Director** may establish a deductible for each **Governmental Entity** that shall apply to each **occurrence** covered under Section II, above, by notifying the **Governmental Entity** in writing. However, in no event shall the deductible apply to an **occurrence** that commenced prior to the establishment of such deductible.

D. Other Coverage

The coverage provided by this Certificate of Coverage shall be excess over and not contributed with any insurance or other coverage that is available to the **covered party** whether such insurance or other coverage was purchased by the **covered party** or included such **covered party** as an additional insured or additional **covered party**. In the event of a liability claim arising out of a **Public Employee's** authorized use of a personal **vehicle**, used in the scope of that employee's duties, this certificate provides coverage in excess of the employee's personal liability coverage. The employee's personal liability policy is primary, including applicable personal insurance deductibles to be paid by the employee, and coverage is extended only in an amount to provide secondary coverage for the remaining financial exposure, if any, up to the **New Mexico Tort Claims Act** limit. This certificate does not reimburse an employee for their personal insurance deductibles.

E. Changes

Other than its annual issuance, the terms and conditions of this Certificate of Coverage shall not be altered or amended or waived, except by written notice signed by the **Director**. Such notice shall be provided at least (30) thirty days prior to the effective date of the change, in writing to the **Governmental Entities**.

F. Coverage Disputes

1. The **Director** shall make a written determination if this Certificate of Coverage applies to any disputed claim. The decision of the **Director** may only be appealed through arbitration. Such arbitration shall be requested by the **covered party** by written request to the **Director** within (30) thirty days of the postmark of the written determination of the **Director**.
2. If such arbitration is requested, the **covered party** and the **Director**, on behalf of the **Public Liability Fund**, shall, within (15) fifteen days from the date the written request is actually received in the office of the **Director**, select one arbitrator each and submit his or her name in writing to the other side. Within (10) ten days after their selections, the two arbitrators shall select a third independent arbitrator. If the two arbitrators cannot agree on the selection of the third arbitrator within those (10) ten days, either side may petition the First Judicial District Court in the county of Santa Fe for the appointment of the third arbitrator. The third arbitrator shall be an attorney and preside as the chairperson of the arbitration panel. No arbitrator shall be employed or affiliated with the **covered party** or the General Services Department, Risk Management Division.
3. The arbitration hearing shall commence within (45) forty-five days from the date of the selection of the chairperson, unless both sides agree to an extension. The **covered party** and the **Public Liability Fund** shall pay the cost of its own selected arbitrator and one-half of the cost of the third selected arbitrator. In addition, each side shall be responsible for its own cost and expense of arbitration.
4. The arbitration panel will endeavor to confine the length of the hearing to (2) two days. A decision of the arbitration panel shall be reported in writing. The written decision of the

arbitration panel shall be given to both sides within (30) thirty days of the close of the hearing.

5. During the course of the arbitration proceedings provided herein, the **Public Liability Fund** will be responsible for all fees and expenses for investigation, defense, or litigation of the claim or lawsuit in question. In the event the arbitration panel determines that coverage does not apply for such defense costs, the **covered party** shall reimburse the **Public Liability Fund** as directed by the arbitration panel.
6. All decisions of the arbitration panel shall be final and binding upon the parties and shall not be subject to any further appeal or court action.

G. **Public Liability Fund Protection**

Notwithstanding the duty of the **Director** to pay claims out of the **Public Liability Fund** under Section II above, the **Director** may withhold payment in any one fiscal year pursuant to Section 41-4-23 (D) of the **New Mexico Tort Claims Act**, if the **Director** believes that the **Public Liability Fund** would be exhausted by payment of all claims allowed during a fiscal year, and if so withheld, the **Director** shall notify all affected **covered parties** in writing as soon as practicable.

VI. **DEFINITIONS**

- A. The phrase “**covered party**” means those persons or entities stated in Section III, above.
- B. The phrase “**Governmental Entity**” or “**Governmental Entities**” means the state or any local public body as defined in Section 41-4-3 (B) of the **New Mexico Tort Claims Act** which has paid its allocated contribution to the Public Liability Fund.
- C. The term “**occurrence**” means an event, act, failure to act, or any other incident which results, or is likely to result, in a claim under this Certificate of Coverage.
- D. The term “**pollutant**” means any solid, liquid, gaseous, thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, petroleum, airborne particles or fibers, molds, asbestos, lead, and waste. Waste includes material to be recycled, reconditioned, or reclaimed. The term **pollutant** as used herein does not mean potable water, agricultural water, water furnished to commercial users, or water used for fire suppression. The term **pollutant** also does not mean police use of mace, oleoresin capsicum (O.C.), pepper gas, or tear gas; or to weed abatement or tree spraying.
- E. The phrase “**Public Liability Fund**” means the fund created under Section 41-4-23 of the New Mexico Tort Claims Act.
- F. The term “**Director**” means the **Director** of the Risk Management Division of the General Services Department of the State of New Mexico.
- G. The phrase “**New Mexico Tort Claims Act**” means NMSA 1978, Section 41-4-1 et seq. (1976), as may be amended.

- H. The phrase “**ultimate net loss**” means the total of all defense costs, defense attorney’s fees, and all damages for which the **covered party** is liable arising out of an **occurrence** for which coverage under this Certificate of Coverage applies.
- I. The phrase “**Workers’ Compensation Fund**” means the fund established under the Risk Management Division statute, NMSA 1978, Section 15-7-6 (1977), as may be amended from time to time, to fund the liabilities for injuries to the employees of the State of New Mexico under the Workers’ Compensation laws of the State of New Mexico.
- J. The term “**vehicle**” means a land, water or air motorized **vehicle**, trailer or semi-trailer, including any machinery or apparatus attached thereto.

SECTION 2

COMMUNITY LAND GRANTS COVERAGE AND LIMITATIONS

I. COVERED COMMUNITY LAND GRANTS

- A. The General Services Department, Risk Management Division is authorized under Section 41-4-30 of the **New Mexico Tort Claims Act** to issue a Certificate of Coverage to community land grants that are governed as a political subdivision of the State of New Mexico pursuant to NMSA 1978, Chapter 49, Article 1.
- B. Coverage is contingent upon prompt payment by the community land grant of the community land grant’s assessment to the **Public Liability Fund** as determined by the **Director** of the Risk Management Division.

II. COVERED ACTIVITIES OF COMMUNITY LAND GRANTS

- A. Coverage is provided for the official activities of the covered community land grant, which are those activities explicitly authorized by the board of trustees of the community land grant for the governance and operation of the community land grant as a **Governmental Entity**, and that are the type of activities typically undertaken by the **Governmental Entities** in New Mexico, and that are not excluded by virtue of being business enterprise activities.
- B. Coverage is provided for the approved activities of the covered community land grant, which are those activities conducted at a community center that are approved through procedures established by the board of trustees of the community land grant, and that are not excluded by virtue of being business enterprise activities.

III. EXCLUSIONS

- A. Coverage for any community land grant does not include coverage for any enterprise or activities undertaken by any of the individual members of the community land grant, whether singly or in association with others.

- B. Coverage for any community land grant does not include coverage for any liability attributed to the business enterprise activities of a community land grant. Business enterprise activities include:
1. Any activity undertaken for purposes of earning a monetary profit for the community land grant or for any of its members. The term “monetary profit” as used herein does not include reasonable incidental charges or fees, such as may be made to recoup costs of furnishing meals or refreshments at official activities, or such as a reasonable fee for conducting an approved activity at the community center.
 2. Any activity involving the lease or sale of any property of the community land grant.
 3. Any activity organized to operate on a non-profit basis, which activity is typically operated on a for-profit basis when conducted by non-governmental entities, such as, but not limited to, the operation of a restaurant or inn, unless the **Director** upon application specifically gives prior approval of coverage for such activity, and only in accordance with such conditions as the **Director** may require.
 4. Any activity involving the provision, sale, or consumption of alcoholic beverages.
- C. Business enterprise activities are excluded from coverage regardless of whether they are authorized by the board of trustees of the community land grant, and regardless of whether they are undertaken by individual trustees, or by members, individually, as partnerships or as other types of associations, or in any corporate form.