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| Great Seal of the State of New Mexico | **State of New Mexico****General Services Department****State Purchasing Division****Agreement Cover Page** |

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| **Awarded Vendor:****Contact:****Email:****Telephone No.:**  |  | Agreement Number**:** Payment Terms**: Net 30**F.O.B**.: Destination** Delivery**:**  |
|  |  |  |
| **Ship To:**           |  | Procurement Specialist**:** Telephone No**.: 505-**Email: **@gsd.nm.gov** |
| **Invoice:** |  |  |
| **For questions regarding this agreement please contact:** |  |  |

Title**:**

Term**:**

**The attached Agreement is made subject to the “terms and conditions” as indicated.**

**STATE OF NEW MEXICO**

**[Insert Procuring Agency Name]**

GENERAL SERVICES INFORMATION TECHNOLOGY AGREEMENT

Agreement No.\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

THIS GENERAL SERVICES INFORMATION TECHNOLOGY AGREEMENT (this “Agreement”) is made by and between the State of New Mexico (the “State”), [**Insert Procuring Agency Name**], hereinafter referred to as “Procuring Agency” and [**Insert Contractor Name**], hereinafter referred to as “Contractor” and collectively the parties are hereinafter referred to as the “Parties.”

WHEREAS, pursuant to the [**CHOICE #1** - Procurement Code, NMSA 1978 13-1-28 *et seq.*; and Procurement Code, NMAC 1.4.1 *et seq.*; **OR** **CHOICE #2** – New Mexico State Use Act (13-1C-1 NMSA 1978);] Contractor has held itself out as an expert in implementing the Scope of Work attached hereto and Procuring Agency has selected Contractor as the offeror most advantageous to the State; and

[**CHOICE #1** – **If procurement method is an RFP or Sole Source Agreement, use the following language:** WHEREAS, all terms and conditions of the [**RFP Number and Name**] or [**SOLE SOURCE AGREEMENT**] and Contractor’s response to such document(s) are incorporated herein by reference; and]

[**CHOICE #2** – **If procurement method is a statewide or an agency price agreement, use the following language:** “WHEREAS, this Agreement is issued against the statewide or agency price agreement, established and maintained by the New Mexico State Purchasing Division (“SPD”) of the General Services Department, [**Insert statewide or agency price agreement number and name**], and through this language the Parties hereby incorporate the statewide price agreement by reference and give the statewide or agency price agreement’s terms and conditions precedence over the terms and conditions contained in this Agreement;”]

[**CHOICE #3** – **If procurement is made by any other method (please specify)**]**,**

**THEREFORE, IT IS MUTUALLY AGREED BETWEEN THE PARTIES:**

**ARTICLE 1 – DEFINITIONS**

1. “Acceptance,” “Accept” or “Accepted” means the approval, following Quality Assurance, of all the Deliverables by Procuring Agency’s ELR (“ELR”).
2. “Agency CIO” means Procuring Agency’s Chief Information Officer.
3. “Application Deployment Package” or “ADP” means Contractor’s centralized and systematic delivery of business critical applications, including the source code (for custom software), documentation, executable code and the deployment tools necessary to successfully install application software fixes, including Contractor’s Software related additions, modifications, or deletions.

D. “Business Days” means Monday through Friday, 7:30 a.m. (MST or MDT) to 5:30 p.m. except for Federal and State holidays.

E. “Change Request” means a written document utilized by either Party to request changes or revisions in the Scope of Work – Exhibit A, attached hereto.

F. “Confidential Information” means any communication or record (whether oral, written, electronically stored or transmitted, or in any other form) that consists of: (1) confidential Procuring Agency or client information as the term is defined in State and/or Federal statutes or regulations; (2) all non-public State budget, expense, payment and other financial information; (3) all attorney-client privileged work product; (4) all information designated by Procuring Agency or any other State office or agency as confidential, including all information designated as confidential under Federal and State statutes or regulations; (5) unless publicly disclosed by Procuring Agency or the State, the pricing, payments, and terms and conditions of this Agreement, and (6) State information that has not been publicly disclosed and that is utilized, received, or maintained by Procuring Agency, Contractor, or other participating State agencies for the purpose of fulfilling a duty or obligation hereunder.

G. “Contract Manager” means a Qualified Person designated by Procuring Agency who is responsible for all aspects of the administration of this Agreement. Under the terms of this Agreement, the Contract Manager will be [**Insert Name**] or his/her Representative.

H. “Data” means a compilation, body, set or sets, of discrete information gathered by Procuring Agency and/or Contractor which Procuring Agency owns and/or controls and which concerns, and may be utilized or manipulated by Procuring Agency and/or Contractor, to further Procuring Agency’s governmental interests, role and mission (“Mission”). Data includes, but is not limited to, Procuring Agency’s information, whether or not stored in one or more databases, Confidential Information and other internal information which affects or may affect Procuring Agency’s ability to further its Mission.

I. “Default” means a violation or breach of this Agreement by a Party’s either: (1) failing to perform one’s own contractual obligations hereunder, or (2) by interfering with the other Party’s performance of its obligations hereunder.

J. “Deliverable” means the verifiable outcomes, results, the Services or products that Contractor will develop, perform, and/or produce and deliver to Procuring Agency according to the Scope of Work.

K. “DoIT” means the New Mexico State Department of Information Technology.

L. “Employees” means stockholders, directors, officers, employees and agents.

M. “Escrow” means a legal document (such as Source Code) delivered by Contractor to a third party escrow agent (“Escrow Agent”), and held by Escrow Agent until Procuring Agency Accepts one or more the Deliverables; in the event Contractor Defaults this Agreement, Procuring Agency will receive the legal document, *e.g.*, Source Code, from Escrow Agent.

N. “Enhancement” means any modification including addition(s), modification(s), or deletion(s) that, when Contractor makes or adds to a Deliverable, materially improves the Deliverable’s utility, efficiency, functional capability, or application (“Utility”). An error correction is not an Enhancement unless the Deliverable’s Utility is improved in Contractor’s process of making the error correction.

O. “Executive Level Representative” or “ELR” means the individual designated and empowered with the authority to represent and make decisions on behalf of Procuring Agency or the Representative of the Executive Level Representative.

P. “GRT” means New Mexico gross receipts tax.

Q. "GSD" means the General Services Department; “GSD” means the General Services Department.

R. “IT” means Information Technology

R. “Intellectual Property (IP)” means any and all proprietary information or material, whether tangible or intangible, whether derived, embodied, composed or comprised of any hard copy, soft copy, electronic format, hardware, firmware, software or manifested in any other form, whether solid, liquid or vapor, that consists of, or is directly or indirectly related to, Know How, trade secrets, copyrightable material, patent protected or protectable inventions and/or information, U.S. and foreign patent applications and patents, service marks, trademarks, and trade names, any of which is conceptualized, created or developed by either one or both of the Parties. For the purposes of this Agreement each Party will have exclusive ownership rights and control over Intellectual Property that the Party owns or controls prior to the commencement of this Agreement (“Pre-Owned IP”). Intellectual Property that Contractor creates during the course of Contractor’s performance of work hereunder will be deemed work made for hire (“Work Made for Hire”). Procuring Agency will be considered to be the creator and sole and exclusive owner of all Work Made for Hire. Contractor agrees that Contractor will not make any application for nor any other claim of ownership regarding any Work Made For Hire or any of the Procuring Agency’s Pre-Owned IP. Together, any and all combinations of Procuring Agency’s Pre-Owned IP and Work Made for Hire will comprise “Agency IP.”

S. “Independent Verification and Validation (“IV&V”)” means the process whereby Procuring Agency retains an independent expert to evaluate, verify and issue a written validation opinion concerning Contractor’s performance of the Project and to determine Contractor’s compliance with the requirements stated in the Scope of Work, whether with respect to evaluating certain stages of the Deliverables, or to evaluating the body of the Deliverables as a whole, or both.

T. “Know How” means the idea(s), technical information and knowledge including, but not limited to, documents, computer storage devices, drawings, flow charts, plans, proposals, records, notes, memoranda, manuals and other tangible items containing, relating to, or causing the enablement of the Work Made for Hire and the Intellectual Property developed hereunder.

U. “Payment Invoice” means each of Contractor’s detailed, certified and written requests for payment concerning the Deliverables that Contractor renders to Procuring Agency. Each Payment Invoice must identify each Deliverable for which the Payment Invoice is submitted and must include the price stated in the Scope of Work (Deliverables section), and in Article 3, below, as well as Contractor’s actual charge, for each Deliverable.

V. “Performance Bond” means a surety bond which guarantees against Contractor’s Default as well as Contractor’s full performance of its obligations hereunder.

W. “Project” means the sum of Contractor’s efforts necessary to produce and deliver the Deliverables to Procuring Agency according to the Scope of Work.

X. “Project Manager” means a Qualified Person appointed by Procuring Agency who oversees and manages Contractor’s efforts to produce and deliver the Deliverables to Procuring Agency. The Project Manager for this Project is [**Insert Name**] or his/her Representative.

Y. “Qualified Person” means a person who has demonstrated experience performing and completing activities and tasks similar to the Project.

Z. “Quality Assurance” or “Quality Assurance Review” means the planned and systematic pattern of rules, measures, procedures and process established by Procuring Agency to ensure that each Deliverable conforms to the requirements stated in the Scope of Work.

AA. “Representative” means one or more substitute person(s) for a title or role, e.g. Project Manager or Contract Manager, when the Party’s primary contact person is unavailable.

BB. “Scope of Work” or “SOW” means the statements of Purpose and the Deliverables attached to this Agreement as Exhibit “A.”

CC. “Service” or “the Services” means the task(s), function(s), and responsibility(ies) assigned to, and performed by Contractor according to the SOW.

DD. “State” means the State of New Mexico.

EE. "State Purchasing Agent (NMSPA)" means the New Mexico State Purchasing Agent or his/her Representative.

FF. “State Purchasing Division (SPD)” means the State Purchasing Division of the New Mexico General Services Department.

GG. “Software” means the operating system and/or application software used by Contractor to provide the Deliverables hereunder. Software may include, but is not limited to, Third Party Software. “Third Party Software” means software owned by third parties which is utilized by Contractor and/or Procuring Agency hereunder.

HH. “Software Maintenance” means the set of activities that result in changes to the Accepted (baseline) product set of Software. These activities consist of corrections, insertions, deletions, extensions, and Enhancements to the baseline Software and operating system.

II. “Source Code” means the human-readable programming instructions organized into sets of files that represent the business logic for the Project application. Source Code may be read as text and subsequently edited, requiring compilation or interpretation by a Qualified Person into binary or machine-readable form before being directly useable by a computer.

JJ. “Turnover Plan” means the written plan developed by Contractor and approved by Procuring Agency to continue the Project in the event the Deliverables stated in the SOW are transferred, either directly to Procuring Agency or to a third party.

**ARTICLE 2 – SCOPE OF WORK**

1. The Scope of Work. The Scope of Work, or “SOW” attached hereto as “Exhibit A,” is incorporated into this Agreement as if fully set forth herein. The SOW governs Contractor’s production and delivery of the Deliverables to Procuring Agency. The Parties may amend the SOW by executing one or more mutually agreed upon written amendments. In the event a conflict of terms exists between this Agreement and the SOW, the terms of this Agreement will govern.
2. Contractor Default. Contractor will deliver the Deliverables as stated in the SOW. In the event Contractor fails to deliver the Deliverables according to the SOW, Procuring Agency may declare Contractor to be in Default hereunder. In the event Procuring Agency declares Contractor to be in Default, Procuring Agency will give written notice to Contractor describing the Default and will specify a reasonable period of time during which Contractor will remediate the Default. Contractor will then give Procuring Agency a written response that advises Procuring Agency concerning the measures Contractor will take to cure the Default as well as Contractor’s proposed timetable for implementing those measures. Nothing in this Section will be construed to prevent Procuring Agency from exercising Procuring Agency’s rights pursuant to Article 6 or Article 16, below.
3. Schedule. Contractor will deliver the final Deliverables to Procuring Agency on or before the due dates stated in the SOW. The due dates will not be altered or waived by Contractor absent Procuring Agency’s prior written consent, according to the Amendment process stated in Article 25, below.
4. License. [**If a software license is required, use the following language:**] Contractor hereby grants Procuring Agency a [**CHOICE #1- If a perpetual license is required, use the following language:**] non-exclusive, irrevocable, perpetual license to use, modify, and copy the following Software: [Insert name of the software and the patent number if applicable] [**CHOICE #2**- **If a Software license is required for the term of this Agreement, use the following language:**] non-exclusive, irrevocable, license to use, modify, and copy the [Insert name of Software and patent number if applicable] Software and any and all updates, corrections and revisions as stated in Article 2 and the SOW for the term of this Agreement.

Procuring Agency’s right to copy the Software is limited to Procuring Agency’s archival, backup and training purposes only. All of Procuring Agency’s archival and backup copies of the Software are subject to the provisions of this Agreement, and Procuring Agency will reproduce all Software related titles, patent numbers, trademarks, copyright and other restricted rights notices on Procuring Agency’s Software copies.

1. Contractor will maintain, at Contractor’s sole expense, a copy of the Software Source Code to be kept by Escrow Agent and will identify Procuring Agency as an authorized recipient of the Software Source Code from Escrow Agent. Contractor will store the Software Source Code in magnetic form on media specified by Procuring Agency. Escrow Agent will be responsible for storing and safekeeping the Software Source Code magnetic media. Contractor will replace the escrowed Software Source Code magnetic media at least every six (6) months to ensure readability and to preserve the Software at the then current revision level. Contractor will include all associated Software documentation with the magnetic media, which will allow Procuring Agency to “top load,” compile and maintain the Software in the event of Contractor’s Default(s).

2. In the event Contractor (a) ceases to do business or ceases to support the Project, or (b) fails to make adequate provision for continued support of the Software that Contractor develops or provides to Procuring Agency, or (c) if Contractor Defaults hereunder, or (d) if this Agreement is terminated, Contractor will, within a twenty-four (24) hour period, make all of the following items available to Procuring Agency: (i) the latest available Source Code and documentation related to the Software that Contractor develops or provides according to the SOW; (ii) the Source Code and compiler/utilities necessary to maintain Procuring Agency’s system; and, (iii) Contractor’s related documentation for Software developed by third parties to the extent Contractor is authorized to disclose such Software to Procuring Agency. In any of the above circumstances (a), (b), (c) or (d), Contractor will, by virtue of this Section, grant Procuring Agency an automatic, uncontested and unlimited right to use, modify and copy the Software, the Source Code and all of their related documentation.

[**CHOICE #3 –** Not Applicable. The Parties agree there is no License.]

1. Source Code. [**CHOICE #1 – If this is a new development and/or a maintenance and operations agreement, use the following language:**] Contractor will deliver any and all Software and Source Code that Contractor develops as a result of Contractor’s new development and/or maintenance Software releases. Each of Contractor’s Application Deployment Packages (“ADP”) must be able to reproduce fully operational applications that include all base application functionalities, all cumulative release functionalities and include the functionalities, as documented, verified and supported by Contractor, which comprise each new application release.

[**CHOICE #2 – If Contractor will hold Software and Source Code in escrow, use the following language:**] For each maintenance release, at Contractor’s sole expense, Contractor will update Contractor’s Application Deployment Packages (“ADP”) and place the updated ADP for escrow with Escrow Agent. The ADP will be in magnetic or digital form on media specified by Procuring Agency. Escrow Agent will be responsible for storage and safekeeping of the ADP storage media. Contractor will identify Procuring Agency to Escrow Agent as an authorized recipient of the ADP storage media, which will contain the most recent application release.

[**CHOICE #3 – If Contractor will not hold Software and/or Source Code in escrow, use the following language:**] For each maintenance release, at Contractor’s sole expense, Contractor will update Contractor’s Application Deployment Packages (“ADP”) and deliver the updated ADP to Procuring Agency in magnetic or digital form on media specified by Procuring Agency.

[**CHOICE #4 –** Not Applicable. The Parties agree there is no Source Code.]

1. Procuring Agency’s Rights.
2. Rights to Software. [**CHOICE #1 – If Procuring Agency has right to own the Software, use the following language:**] Procuring Agency will own all right, title, and interest in and to Procuring Agency’s Confidential Information, the Software, the Source Code and other Deliverables, including without limitation, the specifications, the work plan, and the Custom Software, except that the Deliverables will not include third party software and its associated documentation for the purposes of this Section. Contractor will take all actions necessary and transfer ownership of the Confidential Information, the Software, the Source Code and the other Deliverables to Procuring Agency, without limitation, as well as the Custom Software and associated Documentation on Final Acceptance or as otherwise provided hereunder.] [**CHOICE #2 –**Procuring Agency will have rights to the software as stated in Article 2. D., above.] [**CHOICE #3 –** Not Applicable. The Parties agree that this is an agreement pertaining only to professional services and does not involve the provision or use of Software.]
3. Protection of Proprietary Rights. Contractor will reproduce and attach the State’s copyright, product identifications and other proprietary notices on the copies Contractor makes and delivers of the Software, the Source Code and other Deliverables for Procuring Agency, in whole or in part, or on any electronic, hard copy or other tangible form of the Deliverables.
4. Protection of Data. Contractor will protect and safekeep all of Procuring Agency’s Data to the same or a higher degree of care that Contractor takes with respect to its own information and data. Contractor will implement all measures necessary to protect Procuring Agency’s Data from any and all harm, including but not limited to, breach, intrusion, contamination, corruption, loss, leak, theft, disintegration, viral attack, denial-of-service, malware, worms, trojans, ransomware, hacking, phishing, skimming and other damage of any kind (collectively “Data Damage”), whether caused by Contractor, Contractor’s Employees or one or more third parties. In the event a Data Damage incident occurs while Procuring Agency’s Data is within Contractor’s purview and/or control, within one (1) hour of Contractor’s discovery of a Data Damage incident, Contractor will notify the Project Manager concerning the Data Damage incident, including sufficient information for the Project Manager to determine, in conjunction with Contractor, which measures, if any, Contractor must implement to mitigate the Data Damage.
5. Rights to Data. [**CHOICE #1 – If the Data belongs to Procuring Agency, use the following language:**] Any and all of Procuring Agency’s Data that is stored upon Contractor’s servers or lies within Contractor’s custody hereunder, is Procuring Agency’s sole and separate property and inures to Procuring Agency’s exclusive benefit. None of Contractor or Contractor’s Employees, subcontractor(s), affiliates and/or assigns will make use of, disclose, sell, copy, license or reproduce Procuring Agency’s Data in any manner, or provide of Procuring Agency’s Data to any third party absent Procuring Agency’s prior written authorization. [**CHOICE #2 –** Not Applicable. The Parties agree Procuring Agency has no rights to the Data.]

**ARTICLE 3 - COMPENSATION**

A. Compensation Schedule. Procuring Agency will pay Contractor according to the fixed price set for each Deliverable, per the schedule stated in the SOW, less retainage, if any, as identified in Paragraph D.

B. Payment. The total compensation hereunder will not exceed [**Insert Dollar Amount**] [**CHOICE #1** - excluding New Mexico gross receipts tax. **CHOICE #2** - including New Mexico gross receipts tax.] This amount is the maximum total amount; it is not a guarantee that the work to be performed by Contractor, and the total of the corresponding payments that Procuring Agency pays to Contractor, will equal the maximum total amount. However, the Parties do not intend for Contractor to continue to deliver the Deliverables without compensation once the total compensation amount has been reached. Therefore, Contractor must notify Procuring Agency before the price of a Deliverable reaches the compensation amount for that Deliverable stated in the SOW. In no event will Procuring Agency pay Contractor for any Deliverables in an amount that exceeds the maximum total amount without this Agreement being amended in writing prior to Contractor’s continued delivery of the Deliverables.

Procuring Agency will pay Contractor upon Procuring Agency’s Acceptance of each Deliverable according to Article 4, below, and upon the receipt and Acceptance of Contractor’s detailed and certified Payment Invoice(s). Procuring Agency will forward its payments to Contractor's designated mailing address, stated in Article 28, below. In accordance with Section 13-1-158 NMSA 1978, Procuring Agency will tender payment to Contractor within thirty (30) days of the date of Procuring Agency’s written certification of Acceptance. All Payment Invoices MUST BE received by Procuring Agency no later than fifteen (15) days after the termination of this Agreement. Contractor’s Payment Invoices received by Procuring Agency later than fifteen (15) days after the termination of this Agreement WILL NOT BE PAID.

C. Taxes. [**CHOICE #1- Use if Agreement is between two public entities:** - Not Applicable - This Agreement is between two public entities.]

[**CHOICE #2** – Contractor [**Use either:** - will **OR** will not] be reimbursed by Procuring Agency for applicable New Mexico gross receipts taxes (“GRT”), excluding interest or penalties assessed on Contractor by the New Mexico Taxation and Revenue Department. Contractor is solely responsible for the payment of GRT for any money Contractor receives hereunder. Contractor must report its GRT, income tax and other tax obligations under Contractor's Federal and State tax identification number(s).

Contractor and its subcontractors, if any, will pay all Federal, State and local income and other taxes and government fees applicable to its operation(s) as well as the taxes and fees associated with Contractor’s employment of its Employees. Contractor will require its subcontractors, if any, to hold Procuring Agency harmless from any responsibility for taxes, damages, fees and interest, if applicable, as well as any and all contributions required under Federal and/or state and local laws and regulations, including any other costs, transaction privilege taxes, unemployment compensation insurance, Social Security and Worker’s Compensation.

D. Retainage. [**CHOICE #1** - Procuring Agency will retain [**INSERT percentage (which is recommended at - twenty percent (20%))**] of the fixed-price cost of each stated Deliverable as security for Contractor’s full performance of this Agreement. Procuring Agency will release all retained amounts to Contractor upon Procuring Agency’s Acceptance of the final Deliverable.] [**CHOICE #2** – Not Applicable. The Parties agree there is no retainage.]

E. Performance Bond. [**CHOICE #1- If the amount of this Agreement exceeds $1Million OR, if this Agreement is intended for custom developed software/application, OR Commercial Off the Shelf (COTS) software with greater than 20% Enhancement, OR for any other critical project execution concerns, use the following language:**] Contractor will execute and deliver to Procuring Agency, contemporaneously with the execution of this Agreement, a performance bond in the amount of [**Insert Total Amount of the agreed upon Performance Bond**] (the “Performance Bond”) in Procuring Agency’s name. The Performance Bond will be in effect for the duration of this Agreement and any renewals hereof. Procuring Agency will condition its release of the Performance Bond upon Procuring Agency’s Acceptance of Contractor’s full performance and fulfillment of each and every of its Deliverables, terms, conditions, provisions, and obligations hereunder. Procuring Agency’s right to recoup monies against the Performance Bond will include all of Procuring Agency’s costs and damages associated with the transfer of the Deliverables to a third party or to the State as a result of Contractor’s performance failure(s).

[**CHOICE #2 –** Not Applicable. The Parties agree there is no Performance Bond.]

**ARTICLE 4 – ACCEPTANCE**

A. Submission. Upon Contractor’s completion and delivery of each Deliverable stated in the SOW, Contractor will submit a Payment Invoice, together with an accurate description of the Deliverable, to Procuring Agency. Contractor will submit its Payment Invoices to Procuring Agency according to, or lower than, the Deliverable price stated in the SOW, less the retainage, if any, stated in Article 3(D), above. Contractor will not submit Payment Invoices to Procuring Agency for any amount(s) that exceed the amount(s) stated in the SOW absent Procuring Agency’s prior written permission.

B. Acceptance. According to Section 13-1-158 NMSA 1978, the ELR will determine whether the Deliverable(s) meet(s) the specifications stated in the SOW. Procuring Agency will not pay for any Deliverable until the ELR Accepts the Deliverable in writing. In order to Accept a Deliverable, the ELR, in conjunction with the Project Manager, will perform a Quality Assurance Review of the Deliverable to determine, at a minimum, whether the Deliverable:

1. Meets or exceeds the Deliverable requirements stated in the SOW; and

2. Complies with the terms and conditions of [**CHOICE #1**- RFP or Sole Source Agreement] [**CHOICE #2** – statewide or agency price agreement] [**CHOICE #3 – specify any other procurement method (please specify)**]; and

3. Meets or exceeds the generally accepted industry standards and procedures applicable to the Deliverable(s); and

4. Complies with all other of Contractor’s requirements, duties and obligations hereunder.

In the event the ELR Accepts a Deliverable according to the ELR’s Quality Assurance Review, the ELR will send Contractor the ELR’s written Acceptance within [**INSERT # of days - recommend at not less than fifteen (15)] Business Days**] (the “Acceptance/Rejection Period”) from the date the ELR receives each of Contractor’s Payment Invoice(s).

C. Rejection. If the ELR fails to give Contractor notice of Procuring Agency’s rejection of a Payment Invoice within the Acceptance/Rejection Period, the Deliverable, together with its corresponding Payment Invoice will be deemed to be Accepted by Procuring Agency. In the event the ELR rejects the Deliverable following the ELR’s Quality Assurance Review within the Acceptance/Rejection Period, the ELR will send Contractor a rejection notice together with a consolidated set of comments (“Comments”) indicating the issues, unacceptable items, and/or requested revisions that Contractor should make or perform with respect to the rejected Deliverable. Upon Contractor’s receipt of the ELR’s rejection and Comments, Contractor will have ten (10) Business Days to resubmit the rejected Deliverable to Procuring Agency together with Contractor’s revisions, corrections and/or modifications made according to the ELR’s Comments. Upon receipt of Contractor’s revised, corrected or modified (“Revised”) Deliverable, the ELR will determine whether the Revised Deliverable is Acceptable by conducting a second Quality Assurance Review. The ELR will then issue a written determination of Procuring Agency’s acceptance or rejection of the Revised Deliverable within fifteen (15) Business Days of Procuring Agency’s receipt of the Revised Deliverable. In the event the ELR rejects the Revised Deliverable according to the second Quality Assurance Review, Contractor will be then required to provide a remediation plan that will include a list of Contractor’s planned corrective measures and an associated timeline for Contractor to complete its remediation of the Deliverable. Contractor’s remediation plan must be accepted by the ELR prior to Contractor’s implementation of its Deliverable remediation plan. At the same time, Contractor will also be subject to pay Procuring Agency all of Procuring Agency’s monetary damages associated with Contractor’s failure to timely deliver an Acceptable Deliverable and must complete all remedies attributable to Contractor’s late delivery of the Deliverable. In the event ELR rejects a Deliverable three times, Procuring Agency may declare Contractor to be in Default and may immediately terminate this Agreement. Procuring Agency may then seek to recover from Contractor any and all damages and remedies available hereunder and otherwise available in law or equity.

**ARTICLE 5 – TERM**

[**CHOICE #1:** If this Agreement contains professional services whether based on a statewide or agency price agreement or based on a separate procurement for IT professional services (small purchase, RFP, etc.), use the following language:] THIS AGREEMENT WILL BECOME EFFECTIVE AND BINDING ONLY UPON THE SIGNATURE OF THE STATE PURCHASING DIVISION.

[**CHOICE #2:** If this Agreement is NOT based on a statewide or agency price agreement and is only for tangible property and does not include professional services, use the following language:] THIS AGREEMENT WILL BECOME EFFECTIVE AND BINDING ONLY UPON THE APPROVAL SIGNATURES OF THE PROCURING AGENCY.

[**CHOICE #3:** If this Agreement is based on a statewide or agency price agreement and is only for tangible property and/or the Deliverables, use the following language:] THIS AGREEMENT WILL BECOME EFFECTIVE AND BINDING ONLY UPON THE APPROVAL SIGNATURE OF PROCURING AGENCY.

This Agreement will terminate on [**Insert Termination Date]**, unless terminated pursuant to Article 6, below. The term of this Agreement, including extensions and renewals, will not exceed four years, except as may otherwise be allowed by Section 13-1-150 NMSA 1978.

**ARTICLE 6 – TERMINATION**

1. Grounds. Procuring Agency may terminate this Agreement at any time for convenience or cause. Contractor may only terminate this Agreement in the event Procuring Agency materially Defaults hereunder and subsequently fails to cure its Default within ninety (90) days from the date Contractor first declares Procuring Agency to be in Default.
2. Appropriations. Procuring Agency may terminate this Agreement if required by changes in State or federal law, or so ordered by a court of competent jurisdiction, or due to insufficient appropriations made available by the United States Congress and/or the State Legislature concerning the Parties’ performance hereunder. Procuring Agency’s determination concerning whether sufficient appropriations are available will be deemed fully accepted by Contractor and will be final. In the event Procuring Agency terminates this Agreement pursuant to this subparagraph B, Procuring Agency will provide Contractor written notice of such termination at least fifteen (15) Business Days prior to the effective date of the termination.
3. Notice; Opportunity to Cure.
	1. Except as otherwise provided in Paragraph (B), immediately above, Procuring Agency will give Contractor written notice of Procuring Agency’s intended termination at least thirty (30) days prior to the effective termination date.
	2. Contractor will give Procuring Agency written notice of Contractor’s termination at least thirty (30) days prior to Contractor’s effective termination date, which notice will (i) identify Procuring Agency’s material Default(s) upon which Contractor bases its termination, and (ii) state the measures Procuring Agency should implement to cure such material Default(s). Contractor’s termination notice to Procuring Agency will only take effect: (i) if Procuring Agency fails to commence curing Procuring Agency’s material Default(s) within Contractor’s thirty (30) day notice period, or (ii) in the event Procuring Agency cannot commence to cure its material Default(s) within Contractor’s thirty (30) day notice period, Procuring Agency will issue a written notice to Contractor concerning: (a) Procuring Agency’s intent to cure, and (b) Procuring Agency’s commencement of the due diligence necessary to cure its material Default.
	3. Notwithstanding the foregoing, Procuring Agency may terminate this Agreement immediately upon its written notice sent to Contractor: (i) in the event Contractor becomes patently unable to deliver the Deliverables, as Procuring Agency may, in its sole and exclusive discretion, determine; (ii) if, during the term of this Agreement, Contractor is suspended or debarred by the State Purchasing Agent; or (iii) this Agreement is terminated pursuant to Article 5, above.
4. Liability. Except as otherwise expressly allowed or provided hereunder, Procuring Agency’s sole liability upon termination by either Party will be to compensate Contractor for Contractor’s Acceptable work performed prior to Contractor’s receipt or issuance of a written termination notice; provided, however, that a notice of termination issued by either Party will not nullify or otherwise affect either Party’s liability for pre-termination defaults hereunder. Contractor will submit a Payment Invoice to Procuring Agency for Contractor’s Acceptable work within thirty (30) days of receiving or issuing a notice of termination.

*THE PROVISIONS CONTAINED WITHIN THIS ARTICLE 6 ARE NOT EXCLUSIVE AND DO NOT ACT TO WAIVE PROCURING AGENCY’S OTHER LEGAL RIGHTS AND EQUITABLE REMEDIES ENGENDERED BY CONTRACTOR'S DEFAULT HEREUNDER.*

**ARTICLE 7 – TERMINATION MANAGEMENT**

A. Contractor’s Duties. In the event this Agreement is terminated for any reason, or upon expiration, and in addition to all of Procuring Agency’s other rights to receive Deliverables and other property hereunder, Contractor will:

1. Transfer, deliver, and/or make readily available to Procuring Agency every Deliverable, partially completed Deliverable, and any and all other property in which Procuring Agency has a financial interest, including but not limited to, any and all Procuring Agency Data and/or Procuring Agency Intellectual Property;

2. Not incur any further financial obligations for materials, services, or facilities hereunder absent Procuring Agency’s prior written approval;

3. Terminate all of Contractor’s purchase orders, procurements and subcontractors and will cease all work, except as Procuring Agency may direct, for the orderly completion of the Deliverables and the transition, if any, to a third party;

4. Take and effect all actions as Procuring Agency may direct, for the protection and preservation of the Deliverables, the Data, Procuring Agency’s Intellectual Property and all other all Procuring Agency property as well as any and all records pertaining to, related to and/or required hereunder;

5. Agree in writing that Procuring Agency is not liable for any costs arising out of the termination other than the costs related to the Deliverables Accepted by Procuring Agency prior to the termination;

6. Cooperate fully in the closeout or transition of Contractor’s activities to facilitate Procuring Agency’s administration continuity with respect to Procuring Agency’s ongoing projects and programs;

7. In the event this Agreement is terminated due to Contractor’s Default, lack of performance and/or negligence or willful misconduct, which result(s) in funding reduction(s) to Procuring Agency from any governmental or other source, Contractor will remit the full amount of the funding reduction(s) to Procuring Agency within thirty (30) days of the date of Procuring Agency’s request to Contractor for remittance of the funding reduction(s);

8. Should this Agreement terminate due to Contractor's Default, Contractor will reimburse Procuring Agency for all costs arising from retaining one or more third party(ies) at potentially higher rates as well as for all other direct and indirect costs incurred by Procuring Agency following Contractor’s Default up to the full amount of the total compensation stated in Article 3. B. above;

9. In the event this Agreement is terminated for any reason, or upon its expiration, Contractor will develop and submit for Procuring Agency’s Acceptance a turnover plan (“Turnover Plan”) at least ten (10) Business Days prior to the effective date of termination or expiration of this Agreement. Contractor’s Turnover Plan will state Contractor’s policies, procedures, and measures necessary to ensure: (1) the least disruption in the delivery of the Deliverables during Procuring Agency’s transition of the Project to a third party; and (2) Contractor’s cooperation with Procuring Agency and the third party with respect to Contractor’s orderly transfer of all partial or completed Deliverables to Procuring Agency and the third party.

 Contractor’s Turnover Plan will consist of Contractor’s orderly and timely transfer or return to Procuring Agency of any and all documents, files, Procuring Agency Data, the Software, the Source code, all other related software, documentation, the system turnover plan, IP Procuring Agency IP and other materials. Upon receipt of Procuring Agency’s written request for such transfer or return, Contractor will, within five (5) Business Days, provide to Procuring Agency a copy of Contractor’s most recent versions of all pertinent documents, files, Procuring Agency’s Data, the Software, the Source Code, all other related software, documentation, the system turnover plan, IP Procuring Agency IP and other materials, whether provided by Procuring Agency or created by Contractor hereunder.

B. Procuring Agency. In the event this Agreement is terminated for any reason, or upon expiration, and in addition to all other rights to property set forth in this Agreement, Procuring Agency will:

1. Retain ownership of all Deliverables, Procuring Agency’s Intellectual Property, Contractor’s other work products hereunder, and all related documentation created by Contractor hereunder; and

2. Pay Contractor all amounts due for the Deliverables Accepted by Procuring Agency prior to the effective date of such termination or expiration.

**ARTICLE 8 – INDEMNIFICATION**

A. General. [**Delete if this Agreement is between two public entities -** Contractor will defend, indemnify and hold harmless Procuring Agency, the State and their Employees free from all actions, proceedings, claims, demands, costs, damages, attorneys’ fees and all other liabilities and expenses of any kind from any source which may arise out of Contractor’s performance of this Agreement, which is caused by Contractor’s or Contractor’s Employees’ negligent act(s) or failure(s) to act, during the time when Contractor, and/or any of Contractor’s Employees, has delivered or is delivering the Deliverables hereunder. In the event that any action, suit or proceeding related to the Deliverables is brought against Contractor and/or any of Contractor’s Employees, Contractor will, as soon as practicable, but no later than two (2) Business Days after Contractor receives notice thereof, will notify, by certified mail, the legal counsel of Procuring Agency, the Risk Management Division of GSD, and The State Purchasing Division of GSD.

[**Use if this Agreement is between two public entities -** Neither Party will be responsible for liability incurred as a result of the other Party’s acts or omissions in connection with this Agreement. Any liability incurred in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Sections 41-4-1, et seq.]

B. [**Delete if this Agreement is between two public entities -** The indemnification obligation hereunder will not be limited by the existence of any insurance policy or by any limitation concerning the amount or type of damages, compensation or benefits payable by or for Contractor or any subcontractor, and will survive the termination of this Agreement. Money due or to become due to Contractor hereunder may be retained by Procuring Agency, as necessary, to satisfy any outstanding claim that Procuring Agency may have against Contractor.]

**ARTICLE 9 – INTELLECTUAL PROPERTY**

[**CHOICE #1** – **If purchasing only IT hardware/equipment, use the following language:** - Not Applicable. The Parties agree there is no Intellectual Property.]

[**CHOICE #2** - **Use this provision if Procuring Agency is to own the Intellectual Property:**]  Ownership. Procuring Agency IP will solely belong and inure to Procuring Agency for Procuring Agency’s sole and exclusive use and benefit. Procuring Agency will own and control all right, title and interest to Procuring Agency IP on a worldwide basis. None of Contractor or Contractor’s Employees, subcontractor(s), affiliates and assigns will utilize, copy, re-compile, re-engineer, reverse engineer, create derivative works, or otherwise utilize Procuring Agency IP for Contractor’s benefit or the benefit of any third party or for any purpose other than to fulfill Contractor’s obligations hereunder. Contractor will not disclose Procuring Agency IP to any entity or person outside of Procuring Agency absent Procuring Agency’s prior written permission.

Contractor will notify Procuring Agency, within ten (10) Business Days, of any IP created hereunder by Contractor, Contractor’s Employees or Contractor’s subcontractor(s), all of which IP will be considered Work For Hire and a part of Agency IP. Contractor, on behalf of itself and its Employees and subcontractor(s), will execute or will cause to have executed any and all written assignments and other document(s) necessary to ensure that ownership of such IP vests solely in Procuring Agency. Contractor will take no affirmative action(s) that might have the effect of vesting all or any portion of Procuring Agency IP in any person or entity other than Procuring Agency.

In the event, by judgment of a court of competent jurisdiction, Procuring Agency IP is deemed not to have been created or owned by Procuring Agency, Contractor will grant to Procuring Agency and the State, a perpetual, non-exclusive, royalty free license to reproduce, publish, use, copy and modify all or any portion of the disputed IP for Procuring Agency’s and/or the State’s continued use. Procuring Agency, together with SPD, may extend to Contractor the privilege of utilizing all or any portion(s) of Procuring Agency IP through one or more intellectual property use license agreements that may be created separate and apart from this Agreement.

[**CHOICE #3** - **If the Parties agree that Procuring Agency will grant Contractor the right to own and/or use any Procuring Agency IP, delete the above language and insert the following language:**] In the event Procuring Agency grants Contractor the right to own and/or use any Procuring Agency IP, Contractor hereby acknowledges and grants to Procuring Agency and the State, a perpetual, non-exclusive, royalty free license to reproduce, publish, sell, trade, transfer, transmit, use, copy and modify any and all Procuring Agency IP.

**ARTICLE 10 – INTELLECTUAL PROPERTY LICENSE AND INDEMNIFICATION**

1. Intellectual Property License.. For the purpose of this Agreement, Contractor hereby grants Procuring Agency a full, complete and non-transferable right and license to utilize any and all of Contractor’s Related Pre-Owned IP for so long as Procuring Agency utilizes the Software, Source Code and other Deliverables. Contractor does not grant Procuring Agency any right or license to utilize Contractor’s Unrelated Pre-Owned IP. If Contractor expects that any of Contractor’s Pre-Owned IP will be used by Contractor to fulfill the scope of work under this Agreement, it is Contractor’s responsibility to make the Procuring Agency aware of such Pre-Owned IP in order to eliminate questions of ownership of such IP. If Contractor does use Pre-Owned IP to fulfill the scope of work under this Agreement and identifies such, Contractor, at Procuring Agency’s request, hereby grants Procuring Agency a permanent, full, complete, non-sublicensable, and non-transferable right and license to utilize any and all such IP.
2. Intellectual Property Indemnification. At Contractor’s sole expense, Contractor will defend Procuring Agency, the State and/or any other State entity against any claim brought or made by a third party alleging that any product, Service or Deliverable that Contractor provides hereunder infringes the third party’s Intellectual Property (an “Infringement Claim”). Contractor will pay all costs, damages and attorney’s fees and monetary damages that may be awarded as a result of such Infringement Claim(s) in addition to the amount of the judgment award(s). To qualify to receive Contractor’s defense cost(s) and/or other payment(s) related to any Infringement Claim(s), Procuring Agency will:

1. Give Contractor written notice, within forty-eight (48) hours, of Procuring Agency’s receipt of an Infringement Claim;

2. Work with Contractor to control the defense and settlement of the Infringement Claim(s); and

3. Cooperate with Contractor, in a reasonable manner, to facilitate Contractor’s defense or settlement of the Infringement Claim(s).

C. Procuring Agency’s Rights. In the event any product, Service or Deliverable that Contractor provides to Procuring Agency hereunder becomes, or in Contractor’s opinion is likely to become, the subject of an Infringement Claim, Contractor will, at its sole cost and expense:

1. Provide Procuring Agency the right to continue using the product, Service or Deliverable and fully indemnify Procuring Agency against any and all third Infringement Claim(s) that may arise from Procuring Agency’s use of the product, Service or Deliverable;

2. Replace or modify the product, Service or Deliverable so that such product, Service or Deliverable becomes non-infringing; or

3. Accept the return of the product, Service or Deliverable and refund an amount equal to the value of the returned product, Service or Deliverable, less the unpaid portion of the purchase price and any other amounts, which Procuring Agency owes to Contractor. Contractor’s obligation will be void with respect to any product, Service or Deliverable modified by Procuring Agency to the extent the modification is the direct cause of the Infringement Claim.

**ARTICLE 11 - WARRANTIES**

A. General. Contractor hereby expressly warrants the Deliverable(s) will be correct in all aspects according to the specifications stated in the SOW and all generally accepted industry standards (the combination of which comprise the “Applicable Specifications”). Contractor’s warranty includes, but is not limited to, Contractor’s making correction(s) of defective Deliverable(s) and revision(s) of those defective Deliverables, as necessary, including Contractor’s repair of deficiencies in the Deliverables that are discovered during testing, implementation, or post-implementation phases.

B. Software. [**CHOICE #1**- **Use only if the Parties intend to purchase or develop software.**] Contractor warrants that Software will be correct in all aspects according to the Applicable Specifications. Contractor further warrants that Software will meet the Applicable Specifications for [**INSERT # of years - recommend 6mo.-2yrs.**] years following Acceptance by the ELR and implementation by Procuring Agency. In the event Software fails to meet the Applicable Specifications during the warranty period, Contractor will correct the deficiencies, at no additional cost to Procuring Agency, so that the Software meets the Applicable Specifications. [**CHOICE #2 –** Not Applicable. The Parties agree there is no Software.]

**ARTICLE 12 – CONTRACTOR PERSONNEL**

1. Key Personnel. Contractor’s key personnel (“Key Personnel”) will not be diverted from this Agreement absent Procuring Agency’s prior written approval. Key Personnel are those individuals Procuring Agency considers to be mandatory to the work to be performed hereunder. Contractor’s Key Personnel hereunder will be:

[**Insert Contractor and/or Subcontractor Key Personnel name(s) and title(s),**

**as listed in their statewide price agreement or procurement method.**]

B. Personnel Changes. In the event Contractor replaces any of its personnel, Contractor will make such replacement(s), with Contractor’s other personnel of equal or superior ability, experience, and qualifications. Contractor’s personnel replacements must be pre-approved in writing by Procuring Agency’s Project Manager. For all of Contractor’s personnel, Procuring Agency reserves the right to require submission of their resumes prior to receiving Procuring Agency’s approval. In the event Contractor reduces the number of its personnel assigned to the Project for any reason, Contractor will, within ten (10) Business Days of its personnel reduction, replace those persons with the same or a greater number of persons with equal or superior ability, experience, and qualifications, subject to Procuring Agency’s prior written approval. Procuring Agency, in its sole and exclusive determination, may extend the time Contractor is allowed beyond the required ten (10) Business Day period concerning Contractor’s replacement of its personnel. Contractor will include status reports to Procuring Agency concerning Contractor’s personnel replacement efforts as well as the impact upon the progress of the Project due to the absence of Contractor’s personnel. In addition, Contractor will make interim arrangements to assure that the progress of the Project remains unimpeded by the loss of any of Contractor’s personnel. Procuring Agency reserves the right to require a change in Contractor’s personnel in the event Contractor’s personnel are not, in Procuring Agency’s sole and exclusive determination, meeting Procuring Agency’s standards and/or expectations.

**ARTICLE 13 – INDEPENDENT CONTRACTOR STATUS**

A. Independent Contractor. For the purposes of this Agreement, Contractor and Contractor’s Employees are independent Contractors who produce and deliver the Deliverables to Procuring Agency. Contractor’s Employees are neither employees nor agents of the State (“State Employees”). None of Contractor and Contractor’s Employees will accrue State benefits, including but not limited to, leave, retirement, insurance, bonding, use of state vehicles, or any other benefits that may be afforded to State Employees as a result of Contractor’s entering this Agreement. Contractor acknowledges and agrees that all sums received hereunder are either reportable as a separate business entity or are, in the event Contractor operates as a sole proprietorship, personally reportable by Contractor for income and GRT tax purposes as self-employment or business income and are reportable for self-employment tax.

B. Subject of Proceedings. Contractor warrants that neither Contractor nor any of Contractor’s Employees are presently subject to any litigation or administrative proceeding before any court or administrative body which could adversely affect Contractor’s ability to perform hereunder; nor, to the best of Contractor’s knowledge, information or belief, is any such litigation or proceeding presently threatened against Contractor or any of Contractor’s Employees. In the event any such proceeding is initiated or threatened during the term of this Agreement, Contractor will immediately disclose such initiation or threat to Procuring Agency.

**ARTICLE 14 - CHANGE MANAGEMENT**

Change Request Process. In the event circumstances warrant Contractor making a Change to accomplish the SOW, Contractor will submit a Change Request to Procuring Agency. Each Change Request must meet the following criteria:

1. The Project Manager will draft a written Change Request for the ELR’s review and approval, including:

(a) the name of the person requesting the Change;

(b) a summary of the requested Change;

(c) the start date for the requested Change;

(d) the reason and necessity for the requested Change;

(e) the elements in the Deliverable(s) and/or the SOW that must be altered in order for Contractor to produce and deliver the Change; and

(f) the impact of the Change upon the Project.

2. The ELR will provide a written decision concerning each Change Request to Contractor within ten (10) Business Days of the ELR’s receipt of each Change Request. All decisions made by the ELR concerning a Change Request will be deemed final. Each Change Request, once approved by the ELR, will be integrated into the SOW through an Amendment executed by the Parties if required by Article 25, Section 2.

**ARTICLE 15 – INDEPENDENT VERIFICATION AND VALIDATION**

A. In the event IV&V Professional Services are used for the Project associated with this Agreement, Contractor will fully comply and cooperate with the IV&V vendor. Contractor’s cooperation includes, but is not limited to:

1. Providing the Project documentation;

2. Allowing the IV&V vendor to attend Project related meetings; and

3. Supplying the IV&V vendor with any/all other information and/or material(s) as may be directed by the Project Manager.

B. In the event the purpose of this Agreement is for Contractor to provide IV&V Professional Services, then Contractor will:

1. Submit its IV&V reports directly to DoIT’s Project Oversight and Compliance Division (EPMO@state.nm.us) according to DoIT’s IV&V Reporting Template and Guidelines located on DoIT’s webpage: <http://www.doit.state.nm.us/project_templates.html>, with a copy to Procuring Agency.

2. Use a report format consistent with DoIT’s IV&V Reporting Template and Guidelines located on the same DoIT website.

**ARTICLE 16 – DEFAULT**

In case of Contactor’s Default, for any reason whatsoever, Procuring Agency and/or the State may procure the Deliverables from another source and hold Contractor responsible for any resulting excess costs and/or damages, including but not limited to, direct damages, indirect damages, consequential damages and special damages. Procuring Agency and/or the State may also seek all other available remedies against Contractor hereunder or which may be otherwise available under law or equity.

**ARTICLE 17 – EQUITABLE REMEDIES**

Contractor acknowledges that its failure to comply with any provision hereunder may cause Procuring Agency irrevocable harm and that a remedy at law for such a failure would constitute an inadequate remedy for Procuring Agency. Contractor consents to Procuring Agency’s obtaining from a court of competent jurisdiction, specific performance, or injunction, or any other equitable relief in order to enforce such compliance. Procuring Agency’s right to obtain equitable relief pursuant to this Agreement will be in addition to, and not in lieu of, any other remedy that Procuring Agency may have under applicable law, including, but not limited to, monetary damages.

**ARTICLE 18 - LIABILITY**

Contractor will be liable for damages arising out of injury to persons and/or damage to real, tangible or intangible property at any time, in any way, if and to the extent that the injury or damage was caused by or due to Contractor’s fault or negligence or to a defect in Contractor’s production or delivery of any Deliverable hereunder, whether Contractor produces or delivers the Deliverable in whole or part. Contractor will not be liable for damages arising out of, or caused by, alterations made by Procuring Agency to any equipment or its installation or for losses caused by Procuring Agency’s fault or negligence. In the event Contractor’s negligent or omitted production or delivery of any Deliverable results in a defect which is the direct or indirect cause of injury to any third party and/or employee of Procuring Agency or the State, nothing hereunder will act to limit Contractor’s, or Contractor’s Employees’ liability to such third party and/or employee, or will act to limit any remedy that may exist under law or equity with respect to Contractor’s and/or Contractor’s Employees’ negligent act or omission.

**ARTICLE 19 – ASSIGNMENT**

Contractor will not assign or transfer any of Contractor’s interests, rights, responsibilities, duties, obligations and/or liabilities hereunder or assign any of Contractor’s claims for money due or that might become due hereunder absent Procuring Agency’s prior written approval.

**ARTICLE 20 – SUBCONTRACTING**

A. General Provision. Contractor will not subcontract or assign any portion of this Agreement or the SOW to any subcontractor absent Procuring Agency’s prior written approval. No such subcontracting or assignment will relieve Contractor of its direct and indirect responsibilities, duties, obligations and/or liabilities hereunder, nor will any such subcontracting trigger or obligate Procuring Agency to make a payment, either directly or indirectly, to any subcontractor.

B. Responsibility for Subcontractors to Maintain Confidentiality. Contractor will not disclose any of Procuring Agency’s or State’s Confidential Information to a subcontractor absent Procuring Agency’s prior written consent. Each subcontractor will agree in a written form pre-approved by Procuring Agency to protect and keep confidential any and all Confidential Information in the same manner required of Contractor stated in Article 22, below.

**ARTICLE 21 – RELEASE**

Contractor’s Acceptance of Procuring Agency’s final payment made hereunder will operate as Contractor’s full release of Procuring Agency, the State, and their officers, employees and agents from any and all liabilities, claims and obligations whatsoever arising hereunder.

**ARTICLE 22 – CONFIDENTIALITY**

Contractor will protect and keep confidential any and all Confidential Information that Procuring Agency provides to Contractor as well as any and all Confidential Information that Contractor develops based upon information provided by Procuring Agency during Contractor’s performance hereunder. Contractor will not make available or provide Confidential Information to any third party absent Procuring Agency’s prior written approval. Upon termination of this Agreement, Contractor will: (a) deliver all Confidential Information in its possession to Procuring Agency within thirty (30) Business Days of the termination, and (b) Contractor will protect and will not make available or provide Confidential Information to any third party absent Procuring Agency’s prior written approval for a period of five (5) years commencing on the termination or expiration date. Contractor acknowledges that Contractor’s failure: (a) to deliver such Confidential Information to Procuring Agency, or (b) to protect and keep Confidential Information secret may result in Procuring Agency’s seeking to obtain direct, special and/or incidental damages from Contractor.

**ARTICLE 23 –CONFLICT OF INTEREST**

Contractor warrants that it presently has no interest and will not acquire any interest, direct or indirect, which would conflict in any manner or degree with Contractor’s delivery of the Deliverables required hereunder. Contractor certifies that it has followed the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer, state employee or former state employee.

**ARTICLE 24 - RECORDS AND AUDIT**

Contractor will maintain detailed time and expenditure records, which indicate the date, time, nature and cost of the Deliverables rendered during this Agreement’s term and will retain those records for a period of [**Insert # of years, minimum is three (3) years**] from the date of Procuring Agency’s final payment to Contractor hereunder. Contractor’s records will be subject to inspection by Procuring Agency, NMSPA, GSD, Department of Finance Authority and the New Mexico State Auditor’s Office. Procuring Agency will have the right to audit Contractor’s billings prior and subsequent to each of Procuring Agency’s payments made to Contractor. Procuring Agency’s payment for the Deliverables hereunder will not foreclose Procuring Agency’s right to recover Procuring Agency’s payments made to Contractor or its affiliates against Contractor’s excessive or illegal Payment Invoices, if any.

**ARTICLE 25 - AMENDMENT**

This Agreement will not be altered, changed, or amended except by an instrument in writing executed by the Parties. No amendment will be effective or binding unless approved by all of the State’s and Contractor’s approval authorities. Amendments are required for the following:

1. Deliverable requirements stated in the SOW;

2. Due Date of any Deliverable stated in the SOW only if due date change requires extension of Article 5 termination date;

3. Compensation for any Deliverable stated in the SOW;

4. Agreement Compensation, pursuant to Article 3; or

5. Agreement termination, pursuant to Article 5.

**ARTICLE 26 – NEW MEXICO EMPLOYEES HEALTH COVERAGE**

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

B. Contractor will 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. Contractor’s records are subject to review and audit by a representative of the State.

C. Contractor will advise Contractor’s Employees concerning 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: https://www.bewellnm.com.

D. For Indefinite Quantity, Indefinite Delivery contracts (statewide or agency price agreements without specific limitations on quantity and providing for an indeterminate number of orders to be placed against them); Contractor agrees those requirements will become applicable on the first day of the second month after Contractor reports its combined sales (to the State and, if applicable, to local public bodies in the event those sales are made pursuant to a statewide or agency price agreement) in the aggregated amount of $250,000 or more.

**ARTICLE 27 – SEVERABILITY, MERGER, SCOPE, ORDER OF PRECEDENCE**

A. Severability. The provisions of this Agreement are severable, and in the event for any reason, a clause, sentence or paragraph of this Agreement is determined to be invalid by a court, agency or commission having jurisdiction over the subject matter hereof, such invalidity will not affect the other provisions of this Agreement, which will be given effect absent the invalid provision.

1. Merger/Scope/Order. This Agreement incorporates any and all agreements, covenants and understandings between the Parties concerning the subject matter hereof, and all such agreements, covenants and understanding have been merged into this Agreement. No prior agreement or understanding, verbal or otherwise, of the Parties or their agents or assignees will be valid or enforceable unless stated in this Agreement.

**ARTICLE 28 – NOTICES**

All deliveries, notices, requests, demands or other communications provided for or required by this Agreement will be in writing and will be deemed to have been given when sent by registered or certified mail (return receipt requested), when sent by overnight carrier, or by email addressed to the other Party’s Representative.

Notices will be addressed as follows:

**For PROCURING AGENCY**

[Insert: Name of Individual, Position

Procuring Agency Name

E-mail Address

Telephone Number

Mailing Address]

**For CONTRACTOR**

[Insert Name of Individual, Position

Company Name

E-mail Address

Telephone Number

Mailing Address]

Any change made concerning either a change of address or a replacement of a Party’s Representative must be made in an email or a hard copy letter addressed to the other Party’s Representative.

**ARTICLE 29 – GENERAL PROVISIONS**

1. Contractor will abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State, including but not limited to:
	1. Civil and Criminal Penalties. 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.
	2. Equal Opportunity Compliance. Contractor will abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State, pertaining to equal employment opportunity. In accordance with all such laws of the State, Contractor will assure that no person in the United States will, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed hereunder. In the event Contractor is found to be out of compliance with these requirements during the life of this Agreement, Contractor will take appropriate measures to correct its deficiencies.
	3. Nondiscrimination. Contractor, and all deliverables under this Agreement, shall comply, as applicable, with the Federal Civil Rights Act of 1964, the American with Disabilities Act of 1990 (Public Law 101-336), and every other federal and state law that prohibits discrimination or mandates accommodation for disability, injury, sickness, disease or specified hardship. Any deliverable constituting an interactive or informational system or display solely for use or consumption by a public employee shall comply with accessibility standards for a comparable system or display used or consumed by a member of the public.
	4. Workers Compensation. Contractor will comply with state laws and rules applicable to workers compensation benefits for its employees. In the event Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by Procuring Agency.
2. Applicable Law. The laws of the State will govern this Agreement. Venue will be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By executing this Agreement, Contractor acknowledges and will submit to the jurisdiction of the courts of the State over any and all such lawsuits arising hereunder.
3. Waiver. A Party's failure to require strict performance of any provision of this Agreement will 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 hereunder will be effective unless made in writing, and no effective waiver by a Party of any of its rights will be effective to waive any of its other rights, duties or obligations hereunder.
4. Headings. Any and all headings within this Agreement are inserted for convenience and ease of reference and will not be considered in the construction or interpretation of any article, section or provision of this Agreement or the SOW. Numbered or lettered provisions, sections and subsections contained herein refer only to provisions, sections and subsections of this Agreement unless otherwise expressly stated.
5. Dispute Resolution. In the event dispute arises between the Parties, either Party may send a letter to the other Party requesting the other Party to enter into a dispute resolution process, such as mediation or arbitration, in accordance with NMSA 1978

12-8A-1 through 12-8A-3.

**ARTICLE 30 - SURVIVAL**

The Articles titled Intellectual Property, Intellectual Property Ownership, Confidentiality, and Warranties will survive the expiration or termination of this Agreement. Software License and Software Escrow agreements entered into by the Parties in conjunction with this Agreement will survive the expiration or termination of this Agreement. [**Choice #1** – Other unexpired agreements, promises, or warranties that will survive the termination of this Agreement are: (list here.)]

**ARTICLE 31 - TIME**

Calculation of Time. Any time period herein calculated by reference to a “day” or “days” means a calendar day or calendar days, unless Business Days are used; provided, however, that in the event the last day for a given act falls on a Saturday, Sunday, or a holiday as observed by the State, the day for such given act will be the first day following that is not a Saturday, Sunday, or a State observed holiday.

**ARTICLE 32 – FORCE MAJEURE**

Neither Party will be liable for damages or have any right to terminate this Agreement for any delay or Default in performing hereunder in the event such delay or Default is caused by conditions beyond the Party’s control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), war, insurrection and/or any other cause beyond the reasonable control of the Party whose performance is affected thereby.

**[IF APPLICABLE, ADD ANY PROCURING AGENCY’S GRANT SPECIFIC OR AGREEMENT SPECIFIC ARTICLES STARTING AT THIS POINT.]**

IN WITNESS WHEREOF, the Parties hereby execute this Agreement, which will take effect on the last signature date of the required approval authorities below. Each of the signatories, below, may execute this Agreement by hard copy original, facsimile, digital or electronic signature, any of which will be deemed to be a true and original signature hereunder.

By: /Cabinet\_Secretary/ Date:

 [Insert Procuring Agency Cabinet Secretary Name], Cabinet Secretary

 [Insert Agency Name]

 //$agency-cab-sec

By: /Contractor\_Name/ Date:

 [Insert Contractor Name, Title]

 [Company Name]

 //$contractor

By: Date:

 [Insert Procuring Agency CIO Name], Chief Information Officer

 [Insert Procuring Agency Name]

Approved for legal sufficiency:

By: /General\_Counsel/ Date:

 [Insert Procuring Agency General Counsel Name], General Counsel

 [Insert Procuring Agency Name]

 //$

Approved for financial sufficiency:

By: Date:

 [Insert Procuring Agency Chief Financial Officer Name], Chief Financial Officer

 [Insert Procuring Agency Name]

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

BTIN ID Number: Enter this number before uploading to DocuSign

By:  /Tax\_&\_Rev/ Date:

 Taxation & Revenue Department

*Taxation and Revenue is only verifying the registration and will not confirm or deny taxability statements contained in this contract.*

This Agreement has been approved by the General Services Department, State Purchasing Division:

By: /Purchasing\_Agent/ Date:

Dorothy Mendonca

State Purchasing Agent

State of New Mexico

**EXHIBIT A – SCOPE OF WORK**

1. Purpose:

The Purpose of this Agreement, including its goals and objectives are:

[Include a brief narrative that describes the work to be conducted by the Contractor and include the project’s goals and objectives. Performance measures and activities are not required, but if being included, do so in this section.]

[If applicable, insert **Certified Project Name: Name**]

1. The Deliverables:

The following sections describe the required tasks and subtasks to be performed by Contractor concerning each service or product delivered by Contractor to Procuring Agency (a “Deliverable”) pursuant to this Agreement. Contractor will deliver each Deliverable, but Contractor is not limited to delivering only the identified Deliverables in a given area of the Project. The Parties agree that the Deliverables are the controlling items and that Contractor’s primary obligation is to deliver the Deliverables to Procuring Agency according to the following sections.

**[ Procuring Agency may identify as many Deliverables, with as many associated tasks and subtasks, as may be needed for Contractor to accomplish the Scope of Work.]**

**A. Sample Deliverable Number 1 – [Insert name of deliverable. Name of deliverable here should be the same as the deliverable name in the table.]**

|  |  |  |
| --- | --- | --- |
| **Deliverable Name** | **Due Date** | **Compensation** |
| [Insert name of deliverable. Deliverable name here should be the same as the name used in the title line above the table.] | [Due dates must be stated to facilitate Procuring Agency and Contractor’s efforts to monitor project progress. Insert actual date this deliverable is due. If an actual date is not available, enter a no later than date.] | * [Total Compensation not to exceed $ amount, including \_\_% GRT of $ amount or excluding GRT;

To be Paid (include frequency of payment, Monthly, Quarterly, Upon Review and Acceptance or if one payment, indicate Fixed Cost to Be Paid in Full Upon Invoice) at$ amount rate per hour, hours not to exceed XX. If retainage, include: Less \_\_% retainage of $ amount.] Amount Payable on Acceptance Not to Exceed $ amount including or excluding GRT. |

|  |  |  |
| --- | --- | --- |
| Task Item | Sub Tasks | Description |
| **[Insert Name of Task 1 or tasks to be performed for each Deliverable.]** | **Sub 1 through however many subtasks are needed to accomplish Task 1, which leads to the number of Tasks needed to accomplish Deliverable 1.** | * [Insert Description. Use active verbs to describe the tasks and subtasks to be completed. Begin the statement by assigning responsibility for the party completing the task, for example, The Contractor will. Contractor name should not be used, only the term Contractor, as stated in the first sentence of this template. Also, references to the agency name should not be used, instead use Procuring Agency. Note that Contractor and Procuring Agency are capitalized.]
* [Include the expected deliverable and the agreed upon format. For example, weekly reports to be delivered in Word format, schedule to be delivered in Microsoft Project format. If there is a designated repository the Contractor should use for storing files, include here.]
* [Conclude with review and acceptance of the deliverable by the Procuring Agency.]
 |

1. **Deliverable Number 2 – Project Management Services**

|  |  |  |
| --- | --- | --- |
| **Deliverable Name** | **Due Date** | **Compensation** |
| [Insert name of deliverable. Deliverable name here should be the same as the name used in the title line above the table.] | [Due dates must be stated to facilitate Procuring Agency and Contractor’s efforts to monitor project progress. Insert actual date this deliverable is due. If an actual date is not available, enter a no later than date.] | * [Total Compensation not to exceed $ amount, including \_\_% GRT of $ amount or excluding GRT;

To be Paid (include frequency of payment, Monthly, Quarterly, Upon Review and Acceptance or if one payment, indicate Fixed Cost to Be Paid in Full Upon Invoice) at* $ amount rate per hour, hours not to exceed XX. If retainage, include: Less \_\_% retainage of $ amount.] Amount Payable on Acceptance Not to Exceed $ amount including or excluding GRT.
 |

|  |  |  |
| --- | --- | --- |
| Task Item | Sub Tasks | Description |
| **2.0 [Insert Name of Task 1 or tasks to be performed for each Deliverable.]** | **Sub 1 through however many subtasks are needed to accomplish Task 1, which leads to the number of Tasks needed to accomplish Deliverable 1.** | * [Insert Description. Use active verbs to describe the tasks and subtasks to be completed. Begin the statement by assigning responsibility for the party completing the task, for example, The Contractor will. Contractor name should not be used, only the term Contractor, as stated in the first sentence of this template. Also, references to the agency name should not be used, instead use Procuring Agency. Note that Contractor and Procuring Agency are capitalized.]
* [Include the expected deliverable and the agreed upon format. For example, weekly reports to be delivered in Word format, schedule to be delivered in Microsoft Project format. If there is a designated repository the Contractor should use for storing files, include here.]
* [Conclude with review and acceptance of the deliverable by the Procuring Agency.]
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1. **Deliverable Number 3 – IV&V Initial Assessment**

|  |  |  |
| --- | --- | --- |
| **Deliverable Name** | **Due Date** | **Compensation** |
| IV&V Initial Assessment | [Due dates must be stated to facilitate Procuring Agency and Contractor’s efforts to monitor project progress. Insert actual date this deliverable is due. If an actual date is not available, enter a no later than date.] | * [Total Compensation not to exceed $ amount, including \_\_% GRT of $ amount or excluding GRT;

To be Paid (include frequency of payment, Monthly, Quarterly, Upon Review and Acceptance or if one payment, indicate Fixed Cost to Be Paid in Full Upon Invoice) at* $ amount rate per hour, hours not to exceed XX. If retainage, include: Less \_\_% retainage of $ amount.] Amount Payable on Acceptance Not to Exceed $ amount including or excluding GRT.
 |

|  |  |  |
| --- | --- | --- |
| Task Item | Sub Tasks | Description |
| **3.0 Initial Assessment**  | 3.1  | The Contractor shall provide an initial review of the activities required early in the project, particularly as it relates to planning. This will include a high-level review of previous activities conducted since project inception. |
| 3.2 | The Contractor shall assess the project management processes and project organization and verify that lines of reporting and responsibility provide solid managerial/sponsor oversight of the project. |
| 3.3 | The Contractor shall verify that project team roles and responsibilities of key project personnel are well-defined both for business and technical ownership of the project’s tasks and activities.  |
| 3.4 | The Contractor shall evaluate risk and issue management including processes for monitoring and tracking risks and issues. |
| 3.5 | The Contractor shall evaluate and make recommendations on the estimating and scheduling process of the project to ensure that the project planning assumptions, budget and resources are adequate for the work-breakdown structure and schedule. |
| 3.6 | The Contractor shall assess coordination, communication and management to verify that the Procuring Agency is communicating appropriately and not working independent of one another. |
| Review and Acceptance | 3.8 | The Contractor shall deliver the report to the Department of Information Technology (DoIT), Project Oversight and Compliance Division at epmo@state.nm.us), the Procuring Agency Chief Information Officer (CIO) and any other designated Procuring Agency recipients for review and acceptance. |

**D. Deliverable Number 4 – Retainage Release [Include for fixed price deliverable contracts over $500,000 or other instances when retainage is held]**

|  |  |  |
| --- | --- | --- |
| **Deliverable Name** | **Due Date** | **Compensation** |
| Retainage Release | [Insert date payment is due. | * Total Compensation not to exceed $ Amount, including/excluding GRT.]
 |

|  |  |  |
| --- | --- | --- |
| Task Item | Sub Tasks | Description |
| **4.0 Retainage Release**  | **Notice of Acceptance of All Deliverables** | Procuring Agency shall release payment for the retainage invoice, representing retainage held against this contract, upon review and acceptance of the Deliverables specified in this scope of work. |