

**REQUEST FOR PROPOSALS  
FOR THIRD-PARTY REVIEWER  
OF CERB AND ESPC PROJECTS  
AND COMMISSIONING OVERSIGHT SERVICES  
FOR THE  
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT,  
ENERGY CONSERVATION AND MANAGEMENT DIVISION**

**Section 1. Purpose of this Request for Proposals**

The Energy, Minerals and Natural Resources Department (EMNRD), Energy Conservation and Management Division (Division), is requesting proposals to provide as-needed third-party reviewer and commissioning management services for energy savings performance contracting (ESPC) projects and Clean Energy Revenue Bond (CERB) projects. Successful Offerors shall have demonstrable expertise in construction, building and energy code assessments, building controls, commissioning, and renewable energy technologies. Work will be performed in, but not limited to Santa Fe, Las Cruces, Bernalillo County, Bloomfield, Clayton, and other areas throughout the state. EMNRD may award multiple contracts as a result of this Request for Proposals (RFP).

Any proposals which may result from this RFP are valid for one year from date of issue as indicated in Section 8, Contact Person and Proposal Due Date, below.

The successful Offeror(s) shall provide third party review (TPR) services, on an as needed basis for energy efficiency and renewable energy projects. This will consist of technical evaluation services by conducting on-site evaluations of audit findings and energy efficiency measures and provides a review report to EMNRD and local governments; in parallel with implementation of retrofits, the third party reviewer will inspect and verify the retrofits at 30% completion, 65% completion, and 100% completion. After all retrofits are finalized, the TPR will provide EMNRD with a commissioning report; complete and provide EMNRD with a measurement and verification (M&V) report after six months of post project implementation data, to be provided to EMNRD as specified below.

The Division will assign work on an “as-needed” basis under Task Orders. While the Division anticipates the need to assign several Task Orders, the Division cannot and does not predict or guarantee the number or frequency of Task Order assignments that the Contractor may be asked to complete. A written Task Order will specify the location of the project and the tasks to be performed. On an “as-needed” basis, successful Offeror(s) shall develop and submit, for the Division’s approval, a timetable and budget to perform the work specified in the Task Order. The Division’s written approval shall signify authorization to commence work on that Task Order.

Successful Offeror(s) shall conduct third-party reviews and commissioning oversight on behalf of the Division for CERB projects and ESPC projects initiated by other public entities under approved Task Orders.

To successfully accomplish this, successful Offeror(s) shall:

- 1) Evaluate CERB or ESPC investment grade energy audits of each project, including pricing of proposed measures, measurement and verification, and guarantee insurance; and conduct on-site evaluations of proposed measures and

the value of implementing each measure. Document results in a written report to the Division.

- 2) Compile a comprehensive file of all documentation developed and collected through the duration of each project and provide the Division with a copy of each project file no later than 30 days after project completion.
- 3) As the Division directs, conduct a minimum of two on-site construction inspections per project to ensure measures are being installed according to the separate contracts between public entities and energy performance contractors and that they meet building code requirements.
- 4) Provide commissioning oversight services for each project:
  - a) ensure there is a detailed and comprehensive commissioning plan and precise design specifications set in place before construction is initiated;
  - b) review the application of the testing plan in the contracts between public entities and energy performance contractors through observation and documentation of all equipment and systems, ensuring it complies with the facility's project systems requirements objectives and all contract documents;
  - c) conduct on-site verification of commissioning and performance testing;
  - d) monitor progress of commissioning works and construction by verifying documentary evidence of commissioning activities; and
  - e) verify that training of facility operators and maintenance staff is executed by the energy performance contractor.
- 5) Conduct M&V of energy usage with a baseline comparison six month post retrofit/project completion and provide information to Division as specified in individual approved Task Orders.
- 6) Alert Division to any deficiencies, issues, or building code violations that occur throughout the duration of each project.
- 7) Compile an energy evaluation report for each project using one full year of post implementation utility data compared to the baseline and provide it to the Division no later than fourteen months post project completion and provide information to Division as specified in individual approved Task Orders.
- 8) Review projects to insure that the measures approved by the Division were installed and provide information to Division as specified in individual approved Task Orders.

## Section 2. Proposal Contents and Specifications

Proposals must contain sufficient information to provide EMNRD with a thorough description of Offeror's qualifications to accomplish the activities described in the Scope of Work. All proposals shall be on white 8.5 x 11" paper, in single-spaced, 12-point type. The proposal MUST contain, at a minimum, all listed items in the sequence indicated and be organized in the following format.

- a) Letter of transmittal that:
  - identifies the name, title, telephone and fax numbers, and e-mail address of the person authorized to negotiate the contract on behalf of the Offeror;
  - identifies the names, titles, telephone and fax numbers, and e-mail addresses of persons to be contacted for clarification;
  - explicitly indicate acceptance of the terms and conditions of this RFP and its evaluation factors;
  - that acknowledges receipt of any and all amendments to this RFP; and
  - is signed by the person authorized to contractually obligate the Offeror.
- b) Brief descriptions of staff, including experience.
- c) Brief descriptions of similar projects Offeror has performed.
- d) Description of capabilities, familiarity with energy efficiency equipment, training, and any other resources useful in accomplishing the required work.
- e) Summary of proposed services, including a budget.
- f) List of at least three business references, including contact information.
- g) Completed, signed Campaign Contribution Disclosure Form (Attachment 1).
- h) Completed, signed Statement of Assurances Form (Attachment 2).

Any proposal that does not adhere to these requirements may be deemed non-responsive and rejected on that basis.

## Section 3. Evaluation Point Summary and Criteria

The Division shall use the following criteria in the evaluation of proposals and in the selection of successful Offeror(s):

Factor/Criteria	Points Available
Offeror's Organizational Experience	
Offeror's relevant organizational experience in conducting facility energy assessments of energy efficiency and renewable energy technologies, evaluation of building code requirements, construction	30

oversight, project commissioning, M&V, and technical writing.	
Proposed Staff Experience  Experience of staff members shall encompass the required criteria for the organizational experience including utility data analysis, site inspection, any areas of expertise and other related experience.	30
Budget, including hourly pricing for: <ul style="list-style-type: none"> <li>• energy audit review;</li> <li>• meeting/teleconferencing;</li> <li>• travel time;</li> <li>• audit phase site visits;</li> <li>• construction phase site visits; and</li> <li>• commissioning phase site visits</li> </ul>	25
References  Points will be awarded based upon an evaluation of the responses to a series of questions that will be asked of the references concerning the quality of the Offeror's services, the timeliness of services, responsiveness to problems and complaints and the level of satisfaction with the Offerors overall performance (See Attachment 3, Reference Questionnaire).	15
Total	100 points

**Section 4. Organizational References**

Offerors must provide a minimum of three business references from similar projects performed for private, state or large local government clients within the last three years. Offerors are required to submit Attachment 3 to the business references they list. The business references must submit the Reference Questionnaire directly to the EMNRD Contact Person listed in Section 10 below. Offerors are responsible for ensuring that the completed forms are received by the or before the proposal submission deadline for inclusion in the evaluation process. Business references that are not received, or are not complete, may adversely affect the Offeror's score in the evaluation process. The Evaluation Team may contact any or all business references for validation of information submitted.

**Section 5. Evaluation Process**

The evaluation process will follow the steps listed below:

1. The Evaluation Team members will document contents of competitive sealed proposals after the submittal deadline.
2. The Evaluation Team will review proposals for compliance with the mandatory requirements stated within this RFP. Proposals deemed non-responsive will be eliminated from further consideration.

3. The Contact Person may contact Offerors for clarification of the proposal.

4. The Evaluation Team will evaluate responsive proposals based on the criteria in Section 4 and will select responsive Offeror(s) with the highest total weighted scores as finalist Offeror(s). The Evaluation Team will consult with listed references and select the finalist Offeror(s) whose proposal and references is/are most advantageous to EMNRD, for award. Please note, however, that a deficiency in any one factor may be grounds for rejection regardless of overall score.

## **Section 6. Award**

EMNRD may award multiple contracts under the terms of this RFP. Any Professional Services Agreement (PSA) (Attachment 4) awarded as a result of this RFP shall not be binding until approved by both EMNRD and the Department of Finance and Administration. Award of a PSA or PSAs does not obligate EMNRD to award any work to the successful Offeror(s).

## **Protest period**

Pursuant to NMSA 1978, § 13-1-172 and applicable procurement regulations, Offerors who are not selected for funding have the right to timely protest the procurement. Protests must be written and must include: the name and address of the protestor and the name of the procurement being protested; a statement of the grounds for protest including appropriate supporting exhibits; and the ruling requested from the Division. The protest period begins on the day after notice of selection/non-selection and ends at 5 p.m. 15 days later. Protests must be delivered to: Louise Martinez, ECMD Division Director, 1220 S. St. Francis Drive, Santa Fe, NM 87505.

## **Section 7. Contract Duration**

The contract period shall extend from the date of contract approval by Department of Finance and Administration, and shall last no longer than four years, including amendments.

## **Section 8. Contact Person and Proposal Due Date**

The Division Contact Person is:

Harold Trujillo, Bureau Chief  
Energy Technology and Engineering Bureau  
Energy Conservation and Management Division  
Energy, Minerals and Natural Resources Department  
1220 South St. Francis Drive,  
Santa Fe, New Mexico 87505  
Telephone: (505) 476-3372

Offerors shall submit one original proposal and three identical hard copies to Mr. Trujillo at the above address no later than 3 p.m. MDT October 19, 2018. Proposals must be submitted on 8½x 11 inch paper, in a printed format. Offerors shall not submit proposals by e-mail or facsimile. EMNRD shall not accept proposals submitted after the due date.

## **Section 9. Notices**

Award of agreements is contingent upon sufficient appropriations and authorization being made by the State of New Mexico and the U.S. Department of Energy.

The money made available to support any PSA entered into as a result of this RFP must cover Gross Receipts Taxes as a component of the total PSA amount.

EMNRD may cancel this RFP and reject any and all proposals when it is in the State of New Mexico's best interests.

EMNRD may conduct discussions with Offerors who submit proposals, but may also accept proposals without such discussions.

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

Attachment 1

**Campaign Contribution Disclosure Form**

Pursuant to the Procurement Code, Sections 13-1-28, *et seq.*, NMSA 1978 and NMSA 1978, § 13-1-191.1 (2006), as amended by Laws of 2007, Chapter 234, any prospective contractor seeking to enter into a contract with any state agency or local public body **for professional services, a design and build project delivery system, or the design and installation of measures the primary purpose of which is to conserve natural resources** must file this form with that state agency or local public body. This form must be filed even if the contract qualifies as a small purchase or a sole source contract. The prospective contractor must disclose whether they, a family member or a representative of the prospective contractor has made a campaign contribution to an applicable public official of the state or a local public body during the two years prior to the date on which the contractor submits a proposal or, in the case of a sole source or small purchase contract, the two years prior to the date the contractor signs the contract, if the aggregate total of contributions given by the prospective contractor, a family member or a representative of the prospective contractor to the public official exceeds two hundred and fifty dollars (\$250) over the two year period.

Furthermore, the state agency or local public body may cancel a solicitation or proposed award for a proposed contract pursuant to Section 13-1-181 NMSA 1978 or a contract that is executed may be ratified or terminated pursuant to Section 13-1-182 NMSA 1978 of the Procurement Code if: 1) a prospective contractor, a family member of the prospective contractor, or a representative of the prospective contractor gives a campaign contribution or other thing of value to an applicable public official or the applicable public official's employees during the pendency of the procurement process or 2) a prospective contractor fails to submit a fully completed disclosure statement pursuant to the law.

The state agency or local public body that procures the services or items of tangible personal property shall indicate on the form the name or names of every applicable public official, if any, for which disclosure is required by a prospective contractor.

**THIS FORM MUST BE INCLUDED IN THE REQUEST FOR PROPOSALS AND MUST BE FILED BY ANY PROSPECTIVE CONTRACTOR WHETHER OR NOT THEY, THEIR FAMILY MEMBER, OR THEIR REPRESENTATIVE HAS MADE ANY CONTRIBUTIONS SUBJECT TO DISCLOSURE.**

The following definitions apply:

**“Applicable public official”** means a person elected to an office or a person appointed to complete a term of an elected office, who has the authority to award or influence the award of the contract for which the prospective contractor is submitting a competitive sealed proposal or who has the authority to negotiate a sole source or small purchase contract that may be awarded without submission of a sealed competitive proposal.

**“Campaign Contribution”** means a gift, subscription, loan, advance or deposit of money or other thing of value, including the estimated value of an in-kind contribution, that is made to or received by an applicable public official or any person authorized to raise, collect or expend contributions on that official's behalf for the purpose of electing the official to statewide or local office. “Campaign Contribution” includes the payment of a debt incurred in an election campaign, but does not include the value of services provided without compensation or

unreimbursed travel or other personal expenses of individuals who volunteer a portion or all of their time on behalf of a candidate or political committee, nor does it include the administrative or solicitation expenses of a political committee that are paid by an organization that sponsors the committee.

**“Family member”** means spouse, father, mother, child, father-in-law, mother-in-law, daughter-in-law or son-in-law of (a) a prospective contractor, if the prospective contractor is a natural person; or (b) an owner of a prospective contractor.

**“Pendency of the procurement process”** means the time period commencing with the public notice of the request for proposals and ending with the award of the contract or the cancellation of the request for proposals.

**“Prospective contractor”** means a person or business that is subject to the competitive sealed proposal process set forth in the Procurement Code or is not required to submit a competitive sealed proposal because that person or business qualifies for a sole source or a small purchase contract.

**“Representative of a prospective contractor”** means an officer or director of a corporation, a member or manager of a limited liability corporation, a partner of a partnership or a trustee of a trust of the prospective contractor.

Note: A prospective contractor shall make **separate** disclosures of all campaign contributions given by (1) the prospective contractor, or (2) a family member or (3) representative of the prospective contractor, or shall complete the non-disclosure statement, as applicable.

**DISCLOSURE OF CONTRIBUTIONS:**

<b>Contribution Made By:</b>			
<b>Relation to Prospective Contractor:</b>			
<b>Name of Applicable Public Official:</b>		Governor Susana Martinez	
<b>Contribution(s) Date(s)</b>	<b>Contribution Amount(s):</b>	<b>Nature of Contribution(s):</b>	<b>Purpose of Contribution(s):</b>
	\$		
	\$		
	\$		
	\$		
	\$		

(Attach extra pages if necessary)

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Title/Position: \_\_\_\_\_

**--OR--**

**NO CONTRIBUTIONS IN THE AGGREGATE TOTAL OVER TWO HUNDRED FIFTY DOLLARS (\$250) WERE MADE** to an applicable public official by me, a family member or representative.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Title/Position: \_\_\_\_\_

Attachment 2  
**Statement of Assurances Form**

<p>Each Offeror <b>MUST</b> complete this form and return it with Offeror's proposal or EMNRD will deem the proposal as non-responsive. By signing this form below, Offeror acknowledges and agrees to the following:</p>
<p>This RFP does not commit the State of New Mexico (State) to pay any costs incurred in the in the preparation or submission of this proposal. Any cost incurred by the Offeror in developing a proposal response shall be borne solely by the Offeror. Offeror understands that that Offeror's proposal shall become part of the official file on this matter without obligation to the State. Issuance of this RFP does not constitute an award commitment on the part of the State.</p>
<p>Offeror shall examine all contract documents, noting particularly all stipulations that in any way affect contract work. Failure of an Offeror to acquaint itself fully with the amount and nature of the work required to fulfill all terms of the contract documents shall not be considered a basis for extra compensation after a contract has been awarded.</p>
<p>Offeror represents and warrants to the State that Offeror has the staff, facilities, and competence to furnish the required services. The State may investigate Offeror's adequacy of the staff, facilities, and competence. For this purpose, representatives of the State may make an inspection of Offeror's facilities, equipment, etc., and interview staff.</p>
<p>In order to receive consideration, Offeror's proposal must be signed by an officer having the authority to bind Offeror.</p>
<p>Offeror agrees to comply with all relevant federal and state laws and regulations or rules.</p>
<p>New Mexico Employees Health Coverage:</p> <p>If Offeror has, or grows to, six or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six-month period during the term of any Agreement which may result from this RFP, Offeror agrees, by submitting a proposal, to have in place, and agrees to maintain for the Agreement's term, health insurance for those employees and offer that health insurance to those employees if the expected annual value in the aggregate of any and all contracts between Offeror and the state exceed \$250,000.</p> <p>Offeror agrees to maintain a record of the number of employees who have:</p> <ol style="list-style-type: none"><li>1) accepted health insurance;</li><li>2) declined health insurance due to other health insurance coverage already in place; or</li><li>3) declined health insurance for other reasons.</li></ol> <p style="text-align: center;">These records are subject to review and audit by a representative of the State.</p> <p>Offeror agrees to advise all employees of the availability of state publicly-financed health care coverage programs.</p>
<p>Application of Veterans Preference or New Mexico Business Preference:</p> <p>This procurement is excluded from state preference laws because it is funded with federal dollars.</p>
<p>_____</p> <p>Offeror Signature <span style="float: right;">Date: _____</span></p> <p>Offeror's Printed Name and Title: _____</p>

Attachment 3

**REQUEST FOR PROPOSALS  
FOR THIRD-PARTY REVIEWER  
OF CERB AND ESPC PROJECTS  
AND COMMISSIONING OVERSIGHT SERVICES  
FOR THE ENERGY CONSERVATION AND MANAGEMENT DIVISION  
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT  
REFERENCE QUESTIONNAIRE**

**Name of Individual/Entity  
Requesting Reference:**

The State of New Mexico, as a part of the RFP process, requires Offerors to submit a minimum of three business references as required within this document. The purpose of these references is to document the experience relevant to the scope of work and provide assistance in the evaluation process.

The Offeror is required to send this reference form to each business reference listed. The business reference, in turn, is requested to submit the Reference Form directly to the Procurement Manager by the RFP submission deadline for inclusion in the evaluation process. The form and information provided will become a part of the submitted proposal.

This form is being submitted to you for completion as a business reference for the individual or entity above. Please return this completed form directly to Harold Trujillo, Bureau Chief, Energy Technology and Engineering Bureau, Energy Conservation and Management Division, Energy, Minerals and Natural Resources Department, 1220 South St. Francis Drive, Santa Fe, New Mexico 87505, telephone: (505) 476-3372; fax: (505) 476.3322; Email: Harold.Trujillo@state.nm.us no later than 3 p.m. October 19, 2018. Do not return this form to the individual or entity requesting the reference.

For questions or concerns regarding this form, please contact the Procurement Manager listed above.

**Name of Individual/Entity  
Providing Reference:**

**Contact Name and  
Title/Position:**

**Contact Telephone  
Number:**

**Contact E-Mail Address:**

**QUESTIONS**

1. In what capacity have you worked with this Offeror in the past? (Please explain)

2. How would you rate this Offeror's knowledge and expertise? (Check one)

3 – Excellent _____	2 – Satisfactory _____	1 – Unsatisfactory _____	0 – Unacceptable _____
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Comments:

3. How would you rate the Offeror's flexibility relative to changes in the project scope and timelines? (Check one)

3 – Excellent _____	2 – Satisfactory _____	1 – Unsatisfactory _____	0 – Unacceptable _____
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REFERENCE QUESTIONNAIRE**

Comments:	
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4. What is your level of satisfaction with hard-copy materials produced by the Offeror? (Check one)

3 – Excellent _____	2 – Satisfactory _____	1 – Unsatisfactory _____	0 – Unacceptable _____
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Comments:	
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5. How would you rate the dynamics/interaction between the Offeror and your staff? (Check one)

3 – Excellent _____	2 – Satisfactory _____	1 – Unsatisfactory _____	0 – Unacceptable _____
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Comments:	
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6. Who were the Offeror's principal representatives involved in your project and how would you rate them individually? Would you comment on the skills, knowledge, behaviors or other factors on which you based the rating? (3 – Excellent; 2 – Satisfactory; 1 – Unsatisfactory; 0 – Unacceptable)

Principal Representative Name:		Rating: _____
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Principal Representative Name:		Rating: _____
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Principal Representative Name:		Rating: _____
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Principal Representative Name:		Rating: _____
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Comments:	
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7. How satisfied are you with the products developed by the Offeror? (Check one)

3 – Excellent _____	2 – Satisfactory _____	1 – Unsatisfactory _____	0 – Unacceptable _____
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Comments:	
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8. With which aspect(s) of the Offeror's services are you most satisfied? (Please explain)

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9. With which aspect(s) of the Offeror's services are you least satisfied? (Please explain)

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10. Would you recommend this vendor's services to your organization again? (Please explain)

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**STATE OF NEW MEXICO  
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT  
PROFESSIONAL SERVICES AGREEMENT**

THIS AGREEMENT is made and entered into by and between the State of New Mexico, Energy, Minerals and Natural Resources Department (EMNRD) and (insert Contractor Name) (Contractor), and is effective as of the date set forth below upon which it is executed by the Department of Finance and Administration (DFA).

IT IS AGREED BETWEEN THE PARTIES:

**1. Scope of Work.**

Contractor shall perform the following work:

(Insert Scope of Work here.)

**2. Compensation.**

**Option 1: Work Product.**

A. EMNRD shall pay Contractor for services satisfactorily performed pursuant to the Scope of Work and as specified below. This amount shall not exceed \_\_\_\_\_ (\$ \_\_\_\_\_), which amount includes New Mexico gross receipts taxes and travel pursuant to Paragraphs C and D of this Compensation Section. EMNRD shall make payment upon the satisfactory and timely completion of the work described in the Scope of Work and for no more than the maximum amount set forth below for each deliverable:

*(Insert deliverables/payment schedule here. Delete this instruction.)*

Contractor is responsible for notifying EMNRD when the services provided under this Agreement reach the total compensation amount. In no event shall Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided.

(—OR—)

**Option 2: Lump Sum Amount Upon Completion of All Work. Travel may or may not be paid, depending on negotiation between EMNRD and Contractor.**

A. Upon satisfactory completion of services, EMNRD shall pay Contractor for services satisfactorily performed pursuant to the Scope of Work in an amount not to exceed \_\_\_\_\_ (\$ \_\_\_\_\_), which amount includes New Mexico gross receipts taxes **and any travel, if necessary.**

**Option 3: Time and Materials. Travel may or may not be paid, depending on negotiation between EMNRD and Contractor.**

A. EMNRD shall pay to Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work rendered at the rate of **\$00.00** per hour, such compensation not to exceed **\$00**, which amount includes New Mexico gross receipts taxes, and travel pursuant to Paragraphs C and D of this Compensation Section. This amount is a maximum and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated herein. The parties do not intend for Contractor to continue to provide services without compensation when the total compensation amount is reached. Contractor is responsible for notifying EMNRD when the services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided.

B. *(For single-year contract, may need to tweak the first sentence.)* Payment in FYXX, FYXX, and FYXX is subject to availability of funds pursuant to Section 5, Appropriations, set forth below and to any negotiations between the parties from year to year pursuant to Section 1, Scope of Work, and to approval by DFA. EMNRD must receive all invoices no later than 15 days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

C. *(To be negotiated at EMNRD's discretion.)* EMNRD shall pay such travel expenses as may be incurred in, and that are necessary for, the performance of this Agreement at the rates established in the New Mexico Per Diem and Mileage Act, NMSA 1978, §§ 10-8-1 *et seq.*, as implemented by the current Department of Finance and Administration (DFA) rule and the current EMNRD Travel Policy.

D. Contractor shall be responsible for paying New Mexico Gross Receipts taxes levied on amounts payable under this Agreement.

E. Contractor must submit detailed statements accounting for all services performed, and expenses incurred. *(Invoices must be supported by approved purchase order or equivalent document and invoice by the supplier, evidencing the propriety of each claim for payment. Wage amounts charged shall be based upon payrolls maintained by Contractor and must be supported by time and attendance sheets.)* If EMNRD finds that the statement, services, or expenses are not acceptable, within 30 days after the date of receipt of (i) written notice from Contractor that payment is requested, and (ii) all supporting documentation, EMNRD shall provide Contractor a letter of exception explaining the defect or objection to the statement, services, or expenses, and outlining steps Contractor may take to provide remedial action. Upon certification by EMNRD that the statement, supporting documentation, services, or expenses have been received and accepted, EMNRD shall tender payment to Contractor within 30 days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, EMNRD shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

### **3. Term.**

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

#### 4. Termination.

A. Grounds. EMNRD may terminate this Agreement for convenience or cause. Contractor may only terminate this Agreement based upon EMNRD's uncured, material breach of this Agreement.

B. Notice; EMNRD Opportunity to Cure.

1) Except as otherwise provided in Section 4(B)(3), EMNRD shall give Contractor written notice of termination at least 30 days prior to the intended date of termination.

2) Contractor shall give EMNRD written notice of termination at least 30 days prior to the intended date of termination, which notice shall (i) identify all EMNRD's material breaches of this Agreement upon which the termination is based and (ii) state what EMNRD must do to cure such material breaches. Contractor's notice of termination shall only be effective (i) if EMNRD does not cure all material breaches within the 30 day notice period or (ii) in the case of material breaches that cannot be cured within 30 days, EMNRD does not, within the 30 day notice period, notify Contractor of EMNRD's intent to cure and begin with due diligence to cure the material breach.

3) Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to Contractor (i) if Contractor becomes unable to perform the services contracted for, as determined by EMNRD; (ii) if, during the term of this Agreement, Contractor is suspended or debarred by the State Purchasing Agent; or (iii) the Agreement is terminated pursuant to Section 5, Appropriation, of this Agreement or (iv) this Agreement is terminated pursuant to Section 12, Conflict of Interest; Governmental Conduct Act, Paragraph C, of this Agreement. *(May need to revise Section number to track actual contract contents. Either way, delete this instruction.)*

C. Liability. Except as otherwise expressly allowed or provided under this Agreement, EMNRD's sole liability upon termination shall be to pay for acceptable work performed prior to Contractor's receipt or issuance of a notice of termination; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. Contractor shall submit an invoice for such work within 30 days of receiving or sending the notice of termination. *THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE EMNRD'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.*

D. Termination Management. Immediately upon receipt by either EMNRD or Contractor of notice of termination of this Agreement, Contractor shall:

1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without EMNRD's written approval;

2) comply with all directives EMNRD issues in the notice of termination as to the performance of work under this Agreement; and

3) take such action as EMNRD shall direct for the protection, preservation, retention or transfer of all property titled to EMNRD and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by Contractor with

contract funds shall become property of EMNRD upon termination and shall be submitted to EMNRD as soon as practicable. *(If federal funding is involved, include the following clause. If not, delete it.)* Otherwise, all property procured under this Agreement shall be used and disposed of in accordance with (insert name of federal funding entity) regulations.

**5. Appropriations.**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico and (insert name of federal funding entity) for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature and (insert name of federal funding entity), this Agreement shall terminate immediately upon written notice being given by EMNRD to Contractor. EMNRD's decision as to whether sufficient appropriations are available shall be accepted by Contractor and shall be final. If EMNRD proposes an amendment to the Agreement to unilaterally reduce funding, Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within 30 days of receipt of the proposed amendment.

**6. Status of Contractor.**

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

**7. Assignment.**

Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without EMNRD's prior written approval.

**8. Subcontracting.**

Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of EMNRD. No such subcontract shall relieve Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from EMNRD.

**9. Release.**

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

**10. Confidentiality.**

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

**11. Product of Service -- Copyright.**

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

**12. Conflict of Interest; Governmental Conduct Act.**

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

B. Contractor further represents and warrants that Contractor has complied with, and, during this Agreement's term, shall continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 through 10-16-18. Without in anyway limiting the generality of the foregoing, the Contractor specifically represents and warrants that:

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

2) this Agreement complies with NMSA 1978, § 10-16-7(A) because (i) Contractor is not a public officer or employee of the state; (ii) Contractor is not a member of the family of a public officer or employee of the state; (iii) Contractor is not a business in which a public officer or employee or the family of a public officer or employee has a substantial interest; or (iv) if Contractor is a public officer or employee of the state, a member of the family of a public officer or employee of the state, or a business in which a public officer or employee of the state or the family of a public officer or employee of the state has a substantial interest, public notice was given as required by NMSA 1978, § 10-16-7(A) and this Agreement was awarded pursuant to a competitive process;

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

4) this Agreement complies with NMSA 1978, § 10-16-9(A) because (i) Contractor is not a legislator; (ii) Contractor is not a member of a legislator's family; (iii)

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

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

6) in accordance with NMSA 1978, § 10-16-3(D) and § 10-16-13, Contractor has not contributed, and during this Agreement's term shall not contribute, anything of value to a public officer or employee of EMNRD.

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

D. All terms defined in the Governmental Conduct Act have the same meaning in this Section 12.

**13. Amendment.**

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

**14. Merger.**

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

**15. Penalties for Violation of Law.**

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

**16. Equal Opportunity Compliance.**

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

**17. Applicable Law.**

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

**18. Records and Financial Audit.**

Contractor shall maintain detailed time and expenditure records that indicate the date, time, nature, and cost of services rendered during the Agreement's term and effect and retain them for a period of six years from the date of final payment under this Agreement. Contractor further agrees to include in all subcontracts hereunder the same right of inspection and audit against all subcontractors. EMNRD shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose EMNRD's right to recover excessive or illegal payments. In EMNRD's, DFA's, or the State Auditor's *(or insert name of federal funding entity)*'s sole discretion, the periods of inspection and audit may be extended for records, which relate to litigation or settlement of claims arising out of performance of this Agreement *(and costs and expenses of this Agreement for which exception is under consideration by the federal funding agency or any authorized representative)* and shall continue until all potential litigation, appeals, claims, or exceptions have expired or been resolved.

**19. Indemnification.**

Contractor shall defend, indemnify, and hold harmless EMNRD, its officers, employees, agents, and representatives, and the State of New Mexico 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 the performance of this Agreement, caused by the negligent act or failure to act of Contractor, Contractor's officers, employees, servants, subcontractors, consultants, or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor, Contractor's officers, agents, employees, servants, consultants, or subcontractors thereof has or is performing services pursuant to this Agreement. In the event that any action, suit, or proceeding related to the services performed by Contractor or any officer, agent, employee, servant, or subcontractor under this Agreement is brought against the Contractor, Contractor's officers, employees, servants, subcontractors, consultants, or agents, shall, as soon as

practicable but no later than four days after it receives notice thereof, notify EMNRD's legal counsel, and the Risk Management Division of the New Mexico General Services Department by certified mail. Nothing in this Agreement shall be deemed to be a waiver by the State of New Mexico of the provisions of the Tort Claims Act, NMSA 1978, §§ 41-4-1 *et seq.*

**20. New Mexico Employees Health Coverage.**

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

B. Contractor agrees to maintain a record of the number of employees who have:

- 1) accepted health insurance;
- 2) declined health insurance due to other health insurance coverage already in place; or
- 3) declined health insurance for other reasons.

These records are subject to review and audit by a representative of the state.

C. Contractor agrees to advise all employees of the availability of state publicly financed health care coverage programs.

**21. Invalid Term or Condition.**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable, unless failing to give effect to such term or condition defeats the purpose of this Agreement.

**22. Enforcement of Agreement.**

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

**23. Notices.**

Except as otherwise specified herein, all notices hereunder shall be in writing (including, without limitation, notice by facsimile) and shall be given to the relevant party at its address or facsimile number set forth below, or such other address or facsimile number as such party may hereafter specify by notice to the other given by courier, by United States certified or registered mail, by facsimile, or by other telecommunication device capable of creating a written record of such notice and its receipt.

To EMNRD:

*[insert position title and address of project manager]*

General Counsel  
EMNRD – Office of the Secretary  
1220 S. St. Francis Drive  
Santa Fe, NM 87505

To the Contractor:

*[insert name, address and email]*

To Risk Management Division:

Risk Management Division  
General Services Department  
P.O. Drawer 26100  
Santa Fe, NM 87502-0110

**24. Authority.**

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

**25. Acknowledgement.** *(Option: Include in PSA if acknowledgement required. If not using this section, delete it and renumber successive sections accordingly. Delete this instruction.)*

Contractor shall acknowledge EMNRD and *[insert name of federal funding entity]* as a co-sponsor and funding source in all news releases, programs, proceedings, and related publicity/publications for the Project.

**26. Attorneys' Fees and Costs.**

Contractor agrees that if Contractor is found by a court of competent jurisdiction to have breached this Agreement, or any amendments hereto, or to have committed any tortious act relating to the scope of this Agreement, EMNRD may recover from Contractor reasonable attorneys' fees and costs in connection with pre-litigation enforcement efforts, litigation brought to obtain such judicial determination, or any appeal of such determination, and to collect any judgment.

**27. Minimum Wage Rate.**

If applicable, Contractor shall comply with minimum wage rates as established by the New Mexico Department of Workforce Solutions, Labor Relations Division, and with all other applicable requirements of that Department, including posting of the wage rates in a prominent location on the site of hiring for and performance of this Agreement.

**28. Compliance with Funding Source Conditions.**

Contractor shall comply with all applicable state and federal statutes and rules or regulations imposed as a consequence of funding pursuant to this Agreement.

*(Are you using federal funds for this Agreement? Depending on the funding source, you may be required to include the following. If not, delete this instruction and the inapplicable clauses.)*

Contractor shall also comply with the following clauses in the performance of this Agreement:

A. Compliance with use of Minority Business Enterprises (MBEs) and Women's Business Enterprises (WBEs) - Contractor shall take affirmative steps to assure that MBEs and WBEs are used when possible as sources of supplies and services. The affirmative steps shall include the following:

- 1) including qualified MBEs/WBEs on solicitation lists;
- 2) assuring that MBEs/WBEs are solicited once they are identified;
- 3) when economically feasible, dividing total requirements into smaller tasks or quantities so as to permit maximum MBE/WBE participation;
- 4) where feasible, establishing delivery schedules which will encourage MBE/WBE participation;
- 5) encouraging use of the services of the U.S. Department of Commerce's Minority Business Development Agency and the U.S. Small Business Administration to identify MBEs/WBEs, as required; and
- 6) if any subcontracts are to be let, requiring the subcontractor to take the affirmative steps listed above.

B. Compliance with Trafficking Victims Protection Act of 2000 - Contractor, Contractor's employees, subcontractors, and subcontractors' employees shall not:

- 1) engage in severe forms of trafficking in persons during this Agreement's term;
- 2) procure a commercial sex act during this Agreement's term; or
- 3) use forced labor in the performance of this Agreement.

C. Compliance with NMSA 1978, § 66-7-374, Texting While Driving - Contractor and Contractor's employees shall not read or view a text message or manually type on a handheld mobile communication device for any purpose while driving a motor vehicle in connection with this Agreement, except to summon medical or other emergency help, or unless that device is an amateur radio and the driver holds a valid amateur radio operator license issued by the Federal Communications Commission.

D. In the event this Agreement is funded with federal monies, Contractor shall comply with 2 C.F.R. Sections 200.318 through 200.326 for procurement conducted pursuant to this Agreement.

E. In the event this Agreement is funded with federal monies and Contractor wishes to enter into an agreement with a small business firm or non-profit organization regarding the substitution of parties, assignment, or performance of experimental, developmental, or research work under this Agreement, Contractor shall comply with the requirements of 37 C.F.R. Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements" and any implementing regulations issued by the **(insert name of federal funder)**.

F. Contractor shall not award subcontracts to parties listed on the government-wide exclusions in the federal System for Award Management (SAM), in accordance with OMB guidelines that implement federal Executive Orders 12549 (3 C.F.R. part 1986, Comp., p. 189) and 12689 (3 C.F.R. part 1989 Comp., p. 235), "Debarment and Suspension." SAM exclusions contain the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regularity authority other than Executive Order 12549.

G. If the value of this Agreement exceeds \$100,000, Contractor shall comply with the Byrd Anti-Lobbying Amendment (31 U.S.C. § 1352) regarding the limitations of use of appropriated funds to influence certain federal contracting and financial transactions.

H. If this Agreement is valued at more than \$150,000, Contractor shall comply with all applicable standards orders or requirements issued under the federal Clean Air Act (42 U.S.C. § 7401 *et seq.*); Clean Water Act (33 U.S.C. § 1251 *et seq.*); Executive Order 11738 (Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act With Respect to Federal Contracts, Grants, or Loans); and U.S. Environmental Protection Agency (EPA) regulations.

**29. Insurance.** *(Type of insurance required varies with nature of work performed. Will always require Workers' Compensation. Delete this instruction.)*

A. Contractor certifies that, by signing this Agreement, to have in place and agrees to maintain for this Agreement's term, the following policy or policies of insurance providing:

1) Workers' Compensation protection that complies with the requirements of the New Mexico Workers' Compensation Act, NMSA 1978, §§ 52-1-1 *et seq.*, if applicable. **Employer's liability: \$100,000.00.** If Contractor fails to comply with the Workers' Compensation Act and applicable rules when required to do so, EMNRD may terminate this Agreement.

2) Comprehensive general liability protection (including endorsements providing broad form property damage, personal injury coverage, and contractual assumption of liability for all liability Contractor has assumed under this Agreement or any amendment thereto), pursuant to NMSA 1978, § 41-4-19, as may be amended from time to time. Limits shall not be less than the following:

- a. bodily injury: \$1,000,000.00 per person/\$1,000,000.00 per occurrence;
- b. property damage or combined single limit coverage:

- c. \$1,000,000.00; automobile liability (including non-owned automobile coverage): \$1,000,000.00; and
- d. umbrella: \$1,000,000.00.

Such policy or policies shall name the State of New Mexico and EMNRD as additional insured and shall specifically state the coverage provide under the policy is primary over any other valid and collectible insurance and provide a waiver of subrogation.

3) Comprehensive performance liability protection covering contractual liability that may arise under this Agreement and any amendment hereto. Such policy or policies shall name the State of New Mexico and EMNRD as additional insured and shall specifically state the coverage provided under the policy is primary over any other valid and collectible insurance and provide a waiver of subrogation.

4) Professional liability insurance covering Contractor's negligent acts, errors, or omissions. **(For agreements with architects, engineers, lawyers, etc.)**

5) Medical malpractice liability insurance that complies with the Medical Malpractice Act, NMSA 1978, §§ 41-5-1, *et seq.* **(For agreements with medical providers who are required to have malpractice insurance.)**

6) General liability insurance sufficient to cover the claims which may fall under the Indemnification Paragraph of this Agreement. *(For agreements with medical providers who are not required to have malpractice insurance.)*

B. Contractor shall provide EMNRD with a copy of the insurance certificate within 10 days of Agreement effective date. At EMNRD's request, Contractor shall also provide EMNRD with a copy of the insurance policy, or relevant portions thereof. Contractor shall notify EMNRD 30 days before cancellation or expiration of any required Workers' Compensation or **(include the references to the types of insurance you are asking for)**

**IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of signature by the DFA Contracts Review Bureau below.**

**STATE OF NEW MEXICO, ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Cabinet Secretary or Designee

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Legal Counsel - Certifying legal sufficiency

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Chief Financial Officer

**CONTRACTOR NAME**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Authorized Representative Signature

\_\_\_\_\_  
Printed Name and Title  
This Agreement has been approved by the DFA Contracts Review Bureau

By: \_\_\_\_\_ Date: \_\_\_\_\_

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

**STATE OF NEW MEXICO  
TAXATION AND REVENUE  
DEPARTMENT**

I.D. No.: \_\_\_\_\_  
*(must be 11 digits long)*

By: \_\_\_\_\_

Date: \_\_\_\_\_