

**REQUEST FOR PROPOSALS
FOR CONCESSION
AT
ELEPHANT BUTTE LAKE STATE PARK**

A. Purpose

The New Mexico Energy, Minerals and Natural Resources Department (EMNRD), State Parks Division (Division), in accordance with 19.5.5 NMAC, Concession Activities, is requesting proposals to provide services at Elephant Butte Lake State Park (Park) in Sierra County for the purpose of operating and maintaining a full-service marina, store, and associated facilities (Facility). More than one contract may be awarded as a result of this Request for Proposals (RFP). No EMNRD funds are available for this RFP.

Pursuant to 19.5.5.10.N(1) NMAC, anyone submitting a proposal in connection with this RFP shall provide, with their proposal, proof of financing based on the appraisal of the existing concession facility. Offerors may obtain a copy of the existing appraisal by contacting James Hilderbrandt, Division Business Enterprise Coordinator, at (505) 476-3393, or James.Hilderbrandt@state.nm.us.

B. Park Information

The Park, a state-operated facility offering camping, boating, and other recreation activities in southwestern New Mexico, is the most-visited state park and one of the most popular fishing lakes in New Mexico. Visitation to the Park has averaged more than 900,000 visitors per year for the last two years.

The Division leases the Park from the U.S. Department of the Interior, Bureau of Reclamation (BOR). BOR must approve any concession contract that may result from this RFP and the successful Offeror must comply with BOR directives and standards.

The existing Facility is located at Rock Canyon. The Division anticipates that a Facility will remain in this location, unless conditions require moving to a new location. The successful Offeror shall not reside at the Facility.

C. Qualifications

The Division seeks an organization that meets the following qualifications to manage, and operate a Facility to include:

1. ability and experience to operate and maintain a Facility with some or all the following services: slip rentals, gas service, boat rentals and repairs, boat storage, personal water craft (PWC) rentals and repairs, and a store that provides boating and camping accessories. A portion of boat slips must be available to the general public for overnight rent or temporary use. Standard leases shall not exceed one year and shall be available on a first-come, first-served basis after notice of availability. Two-cycle motors are prohibited on all rental equipment;

2. ability to maintain the Facility grounds, parking area(s), and storage area(s) in accordance with the standards set by the Park and the Division, including removing weeds and trash and disposing of them in an authorized receptacle, to be provided by the successful Offeror;

3. ability to be solely responsible for maintaining the Facility through the term of the contract in accordance with applicable statutes, and rules and regulations, including those governing environmental matters, hazardous materials, and accessibility for persons with disabilities;

4. ability to obtain all necessary state and federal permits prior to commencing construction or modifications to the marina and related facilities;

5. ability to demonstrate and maintain a financial position that supports the development and operation of the marina and all other aspects of the Facility;

6. ability to operate a business that is a strong partner with the Park and Division, but is completely independent and separate from the Park and Division; and

7. ability to implement best practices for the operation of a “clean” marina (*i.e.* pollution prevention, energy efficiency, solid waste reduction, and visitor/customer education on issues related to the lake and marina operation).

D. Scope of Work

The successful Offeror shall provide a full-service, independently-operated Facility whose primary function is to provide a marina or associated facilities that provide attractive, well-operated services to visitors on Park premises not later than June 1, 2019.

E. Proposal Contents

The proposal shall contain the following elements and be organized as follows:

1. Cover letter that:
 - identifies the name, title, telephone and fax numbers, and e-mail address of the person authorized to negotiate a contract on behalf of the Offeror;
 - identifies the names, titles, telephone and fax numbers, and e-mail addresses of person(s) to be contacted for clarification;
 - explicitly indicates acceptance of the terms and conditions of this RFP and its evaluation factors;
 - acknowledges receipt of any and all amendments to this RFP;
 - if applicable, a statement that cites the specific exception to the Pay Equity Reporting Requirement under which the Offeror falls;

- is signed by the person authorized to contractually obligate the Offeror.
2. Proposal summary.
 3. The proposal shall be bound with tab dividers indicating the separately numbered paragraphs corresponding to the following numbers and information:
 - (1) Business plan for the proposed concession that identifies:
 - (a) the type of business;
 - (b) the Park in which the business will be located and the specific location of the business within the Park;
 - (c) services to be offered;
 - (d) proposed concession fee to be paid to the Division;
 - (e) the percentage mark-up of goods and services to be offered;
 - (f) a description of how the business will be operated;
 - (g) an assurance statement that the successful Offeror will follow all federal, state, and local statutes or ordinances and regulations or rules;
 - (h) a proposed maintenance schedule;
 - (i) a building and improvements schedule outlining any proposed capital improvements, including a plan for the financing of the capital improvements, if applicable;
 - (j) identification of all investors or potential investors; and
 - (k) a current financial statement.
 - (2) A market analysis that:
 - (a) defines the market area;
 - (b) identifies existing concessionaires and other similar ventures within the market area and an indication of their success;
 - (c) provides the results of any existing public demand survey; and
 - (d) estimates the beneficial economic impact to the Park and neighboring community.
 - (3) Plan for advertising and promoting the proposed concession and the park.
 - (4) Environmental evaluation of the effects of operating the proposed business that addresses: solid and liquid waste

generation/removal; air quality; water quality; and compliance with federal, state, and local environmental laws.

- (5) A cultural property evaluation that includes the identification and significance of cultural properties in the project area and outlines the project impact on cultural properties and proposed impact mitigation, which follows appropriate state or federal cultural property legislation, guidelines and standards, and is coordinated with appropriate federal and state agencies, including the New Mexico Department of Cultural Affairs, Historic Preservation Division. (A cultural resources inventory has been completed for the Facility's present location.)
- (6) Statement of the proposed terms and conditions related to revenue generated to the state and term of agreement.
- (7) Identification of all required permits from all other jurisdictional agencies and authorization or pre-approval, as required.
- (8) Description of Offeror's past business or other experience that demonstrates Offeror's ability to operate the concession.
- (9) Offeror's projected revenue (income) statement.

4. In addition, the proposal shall also contain:

- (1) a completed, signed Campaign Contribution Form (Attachment 1) -- Offeror shall complete, sign, and submit with Offeror's proposal response the Campaign Contribution Disclosure Form and disclose whether Offeror, a family member, or a representative of the Offeror has made a campaign contribution to an applicable public official during the two years prior to the RFP. Offeror shall complete the non-disclosure statement or make separate disclosures for all campaign contributions given by (1) the Offeror, (2) a family member, or (3) a representative of the Offeror;
- (2) a completed, signed Statement of Assurances Form (Attachment 2);
- (3) a statement acknowledging that the successful Offeror will require all slip and mooring customers to have their vessels properly registered;

- (4) a statement acknowledging that the successful Offeror will provide the Park with a listing of the names and contact information of all slip customers should the Park need to contact said customers;
- (5) a written plan that describes proposed environmental programs and “clean marina” practices (such as pollution prevention, energy efficiency, solid waste reduction, and visitor/customer education on issues related to the lake and marina operation);
- (6) a statement acknowledging the Offeror understands that the Park will meter water and electric usage and will bill the successful Offeror according to said usage; and
- (7) a list of business references, including contact information.

F. Proposal Evaluation

The Division shall rate proposals on the following criteria:

1. Business and Operational Plan (40 points)
 - A. Type of business and services to be offered.
 - B. How the business will be operated including hours, days, and months of operation.
 - C. Proposed capital improvements.
 - D. “Clean marina” plan.
 - E. Maintenance and safety plan based on the “Marina Safety Guidelines” by the National Water Safety Congress.
 - F. Market analysis including creative approaches for increasing collaboration/partnership among successful Offeror, the Division, friend’s groups, and communities.
 - G. Advertising and promotion plan.
 - H. Environmental evaluation.
2. Revenue and Fees (30 points)

Projected revenue and balance sheet, including concession fees to the Division.
3. Statement of Qualifications (30 points)
 - A. Ability/experience.
 - B. Permits and licenses.
 - C. Personnel (proposed staffing), organizational capacity, and experience in operating a marina.

- D. Current financial statement.
- E. Listing of proposed corporate principals (i.e., President, Vice President, Secretary, Treasurer, Board of Directors).

G. Contact Person and Proposal Deadlines

Offerors must provide one original and three identical copies of their proposal at the office listed below no later than 3 p.m., Mountain Time, April 20, 2018:

Kay Dunlap, Superintendent
Elephant Butte Lake State Park
101 Hwy 195, Elephant Butte, N.M., 87935

The Division shall not consider proposals received after the specified date and shall not accept faxed or e-mailed proposals.

H. Contract Terms

The Division may award a contract in accordance with the terms of the attached draft Concession Contract (Attachment 3) and this RFP. Any contract awarded shall not be effective until approved by the New Mexico Board of Finance.

J. Notices

Award of a contract is contingent upon sufficient appropriations and authorization being made by the State of New Mexico.

The Division may conduct discussions with Offerors who submit proposals determined to be reasonably susceptible of being selected for award, but may also select proposals without such discussions.

The Division may cancel this RFP and reject any and all proposals when it is in the state's best interest.

The 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

Statement of Assurances Form

Each Offeror MUST 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:

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.

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.

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.

Offeror acknowledges that in order to receive consideration, Offeror's proposal must be signed by an officer having the authority to bind Offeror.

Offeror agrees to comply with all relevant federal and state laws and regulations or rules.

New Mexico Employees Health Coverage:

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 Contract which may result from this RFP, Offeror agrees, by submitting a proposal, to have in place, and agrees to maintain for the Contract'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.

Offeror 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.

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

Employee Pay Equity Reporting –

A. Offeror agrees if it has 10 or more New Mexico employees OR eight or more employees in the same job classification, at any time during the term of any Contract which may result from this RFP, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for contracts up to one year in duration.

B. If Offeror has 250 or more employees, Offeror must complete and submit the PE250 form on

the annual anniversary of the initial report submittal for contracts up to one year in duration.

C. For contracts that extend beyond one calendar year, or are extended beyond one calendar year, Offeror also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within 30 days of the annual contract anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the contract, whichever comes first.

D. Should Offeror not meet the size requirement for reporting at contract award but subsequently grows such that Contractor meets or exceeds the size requirement for reporting, Offeror agrees to provide the required report within 90 days of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter.

E. Offeror also agrees to levy this requirement on any subcontractor(s) performing more than 10% of the dollar value of any Contract which may result from this RFP if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Offeror further agrees that, should one or more subcontractor not meet the size requirement for reporting at contract award but subsequently grows such that the subcontractor meets or exceeds the size requirement for reporting, Offeror shall submit the required report, for each such subcontractor, within 90 days of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal.

F. Offeror shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the applicable subcontractor(s) in accordance with the schedule contained in this section. Offeror acknowledges that this subcontractor requirement applies even though Offeror itself may not meet the size requirement for reporting and be required to report itself.

Additional Pay Equity Reporting Information

For the purposes of complying with the Pay Equity Reporting Information section above:

1. "Job Classification" means an arrangement of tasks in an establishment or industry into a limited series of jobs or occupations, rated in terms of skill, responsibility, experience, training, and similar considerations, usually for wage setting purposes. This term, or job class, refers to a single cluster of jobs of approximately equal "worth."

2. "New Mexico Employee" (also "Employee") means a person working within the State of New Mexico at a New Mexico facility, regardless where the employee legally resides, and regardless of the origin of compensation checks.

3. "PE10-249 form" means the reporting form to be used by contractors that meet or exceed the minimum size thresholds for reporting but have less than 250 New Mexico employees.

4. "PE250 form" means the reporting form to be used by contractors that have 250 or more New Mexico employees.

5. "Solicitation" means an Invitation to Bid or a Request for Proposals.

B. Report Submittal: Until further notice, successful Offeror shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined. The mailing address is: PO Box 6850, Santa Fe, NM, 87502-6850.

C. The successful Offeror shall not be required to report more frequently than annually unless more than 180 calendar days has elapsed since submittal of the last report and the contract has reached completion. The requirement for reporting at contract completion shall not apply in the case of a one-time fulfillment of a purchase order.

D. Exceptions to the Pay Equity Reporting Requirement:

1. Offerors with fewer than 10 employees are exempt, unless they have at least eight employees in the same job classification.

2. Offerors receiving a contract resulting from an emergency procurement are exempt, unless they hold other contracts that would already subject them to the requirement.

E. Offerors who are subject to the Pay Equity Reporting Requirement shall complete and sign the applicable pay equity form (PE 10-249 or PE250) and submit the form with their proposal. Offerors who fall within an exception to the Pay Equity Reporting Requirement shall include a statement in their transmittal letter that indicates they are exempt and cites the specific exception they fall under. (For specific information regarding pay equity requirements, visit http://gsd.sks.com/statepurchasing/Pay_Equity.aspx.)

Offeror Signature

Date:

Offeror's Printed Name and Title: _____

Attachment 2

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:

Contribution Made By:			
Relation to Prospective Contractor:			
Name of Applicable Public Official:		Governor _____	
Contribution(s) Date(s)	Contribution Amount(s):	Nature of Contribution(s):	Purpose of Contribution(s):
	\$		
	\$		
	\$		
	\$		
	\$		

(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 3
**ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
CONCESSION CONTRACT FOR
(INSERT PARK NAME) STATE PARK
WITH
(INSERT CONCESSIONAIRE NAME)**

NOTE:

Areas highlighted in yellow require a response/revision from Parks.

THIS CONCESSION CONTRACT (Contract) is between the New Mexico Energy, Minerals and Natural Resources Department (EMNRD) acting on behalf of the State Parks Division (Division), (insert park name) State Park (Park) and (insert Concessionaire name) (Concessionaire). The parties agree as follows:

1. Purpose

This Contract is entered into to provide for the grant of a Concession to Concessionaire for the purpose of operating a _____ on the Park premises (Premises) as described in Exhibit A.

2. General Conditions

A. Concessionaire agrees to comply with, bear the expense, if any, of all such compliance, and require its patrons, agents, and employees to comply with the following:

1) NMSA 1978, §§ 16-2-7, 16-2-9, 16-2-10, 16-2-18, 16-2-30, and 16-2-32, and NMSA 1978, § 6-8-10, as they may be amended, and 19.5.5 NMAC, as may be amended;

2) Lease Contract, Contract No. _____, dated _____, between EMNRD or its predecessor agency and the _____ (_____) as may be amended, terminated, or superseded by the parties thereto;

3) all applicable laws and rules or regulations and executive orders as may, from time to time, be issued by EMNRD, the Division, the State of New Mexico, political subdivisions, or the federal government including _____, including without limitation, all civil rights laws governing employment and public accommodations, including 19.5.5 NMAC and all non-discrimination laws, as they may be amended from time to time; and

4) marina operation and maintenance standards as specified by the National Water Safety Congress in the "Guidelines for the Safe Operation and Maintenance of Marinas", 2001, as may be amended from time to time.

B. The Owner, President, or Chairman of the Board of Directors of Concessionaire shall act as liaison with the Division, through the Park Superintendent.

C. The Division and the Concessionaire shall maintain a distinct separation between Concession and Park operations.

D. Concessionaire's customers entering the Park shall be subject to all appropriate permits and corresponding fees.

E. Concessionaire shall not reside at the Facility.

3. Definitions

For purposes of this Contract, the following definitions shall apply:

A. "Advertising" means the favorable and appropriate attraction of public attention to Concessionaire, the Park, EMNRD, or the Division.

B. "Approval" means a written statement signed by the person designated pursuant to the terms of this Contract.

C. "Concession" means commercial activity as authorized in writing by EMNRD conducted within a park.

D. "Concessionaire" is the entity selected under the Request for Concession Proposals issued by the Division on [REDACTED] to operate and maintain a [REDACTED] on the Premises, pursuant to all statutes and rules or regulations, including 19.5.5 NMAC, governing EMNRD and the Division. Concessionaire is a private corporation duly incorporated in New Mexico. Concessionaire is a private entity and is separate, distinct, and independent from EMNRD and the Division.

E. "Division Business Enterprise Coordinator" means a Division employee who maintains all records and documentation concerning Concession contracts and Concession permits.

F. "Net Receipts from Sales and Services" means the total amount of receipts from sales and services (Gross Receipts), less the amount of gross receipts taxes (GRT). Therefore, Gross Receipts minus GRT equals net receipts from sales and services.

G. "Premises" means the location of the Concession area addressed in this Contract, associated improvements, facilities, and any additions thereto as described in Exhibit A by means of a legal description or a map. [REDACTED] owns the land underlying the Premises. All marina facilities, exclusive of marina tenants' property, and the structures on the land within the Premises are owned by Concessionaire and are subject to the Termination Section E below, and the Alterations and Improvement Section, A-C, below.

H. "Receipts" means consideration in money and in trade received from sales and charges for services. Monies from sale of company non-inventoried assets such as vehicles, boats, and capital improvements shall be excluded from Receipts. Receipts also excludes the proceeds received from the sale of licenses for any governmental agency, including but not limited to fishing licenses; and monies received for the pass through of expenses to slip holders and other customers of Concessionaire such as for electric service.

I. "Sales and Services" means transactions by the Concessionaire, or Concessionaire's agents or employees, for which Concessionaire receives consideration in money or money's worth in connection with the Concession business operated pursuant to this Contract.

J. "Secretary" means the EMNRD Cabinet Secretary.

K. "Superintendent" means a Division employee who is in charge of a specific park or parks. For purposes of this Contract, this means the Superintendent in charge of _____ State Park.

4. Term

A. This Contract shall not become effective until approved by the New Mexico Board of Finance. This Contract shall expire at midnight on (insert date), a term of _____ years.

B. _____ will not stand in stead for EMNRD or the Division should the Lease Contract, Contract No. _____, expire or be terminated. At _____'s discretion, _____ may issue a new Concession contract that is in compliance with its policies and directives and standards. If the underlying Lease between _____ and EMNRD expires or is terminated, this Contract shall terminate at the same time.

5. Termination

A. Concessionaire may terminate this Contract with 180-day advance written notice to the Division.

B. The Division may terminate this Contract for convenience or cause, or as specified below. Except for termination pursuant to this Termination Section **B(4), B(5) and B(6) below**, the Concessionaire may request review of a Division action by the Secretary or respond to the notice in writing within 15 calendar days after termination.

1) **Noncompliance** - The Division may terminate this Contract for noncompliance with the Contract terms after sending Concessionaire a notice of proposed termination identifying the areas of noncompliance. The notice shall provide that Concessionaire may request review by the Secretary of the Division's proposal to terminate by responding in writing to the proposal to terminate within 15 calendar days after the notice of the proposed termination's receipt. The notice shall provide that proposed termination shall be effective 30 calendar days after Concessionaire's receipt of the notice if Concessionaire does not request review.

2) **Emergency** – If non-compliance with Contract terms creates a life-endangering situation, the Division may immediately terminate this Contract.

3) **Bankruptcy** - The Division may terminate this Contract after 30 days written notice to Concessionaire if Concessionaire files for bankruptcy or similar pleading under any bankruptcy or insolvency statute.

4) **Public Safety and Limitation of Expenditures** – The Division may terminate this Contract after notice to Concessionaire as provided in the Public Safety Section, below, and in the Limitation of State and Federal Expenditures Section, below.

5) **Termination of Underlying Agreements** – The Division may terminate this Contract after 30 days written notice to Concessionaire if the Division's lease or other agreement with _____ terminates.

6) **Suspension of Business License** – The Division may terminate this Contract after 30 days written notice to Concessionaire on account of Concessionaire's disqualification, revocation, or suspension to do business in the State of New Mexico, or carry on any essential portion of operations under this Contract, provided, however, that Concessionaire shall have the right to remedy such reason for suspension within the 30 day period and upon such remedy the Contract will remain in force and shall not terminate.

C. Review by the Secretary shall consist of an informal oral response or a written response, or both, by Concessionaire in which Concessionaire may present justification, facts, etc. that support continuing the Concession's operation. If Concessionaire requests review of a decision, EMNRD shall meet with Concessionaire within 15 calendar days following the request for review. The Secretary may designate an EMNRD employee, but not an employee of the Division, to hear Concessionaire's response and make recommendations to the Secretary.

D. The Secretary shall consider Concessionaire's written or oral response. The Secretary shall send a final notice to Concessionaire either affirming or withdrawing the decision within 15 calendar days after the written response's receipt or within 15 calendar days after the oral response. The Secretary's decision shall be final and is not subject to further review or appeal within EMNRD.

E. If upon the expiration or termination of this Contract, there is not an incoming Concessionaire, within 120 calendar days after expiration or termination Concessionaire shall remove the personal property and any permanent improvements the Division has directed the Concessionaire to remove from the Premises at Concessionaire's own costs and Concessionaire shall restore the Premises to a safe and natural condition after removing permanent improvements that the Division has not authorized Concessionaire to leave in place. Any personal property on the Premises 121 days or such other time period as mutually agreed to after termination of this Contract may, at the Division's discretion, either become the Division's property, or the Division may take action to compel the Concessionaire to remove the personal property. The Division shall inform the Concessionaire of its decision in writing within 10 days after the time for removal has expired.

F. _____ reserves the right to terminate, for cause, this Contract.

6. Use of Premises

A. Concessionaire shall occupy and use the Premises specifically to _____.

B. Long-term exclusive use or unauthorized extended period use of slips, mooring lines, or boat storage is not allowed and shall be considered a material breach of this Contract for which _____, or the Division may seek monetary damages and other legal relief, including, without limitation, termination of this Contract. "Long-term use" means a period lasting longer than one year. "Exclusive use" is any use which excludes other appropriate public recreational use or users for extended periods of time.

C. Concessionaire shall remove weeds and trash on the Premises and dispose in authorized receptacles.

D. Concessionaire shall be solely responsible for maintaining the Premises through the term of the Contract in accordance with all applicable local, state and federal laws, rules and regulations, including without limitation requirements and those governing activities with potential environmental impacts; use, storage and disposal of hazardous materials, including, but not limited to pesticides, herbicides, sewage effluents, petroleum products and liquid waste (gray water); and accessibility for persons with disabilities.

E. The Concession operation is coupled with a right of ingress and egress for the Concessionaire and its employees. This right of ingress and egress is limited to the reasonable use of said right by the Concessionaire for the purpose of normal operations of the Facility and is geographically limited to the use of the [REDACTED] occupied by the Facility. Concessionaire shall make use of authorized trash receptacles which are located [REDACTED] in the Facility.

F. If Concessionaire seeks to amend the Contract provisions or to renegotiate the Contract in order to expand services beyond those authorized by the Contract, Concessionaire shall comply with 19.5.5.8 NMAC.

G. Rates and prices charged for all services and materials shall be reasonable and customary for the market. All rates and prices must be approved by the Division.

H. Concessionaire shall submit a proposed schedule of hours and months of Concession operations to the Superintendent prior to commencement of operations pursuant to this Contract and by January 15 of each year. The Superintendent shall approve or disapprove the proposed schedule in writing, stating the reasons for disapproval. If the plan is disapproved, Concessionaire shall resubmit a proposed schedule within 10 days of receipt of notice of disapproval of the proposed plan. An approved schedule shall constitute the required hours and months of operations. No operations may continue 20 days after a schedule is disapproved.

I. Concessionaire's manner of operations, the level of services, and the general conduct of the business shall at all times be lawful and reasonable. Concessionaire is responsible for controlling conduct at the Premises of its employees, volunteers, agents, and patrons to avoid unlawful behavior and for contacting the appropriate officials (*i.e.* Division, sheriff's office, State Police, or fire/emergency medical services) to obtain assistance with controlling unlawful behavior at the Premises. Concessionaire shall provide courteous service to the general public and not limit service to a particular individual or group.

J. Concessionaire agrees to commence operations as soon as practicable after the effective date of this Contract, with necessary Approvals, permits, business license, insurance (as specified below in the Insurance Section), and financial assurance (as specified below in the Financial Assurance Section) in place. Concessionaire shall continue such operations until this Contract's expiration pursuant to the Term Section, above, or this Contract's termination pursuant to the Termination Section, above. Except for strikes, boycotts, and conditions over which Concessionaire has no control or with the Superintendent's prior written approval or direction, Concessionaire shall conduct operations during required hours and months of operation.

K. Concessionaire shall comply with all applicable federal statutes and regulations, state statutes and rules, and county or municipal ordinances regarding food sanitation.

L. The sale of personal property other than the approved concession inventory is prohibited on the federal estate. No party will be allowed to sell personal property, including but not

limited to vehicles, manufactured or mobile homes, house trailers, travel trailers, boats or personal watercraft on the federal estate.

7. Alterations and Improvements

A. Concessionaire shall not make any material alterations or improvements to the Premises without _____'s review and Approval and the Superintendent's prior Approval.

B. All designs and construction must comply with all applicable federal, state, and local environmental and historic preservation statutes, rules, regulations, and building code requirements. Where required and before construction, building permits must be obtained from local authorities by Concessionaire. Concessionaire shall deliver copies of said permits to the Superintendent. All facilities will be harmonious in form, line, color, and texture with the surrounding landscape.

C. Upon expiration or termination of this Contract, any incoming Concessionaire shall purchase the permanent improvements owned by the Concessionaire that have been placed on the Concession Premises with the EMNRD Secretary's or Designee's prior Approval. Sale of improvements and personal property shall be at appraised value and conducted as follows. The current Concessionaire shall at Concessionaire's own expense provide an appraisal conducted by a licensed independent appraiser six months prior to expiration of this Contract. Any person submitting a Concession proposal pursuant to 19.5.5.8 NMAC, for an existing Concession where such appraised improvements exist, shall provide, with his or her proposal, proof of financing based on the appraisal. Upon award, the incoming Concessionaire may accept the appraisal or at the incoming Concessionaire's expense conduct a second appraisal. If neither appraisal is acceptable to both the prior Concessionaire and the incoming Concessionaire a third appraiser acceptable to both may be sought. The third appraisal shall be binding on both the prior Concessionaire and incoming Concessionaire.

D. No financial obligation or risk will reside in the federal government or EMNRD for reimbursement for fixed assets or personal property as a result of this Contract. No reimbursement of fixed assets will be awarded to the Concessionaire. Interests in Concessionaire's fixed assets may not extend beyond the terms of the underlying lease agreement between EMNRD and _____.

8. Concession Fee

A. Concessionaire shall pay to the Division a monthly Concession fee calculated as follows:

1) _____ for fuel sales, Concessionaire shall remit a fee of _____ cents for every gallon of gas and oil sold;

2) _____ on Net Receipts exclusive of fuel and oil sales, a Concession fee of _____% for the first five years of this Contract; and

3) _____ on new Receipts exclusive of fuel and oil sales, a Concession fee of _____% beginning in the sixth year of this Contract and continuing through this Contract's term.

B. Concessionaire shall submit the Concession fee and a monthly report detailing Net

Receipts from Sales and Services on a form provided by the Division to the Division Business Enterprise Coordinator. The Concession fee and monthly report shall be received by the Division Business Enterprise Coordinator no later than 5 p.m. on the 25th day of the month after the reporting month, unless the 25th falls on a Saturday, Sunday, or state-recognized holiday, in which case the Concession fee and monthly report shall be received not later than 5 p.m. of the next business day. Concessionaire's failure to submit the Concession fee and monthly report shall result in a penalty fee of 10 percent of the Concession fee for the month that is late or \$50.00, whichever is greater. Late payments in excess of 120 days, or three consecutive months of late payments may also result in termination of this Contract.

C. The Division may authorize Concessionaire, in writing, offsets that are repairs or improvements to public property of facilities and of direct benefit to the Division and the general public. All proposed projects shall have prior written approval by the Division. Within 20 days of the date of the written approval, Concessionaire shall submit a detailed plan to the Superintendent for performance of the approved offset project. The project will be completed within a time period designated by the Division. Thereafter payment shall resume as set forth within this Section. Failure to complete the project authorized by the offset shall result in the total off set amounts being remitted to the Division. Approved offset amounts shall be documented with paid invoices and other supporting documentation proving that those amounts were actually expended by Concessionaire.

9. Construction Activities

A. Concessionaire **anticipates/does not anticipate** construction of new capital improvements during the original term of this Contract. If Concessionaire undertakes capital improvements to publicly-owned property, those improvements shall be consistent with the Park management and development plan and Concessionaire shall obtain the Division's, and if applicable the landowner's, prior approval for the improvements.

B. Concessionaire shall comply with all appropriate local, state, and federal statutes and shall comply with current applicable environmental rules or regulations and building code requirements, including those for accessibility, historical preservation, and cultural properties protection. Concessionaire shall obtain all applicable permits prior to the start of construction and provide copies to the Superintendent.

10. Concessionaire's Records

A. Concessionaire shall furnish the Division Business Enterprise Coordinator annually and within 10 days after expiration or termination of this Contract and within 60 days prior to any assignment, transfer, or subcontract pursuant to the Assignment, Transfer, and Subcontract Section, below, the following reports certified as correct by a Certified Public Accountant:

- 1) a report of all Gross Receipts from Concessionaire's operations under this Contract;
- 2) a balance sheet showing fiscal conditions on the last day of the report period; and
- 3) a statement of cash flow covering operations for the report period.

B. Concessionaire shall establish and maintain a system for record keeping that uses generally accepted accounting principles. Concessionaire shall submit a year-end financial statement from a New Mexico independent certified public accountant that includes an income statement, balance sheet and statement of cash flows no later than 90 calendar days after the end of the Concession fiscal year to the Division Business Enterprise Coordinator. The level of certified public accountant assurance certification required pursuant to the Concessionaire's Records Section A, below, may be an audit, review, or compilation of the financial statements. The Division shall consider the amount of the Concessionaire's gross receipts from sales and services and length of term of the Contract when determining the level of certification required, and shall inform the Concessionaire of the level 30 days after the end of each Division fiscal year.

C. EMNRD, the Division, the Department of Finance and Administration, the State Treasurer, the State Auditor, _____, and any of their duly authorized representatives shall have access to and may examine and audit all pertinent books, documents, papers, and other records of Concessionaire involving this Contract during the term of this Contract and until the expiration of three years after Concessionaire's final Concession fee payment to the Division. Concessionaire shall make such records available upon demand during usual business hours at the Premises or at the Division office in Santa Fe. Such records include but are not limited to financial, employer, and equipment records.

11. Maintenance and Repair

Concessionaire shall properly maintain Concession facilities and real property the Concessionaire intends to use in operating the Concession and capital improvements Concessionaire makes to the Premises. Concessionaire shall complete maintenance with due diligence, in a commercially reasonable manner, so as to ensure visitors' health, safety and welfare. Concessionaire shall prepare an annual operation and maintenance plan that shall include _____, and which requires the Superintendent's approval. The Superintendent shall submit a copy of the approved operation and maintenance plan to the Division Business Enterprise Coordinator. The approved operations and maintenance plan shall become part of the file the Division Business Enterprise Coordinator.

12. Annual Review and Evaluation

_____, along with the Division, and Concessionaire will conduct an annual Concession operation review and evaluation. _____ and the Division may also conduct unplanned reviews, as necessary. If a review identifies operational or administrative deficiencies in the operation of the Concession, a timetable will be established to correct these deficiencies.

13. Reserved Rights

A. This Contract is subject to limitations applicable federal and state agencies place on the Division. The Division reserves the right to install park facilities and utilities and to use the Park for authorized purposes. The Division reserves the right to close the Park or Concessionaire's operations for reasonable law enforcement or safety purposes.

B. Concessionaire is subject, with prior notice, to Division or _____ inspection of the Premises for public safety and health reasons and to monitor compliance with the Contract and operation and maintenance plan. Concessionaires shall always maintain a safe and

healthy environment for the public and Concessionaire's employees. If applicable, the landowner from which the Division leases the land or reservoir may inspect the Premises.

C. The Division or _____ has the right to close down the Concession at any time without prior notice in order to protect the safety and health of the Park, visitors, and staff.

D. At its option and expense, the Division may make its own alterations, additions, or improvements in connection with any plans submitted by Concessionaire involving the Premises for the use and benefit of the general public.

E. Concessionaire is subject to any limitations placed on the Division by any agency having legal authority to do so.

F. All Concession operations are subject to the rights of _____ and its agents to use the subject lands and waters for project purposes, when needed.

G. Concessionaire shall not be entitled to compensation, reimbursement, or damages whatsoever caused by any interruption or interference with Concessionaire operations due to acts of _____, the State of New Mexico, EMNRD, or the Division and their officers, agents, or employees, including closure of Concession operations for reasonable law enforcement, public health, funding, staffing or safety purposes, or suspension of operations due to the lack of appropriation or authorization by the New Mexico Legislature as provided for in the Limitation of State Expenditure Section, below.

14. Insurance

A. Concessionaire shall have liability insurance naming the State of New Mexico, EMNRD, and the Division, and _____ from which the Division leases the land or _____, as additional insured and that specifically states the coverage provide under the policy is primary over any other valid and collectible insurance and provides a waiver of subrogation.co-insured, and indemnifying the State of New Mexico, EMNRD, the Division, and _____ for public liability, personal injury, and property damage in amount equal to or greater than the liability limits set forth in NMSA 1978, Section 41-4-19, as it may be amended from time to time along with worker's compensation insurance, if applicable, prior to taking control of the Premises. Concessionaire's liability insurance policy shall acknowledge that the insurance company has no right of subrogation against the United States.

B. Prior to commencing operations under this Contract, and 30 days prior to each renewal of an insurance contract, Concessionaire shall provide _____ and the Division Business Enterprise Coordinator with one copy of each insurance contract indicating that said insurance is or shall be in effect.

15. New Mexico Employees Health Coverage

A. If Concessionaire 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 this Contract, Concessionaire certifies, by signing this Contract, to have in place, and agree to maintain for this Contract'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 Concessionaire and the state exceed \$250,000.

B. Concessionaire 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. Concessionaire agrees to advise all employees of the availability of state publicly-financed health care coverage programs.

16. Employee Pay Equity Reporting

A. Concessionaire agrees if it has 10 or more New Mexico employees OR eight or more employees in the same job classification, at any time during the term of this contract, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for contracts up to one year in duration.

B. If Concessionaire has 250 or more employees, Concessionaire must complete and submit the PE250 form on the annual anniversary of the initial report submittal for contracts up to one year in duration.

C. For contracts that extend beyond one calendar year, or are extended beyond one calendar year, Concessionaire also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within 30 days of the annual contract anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the contract, whichever comes first.

D. Should Concessionaire not meet the size requirement for reporting at contract award but subsequently grows such that Concessionaire meets or exceeds the size requirement for reporting, Concessionaire agrees to provide the required report within 90 days of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter.

E. Concessionaire also agrees to levy this requirement on any subcontractor(s) performing more than 10% of the dollar value of this Contract if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Concessionaire further agrees that, should one or more subcontractor not meet the size

requirement for reporting at contract award but subsequently grows such that they meet the subcontractor meets or exceeds the size requirement for reporting, Concessionaire shall submit the required report, for each such subcontractor, within 90 days of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal.

F. Concessionaire shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the applicable subcontractor(s) in accordance with the schedule contained in this Section. Concessionaire acknowledges that this subcontractor requirement applies even though Concessionaire itself may not meet the size requirement for reporting and be required to report itself.

G. Notwithstanding the foregoing, if this Contract was procured pursuant to a solicitation, and if Concessionaire has already submitted the required report accompanying Concessionaire's response to such solicitation, the report does not need to be re-submitted with this Contract.

17. Additional Pay Equity Reporting Information

A. For the purposes of complying with the Employee Pay Equity Reporting Section above:

1) "Job Classification" means an arrangement of tasks in an establishment or industry into a limited series of jobs or occupations, rated in terms of skill, responsibility, experience, training, and similar considerations, usually for wage setting purposes. This term, or job class, refers to a single cluster of jobs of approximately equal "worth".

2) "New Mexico Employee" (also Employee) means a person working within the State of New Mexico at a New Mexico facility, regardless where the employee legally resides, and regardless of the origin of compensation checks.

3) "PE10-249 form" means the reporting form to be used by contractors that meet or exceed the minimum size thresholds for reporting but have less than 250 New Mexico employees.

4) "PE250 form" means the reporting form to be used by contractors that have 250 or more New Mexico employees.

5) "Solicitation" means an Invitation to Bid or a Request for Proposals.

B. Contractors with fewer than 10 employees are exempt, unless they have at least eight employees in the same job classification.

18. Federal Minimum Wage

A. *Executive Order 13658*. This Contract is subject to federal Executive Order 13658 (Executive Order), the regulations issued by the Secretary of Labor in 29 C.F.R. part 10 pursuant to the Executive Order, and the following provisions.

B. *Minimum Wages.*

1) Each worker (as defined in 29 C.F.R. 10.2) engaged in the performance of this Contract by Concessionaire or any subcontractor, regardless of any contractual relationship which may be alleged to exist between Concessionaire and worker, shall be paid not less than the applicable minimum wage under Executive Order 13658.

2) The minimum wage required to be paid to each worker performing work on or in connection with this Contract between January 1, 2015 and December 31, 2015 shall be \$10.10 per hour. The minimum wage shall be adjusted each time the Secretary of Labor's annual determination of the applicable minimum wage under section 2(a)(ii) of Executive Order 13658 results in a higher minimum wage. Adjustments to the Executive Order minimum wage under section 2(a)(ii) of Executive Order 13658 shall be effective for all workers subject to the Executive Order beginning January 1 of the following year. If appropriate, EMNRD shall ensure Concessionaire is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 13658 minimum wage beginning on January 1, 2016. The Secretary of Labor will publish annual determinations in the FEDERAL REGISTER no later than 90 days before such new wage is to take effect. The Secretary will also publish the applicable minimum wage on www.wdol.gov (or any successor web site). The applicable published minimum wage is incorporated by reference into this Contract.

3) The Concessionaire shall pay unconditionally to each worker all wages due free and clear and without subsequent deduction (except as otherwise provided by 29 C.F.R. 10.23), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Executive Order may not be of any duration longer than semi-monthly.

4) Concessionaire and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements. In the event of any violation of the minimum wage obligation of this clause, the Concessionaire and any subcontractor(s) responsible therefore shall be liable for the unpaid wages.

5) If the commensurate wage rate paid to a worker on a covered contract whose wages are calculated pursuant to a special certificate issued under 29 U.S.C. 214(c), whether hourly or piece rate, is less than the Executive Order minimum wage, the Concessionaire must pay the Executive Order minimum wage rate to achieve compliance with the Order. If the commensurate wage due under the certificate is greater than the Executive Order minimum wage, the Concessionaire must pay the 14(c) worker the greater commensurate wage.

C. *Withholding.* EMNRD shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from Concessionaire under this or any other federal contract with the same Concessionaire, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by Executive Order 13658.

D. *Contract Suspension/Contract Termination/Contractor Debarment.* In the event of a failure to pay any worker all or part of the wages due under Executive Order 13658 or 29 C.F.R. part 10, or a failure to comply with any other term or condition of Executive Order 13658 or 29 C.F.R. part 10, EMNRD may on its own action or after authorization or by direction of the

Department of Labor and written notification to the Concessionaire, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the federal government may enter into other contracts or arrangements for completion of the work, charging the Concessionaire in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 C.F.R. 10.52.

E. Concessionaire may not discharge any part of its minimum wage obligation under Executive Order 13658 by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, or the cash equivalent thereof.

F. Nothing herein shall relieve the Concessionaire of any other obligation under federal, state or local law, or under contract, for the payment of a higher wage to any worker, nor shall a lower prevailing wage under any such federal, state, or local law, or under contract, entitle Concessionaire to pay less than \$10.10 (or the minimum wage as established each January thereafter) to any worker.

G. *Payroll Records.*

1) Concessionaire shall make and maintain for three years records containing the information specified in paragraphs G.1) (i) through (vi) of this section for each worker and shall make the records available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

- (i) name, address, and Social Security number;
- (ii) worker's occupation(s) or classification(s);
- (iii) rate or rates of wages paid;
- (iv) number of daily and weekly hours worked by each worker;
- (v) any deductions made; and
- (vi) total wages paid.

(2) Concessionaire shall also make available a copy of the Contract, as applicable, for inspection or transcription by authorized representatives of the Wage and Hour Division.

3) Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of 29 C.F.R. part 10 and this Contract, and in the case of failure to produce such records, EMNRD, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment or advance of funds until such time as the violations are discontinued.

4) Concessionaire shall permit authorized representatives of the Wage and Hour Division to conduct investigations, including interviewing workers at the worksite during normal working hours.

5) Nothing in this clause limits or otherwise modifies the contractor's payroll and recordkeeping obligations, if any, under the Davis-Bacon Act, as amended, and its implementing regulations; the Service Contract Act, as amended, and its implementing

regulations; the Fair Labor Standards Act, as amended, and its implementing regulations; or any other applicable law.

H. Concessionaire ("contractor" as defined in 29 C.F.R .10.2) shall insert this clause in all of its covered subcontracts and shall require its subcontractors to include this clause in any covered lower-tier subcontracts. Concessionaire and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with this Contract clause.

I. *Certification of Eligibility.*

1) By entering into this Contract, the Concessionaire (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has an interest in Concessionaire's firm is a person or firm ineligible to be awarded government contracts by virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 C.F.R. 5.12(a)(1).

2) No part of this Contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to receive federal contracts.

3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

J. *Tipped employees.* In paying wages to a tipped employee as defined in section 3(t) of the Fair Labor Standards Act, 29 U.S.C. 203(t), the Concessionaire may take a partial credit against the wage payment obligation (tip credit) to the extent permitted under section 3(a) of Executive Order 13658. In order to take such a tip credit, the employee must receive an amount of tips at least equal to the amount of the credit taken; where the tipped employee does not receive sufficient tips to equal the amount of the tip credit the contractor must increase the cash wage paid for the workweek so that the amount of cash wage paid and the tips received by the employee equal the applicable minimum wage under Executive Order 13658. To utilize this proviso:

1) the employer must inform the tipped employee in advance of the use of the tip credit;

2) the employer must inform the tipped employee of the amount of cash wage that will be paid and the additional amount by which the employee's wages will be considered increased on account of the tip credit;

3) the employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received); and

4) the employer must be able to show by records that the tipped employee receives at least the applicable Executive Order minimum wage through the combination of direct wages and tip credit.

K. *Antiretaliation.* It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or

instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or 29 C.F.R. part 10, or has testified or is about to testify in any such proceeding.

L. *Disputes concerning labor standards.* Disputes related to the application of Executive Order 13658 to this Contract shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 C.F.R. part 10. Disputes within the meaning of this contract clause include disputes between the Concessionaire (or any of its subcontractors) and EMNRD, the U.S. Department of Labor, or the workers or their representatives.

M. *Notice.* Concessionaire must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. With respect to service employees on contracts covered by the Service Contract Act and laborers and mechanics on contracts covered by the Davis-Bacon Act, Concessionaire may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the Concessionaire must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by workers. Concessionaires that customarily post notices to workers electronically may post the notice electronically provided such electronic posting is displayed prominently on any web site that is maintained by the Concessionaire, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

N. Concessionaire shall include this clause in any subcontracts it issues based on this Contract.

19. Indemnification

Concessionaire shall defend, indemnify, and hold harmless [REDACTED], EMNRD, and the Division and their 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 that may arise out of this Contract's performance, caused by the negligent or intentional act or failure to act of Concessionaire, its officers, employees, servants, subcontractors, consultants, clients, or agents, or if caused by the actions of any client of Concessionaire resulting in injury or damage to persons or property during the time when Concessionaire, its officers, agents, employees, servants, subcontractors, or consultants thereof has or is performing services pursuant to this Contract. In the event that any action, suit, or proceeding related to the services performed by Concessionaire, its officers, agents, employees, servants, subcontractors, clients, or consultants under this Contract is brought against Concessionaire, or any of its officers, agents, employees, servants, subcontractors or consultants, Concessionaire shall, as soon as practicable but no later than two days after it receives notice thereof, notify the Division's legal counsel and the Risk Management Division of the New Mexico General Services Department by certified mail. Nothing in this Contract 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.* Nothing in this Contract shall be deemed to be a waiver by [REDACTED] of the Federal Tort Claims Act, 28 U.S.C. § 1-4105 or any other applicable law.

20. Financial Assurance

Prior to taking control of the Premises, Concessionaire shall have the greater of:

A. financial assurance satisfactory to the Division conditioned upon the faithful performance of the Contract in a minimum amount of 10 percent of the gross receipts from Sales and Services for the prior year; or

B. financial assurance satisfactory to the Division conditioned upon the faithful performance of the Contract in a minimum amount of \$5,000 annually, by performance bond or irrevocable letter of credit; if the receipts are anticipated to be less than \$50,000, the Division shall consider the Concession's size and nature and may reduce the financial assurance amount.

21. Utilities and Services

A. The Division furnishes no electricity, water, gas, telephone, sewer, or other utilities to Concessionaire by virtue of this Contract, except as provided in this Utilities and Services Section C. below, and Concessionaire agrees to make separate arrangements with the Division and _____ or others for such utilities as may be required in connection with Concessionaire's use and occupancy of the Premises.

B. Concessionaire shall dispose of solid and liquid waste in proper disposal areas as directed by the Division and applicable state and federal rules and regulations. In the event Concessionaire constructs improvements, pursuant to the Construction Activities Section above, Concessionaire shall be responsible for the disposal of all construction waste at a proper location outside the Park boundary and shall not dispose of such waste using Division disposal facilities.

C. The Division shall provide water and sewer services to Concession using existing systems. However, should those systems fail or be inadequate, or should water or sewer services become unavailable through existing systems, the Division's obligations under this Utilities and Services Section C shall cease. In that event, the Division shall not be responsible for procuring water or sewer services or providing them to the Concession. Concessionaire understands and acknowledges that the Park will meter water and electric usage and shall invoice Concessionaire according to said usage. Concessionaire shall pay the Division for water and electricity used by Concessionaire and its customers.

D. Within six months of the effective date of this Contract, Concessionaire shall submit to the Division a plan for improved environmental management and stewardship and that implements environmental sustainability principles and practices in all aspects of the Concession. This plan shall include strategies and practices that will conserve energy and natural resources, improve energy efficiency, increase use of renewable energy, reduce emissions of greenhouse gases, minimize solid waste generation, minimize air and water pollution, protect lake water quality, and increase public awareness and knowledge about environmental topics that are connect to the marina. The Division shall review the draft plan and a final plan shall be agreed to by Concessionaire and the Division by _____.

22. Advertising and Signs

A. Concessionaire's Advertising within the Park shall be subject to the Division's and _____'s prior Approval. Approvals shall become a part of the file maintained by the Division Business Enterprise Coordinator. Advertising through any media, including the Internet, shall acknowledge that the Premises are within _____ State Park. Printed information using EMNRD, Division, Park, or _____ logos or name requires prior Approval from the Division or

_____. Concessionaire's Advertising outside of the Park shall not be subject to the Division's and _____'s prior approval if EMNRD, Division, Park and _____ logos or name are not used.

B. The _____ logo or name, along with the Division logo and name, shall be displayed at all Concession entrances used by the public. _____ shall approve outdoor signs or other Advertising on the federal estate before they are displayed.

23. Amendments

A. This Contract shall not be amended except by written instrument executed by the parties, reviewed and approved by _____, and approved by the New Mexico Board of Finance.

B. Either the Division or Concessionaire may request to amend or renegotiate this Contract at any time during the Contract term. Concessionaire shall make such request in writing to the Superintendent, with a copy to the Division Business Enterprise Coordinator. Within 30 calendar days of receipt of such request, the Division will either notify Concessionaire of its decision to schedule a meeting with Concessionaire to negotiate the Contract. If Concessionaire seeks to amend the Contract provisions or to renegotiate the Contract in order to expand services beyond those authorize by this Contract, Concessionaire shall comply with 19.5.5.8 NMAC. Concessionaire shall also submit a copy of a request for amendment to the Division Business Enterprise Coordinator.

24. Assignment, Transfer, and Subcontract

A. Concessionaire shall not transfer, sell, subcontract, encumber, assign, extend, renew, assign management responsibilities, exchange Concession business or property or assign rights this Contract grants, without the Secretary's prior Approval. In addition, the above transactions may also require the approval of the New Mexico Board of Finance and the appropriate federal or state agency. Subcontracts are subject to the concession contract's terms and provisions. Documentary evidence for such a transfer shall include:

1) the names, addresses, and interest to be owned by each new individual, business entity, or stockholder thereof; and

2) if the assignee is a corporation, the names, addresses, and positions of the officers of the corporation, including but not limited to, the President, Vice-President, and Secretary or Treasurer.

B. The Secretary may choose not to approve a transfer, sale, subcontract, encumbrance, assignment, extension, renewal, assignment of management responsibilities, exchange of Concession business or property, or an assignment of rights that this Contract grants at the Secretary's discretion, or may place appropriate conditions on approval, including modification of this Contract's terms and conditions as a condition of approval. The Secretary shall not unreasonably withhold a sale or transfer or place unreasonable conditions or modifications on this Contract as a condition of approval.

C. Concessionaire shall submit a proposed subcontract to the Park Superintendent, who shall attach a forwarding letter with recommendations concerning the proposed subcontracting to the Division Business Enterprise Coordinator. The Division may request additional information from

Concessionaire as necessary for the subcontract's review and evaluation. The Division shall notify Concessionaire after the proposed subcontract's receipt of the Division's decision to approve or reject the subcontract. Concessionaire shall submit the subcontract for Approval at least 90 calendar days prior to the subcontract's intended effective date to allow for Approval by the New Mexico Board of Finance and _____, if applicable.

D. If the Division does not approve Concessionaire's request for transfer, sale, subcontract, or any other transaction requiring Approval as set forth in Subsection A of 19.5.5.12 NMAC, Concessionaire may request review by the Secretary or respond in writing within 15 calendar days after receipt of notice that the Division did not approve the transfer, sale, subcontract, or other transaction.

E. Review by the Secretary shall consist of an informal oral response by Concessionaire in which Concessionaire may present justification, facts, etc. that support the transfer, sale, subcontract or any other transaction requiring Approval. If Concessionaire requests review of a decision, EMNRD shall meet with Concessionaire within 15 calendar days following the request. The Secretary may designate an employee of EMNRD, but not of the Division, to hear Concessionaire's response.

F. The Secretary shall consider Concessionaire's written or oral response. The Secretary shall send a final notice to Concessionaire either affirming or withdrawing the decision within 15 calendar days after the written response's receipt or within 15 calendar days after the oral response. The Secretary's decision shall be final and is not subject to further review or appeal within EMNRD.

G. No transfer of rights in the personal property owned by Concessionaire shall affect the Division's rights and authorities to and over the Premises.

25. The Division's Liens

If Concessionaire fails to provide funds to the Division as specified in the Concession Fee Section, above, any monies lawfully owed to the Division by Concessionaire, a lien in favor of the Division shall attach to all assets and property of Concessionaire located on the Premises and shall continue in effect until Concessionaire pays all debts owed to the Division. Liens under this Contract shall be filed and enforced as provided by law.

26. 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:

Business Enterprise Coordinator
EMNRD, State Parks Division
1220 S. St. Francis Dr.
Santa Fe, New Mexico, 87505

Fax: (505) 476-3361

Assistant General Counsel
EMNRD – Office of the Secretary
1220 S. St. Francis Drive
Santa Fe, NM 87505
Fax: (505) 476-3220

To Concessionaire:

(insert contact information)

To Risk Management Division:

Risk Management Division
General Services Department
P.O. Drawer 26100
Santa Fe, NM 87502-0110
Fax: (505) 827-2108

Either party may change its designated notice address by giving written notice of such change at least 10 days before the change is effective.

27. Taxes

In addition to its Concession fee payments to EMNRD set forth at the Concession Fee Section, above, Concessionaire shall promptly pay all taxes, levies, and assessments as may be lawfully imposed upon its improvements and operations by any federal, state, county, or other lawful authority. Concessionaire shall certify to the Division Business Enterprise Coordinator prior to the assignment, expiration, or termination of this Contract, that all federal, state, and county taxes, assessments, and levies have been fully paid, or exempted pursuant to NMSA 1978, § 7-2-4, or NMSA 1978, § 7-9-1 *et seq.*

28. Rights Not Exclusive

The Division grants a non-exclusive right to Concessionaire to conduct operations in the Purposes of this Contract Section, above, within the Park.

29. Officials Not to Benefit

No employee nor agent of _____, the Division, EMNRD, the State of New Mexico or its political subdivisions shall have or acquire any financial benefit, interest (directly or indirectly), or employment in or from the operation that is the subject of this Contract.

30. Non-Waiver of Defaults

The failure of the Division to take any action with respect to any breach or default by Concessionaire under this Contract shall not constitute a waiver of any other breach or default.

31. Non-Discrimination

A. Concessionaire and its employees and agents shall not discriminate on the basis of race, religion, color, national origin, ancestry, sex, age, physical or mental impairment, or serious medical condition, spousal affiliation, sexual orientation, or gender identity against any person by refusing to furnish such person any accommodation, facility, service, or privilege offered to or enjoyed by the general public. Concessionaire shall not publicize its accommodations, facilities, services, or privileges in any manner that would directly or inferentially reflect upon or question the acceptability of the patronage of any person because of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation, or gender identity.

B. Concessionaire shall not discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, sex, age, physical or mental impairment, or serious medical condition, spousal affiliation, sexual orientation, or gender identity. Concessionaire shall take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, religion, color, national origin, ancestry, sex, age, physical or mental impairment, or serious medical condition, spousal affiliation, sexual orientation, or gender identity. Concessionaire's employment practices shall include, but not be limited to the following: hiring, upgrading, demotion, transfer, recruitment, recruitment advertising, layoff, termination, rates of pay and other compensation, and selection for training, including apprenticeship. Concessionaire agrees to post in conspicuous places available to employees and applicants for employment notices to be provided by the Division, which set forth the provisions of this non-discrimination clause.

C. Concessionaire shall, in all solicitations and advertisements for employees, state that all qualified applicants shall receive consideration for employment without regard to race, religion, color, national origin, ancestry, sex, age, physical or mental impairment, or serious medical condition, spousal affiliation, sexual orientation, or gender identity.

D. In the event of Concessionaire non-compliance with this Section or with any of the referenced rules, regulations, or orders, Concessionaire may be declared ineligible for further government contracts; and other sanctions may be imposed and remedies invoked as authorized by law.

E. Concessionaire shall include the provisions of this Section in every approved subcontract, assignment, or sale agreement so that such provisions shall be binding upon Concessionaire successors in interest.

32. Integration

This Contract contains the entire understanding between the parties and there are no other enforceable understandings, representations, or warranties not set forth in this Contract.

33. Public Safety

In the event any improvement, building, structure, or equipment under this Contract is found by federal, state, or local governmental authorities to be unsafe or dangerous to the public or nonconforming to applicable federal, state, and local building, electrical, plumbing, mechanical,

health, safety, or fire codes, Concessionaire shall remedy all deficiencies noted within the time specified by the Division and shall make such improvements as may be required at its own expense. If the Division finds a building, improvement, structure, or equipment to be dangerous or unsafe, Concessionaire shall cease to use such until they are no longer deemed dangerous or unsafe. Concessionaire shall remedy such deficiencies or receive a written waiver of such deficiency from the appropriate authority within 10 days after the Division provides written notice, or within a time otherwise mutually agreed in writing.

Concessionaires are further responsible for developing, implementing, and administering health, safety, and educational programs to ensure that Concessions areas are managed in compliance with federal, state, and local laws, rules, and regulations designed to protect the safety of concession employees and the public. In the event that such programming is found to be deficient in meeting federal, state and local laws, rules and regulations, Concessionaire shall remedy all deficiencies noted within the time specified by the Division or the entity directly responsible for such regulation, or be in breach of this Agreement.

34. Status of Concessionaire

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

35. Limitation of State and Federal Expenditures

The terms of this Contract are contingent upon sufficient appropriations and authorization being made by the New Mexico Legislature and United States Congress for the performance of this Contract. If the Legislature or Congress does not make sufficient appropriations and authorization, this Contract shall terminate upon written notice being given by the Division to Concessionaire. The Division's and [redacted]'s decision as to whether sufficient appropriations are available shall be final, binding, and accepted by Concessionaire.

IN WITNESS WHEREOF, the parties hereto have herein below executed this Contract.

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

By: _____
Cabinet Secretary or Designee

Date: _____

CONCESSIONAIRE NAME

By: _____ Date: _____
Authorized Representative Signature

Printed Name and Title

NEW MEXICO BOARD OF FINANCE

By: _____ Date: _____

(As applicable, replace with name of land management agency for the particular park)

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION

By: _____ Date: _____