

NATURAL HERITAGE CONSERVATION ACT PROGRAM APPLICATION
ISSUED BY THE STATE OF NEW MEXICO,
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT, FORESTRY
DIVISION
FOR STATE AGENCIES, STATE PUBLIC EDUCATIONAL INSTITUTIONS, NATIONS,
TRIBES, PUEBLOS, AND POLITICAL SUBDIVISIONS OF THE STATE

PROGRAM OVERVIEW

The State of New Mexico, Energy, Minerals and Natural Resources Department (EMNRD), Forestry Division (Forestry Division) is seeking applications from state agencies, public educational institutions, political subdivisions of the state, or nations, tribes, or pueblos for conservation projects under the Natural Heritage Conservation Act (NHCA) Program. Tax-exempt private nonprofit charitable corporations or trusts may partner with qualified entities on proposals but may not apply for this funding directly.

This Request for Applications (RFA) is directed to qualified entities that meet the criteria below:

1. a state agency; a state educational institution named in Article 12, Section 11 of the New Mexico Constitution; a political subdivision of the state; or for conservation projects wholly within New Mexico, an Indian tribe or pueblo; or
2. a qualified entity that is partnered with a conservation entity. A qualified conservation entity must be a private nonprofit charitable corporation or trust, authorized to do business in New Mexico, that has tax-exempt status as a public charity pursuant to the Internal Revenue Code of 1986, and that has the power to acquire, hold or maintain land or interests in land. A qualified conservation entity must be identified in the application.

Grant funding focuses primarily on conservation projects and associated transactional costs for conservation and agricultural easement projects such as appraisals, title insurance, title opinions, surveys, or environmental reviews up to three percent of the total value of the conservation project funded or 10 percent of the amount of the grant, whichever is less. While the primary purpose of NHCA is land conservation, funding may also be requested for land restoration projects.

NHCA grant funding is a reimbursement grant under which the qualified entity will be reimbursed for actual costs incurred in the performance of approved project activities.

The Land of Enchantment Legacy Fund (state funds) is funding the NHCA and available for projects beginning in FY25. This funding can further integrate numerous conservation plans, strategies, and initiatives that are already in place in New Mexico.

SCOPE OF WORK

Successful Applicants shall:

1. for conservation projects involving acquisition of a conservation easement or agricultural easement:
 - A. acquire an appraisal that establishes the fair market value of the conservation or agricultural easement and meets United States treasury regulations and the uniform standards of professional appraisal practice;
 - B. provide, as specified by the Forestry Division, documents including:
 - i. a title commitment;
 - ii. phase I environmental site assessment and, if needed based on phase I environmental site assessment, a phase II environmental site assessment;
 - iii. a title opinion certifying that the landowner owns the mineral rights or a report, satisfactory to the Forestry Division, from a professional geologist that the probability of surface mining occurring on such property is so remote as to be negligible;
 - iv. if deemed necessary by the Forestry Division, a property boundary survey;
 - v. if the landowner owns the mineral rights, an easement shall prohibit subsequent sale or development of mineral rights by the landowner granting the conservation or agricultural easement; and
 - vi. a baseline documentation report of the property with the deed of conservation easement or agricultural easement in the office of the applicable county clerk;
 - C. provide easements that contain a provision that if an Applicant, other than Forestry Division, or a partner conservation entity fails to enforce the easement as determined by a court or if either the Applicant or conservation entity cease to exist, that:
 - i. the easement will go to another qualified entity, or otherwise the easement shall become vested in Forestry Division as recommended by EMNRD and other extant easement right holders; and
 - ii. any Applicant's interest in an easement shall only go to another governmental entity. EMNRD shall have the option to provide similar rights of enforcement or possession to other governmental entities (e.g. federal

partners) where such partners have similar rules, regulations or requirements and demonstrated capacity to manage or enforce easements.

2. for conservation projects that are the joint acquisition of a conservation easement or agricultural easement by an Applicant and a conservation entity and are funded in part with a grant to an Applicant:
 - A. the Applicant and conservation entity shall hold title to the conservation easement or agricultural easement as cotenants having undivided interests in proportion to each entity's share of the acquisition;
 - B. the conservation entity shall acquire no less than 10 percent of the easement as a percentage of the appraised easement value and may do so through cash or in-kind contributions to the total project value not paid by a qualified entity:
 - i. if an in-kind contribution, no portion of that contribution shall be comprised of the portion of a donation by a landowner for which the landowner has been previously compensated through a state tax incentive or credit, but nothing in this provision shall diminish the ability for any landowner to be eligible to apply for any state tax incentive or credit;
 - C. the conservation entity, as part of the Applicant's application, shall submit a plan for the conservation and stewardship of the lands for which the conservation entity and the Applicant are responsible. The plan shall comply with the purposes of the NHCA and shall specifically identify the entity responsible for ongoing monitoring and stewardship;
 - D. when a conservation entity has partnered with an Applicant on a land restoration project that is funded in part with a grant to an Applicant:
 - i. the conservation entity shall provide at least 10 percent of the cost of the conservation project and may do so, all or in part, through cash or in-kind contributions to the total project cost not paid by a qualified entity;
 - ii. the Applicant shall submit a plan for management of the lands for which the conservation entity is responsible;
 - iii. a conservation entity partner may prepare the management plan. The management plan shall comply with the purposes of the NHCA and shall

specifically identify the entity responsible for ongoing management, stewardship, and monitoring;

E. monitoring reporting requirements:

- i. Applicants shall submit annual reports, by December 1 each year, to the Forestry Division for 10 years after:
 - a. the date of the acquisition of the conservation or agricultural easement; or
 - b. the date of a grant agreement for a land restoration project; or
 - c. unless a longer or shorter monitoring period is mutually agreed in writing among Forestry Division and the Applicant;
- ii. on joint public-private conservation projects, the Applicant may delegate this requirement to a conservation entity:
 - a. the designated responsible Applicant or conservation entity shall document easement monitoring activities in perpetuity and keep all documentation available for review by the Forestry Division at any time; and
 - b. annual reporting and perpetual documentation shall describe the subject property's management by the landowner and include the details of the qualified entity's and any partner conservation entity's stewardship and monitoring activities;
- iii. for land restoration projects, the report shall:
 - a. provide at least a qualitative assessment of the degree to which the project has accomplished or is accomplishing the objectives specified in the land restoration project application and grant agreements;
 - b. monitoring involves assessment of a conservation project for indications that the pre-specified objectives and intent are being met or that trends are in that direction; there is no requirement for scientific-based, cause-effect research and data collection unless such efforts are specifically made a part of the project agreement at the outset or in subsequent amendments of the agreement; and

- c. the Applicant or any designated partner entity shall collect sufficient baseline information during the first year of the project such that subsequent monitoring and description of change can be accomplished.

ADDITIONAL NOTICES

1. Where applicable, Applicants must factor in Governmental Gross Receipts Tax (GGRT) as part of their responses. Any response that does not clearly indicate GGRT is included in the cost section may be deemed non-responsive and rejected.
2. The Forestry Division may reject applications when it is in the State of New Mexico's best interest.
3. The Forestry Division may conduct discussions with Applicants who submit applications but may also accept applications without such discussions.
4. This program does not reimburse indirect costs. The Forestry Division shall not allow more than 10% in administrative costs.
5. Grant funds cannot be used to purchase capital equipment costing more than \$5,000.00 but may be used to rent equipment.
6. The last funded project may receive only partial funding if the Forestry Division lacks sufficient monies to fully-fund that project. Project contacts will be notified by the Forestry Division Program Manager before any partial funding is approved.
7. Applicants will be evaluated based on Attachment 1, Natural Heritage Conservation Act Program Application Evaluation Criteria.
8. Applicants shall complete and sign Attachment 2, Statement of Assurances, as part of their application.
9. The Forestry Division may award multiple contracts under the terms of Attachment 3, Governmental Services Agreement, Attachment 4, Professional Service Agreement and Attachment 5 Purchase Agreement in accordance with this Request for Applications (RFA).

SUBMISSION AND REVIEW

Applicants must submit their applications on the Forestry Division's Submittable webpage using this link: <https://emnrd-sfd.submittable.com/submit>.

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

Applications are reviewed according to available funds and program demand and the Natural Lands Protection Committee (NLPC) will evaluate and categorize applications according to Attachment 1. The latest information on expected review timelines is updated on the Forestry Division's webpage,

here: <http://www.emnrd.state.nm.us/SFD/RFPs/RFPMain.html>.

Attachment 1
NATURAL HERITAGE CONSERVATION ACT PROGRAM APPLICATION EVALUATION
CRITERIA

No.	Evaluation Criteria	Points
1.	The degree to which the conservation project serves the purpose of the Natural Heritage Conservation Act.	1-4
2.	The extent of cash and in-kind matching financial support for the conservation project from sources other than the state, in context with the amount of funding requested and available overall.	1-4
3.	The Applicant's and partner's technical qualifications and its ability to complete and maintain the proposed conservation project.	1-4
4.	The degree to which the conservation project fosters and integrates with existing conservation plans, strategies, and initiatives specified in cycle announcement.	1-4
5.	The potential for benefits at the landscape and ecosystem scale.	1-4
6.	The potential for improved public access to outdoor recreation opportunities on or off project site.	1-4
7.	The potential economic benefits, including direct commerce and ecosystem services, of the completed conservation project.	1-4
8.	Complementary or strategic values through proximity to other ongoing or completed conservation actions, priorities, or projects, including any priority areas formally identified by NLPC.	1-4
9.	The degree of conservation project readiness to start and complete project on timely schedule.	1-4
10.	The degree and extent of partner involvement.	1-4
11.	The likelihood that the conservation project as proposed will have long-term success in achieving its purposes and will have sustainability, including involvement of land dedicated to conservation purposes and an explicit monitoring plan.	1-4
	Maximum possible points	44

Factor	Level 4	Level 3	Level 2	Level 1
Serves purposes of the Natural Heritage Conservation Act	Clearly serves all purposes	Clearly serves multiple purposes	Clearly serves one purpose and may serve others	Questionable if any purposes are adequately served
Extent of matching cash and in-kind financial support	Applicant/Partner provide more than 75% of project costs	Applicant/Partner provide 50 to 75% of project costs	Applicant/Partner provide 25 to 49% of project costs	Applicant/Partner provide less than 25% of project costs
Qualifications and ability of applicant and partners to complete and maintain proposed project	Substantial past experience and continuing capability to do proposed work and follow-up	Demonstrated completions of similar work and is fully structured to do similar work	Demonstrates some past ability and basic documented qualifications and infrastructure	Indicates uncertain capability or has no prior experience and necessary infrastructure
Degree of fostering existing conservation plans, strategies and initiatives (PSIs) specified in the cycle announcement	Project has substantial relation to most PSIs and directly fosters several	Project clearly fosters multiple PSIs and directly relates to several	Project has clear relation to one PSI and possible service to others	Project has uncertain relation to any PSIs or no clear degree of fostering

Factor	Level 4	Level 3	Level 2	Level 1
Potential for benefits at landscape or ecosystem scale	Substantial landscape and ecological scale benefits are evident in completed work	Substantial landscape or ecological scale benefits are evident in completed work	Desired scale benefits are evident, but are judged minimal	No clear benefits are evident at desired scale
Potential for improved public access to outdoor recreation opportunities on or off project site	Multiple enhanced recreation opportunities are evident, including hunting and fishing	Some enhanced outdoor recreation opportunities are evident and have prospect for growth	Some enhanced outdoor recreation opportunities are evident but are limited	Proposal has no discernible outdoor recreation elements
Potential economic benefits of completed project	Project has multiple economic benefits at multiple scales	Project has some economic benefits locally and broader	Project shows economic benefits, at least locally	Project has no discernible economic benefits
Complementary or strategic values through proximity to other ongoing or completed conservation actions, including any priority areas formally identified by the committee	Project is within a priority area or directly links to nearby completed or ongoing conservation actions and provides added heritage values	Project is within a priority area but has limited relationship to other conservation actions that will provide synergistic heritage values	Project is not within a priority area but has proximity to other actions that may provide synergy or economy of scale or cost effectiveness	Project has no proximity to other conservation endeavors and is not otherwise distinctive as a starting point
Degree of readiness to start and complete project on timely schedule	Readiness and time schedule are clear and background work is complete; timely execution is essentially assured	Readiness and time schedule are clear and reasonable to the project, but could experience some delay	Readiness and time schedule are clear, but have acknowledged or likely delays inconsistent with the nature of the project	Readiness and completion scheduling is unspecified, unclear or uncertain
Degree and extent of partner involvement	Multiple entity project where reasonable partnering is included with clear and substantive involvement and contribution	Multiple entity project where reasonable partnering is included beyond minimal but is not extensive	Single or multiple entity project where partnering is included, but is minimal	Single entity project with no partner involvement when such partnership is possible and advised
Likely long-term success and sustainability	Project is well-described and accomplishable with substantive provisions for sustained maintenance and routine outcome assurance	Project is well-described and accomplishable with basic provisions for sustained maintenance and periodic outcome assessment	Project is inherently achievable but contains limited provisions for maintenance over the long-term	Project appears basically achievable, but long-term outcome is questionable or uncertain

Attachment 2
STATEMENT OF ASSURANCES FORM

<p>Each Applicant MUST complete this form and return it with Applicant's proposal or EMNRD will deem the proposal as non-responsive. By signing this form below, Applicant acknowledges and agrees to the following:</p>	
<p>This RFA 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 Applicant in developing a proposal response shall be borne solely by the Applicant. Applicant understands that that Applicant's proposal shall become part of the official file on this matter without obligation to the State. Issuance of this RFA does not constitute an award commitment on the part of the State.</p>	
<p>Applicant shall examine all contract documents, noting particularly all stipulations that in any way affect contract work. Failure of an Applicant 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>Applicant represents and warrants to the State that Applicant has the staff, facilities, and competence to furnish the required services. The State may investigate Applicant's adequacy of the staff, facilities, and competence. For this purpose, representatives of the State may inspect Applicant's facilities, equipment, etc., and interview staff.</p>	
<p>To receive consideration, Applicant's proposal must be signed by an officer having the authority to bind Applicant.</p>	
<p>Applicant agrees to comply with all relevant federal and state laws and regulations or rules.</p>	
<div style="display: flex; justify-content: space-between;"><div style="width: 60%; border-top: 1px solid black; margin-top: 10px;">Applicant Signature</div><div style="width: 35%; border-top: 1px solid black; margin-top: 10px;">Date:</div></div>	
<p>Applicant's Printed Name and Title: _____</p>	

Attachment 3

STATE OF NEW MEXICO,
GOVERNMENTAL SERVICES AGREEMENT
BETWEEN THE
STATE OF NEW MEXICO,
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
AND
ENTITY

THIS GOVERNMENTAL SERVICES AGREEMENT (Agreement) is made and entered into by and between the State of New Mexico, Energy, Minerals and Natural Resources Department (EMNRD) and (Insert Entity name. Remove this instruction.) (Entity).

THE PARTIES MUTUALLY AGREE:

1. Scope of Work: Entity shall:

(Insert description of work. Remove this instruction.)

Entity shall also provide brief written progress reports to EMNRD on a (*weekly, bi-weekly, monthly, quarterly, annual, with each request for payment/reimbursement or some other time frame*) basis. (All contracts must have reporting requirements, or the program manager must justify the lack of reports in a written memo to the file for auditing purposes.)

2. Compensation: (For paragraph A, select option 1, 2, 3, or 4)

Option 1: Work Product. If you choose this option, remove this Option 1 heading and remove the optional Paragraph As below.

A. EMNRD shall pay Entity for services satisfactorily performed pursuant to the Scope of Work and as specified below. This amount shall not exceed _____ (\$ _____), including New Mexico governmental gross receipts taxes, and any travel (Note: If you pay travel, the amount needs to be set out as a separate deliverable), if necessary, pursuant to Paragraphs B and C 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. Remove this instruction)

This amount is a maximum and not a guarantee that the work assigned to be performed by Entity under this Agreement shall equal the amount stated herein or the amounts state per task. The parties do not intend for the Entity to continue to provide services without compensation when the total compensation amount is reached. Entity is responsible for notifying EMNRD when the services provided under this Agreement reach the total compensation amount. In no event shall the Entity be paid for services provided exceeding the total compensation amount without this Agreement being amended in writing prior to those services exceeding the total compensation amount being provided. 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 SHALL NOT BE PAID.

Option 2: Lump Sum Amount Upon Completion of All Work. If you choose this option, remove Paragraph B of this Compensation Section as well and re-letter successive paragraphs accordingly. Remove the paragraph above it. Remove this Option 2 heading.

A. Upon satisfactory completion of services, EMNRD shall pay Entity for services satisfactorily performed pursuant to the Scope of Work in an amount not to exceed _____ (\$ _____), which amount includes New Mexico governmental gross receipts taxes, and any travel, if necessary, pursuant to Paragraphs B and C of this Compensation Section. In no event shall the Entity be paid for services provided exceeding the total compensation amount without this Agreement being amended in writing prior to those services exceeding the total compensation amount being provided. 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 SHALL NOT BE PAID.

Option 3: Time and Materials. If you choose this option, remove this Option 3 heading and the paragraphs above it.

A. EMNRD shall pay Entity for services rendered and amount not to exceed _____ (\$ _____) per (hour, day, week, month), such compensation not to exceed _____ (\$ _____) in total, which amount includes gross receipts taxes and travel as shown in Paragraphs B and C of this Compensation Section. EMNRD shall reimburse Entity for the cost of materials necessary under this Agreement for an amount not to exceed _____ (\$ _____). This amount is a maximum and not a guarantee that the work assigned to Entity under this Agreement to be performed shall equal the amount stated herein. 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 SHALL NOT BE PAID. Payment shall not relieve the Entity of any unperformed obligations under the Scope of Work.

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

C. Entity shall be responsible for paying New Mexico Governmental Gross Receipts taxes levied on amounts payable under this Agreement.

D. Entity must submit detailed invoices accounting for all services performed, and expenses incurred. Invoices evidencing the propriety of each claim for payment must be supported by approved purchase order. (When compensation is based on hourly rates, Entity shall also provide documentation of hours expended on the services provided.) If EMNRD finds that the invoice services, or expenses are not acceptable, within 30 days of receipt of written notice from Entity that payment is requested for services received, EMNRD shall provide Entity a letter of exception explaining the defect or objection to the invoice, services, or expenses, and outlining steps Entity may take to provide remedial action. Upon certification by EMNRD that the invoice, services, or expenses have been received and accepted, EMNRD shall tender payment to Entity 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.

Option 4: Advance of Funds. If you choose this option, remove all the previous choices. Remove this Option 4 heading.

A. Within XX days following this Agreement's effective date, EMNRD shall transfer to Entity _____ (\$ _____), which shall include New Mexico Governmental Gross Receipts Taxes, for completion of the Tasks described in the Scope of Work above. Payment shall not relieve Entity of any unperformed obligations under the Scope of Work.

B. Upon expiration or termination of this Agreement, if either party has property or funds in its possession belonging to the other, it shall return the property or funds in proportion to the parties' original contribution.

C. Entity shall be responsible for paying New Mexico Governmental Gross Receipts taxes levied on amounts payable under this Agreement, if applicable.

3. Term: This Agreement becomes effective when executed by an authorized representative of Entity and of EMNRD. It shall terminate on (Insert date) unless earlier terminated pursuant to Section 4, Termination, or Section 5, Appropriations, below.

4. Termination: Either party may terminate this Agreement upon written notice delivered to the other at least 10 days prior to the intended termination date. By such termination, neither party may nullify or avoid any obligation required to have been performed prior to termination.

5. Appropriations: This Agreement's terms are contingent upon the New Mexico State Legislature (option - and insert name of federal funding agency) granting sufficient appropriation and authorization. If sufficient appropriation or authorization is not granted, EMNRD may terminate this Agreement, or in the alternative suspend performance pending approval of sufficient appropriation or authorization, upon written notice from EMNRD to Entity. EMNRD's decision as to whether sufficient appropriations are available shall be at its sole and absolute discretion and shall be final, binding, and accepted by Entity.

Option: If Entity is another state agency, revise this section to reflect Entity is not an EMNRD employee. Remove this instruction.)

6. Status of Entity: Entity and its agents and employees are independent contractors performing professional services for EMNRD and are not employees of the State of New Mexico. Entity 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. Entity agrees not to purport to bind the State of New Mexico unless the Entity has express written authority to do so, and then only within the strict limits of that written authority.

7. Assignment: Entity 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: Entity shall not subcontract any portion of the services to be

performed under this Agreement or obligate itself in any manner to any third party, with respect to any rights or responsibilities under this Agreement, without EMNRD's prior written approval. EMNRD may disallow costs incurred by the Entity in relation to a subcontract if Entity does not obtain prior written approval.

Option: Include A and B you are using federal funds for the work of this contract.
Remove this instruction.

A. Entity shall comply with 2 C.F.R. 200.317 through 200.327 for procurement of property or services conducted pursuant to this Agreement.

B. Any contract shall include all provisions necessary to allow Entity to meet its obligations and requirements under this Agreement and all provisions required by law.

Option: Include subparagraph below if subcontractor will be reimbursed for travel expenses.
Remove instruction.

C. Travel expense reimbursement requested for subcontractors, if applicable, shall be reimbursed in accordance with rates established in the Per Diem and Mileage Act, NMSA 1978, Section 10-8-1 *et seq.*, as implemented by the current DFA Rule and EMNRD Travel Policy.

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

11. Product of Services; Copyright: All materials developed or acquired by Entity under this Agreement shall become the State of New Mexico's property and be delivered to EMNRD no later than this Agreement's expiration date. Nothing Entity produces, in whole or in part, under this Agreement shall be the subject of a copyright application or other claim of ownership by or on behalf of Entity.

12. Conflict of Interest; Governmental Conduct Act: Entity warrants that it presently has no interest and that it shall not acquire any interest, direct or indirect, which would conflict in any manner with performance or other services required under this Agreement. Entity certifies that all applicable provisions of the requirements of the Governmental Conduct Act, NMSA 1978, Sections 10-16-1 through -18, including provisions related to contracting with, or employing, public officers, legislators, state employees, or former state employees, have been followed.

13. Amendment: This Agreement shall not be altered, changed, or amended except by written instrument executed and approved by the parties hereto.

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, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless as embodied in this Agreement.

15. Penalties for Violation of Law: 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.

16. Equal Opportunity Compliance: Entity agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Entity 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 Entity is found not to be in compliance with these requirements during the life of this Agreement, Entity 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, Section 38-3-1(G). By execution of this Agreement, Entity 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 any term of this Agreement.

18. Records and Audit:

A. Entity 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 until six years after the termination date specified in Section 3, Term. These records shall be maintained and available within the State of New Mexico. During this time, such records shall be subject to inspection by EMNRD, DFA, and the State Auditor (and insert name of federal funding agency). Entity 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. 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 related to this Agreement for which exception is under consideration by insert name of federal funding agency or any authorized representative) and shall continue until all potential litigation, appeals, claims, or exceptions have expired or been resolved.

Option: Are you using federal funds to pay for this contract? If yes, you must determine whether your provider is a subrecipient or a contractor. If you determine your provider is a subrecipient, you need to include the following paragraph in your contract. If you determine your provider is a contractor, the requirements do not apply and you will remove this this paragraph. Delete this instruction.

B. If Entity receives \$750,000 or more in federal funding from all sources in the aggregate in a fiscal year, Entity's financial records involving services and procurement under this Agreement shall be audited annually pursuant to all federal, state, and local government audit requirements, and in accordance with the Single Audit Act Amendments of 1996, 2 C.F.R. 200, Subpart F – Audit Requirements. Entities who do not meet the \$750,000 audit threshold (Tier 7), must complete the State of New Mexico – Office of the State Auditor Certification Form

for Tier 1 and Tier 2, or the Office of the State Auditor Agreed Upon Procedures (Tiers 3-6) in accordance with the Audit Act, NMSA 1978, Sections 12-6-1 through 12-6-14, and 2.2.2.16 NMAC, Annual Financial Procedures Required for Local Public Bodies with Annual Revenues Less than Five Hundred Thousand Dollars. To comply with state audit requirements, Entities shall have one of the above-mentioned Forms or Agreed Upon Procedures on file with the Office of the State Auditor. Entity shall provide EMNRD with a copy of the independent financial audit, either in hard copy format or electronically, no more than 45 days after the audit's completion for each fiscal year this Agreement is in effect.

19. Liability: Neither party shall be responsible for liability incurred as a result of the other party's acts or omissions in connection with this Agreement. Any liability incurred with this Agreement is subject to the immunities and limitations of the Tort Claims Act, NMSA 1978, Sections 41-4-1 *et seq.*, as amended.

20. Procurement, Utilization, and Disposition of Property: Entity shall report acquisition of any capital property (property with an expected life of at least one year) to EMNRD within one month following the acquisition. If upon termination of this Agreement Entity has any property in its possession belonging to EMNRD, Entity shall account for the property and dispose of it as EMNRD directs. (Option: If federal funding is involved include the following statement. Otherwise remove it and this instruction) All property acquired by the Entity or procured under this Agreement shall be used and disposed of in accordance with [insert federal funding agency's name] regulations governing disposal of property.

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.

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 waiver of a specified right by a party shall be effective to waive any other rights.

23. Notice: Except as otherwise specified herein, all notices hereunder shall be in writing) and shall be given to the relevant party at its address set forth below, or such other address as such party may hereafter specify by notice to the other given by courier, by United States certified or registered mail, or by 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 Entity:

(insert contact information)

To Risk Management Division:

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

24. Authority: If Entity is other than a natural person, the individual(s) signing this Agreement on behalf of Entity represent and warrant that the individual has the power and authority to bind Entity, and that no further action, resolution, or approval from Entity or any other entity is necessary to enter a binding contract.

Option: Include the following if acknowledgment required. If not, remove this section and renumber successive accordingly. Remove this instruction.

25. Acknowledgment: Entity shall acknowledge EMNRD (option - and insert name of federal funding agency) as a co-sponsor and funding source in all news releases, programs, proceedings, and related publicity/publications for the project.

26. Minimum Wage Rate: If applicable, Entity 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 for hiring and performing of this Agreement.

27. Compliance with Law and Funding Source Conditions:

A. Entity shall comply with all applicable state and federal statutes, regulations, or rules, including without limitation those imposed as a consequence of funding pursuant to this Agreement.

(If you are using federal funds to pay for the work of this agreement, the following clauses must be included. If you are using non-federal funding, delete the clauses and this instruction.)

B. Compliance with use of Minority Business Enterprises (MBEs) and Women's Business Enterprises (WBEs) - Entity 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.

C. Compliance with Trafficking Victims Protection Act of 2000 - Entity, Entity'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.

D. Compliance with NMSA 1978, Section 66-7-374, Texting While Driving - Entity and Entity'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.

E. In the event this Agreement is funded with federal monies, Entity shall comply with 2 C.F.R. 200.317 through 200.327 for procurement of property or services conducted pursuant to this Agreement.

F. In the event this Agreement is funded with federal monies and Entity 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, Entity 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).

G. Entity 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.

H. If the value of this Agreement exceeds \$100,000, Entity 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.

I. If this Agreement is valued at more than \$150,000, Entity 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.

Option: If agreement is with a state agency do not include the following provision because all state agencies are covered by Risk Management Division. Remove this Section (and this instruction) and renumber successive sections accordingly. If agreement is with a county, municipality, state university, or public school, determine whether it has insurance coverage. If it does, keep the following. If the county, municipality, state university, or public school does not have coverage, discuss the situation with legal as to how it should be addressed. Remove these instructions.

28. Insurance Coverage: Entity shall provide EMNRD a statement indicating that the activities described in the Scope of Work are covered by insurance as set forth below, secured in accordance with any method allowed by applicable law, including self-insurance, pooling of self-insured reserves, or insurance provided by a third party, prior to commencing work under this Agreement. Entity shall maintain continuous coverage of the activities described in the Scope of Work, so long as this Agreement is in effect. Failure to maintain such coverage is reason for immediate termination of this Agreement. Entity shall notify EMNRD prior to cancellation or expiration of any insurance required under this Agreement.

A. Worker's Compensation protection that complies with the requirements of the Worker's Compensation Act, NMSA 1978, Sections 52-1-1 *et seq.*, if applicable. If the Entity fails to comply with the Workers Compensation Act and applicable rules when required to do so, EMNRD may terminate this Agreement.

B. Comprehensive public liability protection covering property damage and personal injury liability that may arise under this Agreement and any amendments hereto, in amounts equal or greater than liability limits set forth in NMSA 1978, Sections 41-4-19, as it may be amended from time to time.

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

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

By: _____
Cabinet Secretary or Designee

Date: _____

ENTITY NAME

By: _____
Authorized Representative Signature

Date: _____

Printed Name and Title

ATTACHMENT 4

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

THIS AGREEMENT (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 General Services Department/State Purchasing Division (GSD/SPD Contracts Review Bureau).

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 travel and New Mexico gross receipts taxes pursuant to Paragraphs C and D of this Compensation Section (if travel is negotiated. Travel payment language also does not apply when paying on a deliverables basis unless the travel is set out as a separate item. If travel is not paid, remove reference to travel.). 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.)

In no event shall Contractor be paid for services provided or travel expenses exceeding the total compensation amount without this Agreement being amended in writing prior to those services or expenses exceeding the total compensation amount being provided.

(—OR—)

Option 2: Lump Sum Amount Upon Completion of All Work.

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.

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 \$ _____ per hour, such compensation not to exceed \$ _____, which amount includes travel and New Mexico gross receipts taxes, 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 Contractor be paid for services provided or travel expenses exceeding the total compensation amount without this Agreement being amended in writing prior to those services exceeding 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 GSD/SPD. 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. Travel payment language does not apply when choosing to pay Contractor on a lump sum basis. Travel payment language also does not apply when paying on a deliverables basis unless the travel is set out as a separate item.) EMNRD shall pay such travel expenses as may be incurred, 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, Sections 10-8-1 *et seq.*, as implemented by the current Department of Finance and Administration rule and the current EMNRD travel policy.

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

E. Contractor must submit detailed invoices accounting for all services performed, and expenses incurred. Invoices evidencing the propriety of each claim for payment must be supported by approved purchase order. (When compensation is based on hourly rates, Contractor shall also provide documentation of hours expended on the services provided.) If EMNRD finds the invoice services, or expenses are not acceptable, within 30 days of receipt of written notice from Contractor that payment is

requested for services received, EMNRD shall provide Contractor a letter of exception explaining the defect or objection to the invoice, services, or expenses, and outlining steps Contractor may take to provide remedial action. Upon certification by EMNRD that the invoice, 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 THE GSD/SPD Contracts Review Bureau. This Agreement shall terminate on **(DATE)** unless terminated pursuant to paragraph 4 (Termination), or paragraph 5 (Appropriations). In accordance with NMSA 1978, Section 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, Section 13-1-150.

4. Termination.

A. EMNRD.

1) EMNRD may terminate this Agreement for convenience or cause by giving written notice to Contractor at least 30 days prior to the intended date of termination, except that EMNRD may terminate this Agreement immediately by giving written notice to Contractor if (i) Contractor becomes unable to perform the services contracted for as determined in the sole discretion of EMNRD; (ii) during the term of this Agreement, Contractor is suspended or debarred by the State Purchasing Agent; (iii) this 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. (May need to revise Section number to track actual contract contents.)

2) Except as otherwise expressly allowed or provided by 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. 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.

B. Contractor.

1) Contractor may terminate this Agreement only based upon EMNRD's uncured, material breach of this Agreement.

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 EMNRD's alleged 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 if (i) 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.

C. 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 directs 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.
- 4) Contractor shall submit an invoice for work performed prior to Contractor's receipt or issuance of a notice of termination no later than 30 days after receiving or sending a notice of termination.

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 the Contractor. EMNRD's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If EMNRD proposes an amendment to the Agreement to unilaterally reduce funding, the 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.

The Contractor and its subcontractors and employees are independent contractors performing professional services for EMNRD and are not employees of the State of New Mexico. The 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. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor has no authority to bind and shall not bind the State of New Mexico unless expressly authorized in writing by the State of New Mexico, and then only within the strict limits of that authority.

7. Assignment.

The 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.

The 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 the primary Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from EMNRD.

Option: Include A, B, and C if you are using federal funds for the work of this contract. Remove this instruction.

B. Contractor shall comply with 2 C.F.R. 200.317 through 200.327 for procurement of services or property conducted pursuant to this Agreement.

C. Contractor is required to provide EMNRD with evidence of competitive procurement for any subcontract, including records of advertisement of bid, proposals received, and methods to select each subcontractor.

C. Any subcontract agreement shall include all provisions necessary to allow Contractor to meet its obligations and requirements under this Agreement and all provisions required by law.

Option: Include subparagraph below if subcontractor will be reimbursed for travel expenses. Remove instruction.

D. Travel expense reimbursement requested for subcontractors, if applicable, shall be reimbursed in accordance with rates established in the Per Diem and Mileage Act,

NMSA 1978, Section 10-8-1 *et seq.*, as implemented by the current DFA Rule and EMNRD Travel Policy.

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

11. Product of Service -- Copyright.

All materials developed or acquired by the 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 the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

12. Conflict of Interest; Governmental Conduct Act.

A. The 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. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, NMSA 1978, Sections 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, Section 10-16-4.3, the Contractor does not employ, has not employed, and will not employ during the term of this Agreement any Agency employee while such employee was or is employed by EMNRD and participating directly or indirectly in EMNRD's contracting process;

2) this Agreement complies with NMSA 1978, Section 10-16-9(A) because (i) the Contractor is not a public officer or employee of the State; (ii) the Contractor is not a member of the family of a public officer or employee of the State of New Mexico (State); (iii) the 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 the 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, Section 10-16-7(A) and this Agreement was awarded pursuant to a competitive process;

3) in accordance with NMSA 1978, Section 10-16-8(A), (i) the 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) the 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) the Contractor is not a legislator; (ii) the Contractor is not a member of a legislator's family; (iii) the Contractor is not a business in which a legislator or a legislator's family has a substantial interest; or (iv) if the 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, Section 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, Section 10-16-13, the 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, Section 10-16-3(D), the 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 entering 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, in addition to other remedies available to EMNRD and notwithstanding anything in this Agreement to the contrary, EMNRD may immediately terminate the 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, covenant, 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 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.

16. Equal Opportunity Compliance.

The 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, the 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, Section 38-3-1(G). By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over all lawsuits arising under or out of this Agreement's terms.

18. Records and Financial Audit.

The Contractor shall maintain 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. EMNRD shall have the right to audit time and expenditure records both before and after payment, and Contractor agrees to include in all subcontracts hereunder the same right of inspection and audit against all subcontractors. Payment under this Agreement shall not foreclose EMNRD's right to recover excessive or illegal payments. In EMNRD's, GSD/SPD'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.

The Contractor shall defend, indemnify and hold harmless EMNRD, its officers, employees, agents, and representatives, and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, including any action, proceeding, claim, demand, cost, damage, attorney's fee, or other liability or expense caused by the negligent act or failure to act of the Contractor or its officers, employees, servants, subcontractors, consultants, or agents, or 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 subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, , proceeding, claim, demand, cost, damage, attorney's fee or any other liability or expense which may arise out of the performance of this Agreement is brought against the Contractor or its officers, employees, servants, subcontractors, consultants, or agents, the Contractor shall, as soon as practicable but no later than two days after it receives notice thereof, notify EMNRD's legal counsel of 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, Sections 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 the term of the contract, health insurance for those employees and offer that health insurance to those employees if the expected annual value in the aggregate of any and all contracts between 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.

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.

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 notice by facsimile) and shall be given to the relevant party at its mailing address, or if set forth below, at its e-mail address, or such other address as such party may hereafter specify by written notice to the other given by courier, by United States certified or registered mail, or by e-mail 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]

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

To Contractor:

[insert contact information]

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 represents and warrants that such individual 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 amendment hereto, or to have committed any tortious act relating to this Agreement, EMNRD shall be entitled to recover from Contractor reasonable attorneys' fees and costs for pre-litigation research, investigation, and preparation, litigation brought to obtain such judicial determination, 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. Contractor is responsible for obtaining a copy of any federal funding award that provides funding for 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 following 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, Section 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. 200.317 through 200.327 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 regulatory 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, it will establish and maintain during this Agreement's term, the following policy or policies of insurance providing:

1) Workers' Compensation protection that complies with the requirements of the Workers' Compensation Act, NMSA 1978, Sections 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, Section 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: \$1,000,000.00;
- c. 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. (Optional)

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, Sections 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 no later than 10 days after this Agreement's 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 coverage 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 GSD/SPD Contracts Review Bureau below.

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

By: _____
Cabinet Secretary or Designee

Date: _____

By: _____
Legal Counsel - Certifying legal sufficiency

Date: _____

By: _____
Chief Financial Officer

Date: _____

CONTRACTOR NAME

By: _____
Authorized Representative Signature

Date: _____

Printed Name and Title

This Agreement has been approved by the GSD/SPD Contracts Review Bureau

By: _____ Date: _____
GSD/SPD Contracts Review Bureau



(Selection Option 1 or 2)

Option 1:

The records of the Taxation and Revenue Department reflect 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: _____

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

Option 2:

Services will be performed out-of-state, Contractor is exempt from paying gross receipts taxes.

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

By: _____

Date: _____

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

ATTACHMENT 5

STATE OF NEW MEXICO,
PURCHASE AGREEMENT
BETWEEN THE
STATE OF NEW MEXICO,
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
AND
ENTITY

PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT (Agreement) is made by and between (Insert Entity name), (Insert Entity title), authorized to do business in New Mexico (Seller), whose address for notice is (Insert address) and the State of New Mexico, Energy, Minerals and Natural Resources Department, Forestry Division (Buyer), whose address for notice is 1220 South Saint Francis Drive, Santa Fe, New Mexico 87505.

RECITALS:

WHEREAS, Seller is currently under contract with Owner, as defined below, to acquire a deed of conservation easement on (Insert number) acres, more or less, of private land in (Insert name) County, New Mexico (Property) described in the attached and incorporated property map as Attachment A to this Agreement. The current owner of the Property shall be referred to herein as "Owner". The acquisition of the Conservation Easement by Seller shall occur simultaneously with the closing contemplated herein; and

WHEREAS, the form of the Deed of Conservation Easement (Conservation Easement) is attached hereto and incorporated herein as Attachment B to this Agreement; and

WHEREAS, Buyer is a governmental unit qualified for holding conservation easements under Section 170(b)(1)(A)(v) of the Internal Revenue Code and NMSA 1978, Sections 47-12-1 to 47-12-6, 17-4-1 and 17-1-14B(17); and

WHEREAS, for consideration, Seller desires to cause the Conservation Easement to be executed in favor of Buyer and Buyer desires to receive and hold said Conservation Easement; and

WHEREAS, Buyer has had the full opportunity to conduct any and all inspections of the Property, Buyer has no objections to the Property's status or condition, and Buyer accepts such Conservation Easement on the Property in the condition in which it is currently.

NOW, THEREFORE, it is mutually agreed as follows:

1. Purchase of Conservation Easement on Subject Property. In accordance with the recitals above that are included herein by reference and the terms stated herein, Seller agrees to sell, and Buyer agrees to purchase the Conservation Easement referred to above.

The Conservation Easement shall be conveyed directly from Owner to Buyer.

2. Property Conditions. Buyer has investigated this Property's condition prior to closing, consistent with any limitations that may exist on Seller's authority to investigate the Property's condition. Buyer is not relying upon any representation, statement, assertion, or non-assertion the Seller has made to the Property's suitability for a particular use or purpose. Buyer has inspected the Property and is relying upon its examination, in conjunction with the condition of and survey and title commitment for the Property. Buyer takes the Conservation Easement interest in the Property under the express understanding that there are no express or implied warranties (except for warranties of title to be set forth in the Conservation Easement). Provisions of this paragraph shall survive closing and not merge.

3. Purchase Price. The purchase price (Purchase Price) for the Conservation Easement shall be (Insert amount) (\$_____), which is 100% of appraised fair market value of approximately (\$_____) per acre for (Insert total number) acres.

4. Contingencies.

- a. Seller shall satisfy or cause to be satisfied prior to closing any liens or mortgages on the Property.
- b. Buyer's obligations under this Agreement are subject to the condition that Buyer shall use reasonable efforts to obtain permission from the New Mexico State Land Office to acquire an interest in the Property.
- c. Seller has, at Seller's sole cost, delivered to Buyer an appraisal and an appraisal review, which were both accepted by EMNRD, showing that the Purchase Price does not exceed the Conservation Easement's appraised value.
- d. Seller shall, at Seller's sole cost or at a willing third party's expense, deliver to Buyer a Phase I Environmental Site Assessment, prepared by a qualified contractor and identifying EMNRD as an intended user, indicating that there are no environmental hazards on the Property.
- e. Seller shall, at Seller's sole cost or at a willing third party's expense, deliver to Buyer a title report or title opinion showing no person other than the Owner owns the minerals on or under the Property, a signed affidavit from Seller or Owner that the Seller or the Owner has reviewed the documents in the chain of title for the Property and has determined that the Owner owns the minerals on or under the Property, or a Mineral Report, prepared by a qualified geologist and identifying EMNRD as an intended user, indicating that any commercial mineral potential is so remote as to be negligible.
- g. Seller shall provide a Title Commitment in the name of the State of New Mexico, Energy, Minerals and Natural Resources Department, Forestry Division, for the Conservation Easement acceptable to Buyer, evidencing clear title.

- h. Seller shall also provide true, correct, and legible copies of any and all instruments referred to in the Title Commitment that constitute exceptions or restrictions upon the Seller's title.
- i. Seller shall deliver to Buyer and the Title Company a copy of the legal description for the Property.
- j. Seller, in its sole and absolute discretion, shall have exercised its right to purchase the Conservation Easement from the Owner pursuant to its agreement with the Owner.

5. Title Policy. Seller shall cause (Insert Title Name) (Title Company) to issue a title insurance policy in the amount of the purchase price to the benefit of Buyer, subject only to (a) a lien for non-delinquent real property taxes, and (b) any other matters approved by Buyer.

6. Representations and Warranties of Seller. Seller represents and warrants to Buyer that to Seller's knowledge there are no:

- a. pending condemnation or similar proceedings affecting the Property or any portion thereof, or a contemplated condemnation action. If any part of the Property is condemned prior to closing, Seller shall promptly give Buyer written notice of such condemnation;
- b. existing violations by the Property of any applicable laws, ordinances, or restrictions, or the existence of any judicial or administrative action pertaining to the Property, or any action by adjacent landowners pertaining to the Property, or any natural or artificial conditions upon the Property, which would have a material adverse effect upon the Conservation Easement or its value; and
- c. legal actions, suits, or other legal or administrative proceedings pending or threatened against the Property, or any facts that might result in any such action, suit, or other proceeding.

7. Conveyance of Conservation Easement At closing, Seller shall cause the Conservation Easement to be deeded to the State of New Mexico, Energy, Minerals and Natural Resources Department, Forestry Division substantially in the form of Attachment B. Buyer shall make payment to the Title Company for the entire Purchase Price. The Title Company shall distribute the sale proceeds as directed in the settlement statement agreed upon by Seller and Buyer. Upon closing, the Title Company shall file the Conservation Easement with the County Clerk of (Insert name) County and provide a recorded copy to Buyer. The Title Company acting as settlement agent shall be:

(Insert Title Company name)
 (Insert Title Company address)
 (Insert city and zip code)

8. Closing. The closing of this sale shall be on or before (Insert date), and is subject to completion of the contingencies described above in Paragraph 4. If this sale is not closed by that date, this Agreement shall terminate and be of no effect or force, unless terminated earlier or unless the parties agree to a written extension of this Agreement. In no

event shall this Agreement be extended past June 30, 20XX, the underlying funding reversion date.

9. Closing Fees; Reimbursement. Buyer shall pay up to (Insert amount) (\$_____) in closing fees and Seller shall pay, or cause to be paid, any remaining closing fees including the cost of title insurance. Each party shall be responsible for its respective attorney's fees. Further, at Closing, Buyer shall reimburse Seller for certain costs incurred in the amount of (Inset amount) (\$_____). These funds shall serve as reimbursement for costs incurred by Seller on Buyer's behalf for due diligence, including but not limited to appraisal fees and an environmental assessment fees, and for staff overhead and fringe costs.

10. Binding on Successors. This Agreement shall extend to and bind upon the parties' heirs, executors and administrators, assigns, and successors in interest. No party may assign this Agreement without the other party's express written permission.

11. Integration. This Agreement contains the parties' complete agreement and cannot be varied except by written agreement, executed by each party's duly authorized representatives. There are no oral agreements, understandings, representations, or warranties not expressly set forth herein.

12. Counterparts; Electronic Signatures. This Agreement may be executed in counterparts, each of which shall be deemed an original and which together shall constitute one and the same agreement. The parties hereby acknowledge and agree that electronic records and electronic signatures may be used in connection with the execution of this Agreement and electronic signatures or signatures transmitted by e-mail in .pdf format shall be legal and binding and shall have the same full force and effect as if a paper original.

IN WITNESS WHEREOF, the parties have duly executed this Agreement on the date and year first above written.

SELLER:

(INSERT ENTITY)

By: _____ Date: _____
Authorized Representative Signature

Printed Name and Title

BUYER:

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

By: _____ Date: _____
Cabinet Secretary or Designee

APPROVED:

NEW MEXICO STATE LAND OFFICE

By: _____ Date: _____
Commissioner of Public Lands

ATTACHMENT A to PURCHASE AGREEMENT
(Property Description)

ATTACHMENT B TO PURCHASE AGREEMENT
(Form of Deed of Conservation Easement)