



# City of Las Cruces®

PEOPLE HELPING PEOPLE

## Council Action and Executive Summary

Item # 10Ordinance/Resolution# 16-17-047For Meeting of \_\_\_\_\_  
(Ordinance First Reading Date)For Meeting of September 6, 2016  
(Adoption Date)

Please check box that applies to this item:

 QUASI JUDICIAL LEGISLATIVE ADMINISTRATIVE

**TITLE:** A RESOLUTION TO AWARD AN INDEFINITE QUANTITY, INDEFINITE COST PRICE AGREEMENT FOR ELECTRONIC FUEL CARD SERVICES TO WEX BANK DBA WRIGHT EXPRESS FSC (WEX) OF MIDVALE, UTAH FOR A TERM OF FOUR YEARS SUBJECT TO APPROVED BUDGET APPROPRIATIONS AND ANNUAL RENEWAL.

**PURPOSE(S) OF ACTION:**

Award price agreement.

<b>COUNCIL DISTRICT:</b> N/A		
<b><u>Drafter/Staff Contact:</u></b> Leeann DeMouche	<b><u>Department/Section:</u></b> Transportation/Fleet Services	<b><u>Phone:</u></b> 541-2596
<b><u>City Manager Signature:</u></b>		

**BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:**

The Fleet Services Section (Fleet) of the Transportation Department is responsible for the acquisition and management of fuel provided to the City of Las Cruces (City) Fleet customers. Fleet currently manages three fuel sites. Two are located at 1501 E. Hadley Ave. and one is located at 680 N. Motel Blvd. The fuel sites provide unleaded gasoline with an octane level of 87, diesel and/or biodiesel fuel.

The fuel sites are out of the district response area for five of the City's seven fire stations. Emergency response crews are not able to leave their district response area as this could negatively affect response time in the event of an emergency. Therefore, fire station personnel are not able to use these fuel sites. Additionally, the City has 100 fire and police units that require a higher octane level than that what is provided at the fuel sites. In order to accommodate these fueling requirements, Fleet is requesting to utilize electronic fuel card services. The ability to purchase fuel at a private fuel station would allow fire station personnel to stay within district response areas and the units that require a higher octane level to be fueled properly.

Las Cruces Municipal Code, 1997, as amended, Chapter 24, Article IX, Section 24-346 – Authority for Cooperative Procurement, allows the City to utilize contracts from other entities.

Utilization of these contracts is currently the most effective and cost efficient manner for staff to procure supplies and services for the operational needs of the City.

Fleet is requesting to use New Mexico Statewide Price Agreement (NMSPD) No. 60-000-15-00033, which is managed through the Purchasing Section, and award an indefinite quantity, indefinite cost price agreement for electronic fuel card services to WEX of Midvale, Utah for a term of one year with three one year options to renew, subject to approved budget appropriations and annual renewals. Also, due to the continuous fluctuation of fuel prices, Fleet anticipates the total expenditure to be beyond the \$75,000.00 threshold and therefore requires City Council approval.

**SUPPORT INFORMATION:**

1. Resolution.
2. Exhibit "A", Purchasing Manager's Request to Contract.
3. Exhibit "B", NMSP No. 60-000-15-00033.

**SOURCE OF FUNDING:**

<b>Is this action already budgeted?</b>	Yes	<input checked="" type="checkbox"/>	See fund summary below
	No	<input type="checkbox"/>	If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/>	Expense reallocated from: _____
		<input type="checkbox"/>	Proposed funding is from a new revenue source (i.e. grant; see details below)
		<input type="checkbox"/>	Proposed funding is from fund balance the _____ Fund.
<b>Does this action create any revenue?</b>	Yes	<input checked="" type="checkbox"/>	Funds will be deposited into this fund: <u>6150</u> in the amount of <u>\$75,000</u> for <u>FY17</u> .
	No	<input type="checkbox"/>	There is no new revenue generated by this action.

**BUDGET NARRATIVE**

This price agreement is to be used on an "as need basis". Funding will be through the Fleet Services Fund (6150) using Cost of Motor Fuel account number 65120000-751100.

**FUND EXPENDITURE SUMMARY:**

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
Fleet Services	65120000-751100	\$400,000.00	\$1,220,000.00	\$820,000.00	City fuel site purchases.

**OPTIONS / ALTERNATIVES:**

1. Vote "Yes"; this will approve the resolution to award an indefinite quantity, indefinite cost price agreement for electronic fuel card services to WEX of Midvale, Utah for a term of one year with three one year options to renew, subject to approved budget appropriations and annual renewals.
2. Vote "No"; this will not authorize the agreement. This would require Fleet to pursue other options as directed by City Council which may result in a higher cost to the City.
3. Vote to "Amend"; this could modify the resolution and advise staff of necessary adjustments as deemed appropriate.
4. Vote to "Table"; this could delay the indefinite quantity, indefinite cost price agreement for electronic fuel card services and may have an effect on the efficiency of services.

**REFERENCE INFORMATION:**

N/A



# City of Las Cruces®

PEOPLE HELPING PEOPLE

## COUNCIL ACTION AND EXECUTIVE SUMMARY PACKET ROUTING SLIP

For Meeting of \_\_\_\_\_  
 (Ordinance First Reading Date)

For Meeting of September 6, 2016  
 (Adoption Date)

**TITLE:** A RESOLUTION TO AWARD AN INDEFINITE QUANTITY, INDEFINITE COST PRICE AGREEMENT FOR ELECTRONIC FUEL CARD SERVICES TO WEX BANK DBA WRIGHT EXPRESS FSC (WEX) OF MIDVALE, UTAH FOR A TERM OF FOUR YEARS SUBJECT TO APPROVED BUDGET APPROPRIATIONS AND ANNUAL RENEWAL.

Purchasing Manager's Request to Contract (PMRC) {Required?} Yes  No

DEPARTMENT	SIGNATURE	PHONE NO.	DATE
Drafter/Staff Contact	<i>Laura DeMonche</i>	2596	08/02/2016
Department Director	<i>Victoria Fiedler</i>	2048	8-2-16
Other			
Assistant City Manager /CAO	<i>Demetrius Allen</i>	541-2048	8/9/2016
Management & Budget Manager	<i>Victoria Fiedler</i>	2048	8/8/16
Assistant City Manager/COO	<i>[Signature]</i>	541-2221	8/11/16
City Attorney	<i>[Signature]</i>	EXT 2128	16 Aug 2016
City Clerk	<i>[Signature]</i>	X2115	8-18-16

**RESOLUTION NO. 16-17-047**

**A RESOLUTION TO AWARD AN INDEFINITE QUANTITY, INDEFINITE COST PRICE AGREEMENT FOR ELECTRONIC FUEL CARD SERVICES TO WEX BANK DBA WRIGHT EXPRESS FSC (WEX) OF MIDVALE, UTAH FOR A TERM OF FOUR YEARS SUBJECT TO APPROVED BUDGET APPROPRIATIONS AND ANNUAL RENEWAL.**

The City Council is informed that:

**WHEREAS**, the Fleet Services Section manages two fuel sites located at 1501 E. Hadley Ave. and one fuel site at 680 N. Motel Blvd.; and

**WHEREAS**, the City of Las Cruces (City) purchases unleaded gasoline with an octane level of 87, diesel and/or biodiesel fuel for City vehicles and equipment; and

**WHEREAS**, the fuel sites are out of the district response area for five of the City's seven fire stations; and

**WHEREAS**, the City has 100 fire and police units that require a higher octane level than that what is provided at the fuel sites; and

**WHEREAS**, Chapter 24, Article IX, Section 24-346 – Authority for cooperative procurement, allows the City to utilize contracts from other entities; and

**WHEREAS**, WEX of Midvale, Utah is currently under New Mexico Statewide Price Agreement No. 60-000-15-00033 and a copy of said agreement is maintained in the City's Purchasing Section; and

**WHEREAS**, staff is requesting approval from City Council to enter into an indefinite quantity, indefinite cost price agreement with WEX of Midvale, Utah on an as-needed basis for a term of one year with three one year options to renew, subject to approved budget appropriations and annual renewals.

**NOW, THEREFORE**, Be it resolved by the governing body of the City of Las Cruces:

**(I)**

**THAT** the indefinite quantity, indefinite cost price agreement for electronic fuel card services is hereby awarded to WEX of Midvale, Utah to be utilized on an as-needed basis, for a term of one year with three one year options to renew, subject to approved budget appropriations and annual renewals.

**(II)**

**THAT** the Purchasing Manager is authorized to contract with WEX of Midvale, Utah as outlined in the signed Exhibit "A", Purchasing Manager's Request to Contract Form, attached hereto and made a part of this resolution.

**(III)**

**THAT** it is hereby authorized to utilize New Mexico Statewide Price Agreement No. 60-000-15-00033, attached hereto as Exhibit "B", and made part of this resolution for electronic fuel card services with WEX of Midvale, Utah.

**(IV)**

**THAT** City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

**DONE AND APPROVED** this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

APPROVED:

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

(SEAL)

VOTE:

Mayor Miyagishima:

\_\_\_\_\_

Councillor Gandara

\_\_\_\_\_

Councillor Smith:

\_\_\_\_\_

Councillor Pedroza:

\_\_\_\_\_

Councillor Eakman:

\_\_\_\_\_

Councillor Sorg:

\_\_\_\_\_

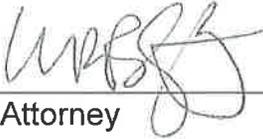
Councillor Levatino:

\_\_\_\_\_

Moved by: \_\_\_\_\_

Seconded by: \_\_\_\_\_

APPROVED AS TO FORM:



\_\_\_\_\_  
City Attorney

<sup>94</sup>  
**CITY OF LAS CRUCES**

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**PURCHASING MANAGER'S REQUEST TO CONTRACT**

**For Meeting of: September 21, 2015**

**Resolution No.: 16-17-047**

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**Existing Contract Purchase For  
Electronic Fuel Card Services**

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The Las Cruces City Council is provided the following information concerning this request:

**RFP/BID SOLICITATION INFORMATION:**

- 1. Existing Contract Issuer **State of New Mexico**
  - 2. Contract Number: **60-000-15-00033**
  - 3. Contract Expiration Date: **July 14, 2018**
  - 4. Description: **Electronic Fuel Card Services**
  - 5. Using Department: **Transpiration / Fleet**
  - 6. Current Award Recommendation To: **WEX Bank, DBA Wright Express FSC  
of Midvale, Utah**
  - 7. Award Amount (includes any tax and contingency): **Indefinite Cost / Indefinite Quantity**
  - 8. Projected Completion Date: **N/A**
- 

**PROCUREMENT CODE COMPLIANCE:**

The City of Las Cruces Procurement Code was administered in the conduct of this procurement and approval to purchase is hereby requested pursuant to **Section 24-316**.

*Debi Smith* / *8-4-16*  
Purchasing Manager Date

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**CONFIRMATION OF FUND ENCUMBRANCE:**

REQUISITION OR PURCHASE ORDER NUMBER:	<b>TBD</b>
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**State of New Mexico  
General Services Department**

**Statewide Price Agreement**

**Awarded Vendor**  
0000045609  
WEX Bank  
7090 South Union Park  
Suite 350  
Midvale, UT 84047  
  
Telephone No. 952-922-1104

Contract Number: 60-000-15-00033

Payment Terms: Per Contract

F.O.B.: Per Contract

Delivery: Per Contract

**Ship To:**  
All State of New Mexico agencies, commissions,  
institutions, political subdivisions and local public  
bodies allowed by law.

Procurement Specialist: Travis Dutton

Telephone No.: 505-827-0477

**Invoice:**  
All State of New Mexico agencies, commissions,  
institutions, political subdivisions and local public  
bodies allowed by law.

Email: travis.dutton-leyda@state.nm.us

**Title: Electronic Fuel Card Services**

**Term: July 15, 2016 thru July 14, 2018**

**This Contract is made subject to the "terms and conditions" shown on the reverse side of this page, and as indicated in this Contract.**

**Accepted for the State of New Mexico**

  
\_\_\_\_\_  
New Mexico State Purchasing Agent

Date: 7/15/16

**Statewide Price Agreement No. 60-000-15-00033**STATE OF NEW MEXICO  
FOR  
Electronic Fuel Card Services

THIS AGREEMENT is made and entered into by and between the State Purchasing Division, State of New Mexico, herein after referred to as the "agency," and **WEX Bank dba Wright Express FSC** herein after referred to as the "Contractor."

**IT IS MUTUALLY AGREED BETWEEN THE PARTIES:****1. Definitions**

- A. "Agreement Administrator" means the individual appointed by the SPA to administer the Price Agreement.
- B. "Procuring Agency" means an agency of the executive, legislative or judicial branches of New Mexico state government as well as local public bodies including cities, counties, public schools and institutions of higher education.
- A. "Products and Services Schedule" refers to the RFP Response submitted by WEX Bank and includes a complete list of products and services offered under this Agreement. Product and service descriptions may be amended with the prior approval of the Agreement Administrator. New products and services shall not be added to the Products and Services Schedule.
- B. "Business Hours" means 8:00 a.m. to 5:00 p.m. Mountain Time.
- C. "Local public body" means every political subdivision of the state and the agencies, instrumentalities and institutions thereof.
- D. "New Mexico State Purchasing Agent" or "NMSPA" means the purchasing agent for the State of New Mexico or a designated representative. May be used interchangeably with "State Purchasing Agent" or "SPA."
- E. "Price Agreement" means a definite quantity contract or indefinite quantity contract which requires the Contractor to furnish items of tangible personal property or service to the procuring agency which issues a purchase order, if the purchase order is within the quantity limitations of the contract, if any.
- F. "Procuring agency" means any state agency or local public body that chooses to procure products or services under this Agreement. Other units of government, including cities, counties, school districts, institutions of higher education and other jurisdictions not subject to the procurement authority of the SPA, are authorized to buy from this Agreement.

- G. "You" and "your" refers to (Contract Name). "We," "us" or "our" refers to the State of New Mexico, agencies, commissions, institutions, political sub-divisions and local public bodies allowed by law to participate in the Agreement and whose accounts are created under this Agreement.

2. Scope of Work

A. Statement of Work – Pursuant to the terms and conditions of this Agreement and the Response to the Request for Proposals submitted by WEX Bank, all State of New Mexico, Agencies, Commissions, Institutions, Political Sub-divisions and Local Public Bodies allowed by law, may participate in the charge a card program established by this Agreement and the Response to Request for Proposals submitted by Contractor. Subject to the terms and conditions of this Agreement, it is understood that no guarantee or warranty is made or implied by either the New Mexico State Purchasing Agent or the Procuring Agencies or that any specific number of cards are to be requested under this Agreement.

- i. All state agencies allowed by law are authorized to utilize this Agreement to obtain fuel and vehicle service charge cards.
- ii. Participation Addendums: Procuring Agencies and other units of New Mexico government, including but not limited to cities, counties, school districts, institutions of higher education and other jurisdictions not subject to the procurement authority of the SPA desiring to enroll and participate in the program will execute a Participation Addendum. The Addendum shall be signed by an authorized representative of the Procuring Agency and shall contain the following:
  - a. Agreement to pay all charges and fees and account balances for all and any of its Cardholders as may be shown in its charge card financial summaries;
  - b. Agreement to accept and perform all duties, responsibilities and obligations required of it; and
  - c. Designation of a principal representative for the Procuring Agency.

To the extent a Participating Entity has already executed a Participation Addendum and is currently using cards under the previous agreement, they will continue to be able to use their cards and be rolled under this agreement and will not need to execute a new Participation Addendum.

- B. Reporting – Progress and utilization reports shall be provided by the Contractor monthly or as mutually agreed upon, based on the Contractor's proposal, which will include sample reports included in this Agreement.

Participants in the program will receive a standard fleet management reporting package which includes an Invoice, Vehicle Analysis Report (VAR tm), Financial Summary, Site

Summary and Exception report (Fleet Analyst tm) from Contractor. Summary billing, including all transaction and ancillary billing information, shall be provided in a billing and reporting product provided by Contractor.

C. Invoices- All invoices must be mailed to the State or Procuring Agency listed as responsible for the charge card account unless otherwise agreed to between an individual Procuring Agency and the Contractor. The State will require a separate statement for each charge card account assigned to an individual agency. Ability to report fueling totals by each subdivision within the individual agency will be required. In addition, a summary billing must be available with totals for all State accounts. Monthly detailed billing must be provided on a per vehicle basis as follows:

- a. Location of fuel site
- b. Fuel transaction date
- c. Fuel transaction time
- d. Driver/Operator personal identification number (PIN) purchasing fuel
- e. Odometer reading
- f. Type and grade of fuel (including type of alternative fuel)
- g. Number of gallons purchased
- h. Cost per gallon
- i. Total fuel cost
- j. Cost per mile
- k. Miles per gallon
- l. Exceptions
- m. Department of Transportation tank number (where applicable)
- n. Tax exemption information
- o. Capability to adjust billing cycle by participant.

### 3. Payment Provisions

All payments under this Agreement are subject to the following provisions.

- A. Acceptance - In accordance with Section 13-1-158 NMSA 1978, the agency shall determine if the product or services provided meet specifications. No payment shall be made for any products or services until the products or services have been accepted in writing by the procuring agency. Unless otherwise agreed upon between the procuring agency and the Contractor, within fifteen (15) days from the date the procuring agency receives written notice from the Contractor that payment is requested for services or within thirty (30) days from the receipt of products, the procuring agency shall issue a written certification of complete or partial acceptance or rejection of the products or services. Unless the procuring agency gives notice of rejection within the specified time period, the products or services will be deemed to have been accepted.

- B. Issuance of Orders - Only written signed orders are valid under this Price Agreement. A Purchase Order is the approved form for state agencies issuing Contract Orders under this Price Agreement. Other authorized government entities may utilize Purchase Orders or forms adapted by them for their own use.
- C. Late Charges: If the State fails to pay as required above, the Contractor may assess a late fee in accordance with the terms contained in the attached fee schedule or in the event a prompt payment act or law governs the State's late fees or interest we will review the prompt payment act or law.
- D. Payment Promise. The State agrees to pay and/or perform : (i) fees listed on the attached fee schedule; (ii) all amounts payable for Transactions on each Card or Account.

#### 4. Term

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED IN WRITING BY THE AGENCY OR THE STATE PURCHASING AGENT, IF REQUIRED. This Agreement shall begin on date approved by the agency or the State Purchasing Agent, if the State Purchasing Agent has signed this Agreement, and end on July 15, 2022. The agency reserves the right to renew the contract on an annual or Biennial basis by mutual Agreement not exceed a total of six (6) years in accordance with NMSA 1978 §13-1-150.

#### 5. Default and Force Majeure

The State reserves the right to cancel all or any part of any orders placed under this contract without cost to the State, if the Vendor fails to meet the provisions of this contract and, except as otherwise provided herein, to hold the Vendor liable for any excess cost occasioned by the State due to the Vendor's default. The Vendor shall not be liable for any excess costs if failure to perform the order arises out of causes beyond the control and without the fault or negligence of the Vendor; such causes include, but are not restricted to, acts of God or the public enemy, acts of the State or Federal Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather and defaults of subcontractors due to any of the above, unless the State shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Vendor to meet the required delivery scheduled. The rights and remedies of the State provided in this paragraph shall not be exclusive and are in addition to any other rights now being provided by law or under this contract.

#### 6. Termination

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

B. Notice; Agency Opportunity to Cure.

1. Except as otherwise provided in Paragraphs 7.A and 17, the Agency shall give Contractor written notice of termination at least thirty (30) days prior to the intended date of termination.

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

3. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor (i) if the Contractor becomes unable to perform the services contracted for, as determined by the Agency; (ii) if, during the term of this Agreement, the Contractor is suspended or debarred by the State Purchasing Agent; or (iii) the Agreement is terminated pursuant to Paragraph 17, "Appropriations", of this Agreement.

C. Liability. Except as otherwise expressly allowed or provided under this Agreement, the Agency's sole liability upon termination shall be to pay for all transactions prior to the 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. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE AGENCY'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

## 7. Amendment

This Price Agreement may be amended by mutual Agreement of the State Purchasing Agent and the Contractor upon written notice by either party to the other. An amendment to this Price Agreement SHALL NOT AFFECT ANY OUTSTANDING ORDERS issued prior to the effective date of the amendment as mutually agreed upon, and as published by the State Purchasing Agent. Amendments affecting price adjustments and/or extension of contract expiration are not allowed unless specifically provided for in the bid and contract documents.

## 8. Status of Contractor

The Contractor, and Contractor's agents and employees, are independent Contractors for the agency and are not employees of the State of New Mexico. The Contractor, and Contractor's 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 personally reportable by the Contractor for income tax purposes, including without limitation, self-employment tax and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has written authority to do so, and then only within the strict limits of that authority.

9. **Assignment**

A. Neither this price Agreement nor any orders placed under this price Agreement, nor any interest therein, nor claim thereunder, shall be assigned or transferred by the Vendor, except as set forth in subparagraph 10B below or as expressly authorized in writing by the State Purchasing Agent's office. No such assignment or transfer shall relieve the Vendor from the obligations and liabilities under this price Agreement.

B. Vendor agrees that any and all claims for overcharge resulting from antitrust violations which are borne by the State as to goods, services, and materials purchased in connection with this bid are hereby assigned to the State.

10. **Subcontracting**

The Contractor shall not subcontract any portion of any services to be performed under this Agreement without written approval from the State Purchasing Agent. The following subcontractor(s) have been approved to supply resources for this Agreement WEX, Inc.

11. **Non-Collusion**

In signing this Agreement, the Vendor/Contractor certifies the Vendor/Contractor has not, either directly or indirectly, entered into action in restraint of free competitive bidding in connection with this offer submitted to the State Purchasing Agent or agency or entity.

12. **Inspection of Plant**

The State Purchasing Agent or agency or entity that is a party to this Agreement may inspect, at any reasonable time during Contractor's regular business hours and upon prior written notice, the Contractor's plant or place of business, or any subcontractor's plant or place of business, which is related to the performance of this contract.

13. **Commercial Warranty**

The Vendor agrees that the tangible personal property or services furnished under this Agreement shall be covered by the most favorable commercial warranties the Vendor gives to any customer for such tangible personal property or services, and that the rights and remedies provided herein shall extend to the State and are in addition to and do not limit any rights afforded to the State by any other clause of this order. Vendor agrees not to disclaim warranties of fitness for a particular purpose or merchantability.

14. **Condition of Proposed Items**

Where tangible personal property is a part of this Agreement, all proposed items are to be NEW and of most current production, unless otherwise specified.

**15. Records and Audit**

During the term of this Agreement and for three years thereafter, the Contractor shall maintain detailed records pertaining to the services rendered and products delivered. These records shall be subject to inspection by the agency, the State Auditor and other appropriate state and federal authorities. The agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the agency to recover excessive or illegal payments.

**16. Appropriations**

The terms of this Agreement, and any orders placed under it, are contingent upon sufficient appropriations and authorization being made by the legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the legislature, this Agreement, and any orders placed under it, shall terminate upon written notice being given by the agency to the Contractor. The agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Agency 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 thirty (30) days of receipt of the proposed amendment.

**17. Release**

The Contractor, upon final payment of the amount due under this Agreement, releases the agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement. The Contractor agrees not to purport to bind the State of New Mexico, unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

**18. Confidentiality**

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

**19. Conflict of Interest**

A. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, 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. The Contractor shall comply with any applicable provisions of the New Mexico Governmental Conduct Act and the New Mexico Financial Disclosures Act.

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, Chapter 10, Article 16 NMSA 1978.

Without in anyway limiting the generality of the foregoing, the Contractor specifically represents and warrants that:

1) in accordance with NMSA 1978, § 10-16-4.3, 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 the Agency and participating directly or indirectly in the Agency's contracting process;

2) this Agreement complies with NMSA 1978, § 10-16-7(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; (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, § 10-16-7(A) and this Agreement was awarded pursuant to a competitive process;

3) in accordance with NMSA 1978, § 10-16-8(A), (i) 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 the Agency'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, § 10-16-7(A), this Agreement is not a sole source or small purchase contract, and this Agreement was awarded in accordance with the provisions of the Procurement Code;

5) in accordance with NMSA 1978, § 10-16-13, 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, § 10-16-3 and § 10-16-13.3, the Contractor has not contributed, and during the term of this Agreement shall not contribute, anything of value to a public officer or employee of the Agency.

C. Contractor's representations and warranties in Paragraphs A and B of this Paragraph 20 are material representations of fact upon which the Agency relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to the Agency if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in Paragraphs A and B of this Paragraph 20 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in Paragraphs A and B of this Paragraph 20 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to the Agency and

notwithstanding anything in the Agreement to the contrary, the Agency may immediately terminate the Agreement.

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

**20. Approval of Contractor Representative(s)**

The agency reserves the right to require a change in Contractor representative(s) if the assigned representative(s) are not, in the opinion of the agency, adequately serving the needs of the State of New Mexico.

**21. Scope of Agreement; 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 agreements or understandings, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**22. Notice**

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

**23. Equal Opportunity Compliance**

The Contractor agrees to abide by all federal and state laws, 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, rules, and regulations, and executive orders of the Governor of the State of New Mexico, the Contractor agrees to assure 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.

**24. Indemnification**

The Contractor shall hold the state and its agencies and employees harmless and shall indemnify the state and its agencies and employees against any and all claims, suits, actions, liabilities and costs of any kind, including attorney's fees for personal injury or damage to property arising from the acts or omissions of the Contractor, its agents, officers, employees or subcontractors. The Contractor shall not be liable for any injury or damage as a result of any negligent act or omission committed by the agency, its officers or employees.

**25. New Mexico Employees Health Coverage**

A. If Contractor has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period 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 (a) accepted health insurance; (b) declined health insurance due to other health insurance coverage already in place; or (c) declined health insurance for other reasons. These records are subject to review and audit by a representative of the state.

C. Contractor agrees to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information: <http://insurenemexico.state.nm.us/>.

**26. Applicable Law**

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with NMSA 1978, § 38-3-1 (G). By execution of this Agreement, Contractor acknowledges and agrees to the 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.

**27. Limitation of Liability**

The Contractor's liability to the agency, or any procuring agency, for any cause whatsoever shall be limited to the purchase price paid to the Contractor for the products and services that are the subject of the agencies, or the procuring agencies, claim. The foregoing limitation does not apply to paragraph 25 of this Agreement or to damages resulting from personal injury caused by the Contractor's negligence.

**28. Arbitration**

Any controversy or claim arising between the parties shall be settled by arbitration pursuant to NMSA 1978 § 44-7A-1 *et seq.*

**29. Incorporation by Reference and Precedence**

If this Agreement has been procured pursuant to a request for proposals, this Agreement is derived from (1) the request for proposal, (including any written clarifications to the request for proposals and any agency response to questions); (2) the Contractor's best and final offer; and (3) the Contractor's response to the request for proposals.

In the event of a dispute under this Agreement, applicable documents will be referred to for the purpose of clarification or for additional detail in the following order of precedence: (1) amendments to the Agreement in reverse chronological order; (2) the Agreement, including the scope of work and all terms and conditions thereof; (3) the request for proposals, including attachments thereto and written responses to questions and written clarifications; (4) the Contractor's best and final offer if such has been made and accepted by the SPA or agency or entity; and (5) the Contractor's response to the request for proposals.

### 30. Workers' Compensation

The Contractor agrees to comply with state laws and rules applicable to workers' compensation benefits for its employees. If the Contractor fails to comply with the Workers' Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the agency.

### 31. Inspection

If this contract is for the purchase of tangible personal property (goods), final inspection and acceptance shall be made at Destination. Tangible personal property rejected at Destination for non-conformance to specifications shall be removed at Contractor's risk and expense promptly after notice of rejection and shall not be allowable as billable items for payment.

### 32. Inspection of Services

If this contract is for the purchase of services, the following terms shall apply.

- A. Services, as used in this Article, include services performed, workmanship, and material furnished or utilized in the performance of services.
- B. The Contractor shall provide and maintain an inspection system acceptable to the State Purchasing Agent or other party to this Agreement covering the services under this Agreement. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the State Purchasing Agent or other party to this Agreement during the term of performance of this Agreement and for as long thereafter as the Agreement requires.
- C. The State Purchasing Agent or other party to this Agreement has the right to inspect and test all services contemplated under this Agreement to the extent practicable at all times and places during the term of the Agreement. The State Purchasing Agent or other party to this Agreement shall perform inspections and tests in a manner that will not unduly delay or interfere with Contractor's performance.
- D. If the State Purchasing Agent or other party to this Agreement performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of such inspections or tests.
- E. If any part of the services do not conform to the requirements of this Agreement, the State Purchasing Agent or other party to this Agreement may require the Contractor to re-perform the services in conformity with the requirements of this Agreement at no

increase in contract amount. When the defects in services cannot be corrected by re-performance, the State Purchasing Agent or other party to this Agreement may:

- (1) require the Contractor to take necessary action(s) to ensure that future performance conforms to the requirements of this Agreement; and
  - (2) reduce the contract price to reflect the reduced value of the services performed.
- F. If the Contractor fails to promptly re-perform the services or to take the necessary action(s) to ensure future performance in conformity with the requirements of this Agreement, the State Purchasing Agent or other party to this Agreement may:
- (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the State Purchasing Agent or other party to this Agreement that is directly related to the performance of such service; or
  - (2) terminate the contract for default.

THE PROVISIONS OF THIS ARTICLE ARE NOT EXCLUSIVE AND DO NOT WAIVE THE STATE PURCHASING AGENT'S OR OTHER PARTY'S TO THIS AGREEMENT OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

### 33. Insurance

If the services contemplated under this Agreement will be performed on or in State facilities or property, Contractor shall maintain in force during the entire term of this Agreement, the following insurance coverage(s), naming the State of New Mexico, General Services Department or other party to this Agreement as additional insured.

- A. Workers Compensation (including accident and disease coverage) at the statutory limit. Employers liability: \$100,000.
- B. Comprehensive general liability (including endorsements providing broad form property damage, personal injury coverage and contractual assumption of liability for all liability the Contractor has assumed under this contract). Limits shall not be less than the following:
  - a. Bodily injury: \$1,000,000 per person /\$1,000,000 per occurrence.
  - b. Property damage or combined single limit coverage: \$1,000,000.
  - c. Automobile liability (including non-owned automobile coverage): \$1,000,000.
  - d. Umbrella: \$1,000,000.
- C. Contractor shall maintain the above insurance for the term of this Agreement and name the State of New Mexico, General Services Department or other party to this Agreement as an additional insured and provide for 30 days cancellation notice on any Certificate of Insurance form furnished by Contractor. Such certificate shall also specifically state the coverage provided under the policy is primary over any other valid and collectible insurance and provide a waiver of subrogation.

**34. Impracticality of Performance**

A party shall be excused from performance under this Agreement for any period that the party is prevented from performing as a result of an act of God, strike, war, civil disturbance, epidemic, or court order, provided that the party has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance. Subject to this provision, such non-performance shall not be deemed a default or a ground for termination.

**35. 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.

**36. 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 compliance 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.

**37. Patent, Copyright and Trade Secret Indemnification**

- A. The Contractor shall defend, at its own expense, the state and its agencies against any claim that any product or service provided under this Agreement infringes any patent, copyright to trademark in the United States or Puerto Rico, and shall pay all costs, damages and attorneys' fees that a court finally awards as a result of any such claim. In addition, if any third party obtains a judgment against the agency based upon Contractor's trade secret infringement relating to any product or services provided under this Agreement, the Contractor agrees to reimburse the state for all costs, attorneys' fees and amount of the judgment. To qualify for such defense and or payment, the agency shall:
  - i. give the Contractor prompt written notice within 48 hours of any claim;
  - ii. allow the Contractor to control the defense of settlement of the claim; and
  - iii. cooperate with the Contractor in a reasonable way to facilitate the defense or settlement of the claim.
- B. If any product or service becomes, or in the Contractor's opinion is likely to become the subject of a claim of infringement, the Contractor shall at its option and expense:
  - i. provide the agency the right to continue using the product or service and fully indemnify the agency against all claims that may arise out of the agency's use of the product or service;
  - ii. replace or modify the product or service so that it becomes non-infringing; or,
  - iii. accept the return of the product or service and refund an amount equal to the value of the returned product or service, less the unpaid portion of the purchase price and any other amounts, which are due to the Contractor. The Contractor's obligation will be void as to any product or service modified by the agency to the extent such modification is the cause of the claim.

### 38. Survival

The Agreement paragraphs titled "Patent, Copyright, Trademark, and Trade Secret Indemnification; Indemnification; and Limit of Liability" shall survive the expiration of this Agreement. Software licenses, leases, maintenance and any other unexpired Agreements that were entered into under the terms and conditions of this Agreement shall survive this Agreement

### 39. Employee Pay Equity Reporting

Contractor agrees if it has ten (10) or more New Mexico employees OR eight (8) or more employees in the same job classification, at any time during the term of this contract, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. If contractor has (250) or more employees contractor must complete and submit the PE250 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. For contracts that extend beyond one (1) calendar year, or are extended beyond one (1) calendar year, contractor also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within thirty (30) days of the annual contract anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the contract, whichever comes first. Should contractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor agrees to provide the required report within ninety (90) days of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter. Contractor also agrees to levy this requirement on any subcontractor(s) performing more than 10% of the dollar value of this contract if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Contractor further agrees that, should one or more subcontractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor will submit the required report, for each such subcontractor, within ninety (90) days of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal. Contractor shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the applicable subcontractor(s) in accordance with the schedule contained in this paragraph. Contractor acknowledges that this subcontractor requirement applies even though contractor itself may not meet the size requirement for reporting and be required to report itself.

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

### 40. Disclosure Regarding Responsibility

A. Any prospective Contractor and any of its Principals who enter into a contract greater than sixty thousand dollars (\$60,000.00) with any state agency or local public body for professional services, tangible personal property, services or construction agrees to disclose whether the

Contractor, or any principal of the Contractor's company:

1. *is presently debarred, suspended, proposed for debarment, or declared ineligible for award of contract by any federal entity, state agency or local public body;*
  2. *has within a three-year period preceding this offer, been convicted in a criminal matter or had a civil judgment rendered against them for:*
    - a. *the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) contract or subcontract;*
    - b. *violation of Federal or state antitrust statutes related to the submission of offers; or*
    - c. *the commission in any federal or state jurisdiction of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violation of Federal criminal tax law, or receiving stolen property;*
  3. *is presently indicted for, or otherwise criminally or civilly charged by any (federal state or local) government entity with the commission of any of the offenses enumerated in paragraph B of this disclosure;*
  4. *has, preceding this offer, been notified of any delinquent Federal or state taxes in an amount that exceeds \$3,000.00 of which the liability remains unsatisfied. Taxes are considered delinquent if the following criteria apply.*
    - a. *The tax liability is finally determined. The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge of the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.*
    - b. *The taxpayer is delinquent in making payment. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.*
    - c. *Have within a three year period preceding this offer, had one or more contracts terminated for default by any federal or state agency or local public body.)*
- B. Principal, for the purpose of this disclosure, means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity or related entities.
- C. The Contractor shall provide immediate written notice to the State Purchasing Agent or
- D. other party to this Agreement if, at any time during the term of this Agreement, the Contractor learns that the Contractor's disclosure was at any time erroneous or became erroneous by reason of changed circumstances.
- E. A disclosure that any of the items in this requirement exist will not necessarily result in termination of this Agreement. However, the disclosure will be considered in the determination of the Contractor's responsibility and ability to perform under this

Agreement. Failure of the Contractor to furnish a disclosure or provide additional information as requested will be grounds for immediate termination of this Agreement pursuant to the conditions set forth in Paragraph 7 of this Agreement.

- F. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the disclosure required by this document. The knowledge and information of a Contractor is not required to exceed that which is the normally possessed by a prudent person in the ordinary course of business dealings.
- G. The disclosure requirement provided is a material representation of fact upon which reliance was placed when making an award and is a continuing material representation of the facts during the term of this Agreement. If during the performance of the contract, the Contractor is indicted for or otherwise criminally or civilly charged by any government entity (federal, state or local) with commission of any offenses named in this document the Contractor must provide immediate written notice to the State Purchasing Agent or other party to this Agreement. If it is later determined that the Contractor knowingly rendered an erroneous disclosure, in addition to other remedies available to the Government, the State Purchasing Agent or Central Purchasing Officer may terminate the involved contract for cause. Still further the State Purchasing Agent or Central Purchasing Officer may suspend or debar the Contractor from eligibility for future solicitations until such time as the matter is resolved to the satisfaction of the State Purchasing Agent or Central Purchasing Officer.

#### **41. Public Works Minimum Wage Act**

A. If this contract is in excess of sixty thousand dollars (\$60,000) and is for construction alteration, demolition or repair (or any combination of these including painting and decorating of state public buildings, state public works or state public roads and requires or involves the employment of mechanics, laborers or both), the requirements of the Public Works Minimum Wage Act, as set forth in Sections 13-4-10 through 13-4-17 are hereby incorporated into this Contract.

B. The minimum wages and fringe benefits to be paid to various classes of laborers and mechanics at all tiers under this contract shall be based upon the wages and benefits determined by the Director of the Labor Relations Division of the New Mexico Department of Workforce Solutions at the time of individual contract award under the authority of Sections 13-4-10 through 13-4-17 NMSA 1978. Using Agencies are responsible for contacting the Labor Relations Division for the current wage rate decision applicable to any resultant contract issued under this agreement and incorporation therein.

C. Such incorporated Wage Decision shall stipulate the Contractor, Subcontractor, Employer, or person acting as Contractor shall pay all mechanics and laborers employed on the site of the project, unconditionally and not less often than once a week and without subsequent unlawful deduction or rebate on any account, the full amounts accrued at time of payment computed at wage rates and fringe benefit rates not less than those determined pursuant to Subsection B of Section 13-4-11 NMSA 1978 to be the prevailing wage rates and prevailing fringe benefit rates issued for the project.

D. The Contractor receiving any such award to which the Act applies shall cause this provision to be placed in all subcontracts awarded by Contractor.

E. In the event during performance under this Contract, if the Director of the Labor Relations Division makes a written finding that any laborer or mechanic employed on the site of the project has been or is being paid as a result of a willful violation a wage rate or fringe benefit rate less than the rates required, the contracting Agency may, by written notice to the Contractor, subcontractor, employer or person acting as a Contractor, terminate the right to proceed with the work or part of the work as to which there has been a willful violation to pay the required wages or fringe benefits, and the contracting Agency may prosecute the work to completion by contract or otherwise, and the Contractor or person acting as a Contractor and the Contractor's or person's sureties shall be liable to the State for any excess costs occasioned thereby. Any party receiving notice of termination of a project or subcontract may appeal the finding of the Director of the Labor Relations Division as provided in the Public Works Minimum Wage Act.

**42. Suspension, Delay or Interruption of Work**

The State Purchasing Agent or other party to this Agreement may, without cause, order the Contractor, in writing, to suspend, delay or interrupt the work in whole or in part for such period of time as the State Purchasing Agent or other party to this Agreement may determine. The contract sum and contract time shall be adjusted for increases in cost and/or time associated with Contractor's compliance therewith. Upon receipt of such notice, Contractor shall leave the jobsite and any equipment in a safe condition prior to departing. Contractor must assert rights to additional compensation within thirty (30) days after suspension of work is lifted and return to work is authorized. Any compensation requested for which entitlement is granted and the contract sum adjusted, shall have profit included (for work completed) and for cost only (not profit) for Contractor costs incurred directly tied to the suspension itself and not otherwise covered by Contract remedy. Any change in Total Compensation must be reflected in an Amendment executed pursuant to Section 8 of this Agreement.

**43. Administrative Fees**

The Contractor agrees to provide a utilization report on all sales and/or services and fees to the agreement administrator in accordance with the following schedule:

<u>Period End</u>	<u>Report Due</u>
September 30	November 30
December 31	February 28 (29)
March 31	May 31
June 30	August 31

The periodic report shall include the gross total sales for the period subtotaled by procuring agency or local public body name. Please note that the SPD is interested in the distinction between sales to state agencies and those to local public bodies (such as cities and counties) to evaluate to whom SPD contracts are most beneficial. Such information will aid in strategically sourcing future procurements to ensure SPD is meeting the needs of its customers.

The reports shall be accompanied with a check payable to the State Purchasing Division for an amount equal to one percent (1.00%) of the total sales for the period. This 1.00% administrative fee will be deducted from the applicable rebate percentage on Exhibit A and the remaining basis points of the rebate will go to the participating entity as an ancillary credit to their invoice.

#### 44. Notification

Either party may give written notice to the other party in accordance with the terms of this Paragraph 45. Any written notice required or permitted to be given hereunder shall be deemed to have been given on the date of delivery if delivered by personal service or hand delivery or three (3) business days after being mailed.

To agency: Lawrence O. Maxwell, State Purchasing Agent

Office address: 1100 South St. Francis Drive  
 (for express carrier Joseph M. Montoya Building, Rm. 2016  
 and hand deliveries) Santa Fe, New Mexico 87505-4108  
 (505) 827-0472 (voice)  
 (505) 827-2484 (fax)  
[Lawrence.maxwell@state.nm.us](mailto:Lawrence.maxwell@state.nm.us)

Either party may change its representative or address above by written notice to the other in accordance with the terms of this Paragraph 44. The carrier for mail delivery and notices shall be the agent of the sender.

#### 45. Succession

This Agreement shall extend to and be binding upon the successors and assigns of the parties.

#### 46. Headings

Any and all headings herein are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement. Numbered or lettered provisions, sections and subsections contained herein, refer only to provisions, sections and subsections of this Agreement unless otherwise expressly stated.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of execution by:

STATE OF NEW MEXICO  
General Services Department

WEX BANK  
(Contractor)

BY: [Signature]

BY: Damen Haas

TITLE: Strategic Sourcing  
Business Chief

TITLE: VP, CFO

**APPROVED**  
By Legal Support at 10:37 am, Jul 14, 2016

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

TAXATION AND REVENUE DEPARTMENT

ID NO.: 02-384105-002

BY: Raymond Ramirez

DATE: 7/15/16

This Agreement has been approved by the State Purchasing Agent of New Mexico:

[Signature]  
State Purchasing Agent

7/15/16  
Date

**EXHIBIT A**

We will provide you with rebates in accordance with the below. It is possible to qualify for A, B, both A and B, or neither.

**A. Volume Rebate**

Subject to the express conditions below, we will issue a monthly financial incentive in the accordance with the below Volume Rebate Table off all your Monthly Retail Transactions charged to your accounts ("the Volume Rebate"). This financial incentive includes the 100 Basis Point (1.00%) Administrative Fee set forth in Section 43 of the Agreement.

**Rebate Table**

<b>Aggregate Monthly Gallons</b>	<b>Basis Points Administrative Fee Paid to St of NM Purchasing (Rebate Percentage)</b>	<b>Basis Points Rebate Credit to Individual Account (Rebate Percentage)</b>
0-299,999	100 basis points (1.00%)	25 basis points (0.25%)
300,000-599,999	100 basis points (1.00%)	45 basis points (0.45%)
600,000-899,999	100 basis points (1.00%)	55 basis points (0.55%)
900,000+	100 basis points (1.00%)	60 basis points (0.60%)

***Conditions***

The Rebate set forth herein is expressly conditioned on the following: (1) your Aggregate Monthly Gallons totally at least the minimum amount appear on the Rebate Table; (2) all entities on one billing cycle (i.e. cycle 4 monthly billing); and (3) payment in full within 30 calendar days of the billing date appearing on your invoice.

***Calculation***

We shall commence calculating the Volume Rebate on the first day of the first billing cycle after the Agreement becomes effective. The Volume Rebate will be calculated by determining the Aggregate Monthly Gallons and the applicable Rebate Percentage, then by multiplying the Rebate Percentage by the total dollar amount of Monthly Retail Transactions for each entity that meets all conditions of the Volume Rebate (above). For avoidance of doubt, accounts that do not pay within the stated 30 calendar day payment terms will not earn a Volume Rebate; however, the gallons on those accounts will be aggregated to determine the overall volume tier met by the State.

***Payment***

Rebates for international transactions shall be paid at a rate of 50% of the applicable Rebate Percentage. Rebates shall be paid to you monthly in arrears.

**B. Payment Timing Rebate**

Subject to the express conditions below, we will issue a monthly rebate in accordance with the below Payment Timing Table off all Monthly Retail Transactions charged to your accounts (the "Payment Timing Rebate").

Bill Presentment	Payment Timing Options	Basis Points (Rebate Percentage)
Monthly	Payment in full within 15 calendar days of the billing date appearing on your invoice.	6 basis points (0.06%)
Monthly	Payment in full within 10 calendar days of the billing date appearing on your invoice via Direct Debit. *	8 basis points (0.08%)

\*Enrollment in Direct Debit requires the completion of a Direct Debit form.

*Conditions*

The Payment Timing Rebate set forth herein is expressly conditioned on our receipt of payment in full in accordance with one of the Payment Timing Options in the Payment Timing Table.

*Calculation*

We shall commence calculating the Rebate as of the closing of the first billing cycle after an agreement becomes effective. The Rebate will be calculated by determining the Payment Timing and the applicable Rebate Percentage, then by multiplying the Rebate Percentage by the total dollar amount of Monthly Retail Transactions.

*Payment*

Payment Timing Rebates for international transactions shall be paid at 50% of the applicable Rebate Percentage. Payment Timing Rebates shall be paid to you monthly in arrears.

**C. Definitions.**

"Aggregate Monthly Gallons" shall mean all Monthly Gallons purchased by the State and any Participating Entity.

"Monthly Gallons" shall mean all gallons of fuel purchased using Cards at retail locations that appear on invoices provided to you during a calendar month. Fuel purchased at Tier 1 Truck Stop locations (currently Flying J, Loves, Petro, and Pilot) are excluded from the Monthly Gallon amount. Due to billing cycle cut off dates and monthly calendar variances invoices received by you in a given month may contain transactions from the previous month and they may not contain all transactions that occurred during the month in which you were invoiced.

"Monthly Retail Transactions" shall mean the total amount of all purchases made using Cards at retail locations that appear on invoices provided to you in a calendar month. Monthly Retail Transactions shall not include: (i) those amounts representing credits, disputed items, fees, late

fees or charges posted to your accounts (such as returned check fees, collection costs, administrative fees and reporting fees), (ii) fuel purchased at Tier 1 Truck Stop locations (currently Flying J, Loves, Petro, and Pilot), or (iii) any amounts posted to an account with respect to which a Card has been reported lost or stolen.

#### WEX Universal Fleet Card Fee Schedule

Set-up Fee	WAIVED
Monthly Card Charge	WAIVED
Replacement Card	WAIVED
International Currency Conversion Fee	2% of the total transaction value
Reproduced Reports	\$25.00 per request
General Research Fee	\$15.00 per hour
Expedited Shipping Fees	Cost varies
Returned Payment Fee	\$50.00 per occurrence
<b>Over Credit Limit Fee</b>	<b>WAIVED</b>
Reactivation Fee	WAIVED
Truck Stop Fee	WAIVED
Program Maintenance Charge	WAIVED
Paper Delivery Fee	WAIVED

*Pricing for additional products and services is available upon request or reflected on the enrollment forms or in the terms of use that you must agree to in order to receive the additional products and services.*

<sup>1</sup>*You may choose to have a flat fee or a per transaction fee applied in the event that you exceed your credit line.*

<sup>2</sup>*Actual charges to be applied to your account will be disclosed on your billing statement.*

**Payment Timing.** Payment is due in full within 30 days of the date appearing on your invoice. If the payment due date falls on a non-Business Day, payment is due on the Business Day before the payment due date or in the event a prompt payment act or law governs the State's payment timing we will review the prompt payment act or law. Invoices include transactions that have posted to our system in your billing cycle and will not include all transactions that have been made in the billing cycle. Your account is delinquent if the balance is not paid within 30 days of the billing date appearing on your invoice.

Upon payment default, finance charges will be assessed at a monthly percentage rate of 6.99%. The periodic rate will be prorated based on the company's billing cycle. Issuer will begin to assess a finance charge on the first day following the date a payment is due and is not posted to the account. The finance charge will be calculated by determining the total balance due on the date the account becomes delinquent. The total balance due includes any additional charges and credits posted to the account since the last billing cycle through the payment due date and then subtracting any payments and/or credits entered during that period for Company reported disputes or otherwise. The total balance due will be multiplied by the periodic rate to determine the account's finance charge. In the event that the calculated finance charge is less than seventy-

five dollars (\$75.00), a minimum finance charge of seventy-five dollars (\$75.00) will be assessed.

If a payment is not received by the payment due date and the balance due is less than ten dollars (\$10), a finance charge will not be assessed and the balance will carry forward to the following billing cycle. If additional charges are posted to the account, including other fees, and the new balance exceeds ten dollars (\$10), a finance charge will be assessed on the new balance upon payment default.