

Agreement Between Owner, Buyer and Contractor

where the basis of payment is a
STIPULATED SUM

RECITAL

Buyer is an entity created by a Joint Powers Agreement as authorized by Section 11-1-1, et. seq., N.M.S.A., 1978, which consists of public educational institutions in New Mexico that have joined together for the purpose of construction, purchasing tangible personal property and services at economical prices.

Owner is a public educational institution, which is a Party to the aforementioned Joint Powers Agreement, desiring to receive certain goods and services.

Seller has responded to a Request for Bid (RFB) or Request for Proposal (RFP) published by Buyer in accordance with the Procurement Code, Section 13-1-103 or 13-1-112, N.M.S.A., 1978, and a resultant contract has been issued to the Seller of construction, tangible personal property and services. Now the Buyer wishes to purchase such construction, tangible personal property and services for the benefit of Owner. In order to consummate the agreement of the parties, it is necessary that the Buyer issue a Purchase Order to Seller under terms and conditions specified in the RFB or RFP, and that Owner issue its Purchase Order to Buyer under the same terms and conditions. This procedure ensures that the funds of New Mexico taxpayers will be spent wisely and prudently.

To this extent, Buyer is acting as a conduit through which title to construction, tangible personal property and services may be vested in Owner. Buyer warrants and assures the Owner that it has complied with the Procurement Code, the Public Works Contract Act and the Sub-contractor Fair Practices Act in contracting for procurements from Seller. In consideration of the recitals and for other valuable consideration, it is agreed as follows:

1. Owner shall issue its Purchase Order to Buyer in which is stated the price, and terms and conditions for acceptance of the goods and services by Owner. Buyer in turn shall issue its Purchase Order to Seller under the same price, terms, and conditions. Because Buyer is acting on behalf of Owner, it is agreed that Seller will assert no claim or suit against Buyer in the event that Seller fails to receive timely payment for its services and materials as set forth below or for any other claim which arises under this Agreement or the purchase orders.
2. Buyer's obligation hereunder will be to act as a procurement agent for the construction, tangible personal property and services provided by Seller to Owner. Both Seller and Owner agree that neither will assert a claim against Buyer in the event that a dispute arises regarding the failure of Seller or Owner to perform as provided hereunder or as called for in the Purchase Orders.
3. If Buyer is named in a suit or dispute by either Seller or Owner, both parties agree jointly and severally to pay for Buyer's reasonable costs of defense, including attorney's fees and out of pocket expenses. This paragraph does not apply if the suit or dispute involves the intentional or grossly negligent breach of Buyer's obligation as the escrow agent for payment under this Procurement Agreement.

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4. Should Buyer be found to be liable for any claim against it in connection with the performance of this Agreement or the Purchase Orders, Owner will indemnify it by paying any sum determined to be owed by Buyer; provided, however, such liability shall not attach if such loss is occasioned by the gross negligence or intentional misconduct of Buyer. Neither Owner nor Buyer shall be liable for any loss or damage to persons or property as a result of the other's acts or omissions or the acts or omissions of the other's officers, agents or employees in connection with this Agreement. Any liability incurred in connection with this Agreement shall be subject to the immunities and limitations of the New Mexico Tort Claims Act, §§ 41-4-1 et seq, NMSA 1978, as amended.

5. Owner and Buyer agree that Buyer's duties and responsibilities under this Agreement are limited to Buyer's obligation to provide, when requested by Owner, lists of vendors on Buyer's records which Buyer has identified as responsible bidders willing to provide specified goods, services, construction and personal property pursuant to the New Mexico Procurement Code, to completing purchase orders forms, to making payment in accordance with Owner's written instruction and to provide strict accountability for all monies paid or received pursuant to this Agreement. Buyer's liability shall be limited to performance of such written instructions and Buyer shall incur no liability to Seller or Owner except for liability arising from its own gross negligence or willful misconduct. Owner acknowledges that Owner's selection of Seller is based upon Owner's independent review of such qualifications and Buyer shall not be liable to Owner as a result of any default of Seller or other persons who are not agents or employees of Buyer as Buyer is acting as procurement agent for Owner. Owner and Seller agree to hold Buyer harmless from all costs, expenses, attorney fees and judgments based upon claims between Owner and Seller in connection with the specified goods, services, construction and personal property obtained through Buyer's cooperative procurement. Specifically, Buyer does not guarantee or make any representations concerning the quality of any goods or the performance of any services procured and Buyer has no obligation concerning delivery, quality or suitability of any goods or the quality or performance of any services.

AGREEMENT

The Project is «RecitalPROJECT». This Agreement is made as of the «RecitalDAY» day of «RecitalMONTH» in the year of «RecitalYEAR», by and between the parties as follows:

Owner:

«OwnerName»
c/o «Owner_co»
«Owner_Address»
«OwnerCity_NMZip»
Phone: «OwnerPhone»
Fax: «OwnerFax»

Buyer:

Cooperative Educational Services
c/o Dr. Max Luft
4216 Balloon Park Road NE
Albuquerque, NM 87109
Phone: (505) 344-5470
Fax: (505) 344-9343

Seller (hereafter called Contractor):

«SellerName»
c/o «Sellerco»
«SellerAddress»
«SellerCityNMZip»
Phone: «SellerPhone»
Fax: «SellerFax»

Design Professional of Record:

«DesgnProfName»
c/o «DesisgnProfco»
«DesgnProfAddress»
«DesgnProfCityNMZip»
Phone: «DesgnProfPhone»
Fax: «DesgnProfFax»

ARTICLE 1
THE CONTRACT DOCUMENTS

The Contract Documents consist of the RFB or RFP and Contractors response which resulted in Award to Contractor for these services and goods, this Agreement, Scope of Work, General Specifications, Time Lines, Budget, Addenda issued prior to execution of this Agreement, and Preliminary Drawings and Modifications issued after execution of this Agreement. These form the Contract, and are fully a part of the Contract as if attached to this Agreement or repeated herein. The PSFA General Conditions of the Contract for Construction are also incorporated as a part of this contract, where such items and terms are applicable. Should a conflict in these documents exist, then Articles in this contract, then the terms and conditions of the RFB or RFP shall prevail in said order. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modification, appears in Article 9.

ARTICLE 2
THE WORK OF THIS CONTRACT

The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

«Article2»

ARTICLE 3
DATE OF COMMENCEMENT AND COMPLETION

3.1 The date of commencement is the date from which the Contract Time of paragraph 3.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a Notice to Proceed issued by the Owner. In no case shall the Contractor proceed without receiving a purchase order from the Buyer. «Article3dot1»

Unless the date of commencement is established by a Notice to Proceed issued by the Owner, the Contractor shall notify the Owner in writing not less than five days before commencing the Work.

3.2 The Contractor shall achieve Substantial Completion of the entire Work not later than «Article3dot2Date».

Substantial Completion shall occur when the Owner's Representative or Design Professional determines that only punch list items remain to be corrected, and shall mean that only a small or minor portion of the work is left to be done. Punch list will be provided within five working days of Substantial Completion acceptance.

3.3 If substantial completion is not achieved within 14 calendar days after the date specified in 3.2, Owner or Buyer has the right to assess liquidated damages in the amount of «Article3dot3aDailyLiqDam»/day. Such amount shall be deducted from final payment or as stated below. «Article3dot3b»

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3.4 If Final Completion is not achieved within 10 working days of receipt of punch list, Owner or Buyer has the right to assess liquidated damages in the amount of \$500/day. Such amount shall be deducted from final payment or as stated below.

ARTICLE 4
CONTRACT SUM

4.1 The Owner shall pay the Buyer in current funds for the Contractor's performance of the Contract the Contract Sum of «Article4dot3Totla» subject to additions and deductions as provided in the Contract Documents.

4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner: «Article4dot2»

4.3 The Contract Sum is determined as follows:

Base Bid Amount	.....	«Article4dot3BaseBid»
Alternates (if any)	.....	«Article4dot3Alternates»
Gross Receipts Tax at	«Article4dot3GrossReceiptRate»%	«Article4dot3GrossReceipt»
Construction sub-total	.....	«Article4dot3ConstSum»
Payment and Performance Bond	.....	«Article4dot3Bond»
Construction Sum	.....	«Article4dot3Totla»

4.4 Unit prices, if any, are as follows: «Article4dot4»

4.5 The Owner shall pay the Buyer a 1.0% administrative fee, which is included in the Contract Sum.

ARTICLE 5
PROGRESS PAYMENTS

5.1 Based upon Applications for Payment submitted to the Owner's Representative by the Contractor and Certifications for Payment issued by the Owner's Representative or Design Professional, the Owner shall make progress payments on account of the Contract Sum to the Buyer. The Owner shall pay Buyer's invoices, not exceeding the Contract Sum (referred to in 4.1), within 20 days of receipt of each invoice.

5.2 Based upon Applications for Payment submitted to the Owner's Representative by the Contractor and Certificates for Payment issued by the Owner's Representative and the Design Professional to the Buyer, the Buyer shall make payments to the Contractor as provided below and elsewhere in the Contract Documents. «Article5dot2»

5.3 Progress payments, approved by Owner's Representative and the Design Professional may include invoices for stored materials, percentage of work completed, verification of sub contractor bids and awards, itemized profit and administration fees. Prior to payment of first request, Labor and Material Payment Bond, Performance Bond, Notification of Award and Statement of Intent to Pay Prevailing

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Wages shall be provided. The final payment request shall include Affidavit of Wages Paid of certified payroll from Contractor and all sub-contractors.

5.4 Applications for Payment may be modified as stated below: «Article5dot4».

5.5 When an Application for Payment has been received by Owner's Representative, approval for payment indicated as Certificate for Payment, if acceptable, shall be transmitted to the Buyer within five working days. When the Buyer receives authorization, the Owner shall be invoiced within four working days.

5.6 Each Application for Payment shall be based upon the schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work, and be prepared in such form and supported by such data to substantiate its accuracy as the Buyer may require. This schedule, unless objected to by the Buyer, shall be used as a basis for reviewing the Contractor's Applications for Payment.

ARTICLE 6 **FINAL PAYMENT**

6.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be authorized by the Owner's Representative and Design Professional to the Buyer when (1) the Contract has been fully performed by the Contractor including the Contractor's responsibility to correct punch list items, and to satisfy other requirements, if any; and (2) a final Certificate for Payment has been issued by the Owner's Representative and Design Professional. Such final payment shall be made by the Buyer no less than seven working days after the receipt of the final payment from Owner, or as follows: «Article6dot1»

ARTICLE 7 **MISCELLANEOUS PROVISIONS**

7.1 Reference. Where reference is made in this Agreement to a provision of the General Conditions or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

7.2 Interest Rate. Payments due and unpaid under this Agreement shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located. «Article7dot2»

7.3 Owners Representative. The Owner's representative shall be as follows, and may be modified at the option of the Owner: «Article7dot3»

7.4 Governance of Agreement. This Agreement shall be governed exclusively by the provisions hereof and by the laws of the State of New Mexico, as the same from time to time exist. The foregoing notwithstanding, any dispute arising under or relating to this Agreement will first be submitted to mediation. If mediation fails to resolve the issues, then this dispute will be submitted to binding arbitration under the laws of the State of New Mexico. All parties necessary for a final and consistent resolution of the issues submitted must be joined in the arbitration, unless the parties agree otherwise. If

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these additional necessary parties cannot be or refuse to be joined in the arbitration, then the parties may waive arbitration and pursue resolution of the issues through litigation.

7.5 Terms Defined. The Terms used in the Agreement which are defined in the General and Categorical Conditions of the Contract between the Buyer and Contractor shall have meanings designated in the Conditions.

7.6 Hold Harmless. The Contractor shall hold harmless and indemnify the Owner and Buyer against any and all injury, loss, or damage including cost of defense – including but not limited to court costs and attorney's fees arising out of the negligent acts, errors, or omissions of the Contractor.

7.7 Independent Contractor Status. The Contractor and his agents and employees are independent contractors and are not an employee of the Owner or the State of New Mexico. The Contractor and his agents and employees shall not accrue leave, retirement, insurance, bonding, use of State vehicles, or any other benefits afforded to employees of the Owner or the State of New Mexico as a result of this Agreement.

7.8 Release of Owner. The Contractor, upon final payment of the amounts due under this Agreement, releases the Owner, his officers and employees, and the State of New Mexico from liabilities and obligations arising from or under this Agreement, including but not limited to all damages, losses, costs, liabilities, and expenses, including but not limited to attorney's fees and costs of litigation that the Contractor may incur.

7.9 No Binding by Contractor. The Contractor agrees not to purport to bind the Owner, Buyer or the State of New Mexico to any obligation not assumed herein by the Owner, Buyer or 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.

7.10 Notices. All notices herein provided to be given, or which may be given, by either party to the other shall be deemed to have been fully given when made in writing and deposited in the United States mail postage prepaid; and in the instance of notice of termination of work, certified mail, Federal Express, or similar verifiable delivery method addresses to those stated on page 2. Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed to either party may be changed by written notice given by such party to the other as herein above provided.

7.11 Gender, Singular/Plural. Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context requires otherwise.

7.12 Captions and Section Headings. The captions and section headings contained in this Agreement are for convenience of reference only, and in no way limit do they define, or enlarge the terms, scope, and conditions of this Agreement.

7.13 Counterparts. This document shall be executed in no less than three (3) counterparts, each of which shall be deemed an original.

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7.14 Certificates and Documents Incorporated. All certificates and documentation required of the Contractor by the provisions of this Agreement shall be incorporated by reference to this Agreement at the time and extent they are consistent with its conditions and terms.

7.15 Severability. If any clause or provision of this Agreement is illegal, invalid, or unenforceable under present or future laws effective during the terms and conditions of this Agreement, then and in that event it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby.

7.16 Waiver. No provision of this Agreement shall be deemed to have been waived by either party unless such waiver be in writing signed by the party making the waiver and addressed to the other parties signed by all; nor shall any custom or practice which may evolve between the parties in the administration of the terms hereof be construed to waive or lessen the right of either party to insist upon performance by the other party in strict accordance with the terms hereof. Further, the waiver by any party of a breach by the party of any term, covenant, or condition hereof shall not operate as a waiver of any subsequent breach of the same or any other term, covenant, or condition thereof.

7.17 Entire Agreement. This Agreement represents the entire contract between the parties and, except as otherwise provided herein, may not be amended, changed, modified, or altered without the written consent of the parties hereto. This Agreement incorporates all of the conditions, agreements, and understandings between the parties concerning the subject matter of this Agreement, and all such conditions, understandings, and agreements have been merged into this written Agreement. No prior condition, agreement, or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this written Agreement.

7.18 Words and Phrases. Words, phrases, and abbreviations which have well-known technical or trade meanings used in the Contract Documents shall be used according to such recognized meanings. In the event of a conflict, the more stringent meaning shall govern.

7.19 Relationship of Contract Documents. The Contract Documents are complementary and any requirement of one contract document shall be as binding as if required by all.

ARTICLE 8 **TERMINATION OR SUSPENSION**

8.1 The Agreement may be terminated by the Owner or the Contractor as provided PSFA General Conditions of the Contract for Construction.

8.2 The Work may be suspended by the Owner as provided in PSFA General Conditions of the Contract for Construction.

ARTICLE 9 **ENUMERATION OF CONTRACT DOCUMENTS**

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9.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated with a check mark as follows:

- ___ Contract between Buyer and Contractor
- ___ Request for Bid published by Buyer
- ___ Response to RFB or RFP by Contractor
- ___ Scope of Work for the Project
- ___ General Specifications for the Project
- ___ Project Manual
- ___ Preliminary Drawings and Modifications
- ___ Performance Bond
- ___ Labor and Material Payment Bond
- ___ Notice to Proceed
- ___ Certificate of Insurance
- ___ «Article9dot1Dot1»

These documents may be held by the Buyer, Seller or Owner, but are not required to be in the possession of each party.

9.1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual and are as follows: «Article9dot1dot2»

9.1.3 The Specifications are those contained in the Project Manual dated «Article9dot1dot3a» as in paragraph 9.1.2, and are as follows: «Article9dot1dot3b»

9.1.4 When a construction contract is awarded in excess of twenty-five thousand dollars (\$25,000) a Performance and a Payment Bond, executed by a surety company authorized to do business in New Mexico and said surety approved in Federal Circular 570 or the State Board of Finance or the Owner in an amount equal to 100% of the contract price shall be delivered to the Buyer with the Owner listed as beneficiary prior to commencement.

9.1.5 The Drawings are as follows unless a different date is shown below: «Article9dot1dot5»

9.1.6 The addenda, if any, are as follows: «Article9dot1dot6»

9.1.7 Other documents, if any, forming part of the Contract Documents are as follows:
«Article9dot1dot7»

9.1.8 The General Conditions are the PSFA General Conditions of the Contract for Construction, most recent edition.

This Agreement is entered into as of the day and year first written above and is executed in at least three original copies of which one is to be delivered to the Contractor, one to the Buyer for use in the administration of the Contract, and the remainder to the Owner.

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OWNER

«OwnerName»

Signature

Printed Name

Title

BUYER

Cooperative Educational Services (CES)

Signature

Printed Name

Title

CONTRACTOR

«SellerName»

Signature

Printed Name

Title

DESIGN PROFESSIONAL

«DesgnProfName»

Signature

Printed Name

Title