

NEW MEXICO STATE UNIVERSITY STANDARD TERMS AND CONDITIONS

A. All Transactions. This Part A applies to all NMSU purchases, unless specifically stated otherwise.

1. Parties. The parties to this Agreement are referred to by the following terms:
 - (a). *Seller* — the supplier or vendor of goods or services.
 - (b). *NMSU* — the Regents of New Mexico State University.
 - (c). *Parties* — NMSU and Seller.
 - (d). *Party* — either NMSU or Seller as contextually appropriate.

2. Agreement. The Purchase Order together with these Standard Terms and Conditions, as incorporated by reference, and any other documents listed on the Purchase Order (collectively, the “Agreement”), comprise the entire understanding between the Parties concerning the Agreement’s subject matter. This Agreement incorporates each commitment, covenant, and understanding between the Parties concerning that subject matter, and each such covenant, commitment and understanding has been merged into this Agreement. No prior commitment or understanding, irrespective of whether written, of the Parties or their agents is valid or enforceable unless embodied in this Agreement. Unless specifically authorized in writing by NMSU, in order of priority the Purchase Order and Standard Terms and Conditions, control over any other document that comprise the Agreement. Any provision proposed by Seller that is inconsistent with or in addition to this Agreement is considered rejected unless explicitly accepted in writing by NMSU.

3. Payment Terms. Unless stated in this Agreement otherwise, the payment provisions for this Agreement are net thirty days from the date of acceptance of the goods or services and receipt of the Seller’s invoice by NMSU’s Accounts Payable Office at invoices@nmsu.edu. Any error within any document required under this Agreement will result in a delay in payment. Any late payment charge is not to exceed $\frac{1}{2}$ of one percent per month. If prompt payment discounts apply to this Agreement, then any discount time period does not begin until goods or services have been accepted and a correct invoice received.

4. Warranties. Seller warrants that the furnished goods, services, or both, will be exactly as specified in the Agreement, free from defects in Seller’s design, labor, materials and manufacture, and conforming to any drawings or specifications incorporated into the Agreement and with any samples furnished by Seller. All applicable Uniform Commercial Code warranties expressed and implied are incorporated into the Agreement.

5. Termination.
 - (a). *Termination for Convenience.* NMSU may, upon thirty days’ written notice, terminate this Agreement for convenience in whole or in part. NMSU must pay Seller on the Agreement before termination as follows: (1) the mutually-chosen unit price for goods delivered and accepted before termination; and (2) the portion of the mutually-chosen price attributable to services rendered before termination. Compensation under the Agreement is not to exceed the total Agreement amount. NMSU is not liable for consequential damages, including lost profits.

(b). *Termination for Default.* NMSU may, by written notice, terminate this Agreement, in whole or in part, for Seller's default if Seller refuses or fails to comply with this Agreement or fails to make progress so as to endanger timely performance and does not cure that failure within ten days of written notice of default. In that event, NMSU may otherwise secure the materials, supplies or service ordered, and Seller is liable for damages suffered by NMSU. If after notice of termination for default NMSU determines Seller was not in default or if Seller's default is due to failure of NMSU, termination is considered to be for the convenience of NMSU. The rights and remedies of NMSU provided in this paragraph are not exclusive and are in addition to any other rights and remedies provided by law or under this Agreement. As used in this paragraph, the word "Seller" includes Seller and its suppliers at any tier.

(c). *Termination for Insolvency.* NMSU has the right to terminate this Agreement at any time if Seller files a petition in bankruptcy, or is adjudicated bankrupt; or if a petition in bankruptcy is filed against Seller and not discharged within thirty days; or if Seller becomes insolvent or makes an assignment for the benefit of its creditors or an arrangement under any bankruptcy law; or if a receiver is appointed for Seller or its business.

6. Non-Discrimination. Seller must operate as an equal opportunity employer and must not discriminate against any employee or applicant for employment because of age, ancestry, color, disability, gender identity, genetic information, national origin, race, religion, serious medical condition, sex (including pregnancy), sexual orientation, spousal affiliation or protected veteran status. Seller must conform to all related state and federal laws, executive orders and rules and regulations.

7. Payroll or Employment Taxes. NMSU has no duty to withhold or pay any federal, state, or local income, payroll or employment taxes of any kind with respect to any payment to Seller or on behalf of Seller or its agents or employees. But NMSU may be required to withhold up to a thirty percent tax withholding, under IRS Publication 515, on payments for services performed by a foreign individual or a foreign entity while in the United States.

8. Workers Compensation. "Term" means a period during which the Agreement has effect. Seller warrants that it has and will maintain in effect worker's compensation insurance for its employees and agents during the Term, to the extent required by law.

9. Inspection and Audit. NMSU reserves the right to audit Seller's records associated with the Agreement at any time during the Term and for a three-year period after the Term has ended. NMSU personnel – or a third party under contract with NMSU – is entitled to conduct any audit during business hours. NMSU must give Seller fourteen days' notice before conducting any audit. Seller must fully cooperate with the auditors. Seller must also make available to NMSU all books and records relevant to the Agreement kept or maintained by any subcontractor or agent of Seller. Seller must make any adjustment or payment due to NMSU as a result of the audit no later than thirty days after presentation of the findings to the Seller. If the audit discovers any finding related to inappropriate accounting (resulting in NMSU being overcharged at least 10 percent of the value of the goods or services, or \$10,000.00 whichever is less), non-performance, misrepresentation or fraud, then Seller must pay the cost of the audit.

10. Patent and Copyright Indemnity. Seller will indemnify, defend and hold harmless NMSU against all losses, liabilities, lawsuits, claims, expenses (including attorneys' fees), costs, and judgments incurred through third-party claims of infringement by the Seller of any copyright, patent, trademark or other intellectual property rights.

11. Advertising. Seller must obtain written NMSU consent before using any trade identity of NMSU in any of Seller's advertising, which consent may be withheld in NMSU's sole discretion.

12. Conflict of Interest. Seller must give notice to NMSU via email at purchasing@nmsu.edu of any NMSU employee or member of the NMSU Board of Regents who has a direct or indirect financial interest in the Seller or in the proposed transaction. An NMSU employee or Regent has a direct or indirect financial interest in the Seller or in the proposed transaction if presently or in the preceding twelve months the employee or Regent, or a close relative of either has or had an ownership interest in the Seller (other than as owner of less than one percent of the stock of a publicly traded corporation); works for the Seller, is a partner, officer, director, trustee or consultant to the Seller, or has a right to receive royalties from the Seller. Seller must file a Conflict of Interest disclosure form with NMSU. The Seller further represents and warrants that it has complied with, and, during the Term, will continue to comply with, all applicable provisions of the Governmental Conduct Act, §§10-16-1 et seq. NMSA 1978.

13. Safeguarding of Confidential Data.

(a). Any item or service specified in this Agreement may require Seller to create, receive from or on behalf of NMSU, or have access to records or systems containing Personal Identifying Information ("PII"). Without limitation, PII may be in the form of any social security number; driver's license number; other government-issued identification number; account number; credit card or debit card number; security code; access code; password; biometric data; Family Educational Rights and Privacy Act ("FERPA") protected data; Health Insurance Portability and Accountability Act ("HIPAA") protected data; Gramm-Leach-Bliley Act ("GLBA") protected data; data falling under the definition of Controlled Unclassified Information under state and federal law; data protected by the European Union; General Data Protection Regulation ("GDPR"); and other similar personal identifying information and protected data. Any PII that NMSU provides NMSU to the Seller, or that the Seller acquires through its own efforts in rendering or providing any goods or services under this Agreement, is considered confidential, to be held in strict confidence and to be released to the Seller's own personnel, agents, sub-agents and sub-consultants only to the extent necessary to provide or perform the goods or services required by this Agreement, and only in compliance with the above referenced laws and the requirements below.

(b). Before releasing PII to any other person or organization, Seller must obtain written consent from NMSU and, if the PII is not owned by NMSU, from the information owner. Seller represents, warrants and certifies that it complies with all NMSU policies regarding protection of PII and with the New Mexico Data Breach Notification Act. ("NMDBNA"). At the request of NMSU, Seller must provide NMSU a written summary of the procedures Seller uses to safeguard PII and a summary of any security and privacy audits or assessments of Seller's procedures performed by Seller's consultants or other external entities.

(c). “*InfoSecProg*” means an information security program that, at a minimum, conforms to those standards promulgated by the National Institute of Standards and Technology, Center for Internet Security (NIST-CIS), the Payment Card Industry Data Security Standards (PCI-DSS) or other equally robust standards. Seller further represents, warrants, and certifies that it will:

(1) hold PII in the strictest confidence, and not use or disclose that information except as

(a) permitted or required by this Agreement,

(b) required by law, or

(c) authorized, in writing, by NMSU and the information owner, if not NMSU, in writing otherwise;

(2) implement and maintain an *InfoSecProg* that contains administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of PII that it creates, receives, maintains, or transmits on behalf of NMSU;

(3) continually monitor its operations and take any action necessary to ensure that the information is safeguarded in accordance with this Agreement; and,

(4) contractually bind and ensure that its agents, sub-agents or sub-consultants adhere to the provisions set forth in this section.

(d). Upon termination of this Agreement or when Seller no longer reasonably requires PII to perform its obligations under this Agreement, whichever is sooner, Seller must, at the direction of NMSU, either:

(1) recover and return in a format approved by NMSU all PII provided by NMSU or created by Seller under this Agreement, including all PII that may be in the possession of Seller’s subcontractors or agents; or,

(2) destroy, in a manner that permanently renders the data unusable, unreadable and undecipherable, all PII provided by NMSU or created by Seller under this Agreement, including all PII that may be in the possession of Seller’s subcontractors or agents.

(e). If Seller becomes aware that PII is subject to a security or privacy breach in which PII is, or is reasonably believed to have been, accessed by an unauthorized person in any manner, Seller must immediately inform NMSU of that breach in writing, must identify to NMSU each person whose PII was compromised, must detail to the extent possible each cause of the breach, must take all necessary measures to ensure that further PII is not compromised, and must immediately begin each action necessary to comply with the notification obligations contained in the New Mexico Data Breach Notification Act (NMDBNA). No later than seven days after discovery of the breach, Seller must provide to NMSU its written plan to comply with the NMDBNA. Seller affirms that the obligations set forth in the NMDBNA are its own, and not those of NMSU. But Seller must fully cooperate with NMSU in any mitigation or notification action that NMSU undertakes due to the security breach. Upon completion of each action required under the NMDBNA, Seller must

certify to NMSU that Seller has completed that action. Seller's actions in complying with the NMDBNA do not entitle Seller to further compensation.

(f). If any Social Security number, credit card number or other similar data that may be used to damage a person's credit rating is disclosed to, or accessed by, an unauthorized person, or if the confidentiality of that information is breached otherwise, then Seller must pay for and arrange at no further cost to NMSU or the information owner a minimum of one year of credit monitoring and identity protection service offered by at least one of the three credit bureaus (Equifax, Experian, TransUnion).

(g). In addition to any other indemnity provided by Seller, upon any security breach involving PII, Seller will indemnify, defend with counsel approved by NMSU, and hold harmless NMSU from, for and against any loss; liability; lawsuit; claim; expense (including attorneys' fee or expense expended in enforcing this provision); cost; civil, regulatory or administrative penalty; or judgment incurred through any third-party claim of violation of the NMDBNA, HIPPA FERPA, GLBA, GDPR, or related to a security breach caused by Seller's own act or omission otherwise.

(h). In addition to any other termination right set forth in this Agreement and any other right at law or equity, if NMSU reasonably determines that the Seller has breached any obligation set forth in this section, NMSU may immediately terminate this Agreement without notice or opportunity to cure.

14. Export Restrictions. "U.S." means the United States of America. This Agreement is expressly made subject to any law, regulation, order, or other restriction on the export from the U.S. of any property, including intellectual property, or information about any property, including intellectual property, which may be imposed from time to time by the U.S. government. The Parties must not export any property, including intellectual property, or information about any property, including intellectual property other than in strict compliance with all applicable laws, regulations, orders or other restrictions. The Seller represents and warrants that the Seller is not located in, under the control of, or a national or resident of any country that is prohibited from engaging in business activities with the U.S.. **Export Control Reporting Requirement:** If NMSU consents to receiving any export-controlled information, equipment or material, then Seller must (i) include the Export Control Classification Number (ECCN) on the packing documentation, and (ii) send an electronic copy of the ECCN number and packing documentation to: exportcontrolmgr@nmsu.edu.

15. Penalties. The Parties understand that the Procurement Code, §§13-1-28 *et seq.* NMSA 1978, as amended, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony criminal penalties for bribes, gratuities and kickbacks.

16. Other Applicable Laws. Any provision required in a binding arrangement of this type by any applicable and valid executive order, federal, state or local law, ordinance, rule or regulation is considered to be incorporated into the Agreement.

17. Liability. Each Party is solely responsible, to the extent allowed by law, for any liability arising from personal injury, including death, or damage to property arising from the acts or failure to act of that Party or of its officials, agents, and employees under the Agreement. NMSU liability is strictly limited by, and this Agreement gives full effect to, the intent of the Tort Claims Act, §§41-4-1 et seq. NMSA 1978, and any amendments to that Act.
18. Independent Contractor. Each Party is considered to be an independent party and not to be an agent or representative of the other Party. Consequently, each Party has no liability for the acts or omissions of the other Party. In addition, neither Party, and none of their respective employees, agents or subcontractors, is entitled to compensation, worker's compensation, or employee benefits from the other Party by virtue of this Agreement.
19. Time is of the Essence. Time is of the essence regarding this Agreement.
20. Assignment. Seller must obtain NMSU's written consent before assigning any right or interest in this Agreement, or delegating any obligation under the Agreement. Any attempted assignment or delegation by Seller is wholly void and totally ineffective for all purposes unless made in conformity with this paragraph.
21. Changes. This Agreement can be modified or rescinded only by written and signed commitment of both Parties.
22. No Waiver. The waiver of a breach of any provision of this Agreement is not considered to be a waiver of any other provision of this Agreement, or as a waiver of any further breach of that provision or any other provision in the Agreement.
23. Force Majeure. No Party is liable or considered in breach of this Agreement for any failure or delay of performance that results, directly or indirectly, from any act of nature, civil or military authority, public disturbance, or any other cause beyond the reasonable control of either Party.
24. Governing Law. The laws of the State of New Mexico govern this Agreement, without giving effect to its choice of law provisions. Venue is proper only in a New Mexico court of competent jurisdiction in accordance with §38-3-1(G) NMSA 1978. By signing this Agreement, Seller acknowledges and accepts the jurisdiction of the courts of the State of New Mexico over any lawsuit arising under or out of any provision of this Agreement or in any way connected with or related or incidental to the dealings of the Parties in respect of the Agreement or any of the related transactions..
25. Waiver of Right to Jury Trial. EACH OF THE PARTIES WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION, OR CAUSE OF ACTION: (A) ARISING UNDER THE AGREEMENT; OR (B) IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES IN RESPECT OF THE AGREEMENT OR ANY RELATED TRANSACTIONS, IN EACH CASE WHETHER NOW EXISTING OR LATER ARISING, AND WHETHER IN CONTRACT, TORT, EQUITY, OR OTHERWISE. EACH PARTY CONSENTS TO ANY SUCH CLAIM, DEMAND, ACTION, OR CAUSE OF ACTION BEING

DECIDED BY COURT TRIAL WITHOUT A JURY AND ACCEPTS THAT THE OTHER PARTY MAY FILE A COPY OF THE AGREEMENT WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY. EACH PARTY AFFIRMS THAT IT HAD AN OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL BEFORE SIGNING THIS WAIVER OF JURY TRIAL, HAS CAREFULLY READ AND FULLY UNDERSTANDS THE EFFECTS OF THIS WAIVER OF JURY TRIAL, AND VOLUNATRILY AGREES TO WAIVE ITS RIGHT TO A JURY TRIAL.

26. Notice. A Party must give in writing any notice required to be given under this Agreement, unless explicitly required otherwise, and send that notice on the same date by USPS mail or conventional overnight courier, and by email addressed to the other Party as follows:

NMSU Procurement Services
Name: New Mexico State University
Attention: NMSU General Counsel
Address: MSC
PO Box 30001
Las Cruces, NM 88003-8001
Email: purchasing@nmsu.edu

Seller: Contact information as provided in the NMSU Vendor Questionnaire.

Notice is considered effective three business days after dispatched by mail or courier as indicated above, properly addressed, with postage prepaid. That notice has effect only if it also includes delivery by properly addressed email. NMSU and Seller may change their respective contact information upon prior written notice.

27. Captions. The headings contained in the Agreement are used solely for convenience and are not considered to define or limit this Agreement.

28. No Third-Party Beneficiary. This Agreement is for the benefit of the Parties only. No right or benefit is conferred to any third-party by or through this Agreement.

29. General Liability Insurance. If providing services on NMSU property, Seller must, at its own expense and without limiting its liability under this Agreement, maintain during the entire term of this Agreement insurance coverage in the following amounts:

- (a). Commercial General Liability Insurance with a minimum combined single limit (bodily injury, property damage and personal injury) of at least One Million Dollars (\$1,000,000) per occurrence, and Two Million Dollars (\$2,000,000) aggregate; and
- (b). Commercial Automobile Liability Insurance with a minimum combined single limit (bodily injury and property damage) of at least One Million Dollars (\$1,000,000) per incident.

Seller must obtain the required insurance coverage from an insurance company or companies recognized as an authorized carrier in the State of New Mexico with at least a Fitch B++ rating. Seller must specify “The Regents of New Mexico State University” as an additional insured and provide NMSU with a certificate or certificates of insurance evidencing the insurance policies required by this section. NMSU may waive or otherwise modify the above insurance requirements.

B. Purchases of Goods or Services with Funds from Federal Sources This Part applies only to NMSU’s purchases of goods or services made with funds from a Federal source.

1. Equal Opportunity. Seller and any subcontractor must abide by the equal opportunity requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a).

2. Ownership of Intellectual Property Developed Under Agreement (Bayh-Dole Act). To the extent that its subject matter set forth performance of experimental, developmental, or research work, the Agreement provides for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

3. Byrd Anti-Lobbying Amendment (31 U.S.C. 1352). If Seller under this Agreement applies or bids for an award of at least \$100,000, then Seller must file the required certification. Seller must require each tier of subcontractor to certify to the tier above that it will not use and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. 1352. Seller must require each subcontractor also to disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Seller must cause each such disclosure to be forwarded from tier to tier up to the direct recipient from the Federal Government.

4. Debarment and Suspension. Seller must fully comply with the requirements stipulated in Subpart C of 45 CFR 620, entitled “Responsibilities of Participants Regarding Transactions.” Seller is responsible for ensuring that any lower tier covered transaction, as described in Subpart B of 45 CFR 620, entitled “Covered Transactions,” includes a term or condition requiring compliance with Subpart C. Seller is also responsible for further requiring the inclusion of a similar term or condition in any subsequent lower tier covered transaction. Seller acknowledges that failing to disclose the information required under 45 CFR 620.335 may result in the termination of the award, or pursuance of other available remedies, including suspension and debarment. Seller may access the Excluded Parties List System at <https://www.sam.gov>.

5. Applicable FAR Clauses. Applicable clauses from the Federal Acquisition Regulations (FAR) and the Department of Defense Federal Acquisition Regulations Supplement (DFARS) are incorporated into this Agreement by reference. The current list of clauses can be found at www.acquisition.gov.

6. Penalties. In compliance with FAR 52.203-7, NMSU has in place and follows procedures designed to prevent and detect violation of the Anti-kickback Act of 1986 in its operations and direct business relationships.

C. Purchases of Goods. The provisions in this Part apply only to purchases of goods.

1. Title and Risk of Loss. The title and risk of loss of the goods do not pass to NMSU until NMSU actually receives the goods at the point or points of delivery. Seller is not authorized to ship the goods under reservation and no tender of a bill of lading operates as a tender of the goods. The Agreement is subject to termination for failure to deliver on time.

2. Inspection of Goods. NMSU has the right to inspect the goods at delivery before accepting them. Despite any final acceptance and payment, Seller is liable for any latent defect, fraud, or any gross mistake that amounts to fraud. Acceptance of goods does not waive the right to claim damages for breach of contract.

3. No Replacement of Defective Tender. Seller must cause every tender of goods fully to comply with this Agreement as to time of delivery, quantity, quality, and the like. Any tender made from Seller that does not fully conform, constitutes a material breach and Seller has no right to substitute a conforming tender.

D. Purchases of Services. This Part applies only to purchases of services.

1. Acceptance of Services. Acceptance of services does not waive the right to claim damages for breach of contract.

2. Instrumentalities. Seller must supply all labor, equipment, tools, materials and supplies to accomplish the mutually-chosen scope of work, except as set forth in this Agreement.

3. Ownership of Intellectual Property Developed Under Agreement. This section and its subparts does not apply to software being licensed to NMSU. This Section and its subparts survive the end of the Term.

(a). *Work Made for Hire.* In exchange for the compensation that Seller receives under this Agreement, Seller affirms that any work product required by this Agreement is considered a work made for hire as defined in the United States Copyright Act (17 U.S.C. §101), applicable common law and corresponding laws of other countries. NMSU has a sole right and authority to seek statutory copyright protection and to enjoy the benefits of ownership of the work. Seller assigns to NMSU all rights, title and interest in and to the work product required by this Agreement, and Seller must require all of its employees, agents, and subcontractors at any tier to commit in writing that they assign to NMSU all right, title and interest in the work product required by the Agreement.

(b). *Ownership of documents.* All documents that Seller prepares under this Agreement are the sole property of NMSU (NMSU Property). Seller must obtain NMSU's written consent before reproducing or distributing NMSU Property. No later than two weeks after a request by NMSU,

Seller must deliver all NMSU Property to NMSU. Seller is responsible for the protection and/or replacement of any original documents in its possession.

(c). *Inventions.* Seller must report any invention arising out of the work required by this Agreement to NMSU. NMSU has sole right and authority to seek statutory patent protection under United States and foreign patent laws and to enjoy the benefits of ownership of the invention, irrespective of whether the invention was required of the Seller or its employees, agents, or subcontractors at any tier, as part of the performance of work required by this Agreement. Seller assigns to NMSU all right, title and interest in and to any invention made in the course of the work required by this Agreement, and must sign and deliver each document and do anything necessary and proper to effect that assignment. Seller must require its employees, agents, and subcontractors at any tier to commit in writing that they will sign and deliver all documents and do anything necessary and proper to effect assignment to NMSU of any invention arising out of work required by this Agreement.

E. Purchases of Construction and Related Services. The provisions in this Part E apply only to purchases of construction and related services.

Incorporation by Reference. The provisions applicable only to construction and related services are in a separate document incorporated here by reference. The current version of this document can be found at <https://purchasing.nmsu.edu/terms-and-conditions/>.