

## NEW MEXICO STATE UNIVERSITY STANDARD TERMS AND CONDITIONS

A. **All Transactions** The terms and conditions in Part apply 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, comprise the entire agreement between the Parties (Agreement). This Agreement incorporates all the agreements, covenants, and understandings between the Parties concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior agreement or understanding, verbal or otherwise, of the parties or their agents will be 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 all other documents that comprise the Agreement. Any terms proposed by Seller which are inconsistent with or in addition to this Agreement are deemed rejected unless explicitly agreed to in writing by NMSU.
3. **Payment Terms.** Unless otherwise stated in this Agreement, the payment terms for this Agreement are net 30 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 [accountspayable@nmsu.edu](mailto:accountspayable@nmsu.edu) (preferred) or MSC 3AP, P O Box 30001, Las Cruces, NM 88003-0027. Errors within any of the required documents will result in a delay in payment. Any late payment charge will not exceed ½ of 1% per month. If prompt payment discounts apply to this Agreement any discount time period will 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 herein and with samples furnished by Seller, if any. All applicable Uniform Commercial Code warranties expressed and implied are incorporated herein.
5. **Termination.**
  - (a) *Termination for Convenience.* NMSU may, upon 30 days written notice, terminate this Agreement for convenience in whole or in part. NMSU will pay Seller on the Agreement before termination as follows: (1) the agreed-upon unit price for goods delivered and accepted before termination; and (2) the portion of the agreed-upon price attributable to services rendered before termination. Compensation hereunder

will in no event exceed the total Agreement amount. NMSU will not be 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 the provisions of this Agreement or fails to make progress so as to endanger timely performance and does not cure such failure within ten (10) days of written notice of default. In such event, NMSU may otherwise secure the materials, supplies or service ordered, and Seller will be 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 will be deemed to be for the convenience of NMSU. The rights and remedies of NMSU provided in this paragraph will not be 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 in the event 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 (30) days; or if Seller becomes insolvent or makes an assignment for the benefit of its creditors or an arrangement pursuant to any bankruptcy law; or if a receiver is appointed for Seller or its business.
6. Non-Discrimination. Seller will operate as an equal opportunity employer and will 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 agrees to conform to all related state and federal laws, executive orders and rules and regulations.
  7. Payroll or Employment Taxes. No federal, state, or local income, payroll or employment taxes of any kind will be withheld or paid by NMSU with respect to payments to Seller or on behalf of Seller or its agents or employees. Except that NMSU may be required to withhold up to a 30% 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. Seller warrants that it has and will maintain in effect worker's compensation insurance for its employees and agents during the term of this Agreement, 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 following the expiration or termination of the Agreement. Any audit may be conducted by NMSU personnel or a third party under contract with NMSU during business hours. NMSU will give Seller 14 days' notice prior to conducting any audit. Seller agrees to fully cooperate with the auditors. Seller will also make available to NMSU all books and records

relevant to the Agreement kept or maintained by any subcontractor or agent of Seller. Any adjustments and/or payments due to NMSU as a result of the audit will be made no longer than 30 days after presentation of the findings to the Seller. Should the audit discover findings related to inappropriate accounting (resulting in NMSU being overcharge charged at least 10% of the value of the goods or services, or \$10,000.00 whichever is less), non-performance, misrepresentation or fraud, the Seller agrees to 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 agrees that it will not use NMSU or any of its names or trademarks in any of Seller's advertising without obtaining prior written consent, which 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 Board of Regents who has a direct or indirect financial interest in the Seller or in the proposed transaction. An NMSU 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 1% 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 of this Agreement, 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:** The item(s) or service(s) 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 social security numbers; driver's license numbers; other government-issued identification numbers; account numbers; credit card or debit card numbers; security codes; access codes; passwords; 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 pursuant to state and federal law ("CUI"); data protected by the European Union (EU) General Data Protection Regulation (GDPR); and other similar personal identifying information and protected data. Any and all PII provided by NMSU to the Seller, or which the Seller acquires through its own efforts in rendering or providing any goods or services under this Agreement, will be considered confidential, be held in strict confidence and will 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. PII will not be released by Seller to any other person or organization without the prior written consent and approval of NMSU and, if the PII is not owned by NMSU, by 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. Seller further represents, warrants, and certifies that it will:
1. hold PII in the strictest confidence and will not use or disclose information except as
    - (a) permitted or required by this Agreement,
    - (b) required by law, or
    - (c) otherwise authorized, in writing, by NMSU and the information owner, if not NMSU, in writing;
  2. implement and maintain a comprehensive information security program 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. Such information security program must at a minimum, conform 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;
  3. continually monitor its operations and take any action necessary to assure the information is safeguarded in accordance with the terms of 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;
  5. upon termination of this Agreement or when Seller no longer reasonably requires PII to perform its obligations under this Agreement, whichever is sooner, Seller agrees to, at the direction of NMSU, either:
    - (a) 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,
    - (b) 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.

- D. 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 such breach in writing, must identify to NMSU the persons whose PII was compromised, must detail to the extent possible the causes of the breach, must take all necessary measures to ensure that further PII is not compromised, and will immediately begin all actions necessary to comply with the notification obligations contained in the NMDBNA. Within seven (7) days of discovery of the breach, Seller must provide to NMSU its written plan to comply with the NMDBNA. Seller agrees that the obligations set forth in the NMDBNA are its own, and not those of NMSU; however, Seller must fully cooperate with NMSU in any mitigation or notification actions undertaken by NMSU due to the security breach. Upon completion of all actions required under the NMDBNA, Seller must certify to NMSU that such actions have been completed. Seller's actions in complying with the NMDBNA will not entitle it to further compensation.
- E. If Social Security numbers, credit card numbers or other similar data that may be used to damage a person's credit rating are disclosed to or accessed by an unauthorized person, or if the confidentiality of such information is otherwise breached, 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).
- F. In addition to any other indemnity provided by Seller, in the event of a security breach involving PII, Seller agrees to indemnify, defend with counsel approved by NMSU, and hold harmless NMSU from, for and against any and all: losses; liabilities; lawsuits; claims; expenses (including attorneys' fees and attorneys' fees expended in enforcing this provision); costs; civil, regulatory and administrative penalties; and judgments incurred through third-party claims of violation of the NMDBNA, HIPAA FERPA, GLBA, GDPR, or otherwise related to a security breach caused by Seller's own acts or omissions.
- G. In addition to any other termination rights set forth in this Agreement and any other rights at law or equity, if NMSU reasonably determines that the Seller has breached any obligations set forth in this section, NMSU may immediately terminate this Agreement without notice or opportunity to cure.
1. Export Restrictions. This Agreement is expressly made subject to any laws, regulation, order, or other restriction on the export from the United States of America (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 government of the U.S. The Parties must not export any property, including intellectual property, or information about any property, including intellectual property other than in strict compliance with the 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:** In the event NMSU agrees to receive any export-controlled information, equipment or materials, Seller must (1) 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.

2. 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.
3. Other Applicable Laws. Any provision required in an agreement of this type by any applicable and valid executive order, federal, state or local law, ordinance, rule or regulation is deemed to be incorporated herein.
4. Liability. The Parties are each solely responsible, to the extent allowed by law for the liability arising from personal injury, including death, or damage to property arising from the acts or failure to act of the respective party or of its officials, agents, and employees pursuant to 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 thereto.
5. Independent Contractor. Each Party is considered to be an independent party and will not be construed to be an agent or representative of the other Party, and therefore, each Party has no liability for the acts or omissions of the other. In addition, neither Party, nor any of their employees, agents or subcontractors, is entitled to compensation, worker's compensation, or employee benefits from the other party by virtue of this Agreement.
6. Time is of the Essence. Time is of the essence regarding all terms of this Agreement.
7. Assignment. No right or interest in this contract will be assigned by Seller and no delegation of any obligation may be made by Seller without the written permission of NMSU. Any attempted assignment or delegation by Seller will be wholly void and totally ineffective for all purposes unless made in conformity with this paragraph.
8. Changes. This Agreement can be modified or rescinded only by written agreement of both parties.
9. No Waiver. The waiver of a breach of any term of this Agreement will in no way be construed as a waiver of any other term of this Agreement or as a waiver any further breach of that term or any other term in the Agreement.
10. Force Majeure. No Party will be liable or be deemed in breach of this Agreement for any failure or delay of performance, which results, directly or indirectly, from acts of nature,

civil or military authority, public disturbance, or any other cause beyond the reasonable control of either Party.

11. Governing Law. The laws of the State of New Mexico will govern this Agreement, without giving effect to its choice of law provisions. Venue will be proper only in a New Mexico court of competent jurisdiction in accordance with §38-3-1(G) NMSA 1978. By execution of this Agreement, Seller 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 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..
  
12. 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 HEREAFTER ARISING, AND WHETHER IN CONTRACT, TORT, EQUITY, OR OTHERWISE. EACH OF THE PARTIES AGREE AND CONSENT THAT ANY SUCH CLAIM, DEMAND, ACTION, OR CAUSE OF ACTION WILL BE DECIDED BY COURT TRIAL WITHOUT A JURY AND THAT THE PARTIES 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 AGREES THAT IT HAD AN OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL PRIOR TO SIGNING THIS WAIVER OF JURY TRIAL, HAS CAREFULLY READ AND FULLY UNDERSTANDS THE EFFECTS OF THIS WAIVER OF JURY TRIAL, AND VOLUNATRIPLY AGREES TO WAIVE ITS RIGHT TO A JURY TRIAL.
  
13. Notice: Any notice required to be given pursuant to this Agreement, except when explicitly required otherwise, must be given in writing and must be sent on the same date by both USPS mail and by email addressed as follows:

NMSU:	Procurement Services
Name:	New Mexico State University
Attention:	NMSU General Counsel
Address:	MSC 3890 PO Box 30001 Las Cruces, NM 88003-8001
Email:	purchasing@nmsu.edu
Seller:	Contact information as provided in the NMSU Vendor Questionnaire.

- (a) Notice will be deemed effective three business days after dispatched by mail, properly addressed, with postage prepaid. An effective notice must also include

delivery by properly addressed email. NMSU and Seller may change their respective contact information upon prior written notice.

(1) Captions. The headings contained herein are used solely for convenience and will not be deemed to define or limit the provisions of this Agreement.

(2) No Third-Party Beneficiary: This Agreement is for the benefit of the Parties only. No rights or benefits are conferred to any third-party by or through this Agreement.

**H. Purchases of Goods or Services with Funds from Federal Sources** The terms and conditions in this Part apply 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). Contracts or agreements for the performance of experimental, developmental, or research work must provide 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). Contractors who apply or bid for an award of \$100,000 or more must file the required certification. Each tier of subcontractor certifies to the tier above that it will not 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. Each subcontractor must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining and Federal award. Such disclosures are 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](http://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.

**I. Purchases of Goods** The terms and conditions in this Part apply only to purchases of goods.

1. Title and Risk of Loss. The title and risk of loss of the goods will 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 will operate as a tender of the goods. The Agreement is subject to termination for failure to deliver on time.
2. Inspection of Goods. NMSU will have the right to inspect the goods at delivery before accepting them. Notwithstanding final acceptance and payment, Seller will be liable for latent defects, fraud, or such gross mistakes as amount to fraud. Acceptance of goods will not waive the right to claim damages for breach of contract.
3. No Replacement of Defective Tender. Every tender of goods must fully comply with all provisions of this contract as to time of delivery, quantity, quality, and the like. If a tender is made which does not fully conform, this will constitute a material breach and Seller will have no right to substitute a conforming tender.

**J. Purchases of Services** The terms and conditions in this Part apply only to purchases of services.

1. Acceptance of Services. Acceptance of services will not waive the right to claim damages for breach of contract.
2. Instrumentalities. Seller will supply all labor, equipment, tools, materials and supplies to accomplish the agreed-upon 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 will survive the termination of this Agreement.
  - (a) *Work Made for Hire.* For the consideration payable under this Agreement, the work product required by this Agreement will be 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, will have the sole right and authority to seek statutory copyright protection and to enjoy the benefits of ownership of the work. Seller hereby assigns to NMSU all rights, title and interest in and to the work product required by this Agreement and will require all

employees, agents, and subcontractors at any tier to agree 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 which are prepared by the Seller under this Agreement are the sole property of NMSU (NMSU Property). NMSU Property may not be reproduced nor distributed without the express written consent of NMSU. Within two weeks of a request by NMSU, Seller agrees to deliver all NMSU Property to NMSU. Seller will be responsible for the protection and/or replacement of any original documents in its possession.
- (c) *Inventions.* Seller agrees to report any invention arising out of the work required by this Agreement to NMSU. NMSU will have 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, whether or not 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 hereby assigns to NMSU all right, title and interest in and to inventions made in the course of the work required by this Agreement and agrees to execute and deliver all documents and do any and all things necessary and proper to effect such assignment. Seller will require employees, agents, and subcontractors at any tier to agree in writing that they will execute and deliver all documents and do any and all things necessary and proper to effect assignment to NMSU of inventions arising out of work required by this Agreement.

**K. Purchases of Construction and Related Services** The terms and conditions in this Part apply only to purchases of construction and related services

1. Incorporation by Reference. The terms and conditions 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://hr.nmsu.edu/purchase/wp-content/uploads/sites/53/2018/02/Construction-Terms-and-Conditions-2018-09-02.pdf>