**NEW MEXICO CAPITAL OUTLAY PROGRAM**

**Public Benefit Credit Facility Agreement**

This Public Benefit Credit Facility Agreement (“**Agreement**”) is made and entered into as of the date stated on the Department’s signature page (“**Effective Date**”) by and between the State [INSERT STATE ENTITY NAME AND ADDRESS] (“**Department**”) and [INSERT BORROWER NAME AND ADDRESS] (“**Grantee**”) (individually “**Party**” and collectively “**Parties**”).

**WITNESSETH**

**WHEREAS**, in the [Laws of (xx), Chapter (xx), Section (xx), Subsection (x), Paragraph (x)], the Legislature made an appropriation to the Department, funds from which the Department is making available to the Grantee pursuant to this Agreement; and

**WHEREAS**, the Department, after reviewing information submitted by Grantee, has determined Grantee is eligible for funds from this appropriation, in accordance with the terms and conditions of this Agreement; and

**WHEREAS**, due to risks identified in the information submitted by Grantee, and to facilitate the stewardship and protection of funds provided hereunder, the Department has determined that establishing a credit facility for the disbursement of funds hereunder is in the best interest of the State; and

**WHEREAS**, Grantee agrees to borrow, and the Department agrees to lend, up to the Appropriated Amount, as defined below, for the purposes set forth in this Agreement.

**NOW, THEREFORE**, in consideration of the mutual covenants and obligations contained herein, the parties hereby mutually agree as follows:

#### **PROJECT DESCRIPTION, FACILITY AMOUNT, AND REVERSION**

1. [Project #] (“**Project**”) [Reversion Date] (“**Reversion Date**”). [Laws of (xx), Chapter (xx), Section (xx), Subsection (x), Paragraph (x)], [insert amount of appropriation in words] ($[insert amount of appropriation in numbers]), to [insert language of appropriation].
2. Loan and Promissory Note. Pursuant to the limitations in the appropriation language above and the terms and conditions stated herein, the Department hereby agrees to make available [insert the appropriation amount in words] $[insert amount of appropriation] (“**Appropriation Amount**” or “**Principal Amount**") to Grantee, in draws as specified by Grantee (“**Outstanding Amount**”).
   1. Grantee agrees to pay the Department the Outstanding Amount up to the Principal Amount of the loan, plus interest on the terms described herein (collectively, "**Loan**").
   2. Grantee’s obligation to pay the Department the principal of and interest on the Loan shall be evidenced by a promissory note ("**Note**") in the form attached hereto as **Attachment 1**.
3. The Principal Amount shall not exceed the Appropriation Amount minus the allocation for Art in Public Places (“AIPP amount”), if applicable, [insert the AIPP amount in words and dollars], which equals [insert the appropriation amount minus the AIPP amount in words and dollars] (“Adjusted Appropriation Amount”).
4. In the event of a conflict among the Principal Amount, the Reversion Date, as defined herein and/or the purpose of the Project(s), as set forth in this Agreement, and the corresponding appropriation language in the laws cited above shall control.
5. The information contained in Article I is referred to collectively as the “**Project Description**.”
6. **CLOSING**
7. The Department shall encumber and make available to draw the Principal Amount of the Loan to the Grantee on a date mutually agreed to by the Parties, subject to any express conditions stated herein ("**Closing Date**”).
8. **LOAN OBLIGATIONS**
9. Principal and Interest Payments.Grantee shall pay the Department the Outstanding Amount up to the Principal Amount of the Loan plus accrued interest in accordance with subsection (D) below, shall maintain Borrower may make prepayments in accordance with subsection (E) below only to the extent permitted hereunder, or in lieu of payments, maintain the public benefit of the Project in accordance with the amortization schedule attached hereto as **Attachment 2** and incorporated herein by reference.
10. Invoice and Reports.The Department shall forward an invoice that includes the Outstanding Amount and interest due to the Lender at least thirty (30) days prior to the next scheduled payment due date.
11. Interest.Interest shall accrue on the Outstanding Amount of the Loan from the Date of draw through the day preceding the Maturity Date or Prepayment Date at the Interest Rate computed on the basis of a 360-day year of twelve 30-day months.
    1. Interest Rate."**Interest Rate**" means the Federal Funds Rate plus three percent (3%) per annum. The Federal Funds Rate is the rate published by the Federal Reserve Bank of New York.
    2. Adjustment: The Interest Rate shall adjust automatically on the first business day of each month based on the Federal Funds Rate in effect on the last business day of the preceding month.
    3. Notification: The Department shall notify the Grantee of any changes to the interest rate within seven (7) business days of the adjustment.
12. Optional Prepayment.Grantee, at its option, may prepay the Loan in whole or part, without penalty, by paying the Department the Outstanding Amount or a portion of the Loan (such date of payment, a "**Prepayment Date**"), plus accrued interest to the Prepayment Date as selected by the Grantee.
13. Repayment Schedule.Grantee shall make equal installment payments to the Department of the Outstanding Amount of the Loan beginning on the Reversion Date and continuing each thirty (30) days thereafter for twenty-four consecutive periods (each such date of payment, a "**Repayment Date**," and the final Repayment Date, "**Maturity Date**").
14. Remittance.All loan payments shall be made payable to the Department and sent to the Department’s Administrative Services Division [Insert Address] at ,or to such other place or person as may be designated by the Department in writing.
15. Public Benefit Operations. Grantee, at its option, may operate the Project in accordance with the public benefit identified in the Appropriation Language. In such an event, the Interest on the Loan shall accrue but be held in abeyance, and so long as the Grantee complies with the terms and conditions stated herein, no payments of principal or interest shall be due upon the loan.
    1. The Public Benefit of the Project, the monetary value of the Public Benefit, and the amortization schedule for said Public Benefit’s repayment of the Principal Amount is contained in **Attachment 2**, incorporated herein by reference.
    2. Grantee’s monthly compliance with the terms and conditions stated herein shall satisfy any repayment obligation for the month hereunder in accordance with a Repayment Date.
    3. Upon Grantee’s full compliance with the terms and conditions stated herein through the amortization schedule and application to the Department, the Department shall cancel the note attached hereto as **Attachment 1**.
16. Universal Commercial Code Rights.

* 1. Establishment of Lien. Grantee, hereby grants to the Department a security interest in the Collateral purchased or improved with Loan funds to secure the performance of the Grantee's obligations under this Agreement dated, including but not limited to the repayment of any funds paid out under the terms of this Agreement.
  2. Collateral Description. The Collateral subject to this UCC-1 lien includes all of the Debtor's right, title, and interest in and to the following assets, whether now owned or hereafter acquired or improved and wherever located:
     1. All inventory, including raw materials, work-in-progress, and finished goods;
     2. All equipment, machinery, and fixtures;
     3. All proceeds and products of the foregoing, including insurance proceeds.
  3. Obligations Secured. This security interest secures the following obligations:
     1. All obligations of Grantee under this Agreement; and
     2. Any other obligations, liabilities, and indebtedness of Grantee to the Department, whether now existing or hereafter arising, direct or indirect, absolute or contingent.
  4. Filing and Perfection. Grantee authorizes Department the right to file a UCC-1 Financing Statement with the appropriate governmental authority to perfect the security interest granted herein. Grantee agrees to execute any additional documents or take any further actions reasonably requested by the Department to effectuate the perfection and priority of the security interest.
  5. Conditions. The establishment and continuation of this UCC-1 lien are subject to the following conditions:
     1. Grantee shall not sell, transfer, or otherwise dispose of any Collateral without the prior written consent of the Department.
     2. Grantee shall maintain the Collateral in good condition and repair, and shall not permit any other liens or encumbrances to attach to the Collateral without the prior written consent of the Department.

#### **DRAW CONDITIONS**

1. Upon the Closing Date, after receipt of a Notice of Department’s Obligation (“**Notice of Obligation**”), attached hereto as **Attachment 3** and incorporated herein by reference, and in accordance with the Project Description, Grantee may draw from the Principal Amount for allowable costs up to the Adjusted Appropriation Amount. This Agreement and any draws up to the Adjusted Appropriation Amount are expressly conditioned upon the following:
   1. Before making any draws under this Agreement, the Grantee must submit to the Department for approval a detailed Procurement Plan and Expenditure Plan identifying each major procurement, anticipated costs, and timeline for expenditures attached to project milestones up to Project completion (“**Project** **Budget**”).
      1. Procurement Plan: The methods and procedures for acquiring goods and services must be outlined, ensuring compliance with applicable laws and regulations.
      2. Expenditure Plan: The intended use of loan funds must be detailed, including timelines and budget allocations for the Project and identification of each anticipated purchase.
      3. Approval Process: Grantee shall submit the plans at least fourteen (14) days before the intended draw date. The Department shall approve the plans by issuing a Notice of Obligation.
   2. Until the Project is fully planned, designed, and all necessary procurements identified in the Project Budget are completed, Grantee’s draws will be limited to the planning, design, and procurement costs outlined in the Project Budget. Once the planning, designing, and procuring stages are complete, the Grantee must obligate at least ten percent (10%) of the Adjusted Appropriation Amount within one (1) year and must have utilized at least eighty-five percent (85%) of the Adjusted Appropriation Amount six (6) months before the reversion date.
   3. Irrespective of any Notice of Obligation, Grantee’s expenditure of funds shall be made in accordance with the Project Budget, on or before the Reversion Date and, if applicable, any Early Termination Date; and
   4. The total amount drawn by Grantee shall not exceed the lesser of:
      1. the Adjusted Appropriation Amount identified in Article I (B) herein; or
      2. the total of all amounts stated in the Notice(s) of Obligation evidencing the Department has received and accepted Grantee’s Third Party Obligation(s); and
   5. Expenditure of drawn funds are made and accounted for pursuant to the State Procurement Code, State’s Model Accounting Practices, and execution of binding written obligations or purchase orders with third-party contractors or vendors for the provision of services, including professional services, or the purchase of tangible personal property and real property for the Project (“**Third Party Obligations**”); and
   6. Grantee’s submittal of timely Draw Requests, in the form identified in **Attachment 4** attached hereto and incorporated by reference, and supporting documentation in accordance with the procedures set forth in this Agreement; and
   7. As security for the repayment of the Loan, the Grantee grants the Department a possessory interest in all capital assets purchased with Project funds; and
      1. In the event of default, as defined in this Agreement, the Department shall have the right to take possession of the capital assets.
      2. Grantee agrees to cooperate fully with the Department in transferring possession of the capital assets, including providing access to the location of the assets and any necessary documentation.
      3. Upon taking possession, the Department may sell or otherwise dispose of the assets in accordance with applicable law to satisfy the outstanding loan balance.
      4. Any surplus proceeds from the sale of the assets, after satisfying the loan and associated costs, shall be returned to Grantee.
      5. Grantee may cure the default and reinstate the loan by paying all past due amounts and associated costs before the Department disposes of the assets.
   8. In the event capital assets acquired with Project funds are to be sold, leased, or licensed to or operated by a private entity, the sale, lease, license, or operating agreement:
      1. must be approved by the applicable oversight entity (if any) in accordance with §§ 13-6-2, 13-6-2.1, and 13-6-3; or
      2. If no oversight entity is required to approve the transaction, the Department of Finance and Administration’s Infrastructure Planning Development Division (IPDD) must approve it as complying with the law.
2. Grantee’s submission of documentation of all Third Party Obligations and amendments thereto (including terminations) to the Department and the Department’s issuance of a Notice of Obligation of the Principal Amount shall be governed by the following:
3. Grantee is authorized to budget the particular amount set forth in the Notice of Obligation, execute the Third Party Obligation, and request the Third Party to begin work after issuance of a Notice of Obligation by the Department.
4. Grantee acknowledges and agrees that any Third Party Obligations agreed to prior to receiving a Notice of Obligation are its sole responsibility.
5. Grantee shall submit to the Department one copy of all Third Party Obligations and amendments thereto (including terminations) as soon as possible after execution by the Third Party but prior to execution by the Grantee.
6. Grantee shall provide all necessary qualified personnel, materials, and facilities to implement the Project. The Grantee shall finance its share (if any) of the costs of the Project, including all Project overruns.
7. Prior to entering into this Agreement, the Department conducted a risk assessment on the Grantee and a project readiness review for the Project. In accordance with State Model Accounting Practices, FIN 9.2, if the Department determines that the expenditure of Project funds by the Grantee requires special conditions, those conditions are identified and listed in **Attachment 6**, which is attached and incorporated by reference. The Parties agree that, to the extent the Department, in its sole and absolute discretion, determines additional special conditions are necessary or that existing special conditions are no longer required, it may update **Attachment 6**, from time to time, without the need for a formal amendment of this Agreement.
8. The Loan shall not be used for purposes other than those authorized by the Department in accordance with the Project Description.
9. The Loan cannot be used to reimburse the Grantee for indirect Project costs unless specifically allowed by law.

#### **TERM & DEADLINE TO EXPEND FUNDS**

1. The term of this Agreement shall begin on the Effective Date and terminate on the 30th day of June during the calendar year of the Reversion Date unless Terminated Before Reversion Date (“**Early Termination**”) pursuant to Article VI herein (collectively “**Term**”).
2. The Project’s funds must be expended on or before the Reversion Date and, if applicable, the Early Termination Date of this Agreement.
   1. For purposes of this Agreement, it is not sufficient for the Grantee to encumber the Project funds on its books on or before the Reversion Date or Early Termination Date.
   2. For purposes of this Agreement, an expenditure of funds has occurred on the date the particular quantity of goods is delivered to and received by the Grantee, title to the goods is transferred to the Grantee, and/or as of the date particular services are rendered to and accepted by the Grantee.
   3. For purposes of this Agreement, an encumbrance of funds pursuant to a contract or purchase order with a third party does not qualify as an expenditure.
3. **DEFAULT AND TERMINATION**
4. General Provision. The Department may terminate this Agreement before the Reversion Date based on the Completion of the Project or Complete Expenditure of the Adjusted Appropriation. Early Termination hereunder includes:
   1. Termination due to completion of the Project before the Reversion Date;
   2. Termination due to complete expenditure of the Adjusted Appropriation Amount before the Reversion Date;
   3. Termination for violation of the terms of this Agreement; or
   4. Termination for suspected mishandling of public funds, including but not limited to fraud, waste, abuse, and conflicts of interest.
5. Event of Default. The occurrence of any of the following shall constitute an event of default (“**Event of Default**”) and entitle the Department to Early Termination:
   1. Material Violation of the terms of this Agreement; or
   2. Suspected mishandling of public funds, including but not limited to fraud, waste, abuse, and conflicts of interest.
6. Non-appropriation. This Agreement is expressly contingent upon the New Mexico State Legislature making sufficient appropriations and authorizations for the Project Description.
   1. If the Legislature does not appropriate the Appropriation Amount, this Agreement shall terminate upon the Department giving the Grantee written notice of such termination. Such termination shall be effective as of the effective date of the law making the non-appropriation.
      1. The Department’s decision as to whether sufficient appropriations or authorizations are available shall be final. Grantee hereby waives any rights to assert an impairment of contract claim against the State of New Mexico in the event of Early Termination of this Agreement.
   2. As used herein, “non-appropriate” or “non-appropriation” includes the following actions by the New Mexico Legislature:
      1. Deauthorization, reauthorization, or revocation of a prior authorization.
7. Draws in the Event of Early Termination. In the event of Early Termination, the Department’s sole and absolute obligation to make funds available to the Grantee is expressly conditioned upon the limitations set forth in Article IV above.
8. Notice. Either Party may terminate this Agreement prior to the Reversion Date by providing the other Party with a minimum of fifteen (15) days advance written notice of the Early Termination. Grantee hereby waives any rights to assert an impairment of contract claim against the State of New Mexico in the event of Early Termination of this Agreement by the Department.
9. Remedies Neither Exclusive Nor Waived. No remedy hereunder is intended to be exclusive, and each such remedy shall be cumulative and in addition to the other remedies. No delay or failure to exercise any remedy shall be construed to be a waiver.
10. Waivers. The Department may waive any Event of Default and its consequences. No waiver of any Event of Default shall extend to or affect any subsequent or any other then-existing Event of Default.

#### **SUSPENSION OF NEW OR FURTHER OBLIGATIONS**

1. Department, in its sole and absolute discretion, may provide written notice to Grantee to suspend further draws. Upon the receipt of such written notice by the Grantee:
   1. Grantee shall immediately suspend entering into new or further written obligations with third parties;
   2. Department will suspend the issuance of any new or further Notice of Obligation under this Agreement; and
   3. Department may direct the Grantee to implement a corrective action plan in accordance with Article VII (D) herein.
2. In the event of Suspension of this Agreement, the Department’s sole and absolute obligation to Grantee is expressly conditioned upon the limitations set forth in Article IV herein.
3. A suspension of new or further obligations under this Agreement shall remain in effect unless or until the date the Grantee receives written notice from the Department informing the Grantee that the Suspension has been lifted or that the Agreement has been Early Terminated. If the Suspension is lifted, the Department will consider further requests for a Notice of Obligation.
4. Corrective Action Plan in the Event of Suspension. Where the Department, in its sole and absolute discretion, directs Grantee to suspend entering into new or further written obligations with third parties pursuant to Article VII(A), the Department may, but is not obligated to, require the Grantee to develop and implement a written corrective action plan to remedy the grounds for the Suspension.
   1. Such a corrective action plan must be approved by the Department and be signed by the Grantee.
   2. Failure to sign a corrective action plan or meet the terms and deadlines set forth in the signed corrective action plan is hereby deemed an Event of Default.
   3. A corrective action plan shall be in addition to, and not in lieu of, any other equitable or legal remedy authorized hereunder or at law, including but not limited to Early Termination.

#### **REPORTING**

1. Database Reporting
   1. Grantee shall provide the Department with quarterly reports of Project activity, entering the required Project information directly into a database maintained by the Department.
   2. Additionally, Grantee shall certify on each Draw Request form, attached hereto as **Attachment 4** and incorporated herein, that all information provided in the database is true and accurate, updates to the database have been maintained, and all Project activity complies with applicable law and the terms of this Agreement.
   3. Grantee hereby acknowledges that failure to perform and/or certify updates to the database will jeopardize the reimbursement of funds. The Department shall give Grantee a minimum of fourteen (14) days’ advance written notice of any changes to the information the Grantee is required to report.
   4. At the Department’s discretion, all reports required hereunder may be directed to and facilitated through an electronic database.
   5. Quarterly reports shall be due on the last day of the month, that is, 30 days prior to the end of the quarter following the execution of this Agreement by the Department and ending during the quarter of the submission of the final request for reimbursement for the Project, or the following quarter. Quarterly reports shall be in the form required by **Attachment 5**, attached hereto, and incorporated herein by reference.
2. Requests for Additional Information/Project Inspection
   1. During the term of this Agreement and the Record Retention Period, the Department may:
      1. Request additional information regarding the Project as it deems necessary and
      2. Conduct on-site inspections of the Project at reasonable times and upon reasonable notice.
   2. Grantee shall respond to such requests for additional information within the time established by the Department.

#### **PROJECT CONDITIONS AND RESTRICTIONS**

1. The following general conditions and restrictions shall apply to the Project:
   1. Draws must be spent in accordance with all applicable state laws, regulations, policies, and guidelines, including, but not limited to, the State Procurement Code.
   2. The Project’s expenditures and liabilities must be accounted for in accordance with the State’s Model Accounting Practices, as amended from time to time.
   3. The Project must be implemented in accordance with the New Mexico Public Works Minimum Wage Act, Section 13-4-10 through 13-4-17 NMSA 1978, as applicable.
   4. The Project must provide a public benefit above and beyond any incidental benefit to private entities in accordance with applicable law, including, but not limited to, Article IX, Section 14 of the Constitution of the State of New Mexico.
   5. Without prior written approval from the Department and State Board of Finance, for the useful life of any asset purchased under this Agreement, Grantee shall not convert any property acquired, built, renovated, repaired, designed, or developed with Project funds to uses other than those specified in the Project Description.
      1. In addition to other remedies available at law or in equity, any disposal or conversion of property acquired, built, renovated, repaired, designed, or developed with Project funds without the Department’s and the Board of Finance’s express written approval will trigger the Département’s right to reimbursement from Grantee of the Appropriated Amount, transfer proceeds from any disposition of property to the State, or otherwise provide consideration to the State for the Appropriated Amounts.
   6. Grantee shall comply with all applicable federal and state laws, rules, and regulations pertaining to civil rights and equal employment opportunity.
      1. In accordance with all such laws, rules, and regulations, the Grantee agrees to assure that no person shall, on the grounds of race, color, national origin, sex, sexual preference, age, or handicap, be excluded from participation in the Project, use of the Project, employment with Grantee, or otherwise be denied benefits/subject to discrimination for any activity performed under this Agreement.
   7. Where the Department, in its sole and absolute discretion, determines Grantee has failed to comply with the above conditions and restriction, Grantee agrees to take appropriate steps to correct any deficiencies immediately. The Grantee’s failure to implement such appropriate steps within a reasonable time, but no longer than thirty (30) days after notice from the Department, constitutes an Event of Default.

#### **REPRESENTATIONS AND WARRANTIES**

1. Reliance by Department.
   1. Grantee expressly acknowledges that the Department relies on the representations and warranties made by Grantee in this Agreement. Grantee acknowledges that such representations and warranties are a material inducement for the Department to enter into this Agreement and loan the Appropriated Amount.
   2. Grantee shall ensure all representations and warranties provided herein are true, accurate, and complete as of the date of the Effective Date and shall remain so throughout the Term of this Agreement. Grantee is responsible for promptly notifying the Department in writing of any changes or inaccuracies in the representations and warranties contained herein.
2. Grantee hereby represents and warrants the following:
   1. Grantee has taken all necessary steps to attain the legal authority to receive and expend the Principal Amount.
   2. Grantee has duly authorized this Agreement, and the person executing it has the authority to do so. Once executed by Grantee, this Agreement shall constitute a binding obligation of Grantee, enforceable according to its terms.
   3. Grantee’s obligations hereunder do not conflict with any law, ordinance, or resolution applicable to Grantee, Grantee’s charter (if applicable), or any judgment or decree to which Grantee is subject.
   4. Grantee has independently confirmed that the Project Description, including, but not limited to, the Appropriated Amount and Reversion Date, is consistent with the underlying appropriation in law.
   5. Grantee’s governing body has duly adopted or passed as an official act a resolution, motion, or similar action authorizing the person identified as the official representative of the Grantee to sign and submit Draw Requests on behalf of Grantee.
   6. Grantee will abide by New Mexico laws regarding conflicts of interest, governmental conduct, and whistleblower protection.
      1. Grantee agrees explicitly none of its officers or employees or its designees or agents, no member of the governing body, and no other public official of Grantee who exercises any function or responsibility with respect to this Agreement, shall have any interest, direct or indirect, in any contract or subcontract, or the proceeds thereof, for the Project.
      2. Further, Grantee will require all of its contractors to incorporate the language set forth in this paragraph, prohibiting conflicts of interest in all subcontracts.
   7. No funds have been paid or will be paid, by or on behalf of the Grantee, to any person for influencing or attempting to influence an officer or employee of the State, any agency, or body in connection with the awarding of any Third Party Obligation.
      1. Grantee will require certifying language prohibiting lobbying to be included in the award documents for all subawards, including subcontracts, loans, and cooperative agreements.
3. Consequences of False or Misleading Representations. If any representation or warranty made by Grantee is found to be false or misleading, the Department shall have the right to exercise any or all of the following remedies:
   1. **Termination of Agreement:** Department may terminate this Agreement immediately upon written notice to the Grantee.
   2. **Acceleration of Repayment Obligation:** Grantee shall immediately repay all Appropriated Amounts disbursed under this Agreement upon demand by the Department.
   3. **Other Remedies:** Department may pursue any other remedies available at law or in equity.
4. Survival of Representations and Warranties. The representations and warranties made by the Grantee shall survive the Early Termination or expiration of this Agreement.

#### **PROJECT RECORDS**

1. Grantee shall be strictly accountable for receipts and disbursements relating to the Principal Amount. Grantee shall follow generally accepted accounting principles and the State’s model accounting principles and, if feasible, maintain a separate bank account or fund with a separate organizational code to ensure separate budgeting and accounting of the funds.
2. For six (6) years following the Project’s completion (“**Record Retention Period**”), Grantee shall maintain all Project-related records, including, but not limited to, all financial records, requests for proposals, invitations to bid, selection and award criteria, contracts and subcontracts, advertisements, minutes of pertinent meetings, as well as records sufficient to fully account for the amount and disposition of the Appropriated Amount from all sources budgeted for the Project, the purpose for which such funds were used, and such other records as the Department may prescribe.
3. Grantee shall make all Project records available to the Department, the Department’s Independent Public Accountant, and the New Mexico State Auditor upon request. With respect to the funds that are the subject of this Agreement, if the State Auditor or the Department finds any funds were improperly expended, Grantee shall be required to reimburse the State all amounts found to be improperly expended.

#### **ARTICLE XII. IMPROPERLY DRAWN FUNDS**

If the Department determines part or all of the Appropriation Amount was improperly drawn by Grantee, including but not limited to draws based upon fraud, mismanagement, misrepresentation, misuse, or violation of law by the Grantee, after ten (10) days’ notice to Grantee and the opportunity to return such funds to the Department, the Department may offset any funds due to Grantee from the State, until the Principal Amount is fully repaid.

#### **ARTICLE XIII. LIABILITY**

Neither Party shall be responsible for liability incurred as a result of the other Party’s acts or omissions in connection with this Agreement. Any liability incurred in connection with this Agreement is subject to immunities and limitations of the New Mexico Tort Claims Act.

#### **ARTICLE XIV. SCOPE OF AGREEMENT**

This Agreement constitutes the entire and exclusive agreement between the Parties concerning the subject matter hereof. The Agreement supersedes all prior or contemporaneous agreements, understandings, discussions, communications, and representations, written or verbal.

#### **REQUIRED NON-APPROPRIATIONS CLAUSE**

1. Grantee acknowledges and agrees to include a “non-appropriations” clause in all contracts between it and other parties that are (i) funded in whole or part by funds made available under this Agreement and (ii) entered into after the Effective Date for the Project that states:
   1. “The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of the State of New Mexico (“**Legislature**”) for the performance of this Agreement.
   2. If the Legislature does not make sufficient appropriations and authorization, [Grantee’s name] may immediately terminate this Agreement by giving Contractor written notice of such termination.
   3. [Grantee’s name]’s decision as to whether sufficient appropriations are available shall be final and accepted by the Contractor. Contractor hereby waives any rights to assert an impairment of contract claim against the [Grantee’s name] or the State of New Mexico in the event of immediate or Early Termination of this Agreement by the [Grantee’s name] or the State Department of Finance and Administration.”

#### **REQUIRED TERMINATION CLAUSE**

1. Grantee acknowledges and agrees to include the following termination clause in all contracts that are (i) funded in whole or part by funds made available under this Agreement and (ii) entered into after the Effective Date for the Project that states:
   1. “This contract is funded in whole or in part by funds made available by the State of New Mexico (“State”). Should the State terminate its Agreement with [Grantee’s name], [Grantee’s name] may terminate this contract immediately by providing Contractor written notice of such termination.
   2. In the event of termination pursuant to this paragraph, [Grantee’s name] only liability to Contractor shall be for goods and services delivered and accepted prior to the termination date.”

#### **COMPLIANCE WITH UNIFORM FUNDING CRITERIA**

1. Throughout the term of this Agreement, Grantee shall:
   1. Submit all reports of annual audits and agreed-upon procedures required by § 12-6-3(A)-(B), NMSA 1978 by the due dates established in § 2.2.2 NMAC, reports of which must be a public record pursuant to § 12-6-5(A), NMSA 1978 within forty-five (45) days of delivery to the State Auditor;
   2. Have a duly adopted budget for the current fiscal year approved by its budgetary oversight agency (if any);
   3. Timely submit all required financial reports to its budgetary oversight agency (if any); and
   4. Use accounting methods and procedures consistent with Generally Accepted Accounting Principles and the State’s Model Accounting Practices to expend the Appropriated Amount in accordance with applicable law and account for and safeguard Project funds and assets acquired with Project funds.
2. In the event Grantee fails to comply with the requirements of subparagraph A of this Article XVIII, Department may take one or more of the following actions:
   1. Suspend new or further draws pursuant to Article VII (A) of this Agreement;
   2. Require the Grantee to develop and implement a written corrective action plan pursuant to Article VII (D) of this Agreement to remedy the non-compliance;
   3. Impose special conditions to address the non-compliance by giving Grantee notice of such special conditions in accordance with Article III of this Agreement;
      1. The Parties agree that any special conditions imposed to address non-compliance shall be incorporated into this Agreement through Attachment 6, upon notice to Grantee, without need for formal amendment of this Agreement;
      2. Special conditions shall be binding and effective on the date that notice is deemed to have been given pursuant to Article III or
   4. Terminate this Agreement pursuant to Article VI of this Agreement.

#### **SEVERANCE TAX AND GENERAL OBLIGATION BONDS**

1. Grantee acknowledges and agrees that the underlying appropriation for the Project may originate from the issuance of tax-exempt severance tax bonds or general obligation bonds by the State. Proceeds from such bonds are administered by the New Mexico State Board of Finance (SBOF), an entity separate and distinct from the Department.
   1. Grantee acknowledges and agrees:
      1. It is Grantee’s responsibility to determine through SBOF what (if any) conditions are currently imposed on the Project;
      2. Department’s failure to inform Grantee of an SBOF-imposed condition does not affect the validity or enforceability of the condition;
      3. The SBOF may in the future impose further or different conditions upon the Project;
      4. All SBOF conditions are attached to the Project and Appropriation Amount without the need for formal amendment of this Agreement;
      5. All applicable SBOF conditions must be satisfied before the SBOF will release to the Department funds subject to the condition(s) and
      6. The Department’s obligation to reimburse Grantee from the Project is expressly contingent upon the satisfaction of the then-current SBOF conditions.
2. Grantee acknowledges and agrees SBOF may, at its sole and absolute discretion, require reimbursement or remove eligibility for bond proceeds for the Project if the Project doesn’t proceed sufficiently.
   1. Grantee must comply with the requirement to encumber five percent (5%) of Project funds within six months of bond issuance as certified by Grantee in the Bond Questionnaire and Certification documents submitted to the SBOF.
   2. Failure to comply may result in the reassignment of the bond proceeds. Upon reassignment of bond proceeds, this Agreement will be suspended until the entity has demonstrated readiness as determined by the SBOF and the Department.
3. Grantee acknowledges and agrees that this Agreement is subject to the SBOF’s Bond Project Disbursements rule, § 2.61.6, NMAC, as may be amended from time to time or re-codified.
4. **GENERAL PROVISIONS**
5. Assignment: Grantee’s rights and obligations under this Agreement are personal and may not be transferred or assigned without the prior written consent of the State. Any attempt at assignment or transfer without such consent shall be void. Any assignment or transfer of Grantee’s rights and obligations approved by the State shall be subject to the provisions of this Agreement.
6. Binding Effect: Except as otherwise provided, all provisions of this Agreement, including the benefits and burdens, shall extend to and be binding upon the Parties’ respective successors and assigns.
7. Authority: Each Party represents and warrants to the other that the execution and delivery of this Agreement and the performance of such Party’s obligations have been duly authorized.
8. Captions and References: The captions and headings in this Agreement are for the convenience of reference only and shall not be used to interpret, define, or limit its provisions. All references in this Agreement to sections (whether spelled out or using the § symbol), subsections, exhibits, or other attachments are references to sections, subsections, exhibits, or other attachments contained herein or incorporated as a part hereof, unless otherwise noted.
9. Counterparts: This Agreement may be executed in multiple, identical, original counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute the same agreement.
10. Digital Signatures: If any signatory signs this agreement using a digital signature in accordance with the State Policies regarding the use of digital signatures, then any agreement or consent to use digital signatures within the electronic system through which that signatory signed shall be incorporated into this Agreement by reference.
11. Modification: Except as otherwise provided in this Agreement, any modification to this Agreement shall only be effective if agreed to in a formal amendment, properly executed and approved in accordance with applicable New Mexico law and State fiscal policies and rules. Modifications permitted under this Agreement, other than Agreement amendments, shall conform to the policies issued by the State.
12. Statutes, Regulations, Fiscal Rules, and Other Authority: Any reference in this Agreement to a statute, regulation, policy, or other authority shall be interpreted to refer to such authority then current, as may have been changed or amended after the Effective Date of this Agreement.
13. External Terms and Conditions: Notwithstanding anything to the contrary herein, the State shall not be subject to any provision included in any terms, conditions, or agreements appearing on Grantee’s or a subcontractor’s website or any provision incorporated into any click-through or online agreements related to the Work unless that provision is specifically referenced in this Agreement.
14. Severability: The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect, provided that the Parties can continue to perform their obligations under this Agreement in accordance with its intent.
15. Survival of Certain Agreement Terms: Any provision of this Agreement that imposes an obligation on a Party after the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement and shall be enforceable by the other Party.
16. Third Party Beneficiaries: Except for the Parties’ respective successors and assigns described in this Agreement, it does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties. Enforcement of this Agreement and all rights and obligations hereunder are reserved solely to the Parties. Any services or benefits that third parties receive as a result of this Agreement are incidental to this Agreement and do not create any rights for such third parties.
17. Waiver: A Party’s failure or delay in exercising any right, power, or privilege under this Agreement, whether explicit or by lack of enforcement, shall not operate as a waiver, nor shall any single or partial exercise of any right, power, or privilege preclude any other or further exercise of such right, power, or privilege.
18. Standard and Manner of Performance: Grantee shall perform its obligations under this Agreement in accordance with the highest standards of care, skill, and diligence in Grantee’s industry, trade, or profession.
19. Licenses, Permits, and Other Authorizations: Grantee shall secure, prior to the Effective Date, and maintain at all times during the term of this Agreement, at its sole expense, all licenses, certifications, permits, and other authorizations required to perform its obligations under this Agreement and shall ensure that all employees, agents, and subcontractors secure and maintain at all times during the term of their employment, agency or subcontractor, all license, certifications, permits and other authorizations required to perform their obligations in relation to this Agreement.
20. Publicity: Any Publicity regarding the subject matter of this Agreement may not be released without prior written approval from the Department. For purposes of this agreement, “Publicity” means notices, informational pamphlets, press releases, email responses, research, reports, signs, and similar public notices prepared by or for the Grantee or jointly with others.
    1. Grantee shall obtain written approval prior to issuing any press release or making any public announcement regarding this agreement. Grantee agrees to obtain approval of the Department in advance with respect to all Public Relations, all communications with media, or all communications with any other member of the public with respect to this agreement, except to acknowledge that an agreement does exist.
    2. For purposes of this agreement, “**Public Relations**” includes community relations and means those activities dedicated to maintaining the Department's image or maintaining or promoting understanding and favorable relations with the community or public at large or any segment of the public.
    3. Violations of either Article XX (Q)(a) or (b) shall constitute a material Breach of Agreement.
21. Data Sharing: The State intends to secure and collate specific data generated by Grantee under this Agreement to use in support of the State’s organizational, policy-making, and management of public resource functions. State, in accordance with **Attachment 7**, attached hereto and incorporated herein by reference, reserves the right to require Grantee and/or its subcontractors to provide specific data relevant to the above-listed functions. Data provided by Grantee may be incorporated into existing or future developed State integrated analysis tools or databases, including but not limited to geographic information system (GIS) networks and databases accessible by the public. Dissemination of data collected may include historical data and projections based on such historical data.
    1. To the extent any data transferred as part of this Agreement is legally determined to be the property of Subrecipient or its subcontractors, Subrecipient and/or its subcontractors grants State a nonexclusive, fully paid-up right and license to reproduce, use, distribute, do derivative works based on, and archive data transferred as part of this Agreement.
22. Venue and Choice of Law: This Agreement shall be governed by and construed in accordance with the laws of the State of New Mexico, without regard to any conflict of law provisions. Any legal suit, action, or proceeding arising out of or related to this Agreement shall be instituted exclusively in the district courts located in Santa Fe, New Mexico. The Parties hereby irrevocably submit to the exclusive jurisdiction and venue of such courts in any such suit, action, or proceeding. The Parties waive any objection to the laying of the venue of any such suit, action, or proceeding in the district courts of Santa Fe, New Mexico, and irrevocably waive and agree not to plead or claim in any such court that any such suit, action, or proceeding brought in any such court has been brought in an inconvenient forum.

[SIGNATURE PAGE AND EXHIBITS FOLLOW]

[THIS SPACE LEFT BLANK INTENTIONALLY]

**IN WITNESS WHEREOF**, the parties have duly executed this Agreement as of the Department's date of execution.

**APPROVED BY DEPARTMENT:**

SPONSOR: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

Office of Secretary: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

Chief Financial Officer: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

Chief Procurement Officer: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

**AS TO LEGAL FORM AND SUFFICIENCY**

General Counsel’s Office: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

**APPROVED BY GRANTEE**:

GRANTEE: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

GRANTEE: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

GRANTEE: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

GRANTEE: By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Legal Counsel Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date:\_\_\_\_\_\_

**ATTACHMENT 1**

**Note**

$\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

For VALUE RECEIVED, [ENTER GRANTEE NAME] ("Maker"), subject to and in accordance with a Loan Agreement dated the [Date], promises to pay to the New Mexico Department of Finance and Administration (the "Holder") the principal sum of [ENTER APPROPRIATION AMOUNT], with interest from date at the rate [Interest Rate]% per annum on the balance from time to time remaining unpaid. The principal and interest shall be payable in lawful money of the United States of America at 407 Galisteo Street Santa Fe, New Mexico, 87501, or at such place as may hereafter be designated by written notice from the Holder to the Maker hereof, on the date and in the manner following:

Maker shall make equal installment payments to the Lender of the Outstanding Amount of the Loan beginning on the First Repayment Date; continuing each [Insert Increment] thereafter for consecutive [Payment Periods] (each such date of payment, a "Repayment Date," and the final Repayment Date, the "Maturity Date").

[GRANTEE NAME]

By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attest:

**ATTACHMENT 2**

Public Benefit Amortization Schedule

**ATTACHMENT 3**

Notice of Obligation Form

**ATTACHMENT 4**

Draw Request Form

**ATTACHMENT 5**

Quarterly Report Form

**ATTACHMENT 6**

Special Conditions

**ATTACHMENT 7**

Data Sharing Provisions