

STATE OF NEW MEXICO  
HUMAN SERVICES DEPARTMENT  
SERVICES AGREEMENT

SPD# 61-630-16-30800

THIS SERVICES AGREEMENT ("Agreement" or "Contract") is made by and between the State of New Mexico, **Human Services Department**, hereinafter referred to as the "**HSD**" or the "**Procuring Agency**", and **Prometric, Inc.**, hereinafter referred to as the "**Contractor**", and is effective as of the date set forth below upon which it is executed by the State Purchasing Department (SPD).

**IT IS AGREED BETWEEN THE PARTIES:**

**Definitions**

- A. "Agreement Administrator" means the individual appointed by the SPA to administer the Price Agreement. [Remove this language if this is a not a Price Agreement but is a contract between the Contractor and a single agency or entity.]
- B. "Business Hours" means 8:00 a.m. to 5:00 p.m. Mountain Time.
- C. "Local public body" means every political subdivision of the state and the agencies, instrumentalities and institutions thereof.
- D. "New Mexico State Purchasing Agent" or "NMSPA" means the purchasing agent for the State of New Mexico or a designated representative. May be used interchangeably with "State Purchasing Agent" or "SPA".
- E. "Procuring agency" means any state agency or local public body that chooses to procure products or services under this Agreement. Other units of government, including cities, counties, school districts, institutions of higher education and other jurisdictions not subject to the procurement authority of the SPA, are authorized to buy from this Agreement.
- F. "You" and "your" refers to (*Contractor*). "We," "us" or "our" refers to the State of New Mexico, agencies, commissions, institutions, political sub-divisions and local public bodies allowed by law to participate in the Agreement and whose accounts are created under this Agreement.

**1. Scope of Work.**

The Contractor shall perform all services detailed in Exhibit A, Scope of Work, attached to this Agreement and incorporated herein by reference.

2. **Compensation.**

A. The HSD shall pay to the Contractor in full payment for services satisfactorily performed such compensation not to exceed \$110,492.55 including gross receipts tax, in accordance with Exhibit B. This amount is a maximum and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated herein. The parties do not intend for the Contractor to continue to provide services without compensation when the total compensation amount is reached. Contractor is responsible for notifying the HSD when the services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided.

The total amount payable to the Contractor under this Agreement shall not exceed \$64,453.98 including gross receipts tax, in FY17.

The total amount payable to the Contractor under this Agreement shall not exceed \$46,038.57 including gross receipts tax, in FY18.

In accordance with RFP 60-630-16-30800, this Agreement can be renewed for three (3) one (1) year periods at the option of HSD. If the option(s) are exercised, compensation in contract option year one (1) will be \$116,013.45 including gross receipts tax. In contract option year two (2) compensation will be \$121,840.95 including gross receipts tax; and in contract option year three (3) compensation will be \$127,984.50 including gross receipts tax. Total compensation for the base year plus the three (3) contract option years will be \$476,331.45 if all options exercised.

B. Payment is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work, and to approval by the SPD. All invoices MUST BE received by the HSD no later than ten (10) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

C. Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the HSD finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the HSD that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the HSD shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

D. All payments under this Agreement are subject to the following:  
Acceptance - In accordance with Section 13-1-158 NMSA 1978, the agency shall determine if the product or services provided meet specifications. No payment shall be made for any

products or services until the products or services have been accepted in writing by the procuring agency. Unless otherwise agreed upon between the procuring agency and the Contractor, within fifteen (15) days from the date the procuring agency receives written notice from the Contractor that payment is requested for services or within thirty (30) days from the receipt of products, the procuring agency shall issue a written certification of complete or partial acceptance or rejection of the products or services. Unless the procuring agency gives notice of rejection within the specified time period, the products or services will be deemed to have been accepted.

E. **Late Charges:** If the State fails to pay as required above, the Contractor may assess a late fee on the unpaid balance of more than 60 days. Late fees will be assessed at a rate based upon the billing address of each State or Procuring Agency account; therefore, the periodic (monthly) late fee rate shall be 1.5% and the corresponding Annual Percentage Rate for the State of New Mexico will be 18%. No late fee on new purchases will be assessed during the billing cycle when the purchase was made.

3. **Term.**

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE SPD. This Agreement shall terminate one year from date of approval, unless terminated pursuant to paragraph 5 (Termination), or paragraph 6 (Appropriations). In accordance with Request for Proposal (RFP) 61-630-16-30800, this Agreement can be renewed for three (3) one (1) year periods, and in accordance with NMSA 1978, § 13-1-150, no contract term for a general services contract, including extensions and renewals, shall exceed four years, except as set forth in NMSA 1978, § 13-1-150.

4. **Default and Force Majeure**

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

5. **Termination.**

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

B. **Notice; HSD Opportunity to Cure.**

1. Except as otherwise provided in Paragraph (5)(B)(3), the HSD shall give

Contractor written notice of termination at least thirty (30) days prior to the intended date of termination.

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

3. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor (i) if the Contractor becomes unable to perform the services contracted for, as determined by the HSD; (ii) if, during the term of this Agreement, the Contractor is suspended or debarred by the State Purchasing Agent; or (iii) the Agreement is terminated pursuant to Paragraph 5, "Appropriations", of this Agreement.

C. Liability. Except as otherwise expressly allowed or provided under this Agreement, the HSD's sole liability upon termination shall be to pay for acceptable work performed prior to the Contractor's receipt or issuance of a notice of termination; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE HSD'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

D. Termination Management. Immediately upon receipt by either the HSD or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the HSD; 2) comply with all directives issued by the HSD in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the HSD shall direct for the protection, preservation, retention or transfer of all property titled to the HSD and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the HSD upon termination and shall be submitted to the HSD as soon as practicable.

6. Appropriations.

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the HSD to the Contractor. The HSD's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the HSD proposes an amendment to the

Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

**7. Status of Contractor.**

The Contractor and its agents and employees are independent contractors performing general services for the HSD and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

**8. Assignment.**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the HSD.

**9. Release.**

Final payment of the amounts due under this Agreement shall operate as a release of the HSD, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

**10. Confidentiality.**

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

**11. Product of Service – Copyright.**

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the HSD no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

Ownership of Examination Items

Notwithstanding the above, all examination items and other materials provided by HSD to Contractor for use in New Mexico exams will remain the property of HSD.

All New Mexico-unique items developed specifically by Contractor for HSD as part of this Agreement that uses information or materials provided by HSD for the State of New Mexico pursuant to the Agreement between the parties or derived from New Mexico law, regulation or statute and applicable only for examinations in New Mexico will be retained by HSD.

All proprietary Contractor-owned examinations items, examinations and computer software developed by Contractor and used to deliver the examinations and/or maintain Registry data, including examination items from its national item bank, will be retained solely by Contractor. At no time will Contractor's proprietary intellectual property be transferred to HSD under the Agreement.

**12. Conflict of Interest; Governmental Conduct Act.**

A. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement.

B. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978. Without in anyway limiting the generality of the foregoing, the Contractor specifically represents and warrants that:

1) in accordance with NMSA 1978, § 10-16-4.3, the Contractor does not employ, has not employed, and will not employ during the term of this Agreement any HSD employee while such employee was or is employed by the HSD and participating directly or indirectly in the HSD's contracting process;

2) this Agreement complies with NMSA 1978, § 10-16-7(A) because (i) the Contractor is not a public officer or employee of the State; (ii) the Contractor is not a member of the family of a public officer or employee of the State; (iii) the Contractor is not a business in which a public officer or employee or the family of a public officer or employee has a substantial interest; or (iv) if the Contractor is a public officer or employee of the State, a member of the family of a public officer or employee of the State, or a business in which a public officer or employee of the State or the family of a public officer or employee of the State has a substantial interest, public notice was given as required by NMSA 1978, § 10-16-7(A) and this Agreement was awarded pursuant to a competitive process;

3) in accordance with NMSA 1978, § 10-16-8(A), (i) the Contractor is not, and has not been represented by, a person who has been a public officer or employee of the State within the preceding year and whose official act directly resulted in this Agreement and (ii) the Contractor is not, and has not been assisted in any way regarding this transaction by, a former public officer or employee of the State whose official act, while in State employment, directly resulted in the HSD's making this Agreement;

4) this Agreement complies with NMSA 1978, § 10-16-9(A) because (i) the Contractor is not a legislator; (ii) the Contractor is not a member of a legislator's family; (iii) the Contractor is not a business in which a legislator or a legislator's family has a substantial interest; or (iv) if the Contractor is a legislator, a member of a legislator's family, or a business in which a legislator or a legislator's family has a substantial interest, disclosure has been made as required by NMSA 1978, § 10-16-7(A), this Agreement is not a sole source or small purchase contract, and this Agreement was awarded in accordance with the provisions of the Procurement Code;

5) in accordance with NMSA 1978, § 10-16-13, the Contractor has not directly participated in the preparation of specifications, qualifications or evaluation criteria for this Agreement or any procurement related to this Agreement; and

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

C. Contractor's representations and warranties in Paragraphs A and B of this Article 12 are material representations of fact upon which the HSD relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to the HSD if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to the HSD and notwithstanding anything in the Agreement to the contrary, the HSD may immediately terminate the Agreement.

D. All terms defined in the Governmental Conduct Act have the same meaning in this Article 12(B).

**13. Amendment.**

A. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.

B. If the HSD proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Contractor shall, within thirty (30) days of receipt of the proposed Amendment, have the option to terminate the Agreement, pursuant to the termination provisions as set forth in Article 4 herein, or to agree to the reduced funding.

**14. Merger.**

This Agreement, including any and all attachments, exhibits and/or appendices, incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**15. Penalties for violation of law.**

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

**16. Equal Opportunity Compliance.**

The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

**17. Applicable Law.**

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

**18. Workers Compensation.**

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

**19. Non-Collusion**

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

**20. Inspection of Plant**

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

**21. Commercial Warranty**

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



**22. Records and Financial Audit.**

A. The Contractor shall maintain detailed records that indicate the nature and price of Services rendered during this Agreement's term and effect and retain them for a period of five (5) years from the date of final payment under this Agreement.

B. Contract for an independent audit in accordance with 2 CFR 200 at the Contractor's expense, as applicable or upon HSD request, submit its most recent 2 CFR 200 audit. The Contractor shall ensure that the auditor is licensed to perform audits in the State of New Mexico and shall be selected by a competitive bid process. The Contractor shall enter into a written contract with the auditor specifying the scope of the audit, the auditor's responsibility, the date by which the audit is to be completed and the fee to be paid to the auditor for this service. Single audits shall comply with procedures specified by the HSD. The audit of the contract shall cover compliance with Federal Regulations and all financial transactions hereunder for the entire term of the Agreement in accordance with procedures promulgated by 2 CFR 200 or by Federal program officials for the conduct and report of such audits. An official copy of the independent auditor's report shall be available to the HSD and any other authorized entity as required by law within (fifteen) 15 days of receipt of the final audit report. The Contractor may request an extension to the deadline for submission of the audit report in writing to the HSD for good cause and the HSD reserves the right to approve or reject any such request. The HSD retains the right to contract for an independent financial and functional audit for funds and operations under this Agreement if it determines that such an audit is warranted or desired.

C. Upon completion of the audit under the applicable federal and state statutes and regulations, the Contractor shall notify the HSD when the audit is available for review and provide online access to the HSD, or the Contractor shall provide the HSD with four (4) originals of the audit report. The HSD will retain two (2) and one (1) will be sent to the HSD/Office of the Inspector General and one (1) to the HSD/Administrative Services Division/Compliance Bureau.

D. Within thirty (30) days thereafter, or as otherwise determined by the HSD in writing, the Contractor shall provide the HSD with a response indicating the status of each of the exceptions or findings in the said audit report. If either the exceptions or findings in the audit are not resolved within thirty (30) days, the HSD has the right to reduce funding, terminate this Agreement, and/or recommend decertification in compliance with state and/or federal regulations governing such action.

E. This audit shall contain the Schedule of Expenditures of Federal Awards for each program to facilitate ease of reconciliation by the HSD. This audit shall also include a review of the schedule of depreciation for all property or equipment with a purchase price of \$5,000 or more pursuant to 2 CFR 200, specifically subpart F, and appendices where appropriate.

F. This audit shall include a report on compliance with requirements applicable to each major program and internal control over compliance in accordance with 2 CFR 200, specifically subpart F and appendices.

**23. Indemnification.**

The Contractor shall defend, indemnify and hold harmless the HSD and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the HSD and the Risk Management Division of the New Mexico General Services Department by certified mail.

**24. New Mexico Employees Health Coverage.**

A. If Contractor has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the term of the contract, Contractor certifies, by signing this agreement, to have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.

B. Contractor agrees to maintain a record of the number of employees who have (a) accepted health insurance; (b) declined health insurance due to other health insurance coverage already in place; or (c) declined health insurance for other reasons. These records are subject to review and audit by a representative of the state.

C. Contractor agrees to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information: <https://www.healthinsurance.org/new-mexico/>

**25. Employee Pay Equity Reporting.**

Contractor agrees if it has ten (10) or more New Mexico employees OR eight (8) or more employees in the same job classification, at any time during the term of this contract, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. If contractor has (250) or more employees contractor must complete and submit the PE250 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. For contracts that extend beyond one (1) calendar year, or are extended beyond one (1) calendar year, contractor also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within thirty (30) days of the annual contract anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the contract, whichever comes first. Should contractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor agrees to provide the required report within ninety (90) days of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter.

Contractor also agrees to levy this requirement on any subcontractor(s) performing more than 10% of the dollar value of this contract if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Contractor further agrees that, should one or more subcontractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor will submit the required report, for each such subcontractor, within ninety (90 days) of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal. Contractor shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the applicable subcontractor(s) in accordance with the schedule contained in this paragraph. Contractor acknowledges that this subcontractor requirement applies even though contractor itself may not meet the size requirement for reporting and be required to report itself.

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

**26. Invalid Term or Condition.**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

**27. Enforcement of Agreement.**

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

**28. Arbitration**

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

**29. Incorporation by Reference and Precedence**

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

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

**30. Inspection of Services**

A. Services, as used in this Article, include services performed, workmanship, and material furnished or utilized in the performance of services.

B. The Contractor shall provide and maintain an inspection system acceptable to the State Purchasing Agent or other party to this Agreement covering the services under this Agreement. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the State Purchasing Agent or other party to this Agreement during the term of performance of this Agreement and for as long thereafter as the Agreement requires.

C. The State Purchasing Agent or other party to this Agreement has the right to inspect and test all services contemplated under this Agreement to the extent practicable at all times and places during the term of the Agreement. The State Purchasing Agent or other party to this Agreement shall perform inspections and tests in a manner that will not unduly delay or interfere with Contractor's performance.

D. If the State Purchasing Agent or other party to this Agreement performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of such inspections or tests.

E. If any part of the services do not conform with the requirements of this Agreement, the State Purchasing Agent or other party to this Agreement may require the Contractor to re-perform the services in conformity with the requirements of this Agreement at no increase in contract amount. When the defects in services cannot be corrected by re-performance, the State Purchasing Agent or other party to this Agreement may:

- (1) require the Contractor to take necessary action(s) to ensure that future performance conforms to the requirements of this Agreement; and
- (2) reduce the contract price to reflect the reduced value of the services performed.

F. If the Contractor fails to promptly re-perform the services or to take the necessary action(s) to ensure future performance in conformity with the requirements of this Agreement, the State Purchasing Agent or other party to this Agreement may:

- (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the State Purchasing Agent or other party to this Agreement that is directly related to the performance of such service; or
- (2) terminate the contract for default.

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

**31. Insurance**

If the services contemplated under this Agreement will be performed on or in State facilities or property, Contractor shall maintain in force during the entire term of this Agreement,

the following insurance coverage(s), naming the State of New Mexico, General Services Department or other party to this Agreement as additional insured.

A. Workers Compensation (including accident and disease coverage) at the statutory limit. Employers liability: \$100,000.

B. Comprehensive general liability (including endorsements providing broad form property damage, personal injury coverage and contractual assumption of liability for all liability the Contractor has assumed under this contract). Limits shall not be less than the following:

- a. Bodily injury: \$1,000,000 per person /\$1,000,000 per occurrence.
- b. Property damage or combined single limit coverage: \$1,000,000.
- c. Automobile liability (including non-owned automobile coverage): \$1,000,000.
- d. Umbrella: \$1,000,000.

C. Contractor shall maintain the above insurance for the term of this Agreement and name the State of New Mexico, General Services Department or other party to this Agreement as an additional insured and provide for 30 days cancellation notice on any Certificate of Insurance form furnished by Contractor. Such certificate shall also specifically state the coverage provided under the policy is primary over any other valid and collectible insurance and provide a waiver of subrogation.

### **32. Impracticality of Performance**

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

### **33. Patent, Copyright and Trade Secret Indemnification**

A. The Contractor shall defend, at its own expense, the state and its agencies against any claim that any product or service provided under this Agreement infringes any patent, copyright to trademark in the United States or Puerto Rico, and shall pay all costs, damages and attorneys' fees that a court finally awards as a result of any such claim. In addition, if any third party obtains a judgment against the agency based upon Contractor's trade secret infringement relating to any product or services provided under this Agreement, the Contractor agrees to reimburse the state for all costs, attorneys' fees and amount of the judgment. To qualify for such defense and or payment, the agency shall:

- i. give the Contractor prompt written notice within 48 hours of any claim;
- ii. allow the Contractor to control the defense of settlement of the claim; and
- iii. cooperate with the Contractor in a reasonable way to facilitate the defense or settlement of the claim.

B. If any product or service becomes, or in the Contractor's opinion is likely to become the subject of a claim of infringement, the Contractor shall at its option and expense:

- i. provide the agency the right to continue using the product or service and fully indemnify the agency against all claims that may arise out of the agency's use of the product or service;
- ii. replace or modify the product or service so that it becomes non-infringing; or,

iii. accept the return of the product or service and refund an amount equal to the value of the returned product or service, less the unpaid portion of the purchase price and any other amounts, which are due to the Contractor. The Contractor's obligation will be void as to any product or service modified by the agency to the extent such modification is the cause of the claim.

**34. Disclosure Regarding Responsibility**

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

1. is presently debarred, suspended, proposed for debarment, or declared ineligible for award of contract by any federal entity, state agency or local public body;
  - a. has within a three-year period preceding this offer, been convicted in a criminal matter or had a civil judgment rendered against them for;
  - b. the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) contract or subcontract;
  - c. violation of Federal or state antitrust statutes related to the submission of offers; or
  - d. the commission in any federal or state jurisdiction of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violation of Federal criminal tax law, or receiving stolen property;
2. is presently indicted for, or otherwise criminally or civilly charged by any (federal state or local) government entity with the commission of any of the offenses enumerated in paragraph B of this disclosure;
3. has, preceding this offer, been notified of any delinquent Federal or state taxes in an amount that exceeds \$3,000.00 of which the liability remains unsatisfied. Taxes are considered delinquent if the following criteria apply.
  - a. The tax liability is finally determined. The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge of the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.
  - b. The taxpayer is delinquent in making payment. A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.
  - c. Have within a three year period preceding this offer, had one or more contracts terminated for default by any federal or state agency or local public body.)

B. Principal, for the purpose of this disclosure, means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity or related entities.

C. The Contractor shall provide immediate written notice to the State Purchasing Agent or other party to this Agreement if, at any time during the term of this Agreement, the Contractor learns that the Contractor's disclosure was at any time erroneous or became erroneous by reason of changed circumstances.

D. A disclosure that any of the items in this requirement exist will not necessarily result in termination of this Agreement. However, the disclosure will be considered in the determination of the Contractor's responsibility and ability to perform under this Agreement. Failure of the Contractor to furnish a disclosure or provide additional information as requested will be grounds for immediate termination of this Agreement pursuant to the conditions set forth in Paragraph 7 of this Agreement.

E. As required by statute, regulation or requirement of this Agreement, and as contained in Paragraph A, above, the Contractor shall require each proposed first-tier subcontractor whose subcontract will equal or exceed \$25,000, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, or proposed for debarment by any Federal department or agency. The Contractor shall make such disclosures available to the HSD when it requests subcontractor approval from the HSD. If the subcontractor, or its principals, is debarred, suspended, or proposed for debarment by any Federal, state or local department or agency, the HSD may refuse to approve the use of the subcontractor.

F. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the disclosure required by this document. The knowledge and information of a Contractor is not required to exceed that which is the normally possessed by a prudent person in the ordinary course of business dealings.

G. The disclosure requirement provided is a material representation of fact upon which reliance was placed when making an award and is a continuing material representation of the facts during the term of this Agreement. If during the performance of the contract, the Contractor is indicted for or otherwise criminally or civilly charged by any government entity (federal, state or local) with commission of any offenses named in this document the Contractor must provide immediate written notice to the State Purchasing Agent or other party to this Agreement. If it is later determined that the Contractor knowingly rendered an erroneous disclosure, in addition to other remedies available to the Government, the State Purchasing Agent or Central Purchasing Officer may terminate the involved contract for cause. Still further the State Purchasing Agent or Central Purchasing Officer may suspend or debar the Contractor from eligibility for future solicitations until such time as the matter is resolved to the satisfaction of the State Purchasing Agent or Central Purchasing Officer.

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

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

**36. Reserved****37. Succession**

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

**38. Headings**

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

**39. Notices.**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the HSD:                   Cindy Brown, Program Manager  
                                       Medical Assistance Division  
                                       Human Services Department  
                                       P.O. Box 2348  
                                       Santa Fe, NM 87505

To the Contractor:       Stacy Lawson, Team Lead, Global Account Management  
                                       Prometric, Inc.  
                                       1501 South Clinton Street  
                                       Baltimore, MD 21224



**40. Certification and Disclosure Regarding Payments To Influence Certain Federal Transactions (Anti-Lobbying).**

A. The applicable definitions and exceptions to prohibited conduct and disclosures contained in 31 U.S.C. § 1352 and 45 C.F.R. Part 93, as applicable, are hereby incorporated by reference in subparagraph (B) of this certification.

B. The Contractor, by executing this AGREEMENT, certifies to the best of its knowledge and belief that:

- 1) No Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any Federal contract, grant, loan, or cooperative agreement; and
- 2) If any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with this solicitation, the offeror shall complete and submit, with its offer, OMB standard form LLL, Disclosure of Lobbying Activities, to the Contracting Officer.

C. The Contractor shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

D. This certification is a material representation of fact upon which reliance is placed when this Agreement is made and entered into. Submission of this certification is a prerequisite for making and entering into this Agreement imposed under 31 U.S.C. § 1352. It shall be a material obligation of the Contractor to keep this certification current as to any and all individuals or activities of anyone associated with the Contractor during the pendency of this Agreement. Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure form to be filed or amended by this provision, shall be subject to: (1) a civil penalty of not less than \$10,000 and not more than \$100,000 for such failure; and/or (2) at the discretion of the HSD, termination of the Agreement.

**41. Non-Discrimination.**

A. The Contractor agrees to comply fully with Title VI of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, Public Law 93-112, as amended; and the Americans With Disabilities Act of 1990, Public Law 101-336; in that there shall be no discrimination against any employee who is employed in the performance of this Agreement, or against any applicant for such employment, because of age, color, national origin, ancestry, race,

religion, creed, disability, sex, or marital status.

B. This provision shall include, but not be limited to, the following: employment, promotion, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship.

C. The Contractor agrees that no qualified handicapped person shall, on the basis of handicap, be excluded from participation or be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of the Contractor. The Contractor further agrees to insert similar provisions in all subcontracts for services allowed under this Agreement under any program or activity.

D. The Contractor agrees to provide meaningful access to services for individuals with Limited English Proficiency (LEP) in accordance with Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency."

#### 42. **Drug Free Workplace.**

A. *Definitions.* As used in this paragraph—

"Controlled substance" means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act, 21 U.S.C 812, and as further defined in regulation at 21 CFR 1308.11 - 1308.15.

"Conviction" means a finding of guilt (including a plea of *nolo contendere*) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

"Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any controlled substance.

"Drug-free workplace" means the site(s) for the performance of work done by the Contractor in connection with a specific contract where employees of the Contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

"Employee" means an employee of a contractor directly engaged in the performance of work under a Government contract. "Directly engaged" is defined to include all direct cost employees and any other contractor employee who has other than a minimal impact or involvement in contract performance.

"Individual" means an offeror/contractor that has no more than one employee including the offeror/contractor.

B. The Contractor, if other than an individual, shall:

1) Publish a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

2) Establish an ongoing drug-free awareness program to inform such employees about:

(i) The dangers of drug abuse in the workplace;

- (ii) The Contractor's policy of maintaining a drug-free workplace;
- (iii) Any available drug counseling, rehabilitation, and employee assistance programs; and
- (iv) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

- a) Provide all employees engaged in performance of the AGREEMENT with a copy of the statement required by subparagraph B(1);
- b) Notify such employees in writing in the statement required by subparagraph (B)(1) of this clause that, as a condition of continued employment on this AGREEMENT, the employee will:
  - (i) Abide by the terms of the statement; and
  - (ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring in the workplace no later than five (5) days after such conviction;
- c) Notify the HSD Program Manager in writing within ten (10) days after receiving notice under (B)(4)(ii) of this paragraph, from an employee or otherwise receiving actual notice of such conviction. The notice shall include the position title of the employee;
- d) Within thirty (30) days after receiving notice under B(4)(ii) of this paragraph of a conviction, take one of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the workplace:
  - (i) Taking appropriate personnel action against such employee, up to and including termination; or
  - (ii) Require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency; and

3) Make a good faith effort to maintain a drug-free workplace through implementation of B(1) through B(6) of this paragraph.

C. The Contractor, if an individual, agrees by entering into this AGREEMENT not to engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while performing this contract.

D. In addition to other remedies available to the HSD, the Contractor's failure to comply with the requirements of subparagraph B or C of this paragraph will render the Contractor in default of this AGREEMENT and subject the Contractor to suspension of payments under the AGREEMENT and/or termination of the AGREEMENT in accordance with paragraph 4, above.

**43. Findings and Sanctions.**

A. The Contractor agrees to be subject to the findings, sanctions and disallowances assessed or required as a result of audits pursuant to this agreement.

B. The Contractor will make repayment of any funds expended by the HSD, subject to which an auditor acting pursuant to this agreement finds were expended, or to which appropriate federal funding agencies take exception and so request reimbursement through a disallowance or deferral based upon the acts or omissions of the Contractor that violate applicable federal statutes and/or regulations, subject to sufficient appropriations of the New Mexico Legislature.

C. If the HSD becomes aware of circumstances that might jeopardize continued federal funding the situation shall be reviewed and reconciled by a mutually agreed upon panel of Contractor and the HSD officials. If reconciliation is not possible, both parties shall present their view to the Director of the Administrative Services Division who shall determine whether continued payment shall be made.

**44. Performance.**

In performance of this Agreement, the Contractor agrees to comply with and assume responsibility for compliance by its employees, its subcontractors, and/or Business Associates (BA), as applicable, with the following requirements:

A. All work will be performed under the supervision of the Contractor, the Contractor's responsible employees, and the Contractor's subcontracted staff.

B. Contractor agrees that if Personally Identifiable Information (PII) as defined by the National Institute of Standards Technology, limited to PII received from, or created on behalf of HSD pursuant to the services; is referred to hereafter in Article 10 as Confidential Information, made available to the Contractor.

C. Contractor agrees that it will account for all Confidential Information upon receipt and store such Confidential Information in a secure manner before, during, and after processing. In addition, all related output will be given the same level of protection by the Contractor as required for the source material.

D. The Contractor certifies that the Confidential Information processed during the performance of this Agreement will be deleted from, or otherwise wiped, removed, or rendered unreadable or incapable of reconstitution by known means on all electronic data storage components in Contractor's facilities, including paper files, recordings, video, written records, printers, copiers, scanners and all magnetic and flash memory components of all systems and portable media, and no output will be retained by the Contractor at the time the work is completed or when this Contract is terminated.

E. No work involving Confidential Information furnished under this Agreement will be subcontracted without prior written approval of the HSD.

F. All incidents affecting the compliance, operation, or security of the HSD's Confidential Information must be reported to the HSD. The Contractor shall notify the HSD of

any instances of security or privacy breach issues or non-compliance promptly upon their discovery, but no later than a period of 24 hours (as stated above). Notification shall include a description of the privacy and security non-compliance issue and corrective action planned and/or taken.

G. The Contractor must provide the HSD with a summary of a corrective action plan (if any) to provide any necessary safeguards to protect PII from security breaches or non-compliance discoveries. The corrective action plan must contain a long term solution to possible future privacy and security threats to PII. In addition to the corrective action, the Contractor must provide daily updates as to the progress of all corrective measures taken until the issue is resolved. The Contractor shall be responsible for all costs of implementing the corrective action plan.

**45. Contractor's Responsibility For Compliance With Laws and Regulations.**

A. The Contractor is responsible for compliance with applicable laws, regulations, and administrative rules that govern the Contractor's performance of the Scope of Work of this Agreement and Exhibit A, including but not limited to, applicable State and Federal tax laws, State and Federal employment laws, State and Federal regulatory requirements and licensing provisions.

B. The Contractor is responsible for causing each of its employees, agents or subcontractors who provide services under this Agreement to be properly licensed, certified, and/or have proper permits to perform any activity related to the Scope of Work of this Agreement and Exhibit A.

**46. Contractor's Responsibility For Compliance With Laws and Regulations Relating To Information Technology.**

A. The Contractor agrees to monitor and control all its employees, subcontractors, consultants, or agents performing the Services under this AGREEMENT in order to assure compliance with the following regulations and standards insofar as they apply to Contractor's processing or storage of Applicant/tester Confidential Information or other data:

1. The Federal Information Security Management Act of 2002 (FISMA);
2. NMAC 1.12.20, *et seq.* "INFORMATION SECURITY OPERATION MANAGEMENT".

**47. Subcontracting.**

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Agency. No such subcontract shall relieve the primary Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from the Procuring Agency.

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

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

**49. Limitation of Liability.**

The Contractor's liability to the agency, or any procuring agency, for any cause whatsoever shall be limited to the purchase price paid to the Contractor for the products and services that are the subject of the HSD's claim. The foregoing limitation does not apply to paragraph 23 of this Agreement or to damages resulting from personal injury caused by the Contractor's negligence.

**50. Survival.**

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

**51. Authority.**

If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represents and warrants that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date of signature by the State Purchasing Agent below:

By: [Signature] Date: 10/20/16  
Brent Earnest, HSD Cabinet Secretary

By: [Signature] for Danny Sandoval Date: 10-24/16  
Danny Sandoval, HSD Chief Financial Officer

Approved for legal sufficiency:

By: [Signature] Date: 10/25/16  
Christopher P. Collins, HSD General Counsel

By: [Signature] Date: 10/12/16  
Contractor Michael P. Sawicki  
SVP/General Counsel

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the NM Taxation and Revenue Department to pay gross receipts and compensating taxes:

CRS ID Number: 03-120264-00-0

By: [Signature] Date: 11/2/16  
Tax and Revenue Department Representative

This Agreement has been approved by the State Purchasing Department:

By: [Signature] Date: 11/16/16  
State Purchasing Agent

**Exhibit A****SCOPE OF WORK**

The Contractor, which shall be the sole testing agency for nurse aides employed in certified nursing facilities in New Mexico, shall be responsible for providing the following:

**A. Summary**

1. Eligibility for Competency Evaluation- Screening nurse aide candidate eligibility for testing
2. Test Development and Delivery - Developing or using standardized, written, skills and oral performance-based examinations; Scheduling and administering examinations
3. Application for Competency Evaluation – Developing registration procedures, application forms and materials; Managing nurse aide candidate application materials
4. Regional Test Sites and Staffing – Establishing test sites; Provide test examiners, equipment, and supplies
5. Test Scoring - Certifying and reporting examination results
6. Test Data Reporting - Reporting test data to the Department of Health (DOH) and the Nurse Aide Registry; Managing computer-based test data
7. Employment Verification - Developing forms and procedures for use in verifying the employment for nurse aides on the Nurse Aide Registry; Maintaining employment verification for biennial nurse aide recertification and for the Nurse Aide Registry
8. In-Service Education Verification - Developing and implementing appropriate procedures for verifying in-service training and education for nurse aides; Maintaining in-service verification for biennial nurse aide recertification and for the Nurse Aide Registry
9. Invoicing – Submitting monthly invoices to HSD

**B. Details****1. Eligibility for Competency Evaluation**

Within four (4) months of employment, all persons working as nurse aides in New Mexico nursing facilities must successfully complete a state-approved nurse aide training program and then be scheduled for a competency evaluation that shall consist of both a written or oral examination and skills demonstration.

A competency evaluation program must be made available to persons who have received nurse aide training in state-approved nursing facility based nurse aide training programs, as well as in non-nursing facility based training programs, such as community colleges, vocational technical programs, and training programs (Appendix F to the RFP lists nursing facility based and non-nursing facility based qualified training programs for nurse aides.)

For reasons of testing consistency and reimbursement efficiency, the HSD will



establish a single competency evaluation program. The Contractor must screen all nurse aide candidates for eligibility as follows:

- a) Proof of employment or offer of employment in a certified nursing facility; and/or
- b) Documentation of seventy five (75) completed hours of nurse aide training from a program approved by the state survey agency; and/or
- c) Documentation by the training agency for nurse aide training completion or original state survey agency letter of approval to take the competency evaluation.

In accordance with 42 CFR 483.156, all test candidates will be allowed three (3) opportunities to successfully complete the examination without re-submitting an application. Failure after three attempts will require retraining and submission of a new application to be eligible for further testing opportunities.

The Contractor must have an established procedure to accommodate the special testing needs of persons with physical challenges or with any religious obligations that may preclude weekend test dates.

## 2. Test Development and Delivery:

The competency evaluation instrument must be valid, reliable, job-related and legally defensible. Content must cover the required curricula in 42 C.F.R. § 483.152. All aspects of competency evaluation and recertification must meet the requirements of federal law and the federal regulations of the Centers for Medicare and Medicaid Services (CMS) pertaining to Nurse Aide Training and Competency Evaluation Programs (NATCEP), including but not limited to 42 U.S.C. §§ 1396b and 1396r and 42 C.F.R. §§ 431.120, 433.15, 483.75, and 483.150 to 483.160.

The competency evaluations must also conform to state regulations on NATCEP in MAD 731 (8.312.2 New Mexico Administrative Code). The Contractor shall take into consideration the literacy level, educational background and testing experience of the candidate population.

The Contractor must offer an oral examination option instead of the written examination. All candidates may choose to take an oral examination instead of the written examination.

The oral examination will have an additional section of exam questions on reading comprehension to determine competency to read job related information. For example, the aide must be able to read materials such as a resident's name band, the contents of a bottle sitting on a bedside stand or a physician's orders.

Candidates must pass the reading comprehension section in order to pass the oral test.

The written and oral examinations shall be developed from a randomized pool of test questions suitable for entry level nurse aides, a portion of which will be used in any one examination. The Contractor shall develop a system that will maintain the integrity of the pool of questions and the individual examinations. The written and oral examinations must be offered, at a minimum, in English and Spanish.

For each nurse aide candidate, the clinical skills demonstration portion of the competency evaluation must consist of a minimum performance of five (5) tasks from a randomized pool of evaluation items ranked according to degree of difficulty. The test examiner will make random selections of tasks with at least one task from each degree of difficulty.

The clinical skills demonstration portion of the competency evaluation must also evaluate the non-task oriented competency of the trainee in communication, safety and resident's rights. The clinical skills demonstration portion of the competency evaluation will be held at the regional testing sites (see APPENDIX J for current regional testing sites) and must be administered by a registered nurse that meets the Center for Medicare and Medicaid Services (CMS) requirements for a test examiner.

With the input and approval of DOH, the Contractor must organize and administer competency evaluations as often as necessary to meet all nursing facilities' competency evaluation needs. The Contractor is responsible for obtaining updated lists of certified nursing facilities at least quarterly qualified for nurse aide training. These lists may be obtained from the DOH.

### 3. Application for Competency Evaluation

All nurse aide candidates must submit an application prior to taking the evaluation. The Contractor must provide candidate study guides, information bulletins and test application materials for prospective nurse aide candidates. The application materials will contain application forms, fee information, application and registration procedures, examination content outlines, and sample questions. Application forms and materials shall be made available on the Contractor's website. Application materials will be subject to the approval of the HSD and the DOH.

The Contractor must establish a toll-free number to answer applicants' questions and to schedule evaluations.

The Contractor must certify that all requested evaluations and re-evaluations will be performed as required.

The Contractor must inform each applicant of the right to request on the application form an alternative method of evaluation in lieu of the written test.

Prior to the competency evaluation, the Contractor shall notify each applicant in writing that a record of his/her successful completion will be entered into the Nurse Aide Registry.

#### 4. Regional Test Sites and Staffing

The Contractor shall establish a minimum of ten (10) regional testing sites (See APPENDIX J for current testing sites) throughout the state based on need, shall pre-register nurse aide candidates, and shall conduct competency evaluations for the written, oral and clinical skills demonstration components of the evaluation, including but not limited to:

- a) Providing testing staff, including examiners, proctors and scoring capabilities.
- b) Providing testing space, including work surface for written tests, a computer terminal area consisting of at least four (4) computers for computer based testing, private space for oral evaluation and clinical settings for clinical skills demonstration.
- c) Providing testing equipment and supplies (including, but not limited to hospital bed, stethoscope and mannequin, and any and all patient assessment tools) required to meet the needs of the clinical skills evaluation.

The Contractor must provide security measures to be followed at test sites, including but not limited to verification of candidate identity, maintaining test integrity, and procedures for handling suspected breaches of security.

#### 5. Test Scoring

The Contractor must ensure that test standardization and scoring of proctored exams is performed only by Contractor staff. The Contractor shall notify the candidate, the HSD, and the nursing facility of competency evaluation results, and shall assist unsuccessful candidates in preparing for re-examination by outlining their areas of test weakness. . Testing results will be made available to candidates no longer than ten (10) business days following exam completion.

The Contractor must issue certificates of completion to each successful candidate of nurse aide competency evaluation.

#### 6. Test Data Reporting

On a monthly basis, the Contractor must provide the HSD and the DOH with the following reports for each test date within forty-five (45) days after the end of the

month:

- a) Test registration rosters and results.
- b) Pass rates and pass/fail ratios by first time nurse aide candidates.
- c) Pass rates and pass/fail ratios by all nurse aide candidates.
- d) Pass/fail performance by training site.
- e) Pass/fail performance by examiner.
- f) Pass/fail performance by clinical skills demonstration item.

With the input and approval of the HSD and the DOH, the Contractor must develop and implement a data file for the storage and maintenance of candidate and examination data. The data will be used to monitor testing activities and support DOH and HSD management decisions regarding test delivery and training needs.

The Contractor must establish, maintain, continuously update and make available for the DOH via internal database, access information required for the DOH's Nurse Aide Registry including competency evaluation outcome data and copies of nurse aide certificates that the DOH can print or download. The Contractor must ensure the accuracy of all information on the certificates, including the name of the current Medical Assistance Division Director. Nurse aide certificates will be subject to the approval of the HSD and the DOH. Test data must be made available by the Contractor for the DOH access within ten (10) business days of the examination.

The Contractor shall establish Nurse Aide Registry data for each successfully certified nurse aide, to include the following data:

- a) Individual's full name
- b) Home address
- c) Home phone number
- d) Date of birth
- e) Social Security Number
- f) Current employer and employer's Medicaid provider number
- g) Date of hire
- h) Date of employment termination, if application
- i) Date competency evaluation completed, and outcome (pass/fail) of the evaluation (dates for both written and clinical skills tests)
- j) Certification number established the contractor
- k) Most recent recertification data, if applicable
- l) Nurse aide status on the registry (active, inactive)

- m) Date of last data update, and a log of the user responsible for that action
- n) An active/inactive record designation
- o) Reciprocity/Endorsement from State of \_\_\_\_\_ (name of State from which reciprocity was granted)
- p) In-service education hours

The Contractor must provide to the DOH a minimum of three (3) secure logins, and read and write access to the Nurse Aide Registry. The DOH must be provided with the data change capability that supports the Nurse Aide Registry services of, including but not limited to, changing, personal identification information of nurse aides, updating nurse aide employers, updating training programs, employment verification, and reciprocity to New Mexico, in accordance with 42 CFR 483.156, from other states.

The Contractor shall maintain daily back-ups for all data, and shall make this information available for the DOH upon request.

## 7. Employment Verification

Current employment verification information must be maintained on the Nurse Aide Registry for the purpose of recertification of Nurse Aides.

The Contractor must develop all necessary forms for use in verifying the employment for nurse aides on the Registry. Employment verification forms will be subject to the approval of the HSD and the DOH.

The Contractor must make the employment verification forms available on the Contractor's website. For the purposes of recertification, the Contractor must provide individual employment verification forms to all nurse aides currently on the New Mexico Nurse Aide Registry. For those nurse aides who provide proof of employment, the Contractor must issue documentation of job verification with an updated expiration date of the nurse aide's certification.

The Contractor shall track all nurse aides on the Nurse Aide Registry that do not provide proof of employment during the prior twenty-four (24) months in order to notify the candidate in writing. Recertification notices will be provided to all nurse aides sixty (60) days prior to his/her twenty-four (24) months employment period expiration date.

The Contractor shall provide an adequate supply of change of address forms to meet the needs of all qualified nursing facilities (APPENDIX H) for use by their nurse aide employees, and will add address changes received to the Nurse Aide Registry.

The Contractor shall provide the DOH access to updated employment verification, testing and actions for addition to the DOH maintained Nurse Aide Registry.

## 8. In-Service Education Verification

The Contractor shall collect and maintain information regarding nurse aide in-service hours offered in the past twelve (12) months from nursing facilities. The Contractor will also provide a supply of two-part forms (in-service hours by nurse aide, and in-service hours by nursing facility) subject to the approval of the HSD and the DOH for tracking in-service hours. Representatives of nursing facilities will be instructed to submit a copy of this form to the Contractor each time an in-service program is offered to a nurse aide.

The Contractor shall enter information from these returned forms to the Nurse Aide Registry record of each individual nurse aide. The Contractor shall provide the following information in alphabetical order by nurse aide to the DOH:

- a) Name
- b) Social Security Number
- c) Name of facility offering the in-service
- d) Total number of in-service education hours for the previous twelve (12) months

The Contractor will provide quarterly to the DOH an alphabetical listing by facility of the total number of in-service education hours offered by each qualified nursing facility for nurse aides during the previous twelve (12) months.

## 9. Invoicing

Invoices are to be submitted monthly, no later than forty-five (45) days after the end of the month for which services are being billed. Invoices must include supporting documentation of the number of clinical skills exams, oral exams, written exams, and re-certifications.

In the case of invoices for services rendered during the last month of the state fiscal year (June), the HSD may require by written notice that the Contractor submit the invoice within a shorter period of time in order to comply with accounting and payment deadlines issued by the New Mexico Department of Finance and Administration.

## C. Deliverables

The Contractor shall provide the following deliverables to the HSD or the DOH, as applicable.

1. A pool of written and oral test questions and a system for maintaining integrity of the questions.
2. A clinical skills demonstration portion of the competency evaluation from a pool of evaluation tasks ranked according to difficulty and a system for maintaining integrity.
3. An explanation of how oral and written examinations and the clinical skills demonstration are reliable and valid.

4. The eligibility criteria for competency evaluation.
5. A packet of study materials and application materials.
6. A schedule of proposed tests with test dates and locations.
7. A plan to mitigate the number of monthly “no shows” on the part of candidates scheduled for test dates and sites.
8. Coordination and agreement with the DOH to establish a data file of certified facilities approved for examination site and exam proctoring.
9. Test site security policy and procedures.
10. A certification notice that includes, at a minimum, a letter describing the renewal process and an employment verification form sent to the nurse aide at least sixty (60) days before the nurse aide lapses from the registry.
11. Test reporting format by test site and test date.
12. Registry data format.
13. A packet of registry support material to include nurse aide candidate information, general information documents, registry services, and Contractor’s contact information.
14. Recertification plan.
15. All forms required, including but not limited to Application Form, Employment Verification Form, In-service Training Form, Change of Address Form.
16. Established reports as stated in subpart B number 6. Test Data Reporting of the Scope of Work.
17. Ad hoc reports.

**Exhibit B**  
**Compensation Rate Chart**

**Base Period, Contract Year 1 (FY17 and FY18)**

<b>Budget Item Description</b>	<b>Base Period 1: Upon SPD approval for one year</b>	<b>Base Period 1: Upon SPD approval for one year</b>	<b>Base Period 1: Upon SPD approval for one year</b>
Clinical Skills Test	517	\$65.00	\$33,605.00
No Show - Clinical Skills Test	62	\$65.00	\$4,030.00
Written Test	502	\$37.00	\$18,574.00
No Show - Written Test	60	\$37.00	\$2,220.00
Oral Test	19	\$37.00	\$703.00
No Show - Oral Test	2	\$37.00	\$74.00
Recertification	1,841	\$25.00	\$46,025.00
Total Service Fees			\$105,231.00
State Gross Tax (5%)			\$5,261.55
Total State Expenditures			\$110,492.55



**Optional Period 1, Contract Year 2 (FY18 and FY19):**

<b>Budget Item Description</b>	<b>Option Period 1, Year 2:</b>	<b>Option Period 1, Year 2:</b>	<b>Option Period 1, Year 2:</b>
Clinical Skills Test	543	\$65.00	\$35,295.00
No Show - Clinical Skills Test	65	\$65.00	\$4,225.00
Written Test	527	\$37.00	\$19,499.00
No Show - Written Test	63	\$37.00	\$2,331.00
Oral Test	20	\$37.00	\$740.00
No Show - Oral Test	2	\$37.00	\$74.00
Recertification	1,933	\$25.00	\$48,325.00
Total Service Fees			\$110,489.00
State Gross Tax (5%)			\$5,524.45
Total State Expenditures			\$116,013.45

**Optional Period 2, Contract Year 3 (FY19 and FY20):**

<b>Budget Item Description</b>	<b>Option Period 2, Year 3:</b>	<b>Option Period 2, Year 3:</b>	<b>Option Period 2, Year 3:</b>
Clinical Skills Test	570	\$65.00	\$37,050.00
No Show - Clinical Skills Test	69	\$65.00	\$4,485.00
Written Test	553	\$37.00	\$20,461.00
No Show - Written Test	66	\$37.00	\$2,442.00
Oral Test	21	\$37.00	\$777.00
No Show - Oral Test	2	\$37.00	\$74.00
Recertification	2,030	\$25.00	\$50,750.00
Total Service Fees			\$116,039.00
State Gross Tax (5%)			\$5,801.95
Total State Expenditures			\$121,840.95

**Optional Period 3, Contract Year 4 (FY20 and FY21):**

<b>Budget Item Description</b>	<b>Option Period 3, Year 4:</b>	<b>Option Period 3, Year 4:</b>	<b>Option Period 3, Year 4:</b>
Clinical Skills Test	599	\$65.00	\$38,935.00
No Show - Clinical Skills Test	72	\$65.00	\$4,680.00
Written Test	581	\$37.00	\$21,497.00
No Show - Written Test	69	\$37.00	\$2,553.00
Oral Test	22	\$37.00	\$814.00
No Show - Oral Test	3	\$37.00	\$111.00
Recertification	2,132	\$25.00	\$53,300.00
Total Service Fees			\$121,890.00
State Gross Tax (5%)			\$6,094.50
Total State Expenditures			\$127,984.50