

MCKINLEY COUNTY, NEW MEXICO
PURCHASE ORDER TERMS AND CONDITIONS
Effective 09-03-2014

1. **ACCEPTANCE OF PURCHASE ORDER:** The Purchase Order, including any Change Orders, Exhibits, or Attachments incorporated herein by reference constitute the entire agreement between McKinley County ("County") and the Seller for the materials, equipment, parts, and/or services (hereafter "goods" and/or "services") described thereon. Acceptance is limited to the terms stated herein, and any additional or different terms proposed by Seller shall be of no force and effect and are hereby rejected unless expressly agreed to in writing by the County. Delivery of goods and performance of services in conformity herewith prior to written acceptance and use of such goods and acceptance of such services by the County shall constitute acceptance of the terms and conditions stated herein for this Purchase Order only. Seller accepts and shall be bound by the terms and conditions of this Purchase Order upon the earlier of: (1) the date on which it notifies the County by acknowledging its acceptance in writing (attached hereto), (2) when it commences performance, or (3) upon use of such goods and acceptance of such services by the County. No other form of acceptance shall be binding on the County.
2. **CHANGES:** County may at any time, in writing, direct or authorize Seller to make changes or modifications within the general scope of this Purchase Order. If such changes or modifications necessitate an increase or decrease in the amount due or in the time required for performance, such matters shall be agreed upon in writing prior to proceeding with the change. No payment shall be made by the County for any change or modification not so approved and/or directed in writing by an authorized County representative prior to the effective date of the change.
3. **TERMINATION:**
 - a. County reserves the right to terminate this Purchase Order at any time and for any reason, including convenience, with respect to undelivered goods or unperformed services. Such termination shall be by written or electronic notice or by oral notice confirmed in writing.
 - b. Except as otherwise provided for in this Purchase Order, the County and the Seller shall consider this Purchase Order terminated upon completion of the performance obligations and upon completion of payment obligations.
4. **DELIVERY:** Time is of the essence. If delivery of conforming goods or performance of conforming services is not completed by the time(s) promised, the County reserves the right, in addition to any other rights and/or remedies it may have under the law or in equity, to cancel this Purchase Order, to reject such goods or services in whole or in part on reasonable notice to Seller and/or to purchase substitute goods or services elsewhere and charge Seller with any loss incurred by the County. Any provisions herein for delivery of goods or performance of services by installments shall not be construed as making the obligations of Seller severable. Shipments sent to the County C.O.D., without the County's written consent, will not be accepted and will be at Seller's risk.
5. **PRICE:** The County shall not be billed at prices higher than stated herein unless authorized in writing by the County. Seller represents that the prices charged for the goods and/or services covered by this Purchase Order are no greater than the lowest prices charged by Seller to comparable entities and that such prices comply with all applicable laws and government regulations in effect at time of quotations, sale, delivery, and performance. Seller agrees to notify the County of any price reduction made in goods and/or services covered by this Purchase Order subsequent to the date hereof and prior to delivery or performance of services and Seller agrees that any such reduction will be applicable to this Purchase Order.
6. **CONTINGENCIES:** Failure of either party to perform hereunder, in whole or in part, occasioned by an act of God or the public enemy, fire, explosion, perils of the sea, flood, drought, war, riot, sabotage, accident, embargo, government priority (including requisition or allocation), or any circumstances of like or different character beyond the reasonable control of the party so failing to perform, or by interruption of or delay in transportation, labor trouble from whatever cause arising and whether or not the demands of the employees involved are reasonable and within the affected party's power to concede, or compliance with any Purchase Order or request of any governmental officer, department, agency or committee, shall not subject said party to any liability to the other party. At the County's option, the period specified for delivery of goods or performance of services hereunder shall be extended by the period of delay occasioned by any such circumstance or the total shall be reduced by that portion of the goods or services which Seller is unable to deliver.
7. **WARRANTIES:** In addition to all warranties established by law, Seller hereby warrants and agrees that:
 - a. All goods and services covered by this Purchase Order shall conform to the specifications, drawings, samples or other descriptions furnished by the County and shall be merchantable, fit for the purpose intended, of best quality and workmanship and free from all defects. The County shall have the right of inspections and approval and, in addition to its other rights and remedies, reject and return goods or require re-performance of services at Seller's expense if defective or not in compliance with the County's specifications and/or scope of work. Defects shall not be deemed waived by the County's failure to notify Seller upon receipt of goods or completion of services or by payment of invoice.
 - b. No disclosure, description or other communication of any sort shall be made by Seller to any third person of the County's purchase of goods or services hereunder, or of the details and characteristics thereof, without the County's prior written consent. Anything furnished to Seller by the County pursuant to this Purchase Order, including without limitation samples, drawings, patterns and materials shall remain the property of the County, shall be held at Seller's risk and shall be returned upon completion of performance hereunder, and no disclosure or reproduction thereof in any form shall be made without the County's prior consent in writing.
 - c. All goods delivered pursuant to this Purchase Order and manner of delivery thereof shall conform to standards established for such goods and delivery in accordance with any applicable federal, state, or local laws or regulations.
 - d. The use or sale of any goods delivered hereunder, or any part thereof, except goods produced to the County's drawings or specifications, does not infringe on any adverse and existing patent, copyright, or license. Seller agrees to indemnify and hold harmless the County from any such patent, copyright, or license infringement violations. This indemnity provision shall survive any termination or expiration of this Purchase Order.
 - e. The foregoing warranties shall survive County's acceptance of goods and performance of services hereunder, including construction projects.
8. **LOSS IN TRANSIT AND ENVIRONMENTAL RESPONSIBILITY:** Title and risk of loss of goods and services purchased by the County under this Purchase Order shall pass to the County upon acceptance of such goods and/or services. All shipments made under this Purchase Order, regardless of the designated F.O.B. point, shall be in accordance with all applicable federal, state, or local laws and/or regulations, including but not limited to U.S. Department of Transportation and U.S. Environmental Protection Agency regulations for hazardous substances. Prior to the County's acceptance of such goods and/or services, the County shall not be liable for any discharge, spill or other incident, including but not limited to expenses nor for any clean-up costs involving any materials, equipment, or parts.
9. **MARKING:** Seller shall mark each package, container, or shipment clearly with the County's name, address, contents, and applicable Purchase Order number(s).
10. **ASSIGNMENT:** Seller shall not assign or subcontract any of its rights or obligations under this Purchase Order without the prior written permission of the County. As such, assignment of this Purchase Order or of any interest herein or of any money due or to become due hereunder without the prior written consent of the County shall be void. In no event shall the County's written permission (if any) be construed as discharging or releasing Seller from the performance of its obligations specified in this Purchase Order.

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11. **GOVERNING LAW:** The formation, interpretation, and performance of this Purchase Order shall be governed by the laws of the State of New Mexico, including the New Mexico Uniform Commercial Code.
12. **EMPLOYEES, INSURANCE, INDEMNIFICATION:**
- a. In providing goods, materials, equipment, parts or performing services hereunder, Seller is an independent contractor, with sole responsibility for all persons employed in connection therewith, including without limitation, exclusive liability for the payment of all Federal, State, and Local Unemployment and Disability Insurance and all Social Security and/or other taxes and contributions payable in respect of such persons, from and against which liability the Seller agrees to indemnify, exonerate and hold harmless the County.
 - b. Seller shall when required by the terms of the contract or solicitation documents provide to the County, prior to the commencement of any services hereunder, certificates of insurance which evidence that Seller has purchased at least the following insurance: General Commercial Liability Insurance and Comprehensive Automobile Liability Insurance; minimum limits of coverage shall be the greater of liability established by the New Mexico Tort Claims Act or combined single limit coverage of \$1,000,000. Seller's Worker's Compensation coverage limits shall be those established by New Mexico statutes. Employer's Liability Insurance coverage shall be the greater of the limits of liability established by the New Mexico Tort Claims Act or \$1,000,000. At the County's option higher limits and additional insurance policies may be specified.
 - c. Seller's insurance policies, regardless of any like insurance coverage that the County may have, shall be primary with respect to the interest of the County, and any insurance maintained by the County is in excess and not contributory to Contractor's insurance policies regardless of any like insurance coverage that the County may have.
 - d. Seller will (or will cause the respective insurance carrier to) provide the County with written notice prior to the cancellation, termination, non-renewal, or any other material change in the policies.
 - e. Nothing in this Purchase Order shall limit Seller's liability to the limits of the insurance coverages required hereunder. Seller shall be solely responsible for payment of all deductible or retention amounts pertaining to any insurance policies required herein or by law.
 - f. Where applicable, all insurance policies shall provide for waiver of subrogation in favor of the County, include cross liability provisions, and all policies, except Workers' Compensation or Professional Liability, shall name the County and its directors, officers, officials, managers, representatives, agents and employees as additional insured, to the extent allowable under such policies.
13. **GENERAL LIABILITY AND INDEMNIFICATION:** Seller shall indemnify and hold harmless the County, including its officers, officials, employees, or agents, against liability, claims, damages, losses or expenses, including attorney fees, only to the extent that the liability, damages, losses or costs are caused by, or arise out of, the acts or omissions of Seller or its officers, employees, or agents. This indemnity provision shall survive any termination or expiration of this Purchase Order.
14. **CARE, CUSTODY, AND CONTROL OF SERVICES, PROPERTY, MATERIALS, AND EQUIPMENT:**
- a. To the extent that Seller provides goods and/or services, Seller shall have the full responsibility for and the risk of loss for such goods and/or services, including the County's furnished property, equipment, and materials under Seller's care, custody, control.
 - b. Seller shall provide all facilities for protection required by public authority or local authority, as applicable.
15. **PAYMENT TERMS AND DISCOUNTS:** Payments shall be paid to Seller within thirty (30) days contingent upon the following:
- a. Application of payment discounts, if considered to be in the best interest of the County;
 - b. From date of receipt by the County's Accounts Payable Department of properly documented invoices as determined by the budgetary and fiscal guidelines of the County;
 - c. On the condition that the Seller has delivered the goods and/or performed the services to the satisfaction of the County. Any taxes (specifically including the New Mexico Gross Receipts tax), licenses, or other governmental fees and charges, are the responsibility of the Seller for tangible goods.
 - d. Invoices for goods or services must be submitted to the County's Accounts Payable Department upon delivery of goods or upon performance of services. If invoices are for goods, invoices should be submitted to the County when such goods are delivered to a carrier for final delivery to the County or upon actual delivery of goods to the County by the Seller. Seller's submittal of invoices for services shall correlate with the payment schedule agreed upon by the Seller and the County as evidenced in this Purchase Order. Invoices not received by the County's Accounts Payable Department within ninety (90) calendar days from the date they are reasonably due may, at the County's sole discretion, be considered as paid in full.
16. **COMPLIANCE WITH LAWS AND COUNTY'S RULES:**
- a. McKinley County is exempt from payment of gross receipts tax on certain and various materials, but is subject to such tax on services and certain other materials, including construction projects defined in 7-9-1k NMSA 1978.
 - b. The taxable status of any sale of materials or services must be determined by the Seller's legal counsel or tax consultant. Invoices rendered for additional taxes after bid award will not be honored.
 - c. Reference is hereby made to paragraph 13-1-191 NMSA that any bribes, gratuities or kickbacks of any type are expressly forbidden and such acts may be subject to civil penalty.
 - d. If this Purchase Order requires the physical presence of Seller's employees, subcontractors or other persons responsible to and under Seller's control on County's premises, Seller shall comply with all applicable federal, state, and County governmental regulations and rules, including without limitation, those regulations and rules relative to environmental, quality, safety, fire prevention, and insurance. Seller shall at all times provide all equipment that is used in the performance of services under this Purchase Order except for that equipment specified in this Purchase Order as being furnished by the County, including all equipment to ensure the safety of all employees, subcontractors or others under Seller's control. All such persons shall be subject to all applicable rules of the County's premises, including regulations and rules for safety, environmental, and fire protection.
 - e. Seller warrants that it will comply with all existing laws, regulations and/or requirement of local, state, and federal governments with respect to any pollution damages whatsoever. Seller agrees to protect, defend, indemnify, exonerate and hold the County harmless from and against any and all suits, claims, liability, losses, liens, demands, fines, costs, criminal and civil penalties, causes of action or any other obligations arising out of or in any manner connected with pollution incidents caused by Seller involving bodily injury, death, property damage or any violation or alleged violation of any federal, state, or local law or regulation. This provision shall survive termination or expiration of this Purchase Order indefinitely.

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f. By law (Section 13-1-191, NMSA, 1978) the County is required to inform Offerors/Bidders/Contractors/Sellers of the following: (1) it is a third-degree felony under New Mexico law to commit the offense of bribery of a public officer or public employee (Section 30-24-1, NMSA, 1978); (2) it is a third degree-degree felony to commit the offense of demanding or receiving a bribe by a public officer or public employee (Section 30-24-2, NMSA, 1978); (3) it is a fourth-degree felony to commit the offense of soliciting or receiving illegal kickbacks (Section 30-41-1, NMSA, 1978; and (4) it is a fourth-degree felony to commit the offense of offering or paying illegal kickbacks (Section 30-41-2, NMSA, 1978).

17. **CONFIDENTIAL INFORMATION:** It is understood by the Seller and the County that the County is a New Mexico County corporation and, as such, is subject to the provisions of the New Mexico Inspection of Public Records Act, Section 14-2-1 through 14-2-12 NMSA 1978.
18. **WAIVER OF CONSEQUENTIAL DAMAGES:** NOTWITHSTANDING ANY OTHER PROVISION IN THIS PURCHASE ORDER, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INDIRECT, NOR CONSEQUENTIAL DAMAGES RESULTING FROM OR ARISING OUT OF THIS PURCHASE ORDER, INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS OR BUSINESS INTERRUPTION, HOWEVER SAME MAY BE CAUSED. THIS LIMITATION ON CONSEQUENTIAL DAMAGES DOES NOT APPLY TO CLAIMS FOR PERSONAL INJURY, WRONGFUL DEATH OR DIRECT DAMAGES TO PROPERTY. NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR PUNITIVE DAMAGES.