



1 witnesses for the Department.

2 By mutual agreement of the parties, a variety of other witnesses testified by affidavit  
3 including Heather Christ, Elyse Eckart, Stephen Bauer, Mark Ivey, Susan Gardner, Colin  
4 Smithpeter, Joel Darnold, David Hart, Todd West, Susanna Gordon, Eugene S. Hertel, Jr., Steven  
5 Rodriguez, Douglas A. Dederman, Michael Bernard, Nathan Bixler, Larry Humphries, Heidi  
6 Ammerlahn, Michael Siegel, Dan Kelly, Mark Ladd, Paul Taylor, Joseph Bishop, Igal Brener,  
7 Nathan Crane, Christopher Shaddix, Marcia Cooper, Jerilyn Timlin, Patrick Chu, Michael Skroch,  
8 Gene Kallenbach, and Keith E. Harlow.

9 Department Exhibits A, B, C, and D and Taxpayer Exhibits 5, 7 – 9, 15 – 17, 19 – 21, 23 –  
10 25, 29 – 33, 35 -, 37 – 60 were admitted. Based on the evidence and arguments presented, the  
11 Hearing Officer finds that Taxpayer’s protest should be GRANTED because it has demonstrated  
12 by a preponderance of evidence that 98.7 percent of its receipts are deductible pursuant to Section  
13 7-9-57, or excluded from taxation under Section 7-9-3.5. Because the subject matter underlying  
14 this protest is abundant with acronyms, a glossary of frequently-used acronyms is appended to this  
15 Decision and Order which the intention that it assist the reader.

16 IT IS DECIDED AND ORDERED AS FOLLOWS:

17 **FINDINGS OF FACT**

18 **I. THE CONSOLIDATED PROTESTS**

19 1. Taxpayer filed an Application for Refund on December 23, 2013 for tax periods  
20 December 2009 through November 2010 in the amount of \$13,331,708.48. [**Stipulated Fact;**  
21 **Administrative File (Application for Refund and accompanying correspondence)**]

22 2. On July 21, 2014, Taxpayer filed a protest of the Department’s alleged failure to act  
23 upon its claim for refund in the amount of \$13,331,708.48 (hereinafter “2014 protest”).

1 **[Administrative File (Protest received July 21, 2014)]**

2 3. On December 19, 2014, Taxpayer filed an Application for Refund for tax periods  
3 ending December 31, 2010 through September 30, 2011, in the amount of \$3,351,289.93.

4 **[Stipulated Fact; Administrative File]**

5 4. On July 17, 2015, Taxpayer filed a protest of the Department's alleged failure to act  
6 upon its claim for refund in amount of \$3,351,289.93 for the periods of December 2010 to  
7 September 2011. This represented Taxpayer's second protest (hereinafter "2015 protest").

8 **[Administrative File (Protest received July 21, 2014)]**

9 5. The 2014 protest and 2015 protest were consolidated on September 23, 2015.

10 **[Administrative File]**

11 6. This proceeding concerns gross receipts taxes paid by Taxpayer on receipts from its  
12 sales of certain services to various out-of-state buyers where one or more of the following  
13 circumstances were present: (i) the out-of-state buyer took delivery of the product of the service  
14 and made initial use for its intended purpose outside New Mexico; or (ii) the service was  
15 performed outside New Mexico.

16 7. This consolidated protest involves Taxpayer's request for a refund of  
17 \$15,325,904.00 in gross receipts taxes that Sandia remitted to the Department between 2009 and  
18 2011. This amount is determined as follows:

Amount of Taxpayer's 2014 protest:	\$13,331,708.48
Amount of Taxpayer's 2015 protest:	\$3,351,289.93
Less the Department's 2015 partial refund:	(\$195,965.35)
Less Taxpayer's 2017/2018 adjustment based upon its analysis and reallocation of costs	(\$1,161,129.06)
<b>Taxpayer's Adjusted Refund Claim</b>	<b>\$15,325,904.00</b>

1           8.       Sandia National Laboratories (“SNL”) is a federally funded research and  
2 development center (“FFRDC”) operated by Taxpayer, a wholly owned subsidiary of Honeywell  
3 International, Inc. Taxpayer operates SNL pursuant to a Management and Operating Contract with  
4 the United States Department of Energy (“DOE”), specifically the National Nuclear Security  
5 Agency (“NNSA”). Prior to Taxpayer serving as operator and during the period applicable to this  
6 protest, Sandia Corporation, a subsidiary of Lockheed Martin Corporation, was the operator of  
7 SNL. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:28:49 to 1:31:26; Ex. 45.1]**

8           9.       James Eanes testified regarding Taxpayer’s general operations and contracting  
9 structure. He has worked for Taxpayer since 1993, and as of the date of the hearing, served as  
10 Senior Manager for Prime Contract and Export Control. **[Testimony of James Eanes, Rcrd. Pt.**  
11 **1, 1:27:49 to 1:28:48]**

12           10.       In more-than-25 years that he has worked for Taxpayer, James Eanes has worked in  
13 procurement, as a Center Business Manager, a Prime Contract Manager, and a Senior Manager in  
14 two different roles. He is familiar with Taxpayer’s operations based on his experience serving  
15 Taxpayer in those functions. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:27:49 to 1:28:48]**

16           11.       William Conron, Taxpayer’s manager of Accounting and Tax, testified regarding  
17 its accounting, gross receipts reporting systems, processes, and management. He previously served  
18 as the financial controller for Emcore Corporation, and he also has worked for other large publicly  
19 traded companies in financial management positions. He holds an undergraduate degree in  
20 Environmental Occupational Safety and Health, a Master of Business Administration in Finance  
21 and Entrepreneurship, and a degree in accounting. **[Testimony of William Conron, Rcrd. Pt. 2,**  
22 **1:12:02 to 1:13:19]**

1           12. Taxpayer is one of several FFRDCs in the United States that the DOE operates,  
2 including National Renewable Energy Laboratory in Colorado, Lawrence Livermore National  
3 Laboratory in California, and Oakridge National Laboratory in Tennessee. Taxpayer operates in  
4 other locations as well, including California, Hawaii, and Alaska. **[Testimony of James Eanes,  
5 Rcrd. Pt. 1, 1:31:10 to 1:35:32; Ex. 58.1]**

6           13. In addition to the work performed for DOE, during the relevant time periods,  
7 Taxpayer also performed scientific research and other services for (i) state and local government  
8 agencies; (ii) private for-profit and not-for-profit corporations; and (iii) foreign governments.  
9 Work performed for non-DOE customers is referred to as “Strategic Partnership Projects” or  
10 “SPP.” This work may also be occasionally referred to as “work for others” or “WFO.” When  
11 Taxpayer performed SPP/WFO, it charged non-DOE customers for the services and tangible  
12 personal property that it provided to those customers. **[Testimony of James Eanes, Rcrd. Pt. 1,  
13 1:35:33 to 1:38:44; Ex. 45.2]**

14           14. In order to comply with its contract with DOE and NNSA, Taxpayer has  
15 implemented policies concerning its SPP/WFO work, specifically prohibiting it from competing  
16 with the private sector in performing SPP/WFO work. Sponsoring agencies may, however, request  
17 the same work from other national labs with similar expertise and capabilities. Agencies  
18 sponsoring SPP/WFO projects decide whether to send them to Taxpayer in New Mexico, another  
19 one of its locations, or another national laboratory entirely. **[Testimony of James Eanes, Rcrd.  
20 Pt. 1, 1:38:45 to 1:43:06; Rcrd. Pt. 2, 28:25 to 29:47; Exs. 45.3 to 45.5]**

21           15. In the SPP/WFO contracting process, a customer or sponsoring agency will first  
22 draft a requirement, for which Taxpayer will then submit a proposal. The customer or agency will  
23 then review Taxpayer’s proposal and determine if they want to proceed. If the customer or

1 sponsoring agency does want to proceed, the DOE and sponsoring agency or customer will enter  
2 into an agreement outlining the terms of the project, which includes a written statement of work.  
3 This process follows the terms of Taxpayer's prime contract with the DOE regarding SPP/WFO  
4 work. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:43:08 to 1:46:06]**

5 16. During the relevant time periods, Taxpayer's revenue was determined based on full  
6 cost recovery. **[Testimony of William Conron, Rcrd. Pt. 2, 1:21:36 to 1:23:32]**

7 17. In 1993 the Secretary of the Taxation and Revenue Department signed *Taxation*  
8 *and Revenue Department Directive 93-1* ("Directive 93-1"), effective December 20, 1993, which  
9 has never been rescinded nor modified. **[Directive 93-1, Ex. 46.877 to 46.882; Testimony of**  
10 **William Conron, Rcrd. Pt. 2, 1:29:10 to 1:30:07]**

11 18. Directive 93-1 authorized Taxpayer to use the following formula to calculate New  
12 Mexico taxable gross receipts: net costs incurred, minus exclusions and exemptions equals gross  
13 receipts; gross receipts minus deductions equals taxable gross receipts. **[Directive 93-1, Ex.**  
14 **46.877 to 46.882; Testimony of William Conron, Rcrd. Pt. 2, 1:30:07 to 1:31:00]**

15 19. Directive 93-1 described four major classes of costs for Taxpayer, including (i)  
16 labor costs; (ii) service center costs; (iii) direct charges; and (iv) corporate burdens. Directive 93-1  
17 further described each of these major classes of costs. Further, Directive 93-1 delineated and  
18 described the various cost elements that comprise each of these four major classes of costs.  
19 **[Directive 93-1, Ex. 46.877 to 46.882]**

20 20. Directive 93-1 provides that Taxpayer's "determination of deductibility of costs is  
21 made on the basis of questionnaires directed to project managers within New Mexico  
22 organizations." **[Ex. 46.881]**

## 23 **II. TAXPAYER'S ACCOUNTING**

1           21. As a FFRDC, Taxpayer is required to follow Generally Accepted Accounting  
2 Principles and must also comply with Cost Accounting Standards (“CAS”). Taxpayer must use  
3 the Standardized Accounting Reporting System, which is a federally required accounting reporting  
4 system that includes a standard general ledger and a standard set of accounts. **[Testimony of**  
5 **William Conron, Rcrd. Pt. 2, 1:20:45 to 1:21:15]**

6           22. Under its contract with DOE, Taxpayer is required to allocate costs to all projects  
7 consistently, using a methodology approved and documented through the CAS board disclosure  
8 statement. **[Ex. 46.900 to 46.906]** The CAS board disclosure statement is filed annually, and the  
9 accounting methodology may only be changed with the approval of the appropriate federal  
10 contracting officer. **[Testimony of William Conron, Rcrd. Pt. 2, 1:20:45 to 1:25:57]** Taxpayer  
11 is also required by the federal government to report statements of costs incurred and claimed,  
12 which reflects total costs on an annual basis for the federal government’s review to ensure that  
13 Taxpayer does not claim any non-allowable costs. **[Testimony of William Conron, Rcrd. Pt. 2,**  
14 **1:26:20 to 1:27:32]** Additionally, Taxpayer undergoes an audit every year by the DOE, and the  
15 accounting firm KPMG. **[Id.]**

16           23. Taxpayer uses Oracle Enterprise Resource Planning (“ERP”) software system for  
17 accounting. The Oracle ERP software system is an enterprise resource planning system with  
18 project accounting. Taxpayer employs procedures and controls in compliance with Office of  
19 Management and Budget Circular A-123 (“OMB A-123”) with respect to its accounting through  
20 the Oracle ERP system. Such procedures and controls include compliance with OMB A-123  
21 requirements, and OMB A-123 testing, all of which is reported to DOE. Taxpayer processes over  
22 4,000,000 transactions per year through the Oracle ERP software system. **[Testimony of William**  
23 **Conron, Rcrd. Pt. 2, 1:13:37 to 1:18:06]**

1           24.     At Taxpayer’s request, consultant developers from Oracle, the provider of  
2 Taxpayer’s Oracle ERP software system, provided customization assistance to Taxpayer in  
3 engineering a module within the Oracle ERP software system to calculate Taxpayer’s New  
4 Mexico gross receipts tax liability using the data inputs from the Oracle ERP software system, in  
5 comport with *Taxation and Revenue Department Directive 93-1*. The Oracle New Mexico Gross  
6 Receipts tax module (“GRT Module”) calculates taxable gross receipts based on exemptions and  
7 percentages of deductible receipts applied to the accounting inputs in the Oracle ERP software  
8 system. **[Testimony of William Conron, Rcrd. Pt. 2, 1:13:37 to 1:18:06]**

9           25.     Taxpayer’s contract with the DOE requires it to conduct internal audits for various  
10 types of costs, including tax. **[Testimony of William Conron, Rcrd. Pt. 2, 1:18:06 to 1:18:51]**

11           26.     In 2011, Taxpayer’s internal audit group determined that Taxpayer was entitled to  
12 deductions it had not previously claimed on its returns. **[Testimony of William Conron, Rcrd.  
13 Pt. 2, 1:31:57 to 1:33:10]**

### 14 **III.     TAXPAYER’S REPORTING OF ITS GROSS RECEIPTS**

#### 15 **A.     TAXPAYER’S ORIGINAL RETURNS**

16           27.     During the periods at issue, Taxpayer prepared its returns by generating reports  
17 through the Oracle GRT Module after the financial close of each month. The reports show  
18 Taxpayer’s revenue, exemptions, and deductions. That report is then reviewed pursuant to  
19 Taxpayer’s accounting review process which includes examination by two senior accountants,  
20 then an accounting manager, a senior accounting manager, and finally, a review by Taxpayer’s  
21 Chief Financial Officer. After the review is complete, Taxpayer’s Chief Financial Officer signs off  
22 on the reports and Taxpayer pays any tax due. **[Testimony of William Conron, Rcrd. Pt. 2,  
23 1:28:04 to 1:29:10]**

1           28. Taxpayer engaged an independent accounting firm, Accounting and Consulting  
2 Group (“ACG”), to conduct a review of all projects in 2012 and 2013. ACG determined that  
3 Taxpayer had over-paid gross receipts taxes for receipts on certain projects during the time from  
4 December 2009 to September 2011. ACG’s conclusions corroborated the conclusions of  
5 Taxpayer’s internal audit team in the preceding year. **[Pre-filed testimony of Heather Christ. 1.2**  
6 **to 1.3; Testimony of William Conron, Rcrd. Pt. 2, 1:32:09 to 1:33:10; Rcrd. Pt. 3, 14:45 to**  
7 **15:13]**

8           **B. TAXPAYER’S AMENDED RETURNS**

9           29. Based on the results of ACG’s review which corroborated Taxpayer’s 2011 internal  
10 audit, Taxpayer amended its returns for the periods from December 2009 to September 2011 to  
11 account for deductions that Taxpayer had not claimed, but which both ACG’s independent review,  
12 and Taxpayer’s internal audit determined could have been claimed during the time periods at  
13 issue. **[Testimony of William Conron, Rcrd. Pt. 2, 1:33:10 to 1:33:55]**

14           30. To prepare amended returns, Taxpayer entered the deduction percentages that  
15 resulted from ACG’s independent review and Taxpayer’s internal audit into the Oracle GRT  
16 Module. **[Testimony of William Conron, Rcrd. Pt. 2, 1:33:11 to 1:34:25]** When Taxpayer  
17 entered the deduction percentages that resulted from ACG’s independent review and Taxpayer’s  
18 internal audit into the Oracle GRT Module, some of the projects for which a deduction percentage  
19 was applied had originally been treated as been exempt. **[Testimony of William Conron, Rcrd.**  
20 **Pt. 2, 1:33:55 to 1:35:52; Rcrd. Pt. 5, 1:13:09 to 1:17:04]**

21           31. If a project is both exempt and deductible, “the deduction trumps . . . [such that  
22 Taxpayer] can’t double dip and take the exemptions too.” **[Testimony of William Conron, Rcrd.**  
23 **Pt. 2, 1:34:25 to 1:35:39]** “[T]here is logic in the [Oracle GRT Module] to make sure you don’t

1 double count [deductions and exemptions].” **[Id.]** Thus, for the projects in the Oracle NMGRT  
2 system that were partially exempt from Taxpayer’s original returns for the periods at issue, the  
3 Oracle GRT Module backed out the previously applied exemption percentages in order to avoid  
4 claiming both the applicable exemption and deduction. **[Testimony of William Conron, Rcrd.  
5 Pt. 2, 1:34:25 to 1:36:29; Rcrd. Pt. 5, 1:13:09 to 1:17:04; Ex. 60.1]**

6 32. As a result of backing out the previously applied exemption percentages, and by  
7 operation of law, Taxpayer’s gross receipts on its amended returns were higher, since 100 percent  
8 of the gross receipts were required to be reported on the amended returns as no exemption  
9 percentage was claimed for receipts that were also deductible. **[Testimony of William Conron,  
10 Rcrd. Pt. 2, 1:33:55 to 1:36:37]; cf. 3.2.100.8 (B) NMAC (a person “is not required to include  
11 in reported gross receipts those receipts which are exempt.”); 3.2.203.9 NMAC (a person  
12 must “report their gross receipts to the department even if such receipts are deductible[.]”)**

13 33. The amended returns reflect the result of this process of first backing out the  
14 exemption percentages and then applying the deduction percentages, thus resulting in higher  
15 reported gross receipts, but lower taxable receipts than on the original returns. **[Testimony of  
16 William Conron, Rcrd. Pt. 2, 1:39:04 to 1:39:03; compare, e.g., Ex. 46.5 with Ex. 46.40;  
17 accord Ex. 46.28; see also Testimony of William Conron, Rcrd. Pt. 2, 1:44:24 to 1:52:21; Exs.  
18 46.95 to 46.876 (workpapers)]**

19 34. Taxpayer filed the amended returns in order to reflect its tax liability as required  
20 under its contract. Taxpayer did not file the amended returns misrepresent its gross receipts, to  
21 avoid tax, or for any improper purpose. **[Testimony of William Conron, Rcrd. Pt. 2, 1:52:21 to  
22 1:52:58]**

1           35. Taxpayer filed its refund claims by calculating a year-to-date amendment amount  
2 and then applying it equally over the months included in the refund claims. This is consistent with  
3 the way Taxpayer had filed refund claims for the past ten to fifteen years, which were granted  
4 without issue. This method was acceptable to the Department in the ten to fifteen years prior in  
5 which Taxpayer filed refund claims, and the Department never directed Taxpayer to do it  
6 otherwise. **[Testimony of William Conron, Rcrd. Pt. 2, 1:39:14 to 1:44:24]** Directive 93-1  
7 specifically provides that adjustments based on exemptions or deductions “are applied  
8 prospectively to accumulated year-to-date costs.” **[Ex. 46.880 to 46.881]**

9           36. Taxpayer reconciled the original returns to the amended returns and provided the  
10 reconciliations to the Department along with the refund claims. Additionally, Taxpayer provided  
11 the Department with its archived internal workpapers and records from the Oracle ERP software  
12 system which were the basis and supporting documentation of the original returns and the refund  
13 claims. **[Testimony of William Conron, Rcrd. Pt. 2, 1:38:38 to 1:47:20; Ex. 46.1 to 46.94]** The  
14 Department had accepted the same type of information in prior refund claims by Taxpayer which  
15 were granted. **[Testimony of William Conron, Rcrd. Pt. 3, 13:54 to 14:44]**

16           37. The method employed by Taxpayer to calculate the deductions to which it is  
17 entitled (i.e., reporting as gross receipts on its amended returns receipts previously claimed exempt  
18 on Taxpayer’s original returns, and then applying the deduction to all deductible receipts) yielded  
19 the same tax refund amount that would have resulted if the GRT Module of Taxpayer’s Oracle  
20 accounting system had instead allowed Taxpayer to apply the deduction in its amended returns  
21 only to the non-exempt, but deductible, receipts reported on its original returns. **[Ex. 60.1]**

22           **C. TAXPAYER’S REFINED RETURNS**

1           38.     After Taxpayer filed the amended returns, the Department requested detailed  
2 project information by month in a format which Taxpayer had never been requested to furnish  
3 previously. **[Testimony of William Conron, Rcrd. Pt. 2, 1:38:19 to 1:38:39; 1:55:49 to**  
4 **1:56:28]**

5           39.     Taxpayer complied with the Department's request and prepared a detailed  
6 crosswalk report and presentation for the Department showing a month-by-month, by-project,  
7 detailed breakdown of its total gross receipts, exemptions, deductions, and taxable gross receipts.  
8 To do so, Taxpayer started from scratch, reconstructing its original and amended returns from the  
9 ground up. During that process Taxpayer discovered minor changes to coding parameters in its  
10 Oracle ERP system that resulted in changes to the information contained in the original returns,  
11 and necessarily, the amended returns. **[Testimony of William Conron, Rcrd. Pt. 2, 1:55:49 to**  
12 **2:03:00; Ex. 46.1275 to 46.1347]**

13           40.     The parameter changes were the result of the way certain parameters in the data are  
14 stored in the Oracle ERP software system. Parameters within the Oracle ERP software system are  
15 "not static, they are dynamic." This means that when Taxpayer was reconstructing its original and  
16 amended returns years later, the Oracle ERP software system was applying its current year  
17 parameters as inputs to the data from 2010 and 2011. **[Testimony of William Conron, Rcrd. Pt.**  
18 **2, 3:07:29 to 3:08:43]**

19           41.     Upon discovery of the changes in parameters, Taxpayer made coding refinements  
20 which allowed it to rework its returns to contain the correct information. It then created original  
21 refined returns, and amended refined returns. Taxpayer created the original refined returns to show  
22 the Department project level detail that could be reconciled to the amended refined returns.  
23 Because of the dynamic parameters in the Oracle ERP system software, had Taxpayer not created

1 both the original refined returns *and* the amended refined returns, the numbers would not reconcile  
2 with the original returns, even though they were the correct numbers. **[Testimony of William  
3 Conron, Rcrd. Pt. 2, 2:03:00 to 2:21:38; Ex. 46.914 to 46.1665]**

4 42. In total, four types of refinements were made to ensure that the data in the refined  
5 returns accurately reflected Taxpayer's gross receipts during the periods at issue: (1) non-taxable  
6 transaction certificate ("NTTC") add-backs; (2) time-stamps; (3) exemption reports; and (4) travel  
7 salaries and date field. **[Testimony of William Conron, Rcrd. Pt. 2, 2:04:02 to 2:12:46]**

8 43. The NTTC add-backs refinement was required because some of the Type 5 NTTCs  
9 Taxpayer issued to sellers were no longer valid once the project became deductible since the next  
10 transaction after the transaction for which the Type 5 NTTC was issued were no longer taxable,  
11 and Taxpayer was no longer eligible to issue a Type 5 NTTC for those transactions. As a result of  
12 this refinement, Taxpayer paid gross receipts tax on transactions for which it had previously issued  
13 an NTTC. **[Testimony of William Conron, Rcrd. Pt. 2 2:01:24 to 2:01:44; Rcrd. Pt. 5, 1:02:15  
14 to 1:07:03; Ex. 46.914]; see NMSA 1978, § 7-9-48.**

15 44. The time-stamps refinement was limited to the periods at issue in 2010. In 2010,  
16 Taxpayer closed its fiscal year in late September. The Oracle ERP software system contained a  
17 coding error that closed Taxpayer's reporting for the month of September on September 17, 2010.  
18 As a result of this coding error, any transaction with a time stamp later than 12:00 a.m. on  
19 September 17, 2010 was not included in Taxpayer's gross receipts for the month of September.  
20 Sandia found this issue and corrected it via the time-stamps refinement, in order to properly report  
21 its receipts. The coding error was resolved for future years after an Oracle update, and the issue  
22 never arose in any future reporting years. **[Testimony of William Conron, Rcrd. Pt. 2, 2:05:21  
23 to 2:07:57; Ex. 46.922]**

1           45.     The exemption reports refinement was required to remove any exemptions that  
2 were not backed out prior to the application of the deduction percentages. Most exemptions were  
3 backed out prior to the application of a deduction percentage, however, some exemptions were not  
4 backed out due to a coding error in the Oracle ERP system software's exemption reports. Upon  
5 finding these exemptions, Taxpayer applied the exemption reports refinement to ensure that they  
6 were properly backed out prior to applying the deduction percentages. **[Testimony of William  
7 Conron, Rcrd. Pt. 2, 2:07:57 to 2:09:21; Ex. 46.923]**

8           46.     The travel salaries and date field refinement was required to ensure that travel  
9 reports were not counted twice in a given year, and that date fields were interpreted correctly. Due  
10 to a coding error in the Oracle ERP system software, some labor costs incurred by Taxpayer for  
11 employee travel were double counted, and a new IT coding update interpreted dates incorrectly.  
12 Taxpayer corrected these coding errors via the travel salaries and date field refinement.  
13 **[Testimony of William Conron, Rcrd. Pt. 2, 2:09:23 to 2:11:47; Ex. 46.923 to 46.936]**

14           47.     Taxpayer tested every exclusion and deduction report. This included random  
15 samplings of the original refined returns and the amended refined returns for accuracy to ensure  
16 that the various coding refinements properly addressed the coding errors discovered. **[Testimony  
17 of William Conron, Rcrd. Pt. 2, 2:21:48 to 2:23:15; Ex. 46.914 to 46.1665]**

18           48.     The Department agreed "that the refinement [of Taxpayer's returns] is correct."  
19 **[Testimony of Janice Shannon, Rcrd. Pt. 5, 24:37 to 24:46]**

20           49.     The refinements to the coding errors in Taxpayer's Oracle GRT Module resulted in  
21 a reduction in the amount of Taxpayer's refund claim from \$16,487,033.06 (which includes a  
22 reduction for the Department's 2015 partial refund of \$195,965.35) to \$15,325,904.00,  
23 representing a reduction in the amount of \$1,161,129.06. **[Testimony of William Conron, Rcrd.**

1 **Pt. 2, 1:36:38 to 1:39:03; Ex. 46.913; Rcrd Part 5, 1:19:21 to 1:20:30; 1:23:12 to 1:24:15; Ex.**  
2 **B; Ex. 46.914]**

3 **D. TAXPAYER'S PRESENTATION TO THE DEPARTMENT**

4 50. On November 30, 2017, Taxpayer presented the results of its review and  
5 refinement to the Department, including presentation of a month-by-month detailed breakdown of  
6 Taxpayer's total gross receipts, exemptions, deductions, and taxable gross receipts, and a project  
7 level crosswalk comparing the original returns to the original refined returns and the amended  
8 refined returns to the amended returns. This allowed Taxpayer to compare the refined original  
9 returns to the refined amended returns resulting in the reconciliation requested by the Department.  
10 After Taxpayer's presentation, the Department was provided with documents containing the  
11 detailed information which formed the basis of the presentation. [**Testimony of William Conron,**  
12 **Rcrd. Pt. 2, 1:55:28 to 2:23:38; Exs. 46.916 to 46.930** (presentation); **Ex. 46.928** (listing the  
13 documents Taxpayer provided to the Department); **Exs. 46.914 to 46.1665** (documents provided  
14 to the Department)]

15 51. In the months following the presentation, the Department asked Taxpayer some  
16 additional questions related to the amount of tax paid on specific projects and Taxpayer  
17 responded. [**Testimony of William Conron, Rcrd. Pt. 2, 1:57:21 to 1:58:21]**

18 52. Information Taxpayer provided to the Department included presentations,  
19 documents, responses to emails, binders of statements of work, customer information and the like.  
20 Taxpayer provided documentation sufficient for the Department to compute the amount of state  
21 taxes due. [**Testimony of William Conron, Rcrd. Pt. 2, 3:12:41 to 3:13:36; Rcrd. Pt. 3, 7:59 to**  
22 **9:03]** The Department previously accepted the same form of information from Taxpayer in prior  
23 refund claims that were granted. [**Testimony of William Conron, Rcrd. Pt. 3, 13:54 to 14:44]**

1           53.     In addition to providing the Department with thousands of pages of project level  
2 detail documentation and the supporting documentation for its returns, Taxpayer also provided the  
3 Department with a detailed “crosswalk” document that showed a complete reconciliation of all of  
4 the information in the original refund claim compared to the amended refund claim. The  
5 Department accepted the reconciliation included in the crosswalk. **[Testimony of Janice  
6 Shannon, Rcrd. Pt. 5, 15:15 to 17:17; Rcrd. Pt. 5, 38:22 to 42:45; Ex. 46.923; Exs. 46.937 to  
7 46.1033]**

8           **E.     OUT-OF-STATE SALES OF SERVICES AND PROPERTY**

9           54.     Several of the projects at issue involve Taxpayer performing services outside of  
10 New Mexico and selling property to customers outside of New Mexico. Taxpayer tracked receipts  
11 from these projects and provided the Department with summary and detailed reports excluding  
12 receipts attributable to the sale of services and property outside of New Mexico. Taxpayer  
13 excluded these receipts, as shown on Exs. 46.1666 to 46.1668 and Exs. 46.1689 to 46.1721, from  
14 its gross receipts prior to claiming the amended deductions at issue in this Protest. **[Testimony of  
15 William Conron, Rcrd. Pt. 2, 2:23:49 to 2:26:02; Exs. 46.1666 to 46.1668; Exs. 46.1689 to  
16 46.1721]**

17           55.     The reports calculating Taxpayer’s gross receipts account for both “Work Outside  
18 NM” and “Purchases Outside NM.” “Purchases Outside NM” refer to purchases Taxpayer made  
19 outside of New Mexico from its facilities in other states, including Hawaii, Nevada, and  
20 California. The DOE made these purchases of personal property for use at these other, non-New-  
21 Mexico sites, and the items of property did not return to New Mexico. **[Testimony of William  
22 Conron, Rcrd. Pt. 2, 2:26:35 to 2:27:18; Exs. 46.1689 to 46.1721]**

1           56. For services performed outside of New Mexico, the receipts of which are classified  
2 as “Work Outside NM” in Taxpayer’s records, Taxpayer tracks employee travel through internal  
3 travel reports. When employees travel outside of New Mexico to perform work for SPP/WFO  
4 clients, those receipts are coded as exempt and excluded from Taxpayer’s gross receipts reported  
5 to the Department. **[Testimony of William Conron, Rcrd. Pt. 2, 2:41:25 to 2:43:26; Exs.**  
6 **46.1684 to 46.1687; Exs. 46.1689 to 46.1721]**

7           **F. DEPARTMENT’S ACKNOWLEDGED CALCULATION ERRORS**

8           57. The Department agreed during the Hearing that its Exhibit B incorrectly states  
9 Taxpayer owes \$53,138.61 in additional gross receipts tax. Instead, Janice Shannon agreed that  
10 Exhibit B should show a refund due of \$53,138.61. **[See Ex. B; Testimony of Janice Shannon,**  
11 **Rcrd. Pt. 5, 34:52 to 37:32]**

12           58. Exhibit B double counts gross receipts tax that Taxpayer already paid, and which  
13 was fully accounted for when Taxpayer reduced its refund claim by \$1,161,129.06. The  
14 Department reduced the “Refund Due” amount by what is reflected in Exhibit B as “NM  
15 Add[itional] GRT Due” in the amount of \$679,890.61. This amount is already reflected in the  
16 \$1,161,129.06 adjustment made by Taxpayer in its refund claim amount. **[See Exs. B, C, 46.969;**  
17 **Testimony of Janice Shannon, Rcrd. Pt. 5, 37:32 to 56:30; Testimony of Bill Conron, Rcrd.**  
18 **Pt. 5, 1:23:14 to 1:24:11]**

19           59. Exhibit C applies the Albuquerque tax rate to receipts reportable to the Remainder  
20 of Bernalillo County location. The majority of Taxpayer’s receipts were reported to Bernalillo  
21 County. **[Testimony of Bill Conron, Rcrd. Pt. 5, 1:02:32 to 1:03:13; Exhibit D]** The City of  
22 Albuquerque and Remainder of Bernalillo County tax rates during the relevant periods were as  
23 follows:

<b>Effective Dates</b>	<b>Albuquerque Location Code 02-100 Rate</b>	<b>Bernalillo Location Code 02-002 Rate</b>
December 2009	6.8750%	5.9375%
January 2010 through June 2010	6.6250%	5.9375%
July 2010 through November 2010	7.0000%	6.0625%

1 See Gross Receipts Tax Rate Schedules available from the Department’s website at  
2 <http://www.tax.newmexico.gov/Businesses/tax-tables.aspx>. If the tax rate for the Remainder of  
3 Bernalillo County had been applied in the Department’s reconciliation, the additional tax due per  
4 amended GRT calculations using the Department’s approach would have been \$560,870.19.

5 **[Testimony of Bill Conron, Rcrd. Pt. 5, 1:02:32 to 1:03:13; Exhibit C.]**

6 60. Exhibit D had several input errors. Janice Shannon testified to some of the input  
7 errors. **[Testimony of Janice Shannon. Pt 5, 41:02 to 52:58; Exhibit D]**

8 61. Taxpayer paid gross receipts tax for its taxable receipts reported on its original  
9 return for August 2010. **[Exs. 46.1744 to 46.1750.]**

10 62. Demonstrative Exhibit A does not take into account the projects to which the  
11 Department stipulated at the Hearing as deductible from Taxpayer’s gross receipts. If the Projects  
12 the Department stipulated to during the Hearing (Project No. 127066 in the amount of \$21,784.39  
13 and Project No. 123172 in the amount of \$91,882.37) are included as “allowed” on the  
14 Department’s demonstrative Exhibit A, then the amount allowed would increase by \$113,666.76  
15 resulting in a total amount allowed of \$4,971,321.15. This total allowed amount would be divided  
16 by the total receipts for the sample of \$81,162,880.76 resulting in an allowed percentage of 6.1250  
17 percent.

63. Even assuming no further stipulations by the Department and that Taxpayer did not prove its entitlement to any further deductions the Department has conceded that Sandia is entitled to a refund of at least \$74,864.91.<sup>1</sup>

64. Excluding the \$679,890.61 in additional tax erroneously applied by the Department in its Exhibit B, and assuming only those projects stipulated to by the Department and that Sandia did not prove its entitlement to any further deductions results in a refund of at least \$754,755.02.

**[Exhibit B]**

**IV. SAMPLE PROJECTS.**

65. Although more than 650 projects represent the source of gross receipts at issue in this consolidated protest, the parties stipulated that it would not be necessary to evaluate each of the 650 projects, but that a review of 65 randomly-sampled projects would be sufficient.

**Conceded Projects**

66. Before the commencement of the hearing, the parties stipulated that the following projects included in the 65-project sample were non-taxable and are allowed:

<u>Project No.</u>	<u>Gross Receipts</u>
97744	\$54,426.45
124793	\$139,225.42
126319	\$163,815.00
127114	\$49,725.43
128373	\$54,721.88
130120	\$292,236.43
134131	\$84,809.43
138162	\$345,261.49
138300	\$116,602.83
139858	\$2,826,994.43
139997	\$54,559.13
141269	\$16,038.65
141431	\$41,402.82
141975	\$372,485.20

<sup>1</sup> This amount is calculated by applying the allowed percentage of 6.125% to the total adjusted refund claim amount of \$15,521,868.95 reduced by the Department's adjustments on Exhibit B to determine the minimum refund claim amount of \$74,864.91. Exhibit B.

143724	\$65,988.99
149432	\$132,577.26
150669	\$46,783.55
	<b>\$4,857,654.39</b>

**[Amended Joint Prehearing Statement, page 27]**

67. The Department also conceded during the hearing that Project No. 127066 was nontaxable and that a refund of gross receipts tax paid on gross receipts of \$21,784.39 should be allowed; and that Project No. 123172 was nontaxable and that a refund of gross receipts tax paid on gross receipts of \$91,882.37 should be allowed, representing a total stipulated refund of gross receipts tax paid on gross receipts of \$4,971,321.15. **[Rcrd. Pt. 3, 2:33 to 2:45; Ex. 54.3]**

68. Taxpayer stipulated that the following projects included in the 65-project sample were taxable and were correctly disallowed, representing a total of \$917,136.77 in taxable gross receipts:

<u>Project No.</u>	<u>Gross Receipts</u>
131152	\$9,022.88
133680	\$222,958.60
137736	\$552,473.66
138475	\$6,980.60
141874	\$125,701.03
	<b>\$917,136.77</b>

**[Taxpayer’s Closing Argument, page 77, FN 34]**

**Contested Projects**

69. All other projects within the random sample remain contested. Those include the following:

<u>Project No.</u>	<u>Gross Receipts</u>
135518	\$52,393,781.22
24121	\$1,957,353.06
102904	\$399,319.08

1	139627	\$1,462,447.92
2	137043	\$631,046.93
3	131119	\$2,874,539.63
4	143841	\$144,921.48
5	138914	\$1,631,654.14
6	139709	\$105,702.48
7	128331	\$1,281,587.78
8	120930	\$33,337.48
9	140001	\$192,216.48
10	139847	\$24,197.92
11	125912	\$32,633.45
12	126261	\$46,736.95
13	132231	\$203,955.03
14	132645	\$835,232.34
15	134415	\$793,122.40
16	135841	\$317,648.79
17	136454	\$444,748.37
18	136941	\$285,931.54
19	138750	\$210,971.60
20	139429	\$93,786.41
21	139470	\$55,926.45
22	139721	\$262,436.99
23	140580	\$580,284.72
24	141982	\$225,759.85
25	144655	\$214,122.58
26	144883	\$331,482.70
27	137337	\$287,622.23
28	123514	\$726,154.56
29	127024	\$135,785.60
30	127150	\$4,552.84
31	127777	\$4,637,043.32
32	127957	\$43,213.25
33	130380	\$747,952.05
34	137386	\$18,168.42
35	137766	\$241,306.60
36	139019	\$351,137.79
37		<b>\$75,259,822.43</b>

**Project No. 128331**

70. Project No. 128331 was initiated by the National Aeronautics and Space Administration (“NASA”) in response to the loss of the Space Shuttle Columbia. Project No. 128331 consisted of developing and manufacturing equipment for NASA’s use during in-orbit

1 inspections of the shuttle's thermal protection system in order to evaluate whether the system  
2 could provide a safe to re-entry for the shuttle and its crew. Taxpayer also deployed personnel to  
3 NASA's Mission Control in Houston, Texas to provide expert analysis and interpretation of data  
4 generated by the equipment. **[Testimony of Robert Habbit, Jr., Rcrd. Pt. 3, 34:32 to 36:01]**

5 71. Taxpayer's Senior Research and Development Manager, Robert Habbit, Jr., was  
6 the project manager for Project No. 128331 from the initial proposal for the project, and the  
7 performance of services for the project from start to finish. Mr. Habbit Jr., a mechanical engineer  
8 with 32 years of experience working at SNL, testified regarding the scope of Project No. 128331  
9 including Taxpayer's competition with other labs for the project, the services performed by  
10 Taxpayer, and the deliverables provided to NASA. **[Testimony of Robert Habbit, Jr., Rcrd. Pt.  
11 3, 27:47 to 29:19; 30:19 to 52:31; Exs. 53.1 to 53.47]**

12 72. Copies of the statement of work and associated documents for Project No. 128331  
13 are in the record at Exs. 53.1 to 53.47 and supplement the live testimony of Mr. Habbit, Jr.  
14 **[Testimony of Robert Habbit, Jr; Exs. 53.1 to 53.47].**

15 73. Following the destruction of Space Shuttle Columbia in 2003, and the deaths of its  
16 crew, NASA issued a Request for Information, seeking proposals from national labs to provide  
17 technology and expertise in the development and operation of equipment that could evaluate,  
18 while in orbit, whether the condition of the thermal protection system, as of the time of the  
19 inspection, would permit for a safe shuttle re-entry. Taxpayer responded to the Request for  
20 Information, along with several other laboratories, and was awarded the contract. **[Testimony of  
21 Robert Habbit, Jr., Rcrd. Pt. 3, 34:37 to 37:28; Exs. 53.1 to 53.47]**

22 74. The customer for Project No. 128331 was NASA Johnson Space Center.  
23 **[Testimony of Robert Habbit, Jr., Rcrd. Pt. 3, 31:49 to 33:35; Exs. 56.23 to 56.36]**



1           80.     Project Nos. 102904 and 139627 were projects for the Department of Homeland  
2 Security (“DHS”) in which Taxpayer developed a methodology and software to restore operations  
3 at airports after a chemical attack. **[Testimony of Robert Knowlton, Rcrd. Pt. 3, 1:43:13 to**  
4 **1:49:01; 2:00:40 to 2:02:03; Ex. 49.1 to 49.21]**

5           81.     Robert Knowlton, Distinguished Member of Technical Staff at Taxpayer, worked  
6 on Project Nos. 102904 and 139627. Mr. Knowlton has been employed by Taxpayer for more than  
7 twenty years, and worked on Project Nos. 102904 and 139627, underlying his knowledge of  
8 Taxpayer’s competition for the project, the services performed by Taxpayer, and the deliverables  
9 provided to DHS. **[Testimony of Robert Knowlton, Rcrd. Pt. 3, 1:43:13 to 1:49:01; 2:00:40 to**  
10 **2:02:03; Exs. 49.1 to 49.21]**

11           82.     Copies of the statement of work and associated documents for Project Nos. 102904  
12 and 139627 are in the record at Exs. 49.1 to 49.21, which supplement Mr. Knowlton’s testimony.  
13 **[Testimony of Robert Knowlton; Exs. 49.1 to 49.21]**

14           83.     Taxpayer competed with other FFRDCs for the contracts for Project Nos. 102904  
15 and 139627. A different FFRDC could have performed the work that Taxpayer performed under  
16 the contract for Project Nos. 102904 and 139627. **[Testimony of Robert Knowlton, Rcrd. Pt. 3,**  
17 **2:01:15 to 2:02:04; Exs. 49.1 to 49.21]**

18           84.     Taxpayer’s customer for Project Nos. 102904 and 139627 was the DHS, located in  
19 or near Washington, D.C. **[Testimony of Robert Knowlton, Rcrd. Pt. 3, 1:49:52 to 1:50:39;**  
20 **2:02:04 to 2:02:14; Exs. 49.1 to 49.21]**

21           85.     Pursuant to the contracts for Project Nos. 102904 and 139627, Taxpayer developed  
22 the methodology and software in New Mexico, and delivered the methodology and software to the  
23 DHS in Washington, D.C. in the form of electronic files, a video demonstration on a DVD, and

1 software on CDs and DVDs sent via a commercial carrier. Taxpayer also performed a  
2 demonstration for the DHS at the Ontario International Airport in Ontario, California. **[Testimony**  
3 **of Robert Knowlton, Rcrd. Pt. 3, 1:51:05 to 1:54:17; 2:00:40 to 2:02:03 Ex. 49.1 to 49.21]**

4 86. The electronic files, video demonstration DVD, and software CDs were used by  
5 DHS in or near Washington, D.C. **[Testimony of Robert Knowlton, Rcrd. Pt. 3, 1:54:54 to**  
6 **1:56:44; Ex. 49.1 to 49.21]**

7 **Project No. 137043**

8 87. Project No. 137043 was a project for the Defense Threat Reduction Agency  
9 (“DTRA”) of the Department of Defense in which Taxpayer developed software to assist in the  
10 recovery process and decontamination alternatives following a biological weapon attack  
11 distributed across a wide area. **[Testimony of Robert Knowlton, Rcrd. Pt. 3, 1:49:02 to 1:49:51;**  
12 **Exs. 49.22 to 49.47]**

13 88. Robert Knowlton, Distinguished Member of the Technical Staff at Taxpayer,  
14 worked on Project No. 137043. Mr. Knowlton has been employed by Taxpayer for more than  
15 twenty years, and he worked on Project No. 137043, underlying his familiarity with Taxpayer’s  
16 competition for the project, the services performed by Taxpayer, and the deliverables provided to  
17 DTRA. **[Testimony of Robert Knowlton, Rcrd. Pt. 3, 1:43:13 to 1:49:01; 2:00:40 to 2:02:03;**  
18 **Exs. 49.22 to 49.47]**

19 89. Copies of the statement of work and associated documents for Project No. 137043  
20 are in the record at Exs. 49.22 to 49.47, which supplement Mr. Knowlton’s live testimony.  
21 **[Testimony of Robert Knowlton; Exs. 49.22 to 49.47]**

22 90. Taxpayer competed with other FRDCs for the contract for Project No. 137043.  
23 **[Testimony of Robert Knowlton, Rcrd. Pt. 3, 2:01:15 to 2:02:04; Exs. 49.22 to 49.47]**



1           96.     Max Decker, Senior Manager at Taxpayer, was involved in Project No. 135518,  
2 and has been employed by Taxpayer for nearly 29 years, during which he has served in various  
3 roles ranging from staff member to senior management. While aspects of Project No. 135518 are  
4 classified, Mr. Decker was credibly testified regarding the delivery and initial use of the product of  
5 the services performed. **[Testimony of Max Decker, Rcrd. Pt. 4, 1:41 to 42:50; Exs. 47.1 to**  
6 **47.117]**

7           97.     Copies of the statement of work and associated documents for Project No. 135518  
8 are in the record at Exs. 47.1 to 47.117, supplement Mr. Decker’s live testimony. **[Testimony of**  
9 **Max Decker; Exs. 47.1 to 47.117]**

10          98.     Taxpayer’s customer for Project No. 135518 was the Space Missile Center  
11 (“SMC”) which is a division of the United States Air Force Space Command. The Space Missile  
12 Center is located in Los Angeles, California, and the United States Air Force Space Command  
13 (“USAF-SC”) is located in Colorado. **[Testimony of Max Decker, Rcrd. Pt. 4, 4:26 to 6:48;**  
14 **Exs. 47.1 to 47.117]**

15          99.     Prior to the time periods at issue Taxpayer developed sensors and systems to detect  
16 aboveground nuclear explosions, and provided system operational support to the United States Air  
17 Force for existing sensors and systems. The sensors are installed on GPS satellites from where  
18 they gather data. **[Testimony of Max Decker, Rcrd. Pt. 4, 6:49 to 42:50; Exs. 47.1 to 47.117]**

19          100.    The data from the sensors is transmitted to ground stations that are operated by the  
20 Air Force at Buckley Air Force Base in Colorado. **[Testimony of Max Decker, Rcrd. Pt. 4, 8:15**  
21 **to 8:31; Exs. 47.1 to 47.117]**

22          101.    The deliverables for Project No. 135518 consisted of updated computer equipment  
23 and servers with integrated modeling tools and software to support existing trailers previously

1 delivered to the United States Air Force as part of its integrated ground system. The updated  
2 computer software and computer equipment developed by Taxpayer were delivered to the Air  
3 Force in Greeley, Colorado for use in supporting the existing trailers. Taxpayer also deployed  
4 personnel to the Air Force's location in Colorado to provide initial operational capability support,  
5 maintenance and ongoing support and analysis of the updated computer equipment and servers in  
6 Colorado. **[Testimony of Max Decker, Rcrd. Pt. 4, 6:49 to 12:25; Exs. 47.1 to 47.117]**

7 102. Taxpayer also operates a test-bed in New Mexico to test software upgrades and  
8 fixes for the ground system in Colorado. Results from the test-bed were sent to the Buckley Air  
9 Force base in Colorado, the Cheyenne Mountain military base in Colorado, the U.S. Strategic  
10 Command, and the Pentagon. **[Testimony of Max Decker, Rcrd. Pt. 4, 18:30 to 19:40; Exs. 47.1  
11 to 47.117]** However, Taxpayer declined claiming a deduction for the receipts generated from its  
12 operation of the test-bed. **[Testimony of Max Decker, Rcrd. Pt. 4, 56:09 to 1:00:15; 1:08:50 to  
13 1:10:36; Exs. 47.42; 47.44; 47.117]**

14 103. Taxpayer also operates an antenna in New Mexico that enables in-orbit testing of  
15 satellites. Results from antenna tests are sent to the Buckley Air Force base in Colorado.  
16 **[Testimony of Max Decker, Rcrd. Pt. 4, 18:30 to 21:10; Exs. 47.1 to 47.117]** However,  
17 Taxpayer declined claiming a deduction for the receipts generated from its operation of the  
18 antenna. **[Testimony of Max Decker, Rcrd. Pt. 4, 56:09 to 1:00:15; 1:08:50 to 1:10:36; Exs.  
19 47.42; 47.44; 47.117]**

20 104. The USAF-SC has no presence in New Mexico. While the United States Air Force  
21 does have significant presence in New Mexico, Taxpayer did not interact with local Air Force  
22 personnel or use local Air Force facilities in the performance of its work for Project No. 135518.  
23 **[Testimony of Max Decker, Rcrd. Pt. 4, 42:33 to 42:50; Exs. 47.1 to 47.117]**



1 110. Pursuant to the contract for Project No. 24121, Taxpayer assisted with an  
2 atmospheric radiation measurement (“ARM”) program designed to measure radiation from the sun  
3 and the role of water vapor and clouds in the enhancement, or inhibition of the energy transfer of  
4 such radiation in and out of the earth’s atmosphere. Specifically, Taxpayer set up equipment and  
5 provided support to maintain a research site in Barrow, Alaska to take measurements in the arctic.  
6 Data from the ARMs in Barrow, Alaska were delivered to the Oakridge National Laboratory in  
7 Oakridge, Tennessee, where the data was then archived and maintained for further study.  
8 **[Testimony of Jeffrey Zirzow, Rcrd. Pt. 4, 1:31:15 to 1:37:14; Exs. 48.1 to 48.12; 57.1 to 57.2]**

9 111. Under the contract for Project No. 24121, prior to the periods at issue, Taxpayer  
10 delivered a working ARM system located in Barrow, Alaska. During the periods at issue,  
11 Taxpayer, directly and through the use of contractors in Alaska, monitored the data collected by  
12 the ARM system and sent it from the ARM system in Barrow, Alaska to the Oakridge National  
13 Laboratory in Oakridge, Tennessee, where the data was then archived and stored for further study.  
14 During the periods at issue, Taxpayer also provided monthly reports regarding the volume of data,  
15 data integrity and other information related to the performance of the ARM system to the  
16 Oakridge National Laboratory in Oakridge, Tennessee. **[Testimony of Jeffrey Zirzow, Rcrd. Pt.**  
17 **4, 1:31:15 to 1:44:04; Exs. 48.1 to 48.12; 57.1 to 57.2]**

18 112. Taxpayer also engaged contractors to perform “daily rounds” at the ARM  
19 measuring site in Barrow, Alaska. These “daily rounds” consisted of performing upkeep and  
20 maintenance. Taxpayer provided advice and troubleshooting of problems to the contractors in  
21 Barrow, Alaska, which was delivered and initially used by the contractors in Barrow, Alaska.  
22 **[Testimony of Jeffrey Zirzow, Rcrd. Pt. 4, 1:31:15 to 1:44:04; Exs. 48.1 to 48.12; 57.1 to 57.2]**

1 113. Additionally, Taxpayer dispatched employees to Barrow, Alaska several times per  
2 year for two-to-three-week periods to calibrate instrument, replace parts, or perform other  
3 modifications at the ARM site. **[Testimony of Jeffrey Zirzow, Rcrd. Pt. 4, 1:31:15 to 1:44:04;**  
4 **Exs. 48.1 to 48.12; 57.1 to 57.2]**

5 114. All of the parts and equipment developed by Taxpayer, and the reports and  
6 troubleshooting for the ARM measuring site in Barrow, Alaska, were delivered and initially used  
7 at the ARM measuring site in Barrow, Alaska. None of the deliverables under the contract for  
8 Project No. 24121 were used in New Mexico. **[Testimony of Jeffrey Zirzow, Rcrd. Pt. 4,**  
9 **1:42:25 to 1:44:05; Exs. 48.1 to 48.12; 57.1 to 57.2]**

10 115. The DOE could have utilized other national laboratories for Project No. 24121. In  
11 fact, “part of the work could have gone to a university, but [the DOE] would typically go ahead  
12 and contract to all of the national labs and then the national labs would send contracts to the  
13 universities.” **[Testimony of Jeffrey Zirzow, Rcrd. Pt. 4, 1:45:38 to 1:46:25; Exs. 48.1 to**  
14 **48.12; 57.1 to 57.2]**

15 116. There are no ARM measuring stations or facilities in New Mexico. In addition to  
16 the ARM measuring station in Barrow, Alaska, the other ARM measuring stations are located in  
17 northern Oklahoma/southern Kansas, the tropical western pacific, Africa, China and the Atlantic  
18 Ocean. **[Testimony of Jeffrey Zirzow, Rcrd. Pt. 4, 1:31:15 to 1:32:45; Exs. 48.1 to 48.12; 57.1**  
19 **to 57.2]**

20 117. While the DOE has an office in Albuquerque, that office is not part of the division  
21 of the DOE which dealt with the ARM measuring sites. Taxpayer did not interact with the local  
22 DOE office other than what was minimally required locally by Taxpayer’s requirements.  
23 **[Testimony of Jeffrey Zirzow, Rcrd. Pt. 4, 1:46:15 to 1:47:25; Exs. 48.1 to 48.12; 57.1 to 57.2]**

**Project Nos. 138914 and 139709**

118. Brian Kast, Principal Member of Technical Staff at Taxpayer, who worked on Project No. 138914, and provided support for Project No. 139709, credibly testified regarding Project Nos. 138914 and 139709, including the services performed, the deliverables provided by Taxpayer, and Taxpayer's competition for the project. Mr. Kast worked for Taxpayer as a contractor from 1989 to 1997, and he has been a direct employee of Taxpayer since 1997, over 20 years. **[Testimony of Brian Kast, Rcrd. Pt. 4, 2:16:43 to 2:36:25; Exs. 51.1 to 51.35]**

119. Copies of the statement of work and associated documents for Project Nos. 138914 and 139709 are in the record at Exs. 51.1 to 51.35, and supplement the live testimony of Mr. Kast. **[Testimony of Brian Kast; Exs. 51.1 to 51.35].**

120. Project Nos. 138914 and 139709 were projects for the Joint Munitions Command, a division of the United States Army ("JMC") located at the Defense Ammunition Center in McAlester, Oklahoma. Pursuant to the contracts for Project Nos. 138914 and 139709, Taxpayer designed and installed systems for the disposal of outdated cluster ammunitions, including small mines and grenades which present a greater challenge than standard explosive warheads. **[Testimony of Brian Kast, Rcrd. Pt. 4, 2:16:43 to 2:25:31; Exs. 51.1 to 51.35]**

121. The JMC could have utilized other national laboratories for the work performed for Project Nos. 138914 and 139709. In fact, "[Taxpayer] do[es] a very small piece of what [the JMC] do[es]" and "the majority of what [the JMC] do[es] is done elsewhere." **[Testimony of Brian Kast, Rcrd. Pt. 4, 2:16:43 to 2:36:25; Exs. 51.1 to 51.35]**

122. Pursuant to the contracts for Project Nos. 138914 and 139709, Taxpayer designed systems that include the equipment, hardware and software for disposing of outdated cluster ammunitions, including small mines and grenades. Taxpayer then delivered and installed the

1 systems in facilities located in Nevada and Oklahoma where the systems initially used to process  
2 and dispose of live explosives. **[Testimony of Brian Kast, Rcrd. Pt. 4, 2:16:43 to 2:36:25; Exs.**  
3 **51.1 to 51.35]**

4 123. The equipment, hardware, and software delivered to the JMC pursuant contracts for  
5 Project Nos. 138914 and 139709 were delivered together to either Hawthorne, Nevada, and in  
6 McAlester, Oklahoma. **[Testimony of Brian Kast, Rcrd. Pt. 4, 2:27:00 to 2:27:46; Exs. 51.1 to**  
7 **51.35]**

8 124. The equipment, hardware, and software delivered to the JMC under the contracts  
9 for Project Nos. 138914 and 139709 are not located in New Mexico, and they cannot be used by  
10 Taxpayer in New Mexico, as Taxpayer does not “have facilities in Albuquerque to do anything  
11 with live explosives.” **[Testimony of Brian Kast, Rcrd. Pt. 4, 2:27:35 to 2:28:18; Exs. 51.1 to**  
12 **51.35]** Taxpayer “can only get [the equipment, hardware, and software] so far until it has to start  
13 dealing with real materials, and at that point, [Taxpayer] move[s] [the equipment, hardware, and  
14 software] to the deployment site to finish . . . integration and do the initial testing there.” **[Id.]**

15 125. The JMC does not have a presence in New Mexico, and Taxpayer did not interact  
16 with the JMC or the United States Army in New Mexico for the performance of its work for  
17 Project Nos. 138914 and 139709. **[Testimony of Brian Kast, Rcrd. Pt. 4, 2:16:43 to 2:36:25;**  
18 **Exs. 51.1 to 51.35]**

19 126. Taxpayer’s customer, the JMC, provided Certification as to Purchase and Use of  
20 Products of Services Performed to Sandia in which the JMC certified that, pursuant to the  
21 contracts for Project Nos. 138914 and 139709, the products of the services were delivered to the  
22 Army “at locations outside the state of New Mexico” and that “the deliverables were used at  
23 [JMC–Demil Capabilities Division] facilities to demilitarize munitions in both McAlester,

1 Oklahoma and Hawthorne, Nevada[.]” [Testimony of Brian Kast, Rcrd. Pt. 4, 2:28:18 to  
2 2:29:35; Exs. 51.1 to 51.2]

3 **Project Nos. 131119 and 143841**

4 127. Karim Mahrous, Ph.D, Senior Manager Information Security Scientist at Taxpayer  
5 was the primary expert on Project Nos. 131119 and 143841, credibly testified via video  
6 conference regarding Project Nos. 131119 and 143841, including the services performed, the  
7 deliverables provided by Taxpayer, and Taxpayer’s competition for the project. [Testimony of  
8 Karim Mahrous, Rcrd. Pt. 6, 2:07 to 18:15; Exs. 50.1 to 50.74]

9 128. Copies of the statement of work and associated documents for Project Nos. 131119  
10 and 143841 are in the record at Exs. 50.1 to 50.74, which supplement Dr. Mahrous’ live  
11 testimony. [Testimony of Karim Mahrous; Exs. 50.1 to 50.74]

12 129. Project No. 131119 was for the DHS, located in or near Washington, D.C. Pursuant  
13 to the contract for Project No. 131119, Taxpayer developed software for modeling and simulating  
14 various manmade and natural disasters for purposes of aiding the Federal Emergency Management  
15 Agency (“FEMA”) in responding to and mitigating natural and manmade disasters. Taxpayer  
16 primarily performed its work on Project No. 131119 at Taxpayer’s California location and  
17 performed the remainder in New Mexico, but it ultimately delivered presentations, briefings,  
18 publications, and reports to DHS in Washington, D.C. [Testimony of Karim Mahrous, Rcrd. Pt.  
19 6, 2:07 to 13:15; Exs. 50.1 to 50.74]

20 130. The presentations, briefings, publications, and reports delivered to DHS in  
21 Washington, D.C. pursuant to the contract for Project No. 131119 were not used in New Mexico.  
22 [Testimony of Karim Mahrous, Rcrd. Pt. 6, 2:07 to 13:15; Exs. 50.1 to 50.74]



1 137. Copies of the statement of work and associated documents for the related Project  
2 Nos. 120930 and 140884 are in the record at Exs. 45.64 to 45.80 and Exs. 45.81 to 45.100,  
3 respectively, which supplement the live testimony of Mr. Eanes. These documents are similar to  
4 the documentation that a typical SPP/WFO project would contain, and they are designed to  
5 conform with Taxpayer's prime contract with DOE. **[Testimony of James Eanes, Rcrd. Pt. 1,**  
6 **1:58:17 to 2:01:21]**

7 138. The sponsor for Project Nos. 120930 and 140884 was not located in New Mexico.  
8 **[Testimony of James Eanes, Rcrd. Pt. 1, 2:10:12 to 2:10:54; Exs. 45.64 to 45.80; Exs. 45.81 to**  
9 **45.100]**

10 139. The products of the services performed under Project Nos. 120930 and 140884  
11 were delivered outside New Mexico to the sponsor's location. **[Testimony of James Eanes,**  
12 **Rcrd. Pt. 1, 2:10:55 to 2:11:03; Exs. 45.64 to 45.80; Exs. 45.81 to 45.100]**

13 140. None of the products of the services performed under Project Nos. 120930 and  
14 140884 were delivered or initially used in New Mexico. **[Testimony of James Eanes, Rcrd. Pt.**  
15 **1, 2:10:55 to 2:11:29; Exs. 45.64 to 45.80; Exs. 45.81 to 45.100]**

16 141. The Department previously conceded that the receipts from Project Nos. 120930  
17 and 140884 were allowable as deductible since the projects were specifically meant for the  
18 construction of a building in Manhattan, Kansas. **[Testimony of Janice Shannon, Rcrd. Pt. 2,**  
19 **1:05:02 to 1:06:29; Ex. 54.3]**

20 142. Copies of the statement of work and associated documents for Project No. 140001  
21 are in the record at Exs. 45.101 to 45.151, which supplement Mr. Eanes' live testimony. These  
22 documents are similar to the documentation that a typical SPP/WFO project would contain, and

1 they are designed to conform with Taxpayer's prime contract with DOE. **[Testimony of James**  
2 **Eanes, Rcrd. Pt. 1, 1:58:17 to 2:01:21]**

3 143. The sponsor for Project No. 140001 was not located in New Mexico. **[Testimony**  
4 **of James Eanes, Rcrd. Pt. 1, 2:10:12 to 2:10:54; Exs. 45.101 to 45.151]**

5 144. The products of the services performed under Project No. 140001 were delivered  
6 outside New Mexico to the sponsor's location. **[Testimony of James Eanes, Rcrd. Pt. 1, 2:10:55**  
7 **to 2:11:03; Exs. 45.101 to 45.151]**

8 145. None of the products of the services performed under Project No. 140001 were  
9 delivered or initially used in New Mexico. **[Testimony of James Eanes, Rcrd. Pt. 1, 2:10:55 to**  
10 **2:11:29; Exs. 45.101 to 45.151]**

11 146. The Department previously conceded that the receipts from Project No. 140001  
12 were allowed as deductible since the project involved Sandia serving the Nuclear Regulatory  
13 Commission ("NRC") with license applications for nuclear plants. **[Testimony of Janice**  
14 **Shannon, Rcrd. Pt. 2; 1:08:23 to 1:08:53; Ex. 54.7]**

15 147. Copies of the statement of work and associated documents for Project No. 139847  
16 are in the record at Exs. 45.316 to 45.324, which supplement Mr. Eanes' live testimony. These  
17 documents are similar to the documentation that a typical SPP/WFO project would contain, and  
18 they are designed to conform with Taxpayer's prime contract with DOE. **[Testimony of James**  
19 **Eanes, Rcrd. Pt. 1, 1:58:17 to 2:01:21]**

20 148. The sponsor for Project No. 139847 was not located in New Mexico. **[Testimony**  
21 **of James Eanes, Rcrd. Pt. 1, 2:10:12 to 2:10:54; Exs. 45.316 to 45.324]**

1 149. The products of the services performed under Project No. 139847 were delivered  
2 outside New Mexico to the sponsor's location. [**Testimony of James Eanes, Rcrd. Pt. 1, 2:10:55**  
3 **to 2:11:03; Exs. 45.316 to 45.324]**

4 150. None of the products of the services performed under Project No. 139847 were  
5 delivered or initially used in New Mexico. [**Testimony of James Eanes, Rcrd. Pt. 1, 2:10:55 to**  
6 **2:11:29; Exs. 45.316 to 45.324]**

7 **Project No. 125912**

8 151. Taxpayer manager Colin Smithpeter, Ph.D. testified concerning Project No.  
9 125912. He provided his direct testimony through pre-filed written, sworn testimony. Dr.  
10 Smithpeter was available to appear at the Hearing and be cross-examined by the Department's  
11 lawyer. The Department waived its right to cross-examine. Dr. Smithpeter worked as the project  
12 manager for Project No. 125912 between 2008 and 2010, and was competent to testify concerning  
13 that project. [**Ex. 16.1 to 16.2, ¶¶ 3, 4]**

14 152. Copies of the statement of work and associated documents for Project No. 125912  
15 are in the record at Exs. 16.5 to 16.22, which are incorporated by the pre-filed testimony of Dr.  
16 Smithpeter. [**Ex. 16.2, ¶ 5]**

17 153. A project questionnaire for Project No. 1259125 is in the record at Ex. 16.4. In Dr.  
18 Smithpeter's pre-filed testimony, he certified under oath that he provided the information for the  
19 responses to the project questionnaire and he reviewed it. He also certified that the information in  
20 the questionnaire is true and correct. [**Ex. 16.3, ¶ 10]**

21 154. Project No. 125912 concerned Rooftop Critical Experiments. The customer for  
22 Project No. 125912 was the U.S. Army Materiel Command, which at that time had a site at Ft.  
23 Monmouth, New Jersey. [**Ex. 16.2, ¶8; Ex. 16.8]**

1 155. The work on Project No. 125912 was to demonstrate the value of a radio frequency  
2 tag to the search and rescue of U.S. military personnel through experiments and subsequent papers  
3 and reports. [Ex. 16.2, ¶¶6, 7; Ex. 16.5 to 16.22]

4 156. The deliverable product of the service for Project No. 125912 consisted of papers  
5 and reports. [Ex. 16.2, ¶ 6; 16.4, item 3; Ex. 16.5 to 16.22] All of the products and services were  
6 delivered to the U.S. Army in New Jersey, where initial use occurred. [Ex. 16.2, ¶ 8; 16.4, items  
7 4, 8; Ex. 16.5 to 16.22]

8 157. Initial use of the product of the services occurred outside New Mexico. [Ex. 16.2,  
9 ¶9; 16.4, item 9; Ex. 16.5 to 16.22]

10 **Project No. 126261**

11 158. Taxpayer manager Joel Darnold testified concerning Project No. 126261. He  
12 provided his direct testimony through a pre-filed written, sworn testimony. Mr. Darnold was  
13 available to appear at the hearing and be cross-examined by the Department's lawyer. The  
14 Department waived its right to cross-examine. Mr. Darnold worked as the project lead for Project  
15 No. 126261 between 2008 and 2011, and he was competent to testify concerning that project.  
16 [Exs. 20.1 to 20.2, ¶¶3, 4]

17 159. Copies of the statement of work and associated documents for Project No. 126261  
18 are in the record at Exs. 20.5 to 20.94, which exhibits support the pre-filed testimony of Mr.  
19 Darnold; [Ex. 20.2, ¶5]

20 160. A project questionnaire for Project No. 126261 is in the record at Ex. 20.4. In Mr.  
21 Darnold's pre-filed testimony, he certified under oath that he provided the information for the  
22 responses to the project questionnaire and he reviewed it. He also certified that the information in  
23 the questionnaire is true and correct. [Ex. 20.3, ¶10]

1 161. The work of Project No. 126261 involved defining requirements and developing  
2 multiple versions of the Miniaturized RF Tags. [Ex. 20.2, ¶6; Ex. 20.5 to 20.94]

3 162. Taxpayer's customer for Project No. 126261 was the U.S. Army. [Exs. 20.2, ¶8;  
4 20.4, items 4, 6; Ex. 20.8.]

5 163. Taxpayer's deliverables for Project No. 126261 under its statement of work  
6 consisted of: (i) a final report; and (ii) five printed wiring assemblies. [Ex. 20.4, item 3; Ex. 20.3,  
7 ¶10; Exs. 20.5 to 20.94] These were delivered to the U.S. Army at Fort Monmouth, New Jersey,  
8 where their first intended use by the Army occurred. [Ex. 20.2, ¶ 8; Ex. 20.11; Ex. 20.4, items 4,  
9 8; Exs. 20.5 to 20.94]

10 164. Initial use of the product of the services occurred outside New Mexico. [Ex. 20.2,  
11 ¶9; Ex. 20.4, item 9]

12 **Project No. 132231**

13 165. Taxpayer Manager Todd West, Ph.D testified concerning Project No. 132231. He  
14 provided his direct testimony through pre-filed written, sworn testimony. Dr. West was available  
15 to appear at the Hearing and be cross-examined by the Department's lawyer. The Department  
16 waived its right to cross-examine. Dr. West worked on Project No. 132231 from October 2008  
17 through October 2009, and he was competent to testify concerning the project. [Exs. 32.1-32.2,  
18 ¶¶3, 4.]

19 166. Taxpayer Manager Susanna Gordon, Ph.D also testified concerning Project No.  
20 132231. She provided her direct testimony through pre-filed written, sworn testimony. Dr. Gordon  
21 was available to appear at the hearing and be cross-examined by the Department's lawyer. The  
22 Department waived its right to cross-examine. Dr. Gordon worked on Project No. 132231 in a

1 management role from 2009 through 2011, and she was competent to testify concerning that  
2 project. [Exs. 42.1 to 42.2, ¶¶3, 4]

3 167. Copies of the statement of work and associated documents for Project No. 132231  
4 are in the record at Exs. 32.6 to 32.23 and Exs. 42.5 to 42.22, which are incorporated by the pre-  
5 filed testimony of Dr. West and Dr. Gordon. [Ex. 32.2, ¶ 5; Ex. 42.2, ¶ 5]

6 168. Project questionnaires for Project No. 132231 are in the record at Ex. 32.5 and Ex.  
7 42.4. In Dr. West's pre-filed testimony, he certified under oath that he provided the information  
8 for the responses to the project questionnaire and he reviewed it. He also certified that the  
9 information in the questionnaire is true and correct. [Exs. 32.2 to 32.3, ¶10] In Dr. Gordon's pre-  
10 filed testimony, she certified under oath that she provided the information for the responses to the  
11 project questionnaire and she reviewed it. She also certified that the information in the  
12 questionnaire is true and correct. [Ex. 42.3, ¶ 10]

13 169. Project No. 132231 concerned performing services in connection with Bioassays  
14 Next Generation. The customer for the project was the Department of Homeland Security Office  
15 of Science and Technology. [Exs. 32.1-32.2, ¶4; Ex. 32.5, item 1; Ex. 42.2, ¶4; Ex. 42.4, item 1]

16 170. Taxpayer personnel defined threat scenarios, elicited requirements for future  
17 detection systems from end users, developed a decision response model, gathered and synthesized  
18 input from subject-matter experts, generated requirements for detection of next-generation threat  
19 agents, and performed interagency reviews. [Ex. 32.2, ¶6; Ex. 32.5, item 2; Ex. 42.2, ¶6; Ex.  
20 42.4, item 2]

21 171. The products of the services for Project No. 132231 were briefings for an  
22 interagency group and a final report. [Ex. 32.2, ¶6; Ex. 32.5, item 3; Ex. 42.2, ¶6; Ex. 42.4, item

23 3

1 172. The products that Taxpayer developed for Project No. 132231 were delivered  
2 electronically or in-person to the Department of Homeland Security in Washington, DC or to an  
3 interagency group in Virginia, and they were initially used for their intended purpose at those  
4 locations. The first use of the products of the services took place outside New Mexico. [Ex. 32.2,  
5 ¶8; Ex. 32.5, items 4, 8; Ex. 42.3, ¶8; Ex. 42.4, items 4, 8]

6 173. Initial use of the product of the services occurred outside New Mexico. [Ex. 32.2,  
7 ¶9; Ex. 32.5, item 9; Ex. 42.3, ¶9; Ex. 42.4, item 9]

8 **Project No. 132645**

9 174. Taxpayer manager Eugene Hertel, Ph.D testified concerning Project No. 132645.  
10 He provided his direct testimony through pre-filed written testimony. Dr. Hertel was available to  
11 appear at the Hearing and be cross-examined by the Department’s lawyer. The Department waived  
12 its right to cross-examine. Dr. Hertel was responsible for Project No. 132645 during the relevant  
13 time period as project manager, and he was competent to testify concerning that project. [Ex.  
14 15.27-15.28, ¶¶3, 4]

15 175. Copies of the statement of work and associated documents for Project No. 132645  
16 are in the record at Exs. 15.31 to 15.33, which are incorporated by pre-filed testimony of Dr.  
17 Hertel. [Ex. 15.28, ¶5]

18 176. A project questionnaire for Project No. 132645 is in the record at Ex. 15.30. In Dr.  
19 Hertel’s pre-filed testimony, he certified under oath that he provided the information for the  
20 responses to the project questionnaire and he reviewed it. He also certified that the information in  
21 the questionnaire is true and correct. [Ex. 15.29, ¶10.

22 177. Project No. 132645 concerned DET Threat Engineering. The customer for Project  
23 No. 132645 was the Missile Defense Agency (“MDA”), an agency of the U.S. Department of

1 Defense, located in Virginia. [Exs. 15.27-15.28, ¶4; Ex. 15.29, ¶8; Ex. 15.30, Item 1; 15.31 to  
2 15.53]

3 178. Project No. 132645 involved research by Taxpayer's technical staff. The results of  
4 that research were delivered to the customer, the MDA, as electronic slide presentations delivered  
5 by email. Taxpayer also provided a CAD (computer aided design) model to the customer via  
6 email. [Exs. 15.28 to 15.29, ¶7; Exs. 15.31 to 15.53]

7 179. The products of Taxpayer's research services for Project No. 132645 were  
8 delivered to the MDA in Washington, DC and to the National Air and Space Intelligence Agency  
9 in Dayton, Ohio. Employees of those agencies made initial use of Taxpayer's products for their  
10 intended purpose (research and development) at those out-of-state locations. [Exs. 15.28-15.29,  
11 ¶¶6, 7, 8; Ex. 15.30, items 2, 3, 4, 8; Exs. 15.31 to 15.53]

12 180. Initial use of the product of the services occurred outside New Mexico. [Ex. 15.29,  
13 ¶10; Ex. 15.30, item 9]

14 **Project No. 134415**

15 181. Taxpayer manager, Steven Rodriguez, testified concerning Project No. 134415. He  
16 provided his direct testimony through pre-filed written testimony. Mr. Rodriguez was available to  
17 appear at the Hearing and be cross-examined by the Department's lawyer. The Department waived  
18 its right to cross-examine. Mr. Rodriguez served as project lead for Project No. 134415 from  
19 November 2008 through July 2013, and he was competent to testify concerning that project. [Exs.  
20 41.1 to 41.2, ¶¶3, 4]

21 182. Copies of the statement of work and associated documents for Project No. 134415  
22 are in the record at Exs. 41.5 to 41.26, which are incorporated by the pre-filed testimony of Mr.  
23 Rodriguez. [Ex. 41.2, ¶5]

1 183. A project questionnaire for Project No. 134415 is in the record at Ex. 41.4. In Mr.  
2 Rodriguez's pre-filed testimony, he certified under oath that he provided the information for the  
3 responses to the project questionnaire and he reviewed it. He also certified that the information in  
4 the questionnaire is true and correct. [Ex. 41.3, ¶ 10]

5 184. Project No. 134415 concerned work on the High-Accuracy Separation Package  
6 ("HASP") re-design. Taxpayer's customers for this project were the NNSA and the U.S. Air  
7 Force. [Exs. 41.1 to 41.2 ¶¶4, 5, 6, 8; Ex. 41.4; Exs. 41.5 to 41.26]

8 185. Project No. 134415 involved a contract whereby Taxpayer agreed to redesign a part  
9 used to sense the trajectory of a nuclear warhead reentry vehicle. As part of this effort, Taxpayer  
10 created prototypes of the HASP in New Mexico. [Exs. 41.2 ¶6; Exs. 41.5 to 41.26]

11 186. The final products of Project No. 134415 were: (i) a report; (ii) drawings; and (iii)  
12 schematic diagrams for the design of the HASP. These items were delivered to the Honeywell  
13 Federal Manufacturing & Technology facility in Kansas City, Missouri, where they were used to  
14 produce the HASPs. The manufactured HASPs were then sent to the Pantex facility in Amarillo,  
15 Texas. The first intended use of the design reports, schematics and drawings occurred in Missouri.  
16 [Exs. 41.2 to 41.3, ¶¶6, 7, 8; see also Ex. 41.4, items 3, 4, 8; Exs. 41.5 to 41.26]

17 187. Initial use of the product of the services occurred outside New Mexico. [Ex. 41.3,  
18 ¶9; Ex. 41.4, item 9]

19 **Project No. 135841**

20 188. Taxpayer manager, Douglas Dederman, testified concerning Project No. 135841.  
21 He provided his direct testimony through pre-filed written testimony. Mr. Dederman was available  
22 to appear at the Hearing and be cross-examined by the Department's lawyer. The Department  
23 waived its right to cross-examine. Mr. Dederman served as project manager for Project No.

1 135841 from 2008 through 2011, and he was competent to testify concerning that project. [Exs.  
2 **39.1 to 39.2, ¶¶3, 4; Ex. 39.4]**

3 189. Copies of the statement of work and associated documents for Project No. 135841  
4 are in the record at Exs. 39.5 to 39.14, which are incorporated by the testimony of Mr. Dederman.  
5 [Ex. 39.2, ¶5]

6 190. A project questionnaire for Project No. 135841 is in the record at Ex. 39.4. In Mr.  
7 Dederman's pre-filed testimony, he certified under oath that he provided the information for the  
8 responses to the project questionnaire and he reviewed it. He also certified that the information in  
9 the questionnaire is true and correct. [Ex. 39.3, ¶10]

10 191. Project No. 135841 concerned research and development work to model and  
11 validate the origin of traumatic brain injury in order to understand the mechanisms of blast-  
12 induced traumatic brain injury and improving helmet design. Taxpayer's customer for this project  
13 was the Office of Naval Research for the U.S. Navy. [Exs. 39.1 to 39.2, ¶¶4, 6, 7; Ex. 39.4, item  
14 **2; Exs. 39.6 to 39.14]**

15 192. The product of Project No. 135841 consisted of a white paper report that was  
16 provided to the Office of Naval Research Force Protection in Arlington, VA. The first intended  
17 use of the report occurred at that location. [Exs. 39.2 to 39.3, ¶¶6, 8; Ex. 39.4, items 3, 4, 8; Exs.  
18 **39.6 to 39.14]**

19 193. Initial use of the product of the services occurred outside New Mexico. [Ex. 39.3,  
20 **¶9; Ex. 39.4, item 9]**

### 21 **Project No. 136454**

22 194. Taxpayer manager, Michael Bernard, Ph.D, testified concerning Project No.  
23 136454. He provided his direct testimony through pre-filed written testimony. Dr. Bernard was

1 available to appear at the hearing and be cross-examined by the Department's lawyer. The  
2 Department waived its right to cross-examine. Dr. Bernard served as principal researcher for  
3 Project No. 136454 from March 2009 through June 2010, and he was competent to testify  
4 concerning that project. [Exs. 8.1 & 8.2, ¶4]

5 195. Copies of the statement of work and associated documents for Project No. 136454  
6 are in the record at Exs. 8.4 to 8.13, which are incorporated by the pre-filed testimony of Dr.  
7 Bernard. [Ex. 8.2, ¶5]

8 196. A project questionnaire for Project No. 136454 is in the record at Ex. 8.14. In Dr.  
9 Bernard's pre-filed testimony, he certified under oath that he provided the information for the  
10 responses to the project questionnaire and he reviewed it. He also certified that the information in  
11 the questionnaire is true and correct. [Ex. 8.3, ¶10]

12 197. Project No. 136454 involved research work concerning Influence Operations.  
13 Taxpayer's customer for this project was the U.S. Air Force at Wright-Patterson AFB in Ohio.  
14 [Ex. 8.2, ¶6; Ex. 8.14, item 1]

15 198. The deliverables for Project No. 136454 were monthly updates, quarterly reviews,  
16 regular briefings, an assessment document and computational models. These deliverables were  
17 delivered to the U.S. Air Force in Ohio, where they were initially used by the Air Force for their  
18 intended purpose. [Ex. 8.2, ¶¶6, 7, 8; Ex. 8.14, items 3, 5, 8; Exs. 8.4 to 8.13]

19 199. Initial use of the product of the services occurred outside New Mexico. [Ex. 8.2,  
20 ¶9]

21 **Project No. 136941**

22 200. Taxpayer manager, Nathan Bixler, Ph.D, testified concerning Project No. 136941.  
23 His direct testimony was through pre-filed written testimony. Dr. Bixler was available to appear at

1 the Hearing and be cross-examined by the Department’s lawyer. The Department waived its right  
2 to cross-examine. Dr. Bixler served as the principal investigator for Project No. 136941 from July  
3 2008 through February 2012, and he was competent to testify concerning the project. **[Exs. 36.1 to**  
4 **36.2, ¶¶3, 4]**

5 201. Copies of the statement of work and associated documents for Project No. 136941  
6 are in the record at Exs. 36.6 to 36.34, which are incorporated by the pre-filed testimony of Dr.  
7 Bixler. **[Ex. 36.2, ¶5]**

8 202. A project questionnaire for Project No. 136941 is in the record at Ex. 36.5. In Dr.  
9 Bixler’s pre-filed testimony, he certified under oath that he provided the information for the  
10 responses to the project questionnaire and he reviewed it. He also certified that the information in  
11 the questionnaire is true and correct. **[Ex. 36.4, ¶10]**

12 203. Project No. 136941 concerned “Modernization of MACCS 2.” The purpose of  
13 Project No. 136941 was to modernize software used by the NRC to evaluate consequences from  
14 severe accidents involving the release of radioactive material into the environment. **[Exs. 36.1 to**  
15 **36.3, ¶¶4, 7; Ex. 36.5, item 6; Exs. 36.6 to 36.34]**

16 204. The products of the service for Project No. 136941 consisted of MACCS 2  
17 software documentation and associated reports. These products were installed on compact discs  
18 and delivered by mail to the NRC in Washington, DC and Bethesda, Maryland. The staff of the  
19 NRC used the products at those locations. **[Exs. 36.2 to 36.3, ¶¶6, 7; Ex. 36.5, items 3, 8, 9; Exs.**  
20 **36.6 to 36.34]**

21 205. The product of the service for Project No. 136941 was initially used for its intended  
22 purpose by employees of the NRC in Washington DC and Bethesda, MD. **[Ex 36.3, ¶8; Ex. 36.5,**  
23 **items 4, 8]**







1 222. Copies of the statement of work and associated documents for Project No. 139470  
2 are in the record at Exs. 40.5 to 40.27, which Mr. Kelly incorporated in his pre-filed testimony.

3 **[Ex. 40.2, ¶5]**

4 223. A project questionnaire for Project No. 139470 is in the record at Ex. 40.4. In Mr.  
5 Kelly's pre-filed testimony, he certified under oath that he provided the information for the  
6 responses to the project questionnaire and he reviewed it. He also certified that the information in  
7 the questionnaire is true and correct. **[Ex. 40.3, ¶10]**

8 224. Project No. 139470 involved working on the Missile Defense System Engineering  
9 Program for the MDA. The purpose of Project No. 139470 was to provide technical expertise to  
10 assist in the evaluation of the effectiveness of proposed and existing missile defense elements.  
11 Under the terms of Taxpayer's agreement with the MDA, Taxpayer agreed to provide technical  
12 analysis consisting of engineering design, modeling, simulation, and analysis to the customer in  
13 Washington, DC. **[Exs. 40.2 to 40.3, ¶¶4, 6, 7; Ex. 40.4, items 3, 6; Exs. 40.5 to 40.27]**

14 225. The deliverable product of the service for Project No. 139470 consisted of technical  
15 analysis including engineering design, modeling, simulation, and analysis. **[Ex. 40.2, ¶ 6; Ex.**  
16 **40.4, item 3; Exs. 40.5 to 40.27]** All of the products and services were delivered to the MDA in or  
17 near Washington, DC area, where initial use occurred. **[Ex. 40.3, ¶8; Ex. 40.4, items 4, 7, 8]**

18 226. Initial use of the product of the services occurred outside New Mexico. **[Ex. 40.3,**  
19 **¶9; Ex. 40.4, item 9]**

20 **Project No. 139721**

21 227. Taxpayer manager, Mark Ladd, Ph.D, testified concerning Project No. 139721. His  
22 direct testimony was through a pre-filed written and sworn testimony. Dr. Ladd was available to  
23 appear at the hearing and be cross-examined by the Department's lawyer. The Department waived

1 its right to cross-examine. Dr. Ladd was responsible for Project No. 139721, and he was the  
2 manager for the duration of that project. He was competent to testify concerning that project. [Exs.  
3 **38.1 to 38.2, ¶¶3, 4]**

4 228. Copies of the statement of work and associated documents for Project No. 139721  
5 are in the record at Exs. 38.5 to 38.13, which were incorporated by Dr. Ladd's pre-filed testimony.  
6 [Ex. 38.2, ¶5]

7 229. A project questionnaire for Project No. 139721 is in the record at Ex. 38.4. In Dr.  
8 Ladd's pre-filed testimony, he certified under oath that he provided the information for the  
9 responses to the project questionnaire and he reviewed it. He also certified that the information in  
10 the questionnaire is true and correct. [Ex. 38.3, ¶10]

11 230. The customer under Project No. 139721 was the Domestic Nuclear Detection  
12 Office ("DNDO") of the DHS. Project No. 139721 concerned "Feasibility of Electronically  
13 Tagging and Tracking of Portable Radiation Sources." This involved technical advice to the  
14 DNDO concerning the detection and reporting of illicitly transported radiological materials by  
15 evaluating and analyzing the current technical, economic, and operational feasibility of  
16 electronically tagging and tracking portable radiation sources. [Exs. 38.1 to 38.3, ¶¶4, 5, 6; Ex.  
17 **38.4, item 2; Exs. 38.5 to 38.13]**

18 231. The product of the service for Project No. 139721 was a written report. The report  
19 was delivered to the DNDO office in Washington, DC. The staff of the DNDO used the report in  
20 Washington, DC. [Ex. 38.3, ¶¶7, 8; Ex. 38.4, items 3, 4, 8]

21 232. The product of the service for Project No. 139721 was initially used by employees  
22 of DNDO for its intended purpose in Washington DC. [Ex 38.3, ¶8; Ex. 38.4, item 8]



1 used the report at that location; the first use of the report did not occur in New Mexico. [Exs. 30.2  
2 to 30.3, ¶¶6, 8; Ex. 30.4, items 3, 4, 8]

3 239. Initial use of the product of the services occurred outside New Mexico. [Ex. 30.3,  
4 ¶9; Ex. 30.4, item 9]

5 **Project No. 141982**

6 240. Taxpayer manager, Marcia Cooper, Ph.D, testified concerning Project No. 141982.  
7 Her direct testimony was through pre-filed written, sworn testimony. Dr. Cooper was available to  
8 appear at the Hearing and be cross-examined by the Department's lawyer. The Department waived  
9 its right to cross-examine. Dr. Cooper served as project manager and principal investigator for  
10 Project No. 141982 from April 2009 to August 2011. She was competent to testify concerning that  
11 project. [Exs. 21.1 to 21.2, ¶¶ 3, 4]

12 241. Copies of the statement of work and associated documents for Project No. 141982  
13 are in the record at Exs. 21.6 to 21.25, which are incorporated by the pre-filed testimony of Dr.  
14 Cooper. [Ex. 21.2, ¶5]

15 242. A project questionnaire for Project No. 141982 is in the record at Ex. 21.5. In her  
16 pre-filed testimony, Dr. Cooper certified under oath that she provided information for the project  
17 questionnaire and reviewed it and that the information in it is true and correct. [Ex. 21.4, ¶9]

18 243. The subject of Project No. 141982 was Insensitive Munitions Materials Shock  
19 Characterization. The customer for Project No. 141982 was the U.S. Air Force Research  
20 Laboratory, Eglin AFB, in Florida. [Ex. 21.2, ¶4]

21 244. Taxpayer's work on Project No. 141982 consisted of experimentation, modeling  
22 and analysis at its location in Albuquerque and as-needed technical consultation. The purpose of  
23 this work was to determine the shock response of several energetic and inert materials and to

1 support integration of the results into hydrocode models for simulating insensitive munitions  
2 threats. [Exs. 21.2 to 21.3, ¶5; Ex. 21.13]

3 245. The deliverable for Project No. 141982 consisted of data and calculations presented  
4 on a spreadsheet. [Exs. 21.2 to 21.3, ¶5; Ex. 21.5, item 3; Exs. 21.6 to 21.25]

5 246. The products of Taxpayer's services (data and calculations) for Project No. 141982  
6 were delivered to Taxpayer's customer at out-of-state locations, including California and Florida.  
7 The initial use of the data and calculations produced by Taxpayer under Project No. 141982  
8 occurred at those out-of-state locations. [Exs. 21.3 to 21.4, ¶7; Ex. 21.5, items 2, 4, 8]

9 247. Initial use of the product of the services occurred outside New Mexico. [Ex. 21.4,  
10 ¶8; Ex. 21.5, item 9]

11 **Project No. 144655**

12 248. Taxpayer manager, Jerilyn Timlin, Ph.D, testified concerning Project No. 144655.  
13 Dr. Timlin's direct testimony was through pre-filed written, sworn testimony. Dr. Timlin was  
14 available to appear at the hearing and be cross-examined by the Department's lawyer. The  
15 Department waived its right to cross-examine. Dr. Timlin served as principal investigator for  
16 Project No. 144655 from September 2009 to approximately May 2014. Dr. Timlin was competent  
17 to testify concerning that project. [Exs. 5.1 to 5.2, ¶¶ 3, 4]

18 249. Copies of the statement of work and associated documents for Project No. 144655  
19 are in the record at Exs. 5.4 to 5.14, and are incorporated by the pre-filed testimony of Dr. Timlin.  
20 [Ex. 5.2, ¶5]

21 250. A project questionnaire for Project No. 144655 is in the record at Ex. 5.15. In Dr.  
22 Timlin's pre-filed testimony, Dr. Timlin certified under oath that he provided the information for

1 the responses to the project questionnaire, that he reviewed it and that the information in it is true  
2 and correct. *See* Ex. 5.3, ¶ 10.

3 251. The customer for Project No. 144655 was the National Institutes of Health  
4 (“NIH”), in Bethesda, Maryland. [Ex. 5.1 to 5.3, ¶¶4, 8; Ex. 5.7]

5 252. Project No. 144655 concerned Multiplexed Measurements of Protein Dynamics  
6 and Interactions at Extreme Resolution. In its agreement with the NIH, Taxpayer agreed to provide  
7 novel imaging methods to measure protein complex formation and protein networks requiring the  
8 design of new hardware. [Ex. 5.2, ¶6; Exs. 5.4 to 5.14]

9 253. The deliverables for Project No. 144655 were: (i) a report that summarized the  
10 hardware design; and (ii) a list of journal publications and patents that resulted from the project.  
11 [Ex. 5.2, ¶6]

12 254. The deliverables were sent to Taxpayer’s customer, the NIH, in Maryland and  
13 initially used for their intended purpose at that location by employees of the NIH. [Ex. 5.3, ¶8;  
14 Ex. 5.15, ¶8]

15 255. Initial use of the product of the services occurred outside New Mexico. [Ex. 5.3,  
16 ¶9]

17 **Project No. 144883**

18 256. Taxpayer manager, Patrick Chu, Ph.D, testified concerning Project No. 144883. Dr.  
19 Chu’s direct testimony was through pre-filed written, sworn testimony. Dr. Chu was available to  
20 appear at the hearing and be cross-examined by the Department’s lawyer. The Department waived  
21 its right to cross-examine. Dr. Chu supervised the project from January 2011 to March 2013 and  
22 was competent to testify concerning Project No. 144883. [Exs. 31.1 to 31.2, ¶¶3, 4]



1 waived its right to cross-examine. Mr. Kelly worked as the project manager for Project No.  
2 137337 between 2009 and 2011, and he was competent to testify concerning that project. [Exs.  
3 **61.1 to 61.2, ¶¶3, 4]**

4 264. Copies of the statement of work and associated documents for Project No. 137337  
5 are in the record at Exs. 61.5 to 61.49, which are incorporated by the pre-filed testimony of Mr.  
6 Kelly. [Ex. 61.2, ¶5]

7 265. A project questionnaire for Project No. 137337 is in the record at Ex. 61.4. In Mr.  
8 Kelly's pre-filed testimony, he certified under oath that he provided the information for the  
9 responses to the project questionnaire and he reviewed it. He also certified that the information in  
10 the questionnaire is true and correct. [Ex. 61.3, ¶10]

11 266. Project No. 137337 concerned the Missile Defense System Engineering Program.  
12 The customer for Project No. 137337 was the MDA in Washington, DC. [Ex. 61.2, ¶4]

13 267. The work of Project No. 137337 was to support the MDA with on-site technical  
14 advice regarding programmatic analyses and assessments of threats, lethality, and  
15 countermeasures as part of a missile defense system evaluation. [Ex. 61.2, ¶6; Ex. 61.4, item 2;  
16 **Exs. 61.5 to 61.49]**

17 268. The deliverable product of the service for Project No. 137337 consisted of on-site  
18 technical advice. [Ex. 61.2, ¶7; Ex. 61.4, item 3; Exs. 61.5 to 61.49] All of the products and  
19 services were delivered to the MDA in Washington, DC, where initial use occurred. [Ex. 61.2, ¶8;  
20 **Ex. 61.4, items 4, 8]**

21 269. Initial use of the product of the services occurred outside New Mexico. [Ex. 61.3,  
22 **¶9; Ex. 61.4, item 9]**



1 needed and to remove all US-Government-owned contents from the TCBR and decommission the  
2 TCBR. These services took place at SNL and Staten Island in New York. [Exs. 62.2 to 62.3, ¶¶4,  
3 6; Exs. 62.7 to 62.23]

4 276. The deliverable product of the service for Project No. 136745 consisted of the  
5 above-described maintenance, removal, and decommissioning. [Ex 62.2 to 62.3, ¶4; Ex. 62.5,  
6 item 3; Exs. 62.7 to 62.23] All of the products and services were delivered to the DHS in  
7 Washington, DC, where initial use occurred. [Ex. 62.5, items 4, 8]

8 277. Initial use of the product of the services occurred outside New Mexico. [Ex. 62.3,  
9 ¶8; Ex. 62.5, item 9]

10 278. The Department previously conceded that, while the receipts from Project No.  
11 136745 were initially disallowed, they were subsequently allowed as deductible since the project  
12 was performed in New York and involved the lead project manager relocating to New York. The  
13 Department did not state that this decision was pending review of additional information.  
14 [Testimony of Janice Shannon, Rcrd. Pt. 2, 1:06:46 to 1:07:46; Ex. 54.5]

#### 15 The Classified Projects

16 279. Taxpayer claimed a deduction from gross receipts for the following projects  
17 (collectively, “Classified Projects”):

18	<u>Project No.</u>	<u>Amount of Gross Receipts</u>
19	Project 123514:	\$726,154.56
20	Project 127024:	\$135,785.60
21	Project 127150:	\$4,552.87
22	Project 127777:	\$4,637,043.32
23	Project 127957:	\$43,213.25
24	Project 130380:	\$747,952.05
25	Project 137386:	\$18,168.42
26	Project 137766:	\$241,304.60
27	Project 139019:	\$351,137.79

1           **[Exs. 45.6 to 45.8]**

2           280. Taxpayer performs classified work that requires various levels of clearance to  
3 access information. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:47:02 to 1:48:02]**

4           281. When Taxpayer receives work from a sponsoring agency, that agency determines  
5 the classification level. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:48:02 to 1:48:14]**

6           282. In order to access classified work, a Taxpayer employee must have both the  
7 necessary security clearance and a “need to know.” The sponsoring agency determines the  
8 requirements for a need to know and who may access the project’s information. Even if a person  
9 has a legitimate and significant need to access classified information, access will be denied unless  
10 the customer or government entity owning the classification allows it. **[Testimony of James**  
11 **Eanes, Rcrd. Pt. 1, 1:48:15 to 1:49:50]**

12           283. Some Taxpayer projects are entirely classified, and others may be partially  
13 classified with regard for the nature of the technical work, identity of the customer, or specific  
14 delivery location. The scope of information that is classified depends on the determination of the  
15 sponsoring agency. For projects that are entirely classified, Taxpayer would be prohibited from  
16 providing project proposals, including the applicable statement of work, to the Department’s  
17 auditors. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:49:50 to 1:51:20]**

18           284. Prior to the Hearing, Taxpayer obtained an affidavit concerning the Classified  
19 Projects from Keith E. Harlow, Associate Deputy Director of the DOE’s Office of Intelligence and  
20 Counterintelligence (“DOE-IN”). Mr. Harlow’s affidavit is in the record as Exs. 45.6 to 45.8.  
21 DOE-IN is the office responsible for managing, reviewing, and approving intelligence and  
22 intelligence-related SPP/WFO work. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:51:21 to**  
23 **1:54:27; Ex. 45.6]**

1           285. All of the Classified Projects were determined by DOE-IN to be of sufficient  
2 sensitivity to preclude release of their respective statements of work. **[Testimony of James Eanes,**  
3 **Rcrd. Pt. 1, 1:54:32 to 1:55:08; Ex. 45.7]**

4           286. Nevertheless, all of the classified projects were contracted through the SPP process  
5 during or before the period December 2009 through September 2011. **[Testimony of James**  
6 **Eanes, Rcrd. Pt. 1, 1:55:09 to 1:55:55; Ex. 45.7]**

7           287. The services under each classified project were performed in New Mexico.  
8 **[Testimony of James Eanes, Rcrd. Pt. 1, 1:55:56 to 1:56:12; Exs. 45.7 to 45.8]**

9           288. The products of the respective services performed under the classified projects  
10 were delivered to, and initially used at, the sponsors' respective locations, which in each case  
11 outside of New Mexico. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:57:24 to 1:57:47; Ex. 45.8]**

12           289. The products of the services performed under the Classified Projects were not  
13 delivered or initially used in New Mexico. **[Testimony of James Eanes, Rcrd. Pt. 1, 1:57:24 to**  
14 **1:57:47; Ex. 45.8]**

## 15 **V. PROCEDURAL HISTORY OF CONSOLIDATED PROTESTS**

16           290. On September 26, 2014, the Department submitted a request for a scheduling  
17 hearing to address Taxpayer's 2014 protest. **[Administrative File (Hearing Request filed**  
18 **9/26/2014)]**

19           291. On October 1, 2014, the Administrative Hearings Office entered a Notice of  
20 Telephonic Scheduling Conference setting an initial scheduling conference for October 20, 2014.  
21 **[Administrative File]**

22           292. An initial telephonic scheduling conference occurred on October 20, 2014 at which  
23 time the parties indicated they could benefit from additional time to evaluate issues subject of the

1 2014 protest prior to proceeding with scheduling. They agreed to an informal conference on or  
2 before February 6, 2015, and a second telephonic scheduling conference was set to occur on  
3 February 20, 2015. The Administrative Hearings Office entered a Second Notice of Telephonic  
4 Scheduling Conference on October 20, 2015. **[Administrative File]**

5 293. A second telephonic scheduling conference occurred on February 20, 2015, which  
6 in addition to establishing various prehearing deadlines, set a hearing on the merits of Taxpayer's  
7 2014 protest to occur on April 21, 2016. **[Administrative File (Scheduling Order and Notice of  
8 Hearing on the Merits filed 2/23/2015)]**

9 294. On March 31, 2015, Taxpayer's counsel of record filed a Notice of Substitution and  
10 Withdrawal which permitted him to continue representing Taxpayer after his law practice  
11 transferred between law firms (Brownstein Hyatt Farber Schreck, LLP to Gallagher & Kennedy,  
12 PA). **[Administrative File (Notice of Substitution and Withdrawal filed 3/31/2015)]**

13 295. On July 27, 2015, the Department acknowledged the 2015 protest submitted on  
14 July 17, 2015 under Letter ID No. L1197314096. **[Administrative File]**

15 296. On August 14, 2015, the Taxpayer and Department individually filed their  
16 preliminary witness and exhibit lists in reference to the 2014 protest. **[Administrative File  
17 (Sandia Corporation's Preliminary Witness and Exhibit List; New Mexico Taxation and  
18 Revenue Department's Preliminary Witness and Preliminary Exhibit Lists)]**

19 297. On September 9, 2015, the Department submitted a request for a scheduling  
20 hearing to address Taxpayer's 2015 protest. **[Administrative File (Hearing Request filed  
21 9/9/2015)]**

22 298. On September 11, 2015, the Administrative Hearings Office entered a Notice of  
23 Telephonic Scheduling Conference setting an initial scheduling conference for September 23,

1 2015 in reference to Taxpayer's 2015 protest. **[Administrative File]**

2 299. An initial telephonic scheduling conference occurred on September 23, 2015 in  
3 reference to the 2015 protest at which time the parties did not object that the 2014 protest and  
4 2015 protest should be consolidated. The Administrative Hearings Office entered a Scheduling  
5 Order, Consolidated Order, and Notice of Hearing on the Merits which in addition to  
6 consolidating the protests, adopted the deadlines and hearing date previously established for the  
7 2014 protest. **[Administrative File]**

8 300. On September 23, 2015, the Department issued a partial denial of Taxpayer's claim  
9 for refund under Letter ID No. L1632708656 for tax periods December 31, 2009 through  
10 November 30, 2010. The Department denied \$13,135,743.13 but approved a refund of  
11 \$195,965.35, plus interest in the amount of \$6,136.67, for a total refund of \$202,102.02.

12 **[Stipulated Fact; Administrative File]**

13 301. On December 21, 2015, Taxpayer filed its Supplement to Consolidated Protests in  
14 which it expressly protested the partial denial of its claim for refund, in the amount of  
15 \$13,135,743.13, which was originally subject of the 2014 protest, and any aspect of the denial  
16 which might tend to also effect the 2015 protest. **[Stipulated Fact; Administrative File]**

17 302. On January 14, 2016, the parties filed a Joint Motion to Extend All Deadlines and  
18 Reset the Hearing Date in which they requested that all deadlines and the hearing on the merits of  
19 the consolidated protests be vacated and reset in no less than 90 days. **[Administrative File]**

20 303. On January 22, 2016, the Administrative Hearings Office entered an Order  
21 Granting Continuance, Resetting Deadlines, and Amended Notice of Hearing on the Merits, which  
22 in addition to rescheduling various deadlines, set a hearing on the merits of the consolidated  
23 protest for November 14, 2016. **[Administrative File]**

1           304. On July 15, 2016, the parties filed a Stipulated Agreement to Extend Deadline to  
2 File Motions. **[Administrative File]**

3           305. On July 27, 2016, the Administrative Hearings Office entered a Second Amended  
4 Notice of Hearing on the Merits which continued the previously-set hearing to May 22, 2017.  
5 **[Administrative File]**

6           306. On January 5, 2017, Ms. Suzanne Wood Bruckner, Esq. (Sutin, Thayer & Browne  
7 PC) entered her appearance and substituted for Taxpayer's previous counsel of record, Mr.  
8 Timothy Van Valen (Gallagher & Kennedy, PA). **[Administrative File (Notice of Withdrawal  
9 and Substitution of Counsel filed 1/5/17)]**

10           307. On March 10, 2017, the parties submitted a Joint Motion to Enter Stipulated Order  
11 on Pre-Filing of Witness Testimony and to Reduce the Duration of the Hearing from Four Days to  
12 Two. **[Administrative File]**

13           308. On March 17, 2017, the Administrative Hearings Office entered an Order  
14 Requiring Additional Information on the Parties Joint Motion for Pre-Filing of Witness  
15 Testimony. **[Administrative File]**

16           309. On March 31, 2017, Taxpayer filed Taxpayer Sandia Corporation's Response to the  
17 Hearing Officer's Order Requiring Additional Information notifying the Hearing Officer and  
18 Department that the following witnesses might submit pre-filed testimony: a) James Eanes; b)  
19 Elyse Eckart; c) Max Decker; d) Stephen Bauer; e) Michael Bernard; f) Jerilyn Timlin; g) Joseph  
20 Bishop; and h) Heather Christ. **[Administrative File]**

21           310. On April 17, 2017, the Administrative Hearings Office entered an Order Allowing  
22 Pre-Filed Witness Testimony. **[Administrative File]**

23           311. On April 26, 2017, the Administrative Hearings Office entered a Continuance

1 Order, Notice of Reassignment, Amended Limited Scheduling Order and Amended Notice of  
2 Hearing. Among other various deadlines, the hearing on the merits was continued to July 13,  
3 2017. **[Administrative File]**

4 312. On April 28, 2017, the Department filed an Unopposed Motion for Procedural  
5 Order requesting additional time to submit pre-filed testimony. **[Administrative File]**

6 313. On May 22, 2017, Taxpayer filed a Certificate of Service indicating that it served  
7 the Department's counsel of record with a compact disk containing Taxpayer Sandia  
8 Corporation's Pre-Filing of Witness Testimony. **[Administrative File]**

9 314. On May 22, 2017, the Department submitted its Pre-Filing of Witness Testimony  
10 of Simone Mehta-Campbell and Janice Shannon.<sup>2</sup> **[Administrative File]**

11 315. Also on May 22, 2017, the Department filed a Certificate of Service to certify that  
12 it served its Pre-Filing of Witness Testimony on Taxpayer's counsel of record. **[Administrative**  
13 **File]**

14 316. On May 23, 2017, the Department supplemented its Pre-Filing of Witness  
15 Testimony of Simone Mehta-Campbell and Janice Shannon.<sup>3</sup> **[Administrative File]**

16 317. On May 23, 2017, Taxpayer filed Taxpayer's Motion for an Order Barring the TRD  
17 from Repudiating its Previous Responses to Interrogatories. **[Administrative File]**

18 318. On June 7, 2017, the Department filed Department's Response to Taxpayer's  
19 "Motion for an Order Barring the TRD from Repudiating its Past Responses to Interrogatories".  
20 **[Administrative File]**

21 319. On June 27, 2017, the Administrative Hearings Office entered an Order on Motion

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<sup>2</sup> Although Taxpayer did not object on its own accord, the Hearing Officer observed that the pre-filed testimony was neither subscribed nor sworn. The Hearing Officer notified the parties of the foregoing observation during the status hearing on December 5, 2018. **[Record of Status Hearing (12/15/2018)]**

<sup>3</sup> See FN 1.

1 to Bar in which it permitted until July 5, 2017 for Taxpayer to pre-file additional testimony  
2 regarding the projects that were not addressed in its previously-filed testimonial submissions.

3 **[Administrative File]**

4 320. On June 29, 2017, the parties filed their Joint Prehearing Statement.

5 **[Administrative File]**

6 321. On June 30, 2017, Taxpayer filed Taxpayer Sandia's Motion to Continue the  
7 Hearing Set for July 13, 2017 to Allow Sandia Additional Time to Compile Witness Testimony.

8 The Department opposed the motion. **[Administrative File]**

9 322. On July 3, 2017, the Department filed Department's Response to Motion for  
10 Continuance indicating that it did not oppose Taxpayer's motion, but suggested that discovery  
11 remain open until Taxpayer filed its supplemental pre-filed testimony. **[Administrative File]**

12 323. On July 5, 2017, Taxpayer also filed the following: (a) Written Testimony of Elyse  
13 Eckart; (b) Written Testimony of Heather Christ; (c) Written Testimony of James Eanes; (d)  
14 Written Testimony of Mark Ivey; (e) Written Testimony of Jerilyn Timlin; (f) Written Testimony  
15 of Max Decker (g) Written Testimony of Joseph Bishop; (h) Written Testimony of Michael  
16 Bernard; and (i) Written Testimony of Stephen Bauer. **[Administrative File]**

17 324. On July 6, 2017, Taxpayer also filed the following: (a) Written Testimony of  
18 Eugene S. Hertel, Jr.; (b) Written Testimony of Paul Taylor; (c) Written Testimony of Brian Kast;  
19 (d) Supplemental Written Testimony of Elyse Eckart; and (e) Supplemental Written Testimony of  
20 Heather Christ. **[Administrative File]**

21 325. On July 6, 2017, the Department filed a Joint Stipulation, indicating approval by  
22 Taxpayer's counsel of record, which recognized the agreement of the parties that the percentage of  
23 Taxpayer's receipts from 65 projects in the sample, as determined by this proceeding to be non-

1 taxable, will apply to all of the projects at issue to determine the amount of Taxpayer's total  
2 refund. **[Stipulated Fact; Administrative File]**

3 326. On July 10, 2017, the Administrative Hearings Office entered an Amended Notice  
4 of Administrative Hearing which vacated the hearing on the merits of the consolidated protest  
5 scheduled to commence on July 13, 2017, but nevertheless required the parties and their counsel to  
6 appear in person to address status and scheduling matters. **[Administrative File]**

7 327. On July 14, 2017, the Administrative Hearings Office entered an Notice of  
8 Reassignment, Amended Scheduling Order and Amended Notice of Administrative Hearing which  
9 among establishing various deadlines, reassigned the consolidated protest to the undersigned  
10 Hearing Officer and set a hearing on the merits of protest to commence on September 18, 2018.  
11 **[Administrative File]**

12 328. On July 27, 2017, Tonya Noonan Herring, Esq. entered her appearance as co-  
13 counsel for the Department. **[Administrative File]**

14 329. On August 21, 2017, Taxpayer filed Taxpayer's Motion for Protective Order  
15 Concerning the Confidentiality of Documents in which it requested that the Administrative  
16 Hearings Office adopt a proposed Protective Order Concerning the Confidentiality of Documents,  
17 attached as an exhibit to its motion. **[Administrative File]**

18 330. On September 1, 2017, the Department filed Department's Opposition to Motion  
19 for a Protective Order. **[Administrative File]**

20 331. On September 1, 2017, Taxpayer filed Taxpayer Sandia's Unopposed Motion to  
21 Continue the Hearing Currently Set for September 18, 2017, seeking that the matter be continued  
22 until a date after February of 2018. **[Administrative File]**

23 332. On September 5, 2017, Taxpayer filed Taxpayer's Second Supplementation of the

1 Statement of Grounds Supporting its Protest. **[Administrative File]**

2 333. On September 7, 2017, the Administrative Hearings Office entered an Order  
3 Granting Continuance and Amended Notice of Administrative Hearing. **[Administrative File]**

4 334. On September 15, 2017, the Administrative Hearings Office entered an Order  
5 Denying Taxpayer's Motion for Protective Order Concerning the Confidentiality of Documents.  
6 **[Administrative File]**

7 335. On April 5, 2018, Taxpayer filed its Unopposed Motion to Continue Hearing Date  
8 Due to Unavailability of Counsel. Taxpayer requested that the protest be continued to a date after  
9 October 1, 2018. **[Administrative File]**

10 336. On April 9, 2018, Taxpayer filed Taxpayer's Motion to Allow Certain Witnesses to  
11 Testify by Videoconference, or in the Alternative, by Telephone. **[Administrative File]**

12 337. On April 11, 2018, the Administrative Hearings Office entered an Order Granting  
13 Continuance and Amended Notice of Administrative Hearing which set a hearing on the  
14 consolidated protests to commence on December 10, 2018. **[Administrative File]**

15 338. On August 27, 2018, the Administrative Hearings Office entered an Order  
16 Permitting Videoconference Testimony for: (a) Karim Mahrous; (b) Todd West; (c) Heidi  
17 Ammerlahn; (d) Christopher Shaddix; (e) Paul Nielan; and (f) Susan Gardner. **[Administrative**  
18 **File]**

19 339. On October 19, 2018, the Department filed a Substitution of Counsel providing  
20 notice that David Mittle, Esq. would be substituting for Tonya Herring, Esq. **[Administrative**  
21 **File]**

22 340. On November 26, 2018, the parties filed their Joint Prehearing Statement in which  
23 they summarized their respective factual and legal positions, and summarized the evidence they

1 expected to be proffered during the hearing on the merits. **[Administrative File]**

2 341. On November 29, 2018, Taxpayer filed a Motion for Leave to File Motion to  
3 Enforce Department's Admission and to Deem Certain Refund Claims Allowed. **[Administrative**  
4 **File]**

5 342. On November 29, 2018, Taxpayer filed Taxpayer's Supplement to Joint Prehearing  
6 Statement. The supplement provided page numbers for its exhibits which were not initially  
7 included in the previously-submitted Joint Prehearing Statement. **[Administrative File]**

8 343. The parties appeared for a telephonic status hearing on December 5, 2018 at which  
9 time they addressed various prehearing matters, particularly in reference to the order of their  
10 presentations, and other issues including whether the caption should be amended as provided  
11 above, and the status of Motion for Leave to File Motion to Enforce Department's Admission and  
12 to Deem Certain Refund Claims Allowed. The parties also agreed that the caption should be  
13 amended and that argument concerning the referenced motion would be reserved until the morning  
14 the hearing was scheduled to commence, and after the Department had filed its response. **[Record**  
15 **of Hearing (12/5/18)]**

16 344. On December 5, 2018, the Department filed its response to Taxpayer's Motion to  
17 Enforce. **[Administrative File]**

18 345. On December 6, 2018, the Administrative Hearings Office entered an Order  
19 Amending Caption which amended the captioned as provided above. **[Administrative File]**

20 346. On December 7, 2018, the parties filed an Amended Joint Prehearing Statement.  
21 **[Administrative File]**

22 347. The parties appeared for a hearing on the merits of Taxpayer's protest on December  
23 10, 11, and 12, 2019.

1 348. On January 4, 2019, Taxpayer filed Taxpayer's Filing of Additional Witness  
2 Testimony and Exhibits. The testimony and related exhibits concerned the testimony of the  
3 following: (a) Daniel Kelly; and (b) Gene Kallenbach. **[Administrative File]**

4 349. On January 24, 2019, the parties filed a Joint Motion to Extend Briefing Deadline  
5 in which they requested that the deadline for post-hearing submissions be extended through  
6 February 12, 2019. **[Administrative File]**

7 350. On January 24, 2019, the Administrative Hearings Office entered an Order  
8 Extending Deadline for Post-Hearing Submissions which extend the previously agreed-upon  
9 deadline through February 12, 2019. **[Administrative File]**

10 351. On February 12, 2019, the parties submitted the following: (a) Taxpayer Sandia's  
11 Requested Findings of Fact and Conclusions of Law; (b) Department's Proposed Findings of Fact  
12 and Conclusions of Law; (c) Taxpayer's Closing Argument; and (d) Department Closing Brief.  
13 **[Administrative File]**

14 352. Of all the projects relevant to protest, the Department selected 65 projects for  
15 sampling and closer evaluation. **[Stipulated Fact]**

16 353. Taxpayer has paid gross receipts tax on all of the receipts reported on the original  
17 returns for all of the projects at issue in the consolidated protest for the tax periods December 2009  
18 through September 2011. **[Testimony of William Conron, Rcrd. Pt. 2, 3:20:26 to 3:21:44;**  
19 **Rcrd. Pt. 3, 10:40 to 13:52; Exs. 46.41 to 46.51, 46.85 to 46.91, 46.93 to 46.94 (see top right**  
20 **corner "Payment made by: Automated clearinghouse deposit"); Exs. 4 46.1740; 46.1751]**

## 21 **DISCUSSION**

22 The issue presented in this consolidated protest is whether Taxpayer is entitled to a refund in  
23 the amount of \$15,325,904.00 for gross receipts taxes previously remitted to the State of New Mexico

1 in the periods from December 2009 through September 2011. Although the entire amount claimed  
2 relates to receipts derived from work on more than 650 projects, the parties have agreed that the  
3 amount of any refund should be determined by ascertaining the percentage of non-taxable receipts  
4 from a sample of 65 projects, and then applying the percentage to the total number of projects at  
5 issue. Therefore, in addition to evaluating the all-encompassing legal issues arising from this protest,  
6 the Hearing Officer will also discuss, as applicable, individual projects contained in the sample.

7 As a preliminary matter, the Hearing Officer has ascribed each project a “Sample” number,  
8 simply determined by the order in which that sample project is addressed in the following discussion.  
9 For example, the first project discussed is designated Sample No. 1, while the last project discussed is  
10 designated Sample No. 65. The primary purpose of the numbers is simply to aid in accounting for  
11 every project contained in the sample, within the following discussion. A secondary benefit may be to  
12 permit the parties and a reviewing court to utilize the simplified, sequential numbering, to more  
13 efficiently locate the discussion of a particular project within the discussion that follows. To assist in  
14 that regard the reader will also recognize a series of tables that allows the reader to cross-reference a  
15 sample number to a particular project number.

16 **Burden of Proof.**

17 For the privilege of engaging in business, New Mexico imposes a gross receipts tax on the  
18 receipts of any person engaged in business. NMSA 1978, Section 7-9-4 (2002). Under NMSA  
19 1978, Section 7-9-3.5 (A) (1) (2007), the term “gross receipts” is broadly defined to mean:

20 the total amount of money or the value of other consideration received from  
21 selling property in New Mexico, from leasing or licensing property employed  
22 in New Mexico, from granting a right to use a franchise employed in New  
23 Mexico, from selling services performed outside New Mexico, the product of  
24 which is initially used in New Mexico, or from performing services in New  
25 Mexico.

26 “Engaging in business” is defined as “carrying on or causing to be carried on any activity

1 with the purpose of direct or indirect benefit.” NMSA 1978, Section 7-9-3.3 (2003). Under the  
2 Gross Receipts and Compensating Tax Act, there is a statutory presumption that all receipts of a  
3 person engaged in business are taxable. NMSA 1978, Section 7-9-5 (2002). Despite the general  
4 presumption of taxability of an entity engaged in business in New Mexico, taxpayers may avail  
5 themselves of the benefit of various deductions, as Taxpayer does in the consolidated protest.

6 Because Taxpayer’s claim for refund is premised on a deduction from gross receipts tax,  
7 specifically NMSA 1978, Section 7-9-57, “the statute must be construed strictly in favor of the  
8 taxing authority, the right to the exemption or deduction must be clearly and unambiguously,  
9 expressed in the statute, and the right must be clearly established by the taxpayer.” *Wing Pawn Shop*  
10 *v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation  
11 omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep’t*, 2003-NMSC-7, ¶9, 133 N.M. 447;  
12 *Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals  
13 reviewed a refund denial through “lens of presumption of correctness” and applied the principle that  
14 deductions underlying the claim for refund are to be construed narrowly).

15 Yet, *Wing Pawn Shop* also cautions that “[o]nce it is determined that a tax is applicable,  
16 after allowing for any statutory deduction, the statute permitting the deduction must be narrowly,  
17 yet reasonably construed. ‘A tax statute must also be given a fair, unbiased, and reasonable  
18 construction, without favor or prejudice to either the taxpayer or the State, to the end that the  
19 legislative intent is effectuated and the public interests to be subserved thereby are furthered.’”  
20 *Wing Pawn Shop*, 1991-NMCA-024, ¶16 (*quoting Chavez v. Comm’r of Revenue*, 1970-NMCA-  
21 116, ¶7, 82 N.M. 97, 476 P.2d 67).

22 The Hearing Officer perceives the primary question of law under the facts of this protest  
23 arising from the construction of Section 7-9-57. Under specific circumstances, it permits taxpayers a

1 deduction from gross receipts derived from the sale of services, stating in relevant part:

2 **7-9-57. Deduction; gross receipts tax; sale of certain services to an**  
3 **out-of-state buyer.**  
4

5 A. Receipts from performing a service may be deducted from gross  
6 receipts if the sale of the service is made to an out-of-state buyer who  
7 delivers to the seller either an appropriate nontaxable transaction  
8 certificate or other evidence acceptable to the secretary unless the  
9 buyer of the service or any of the buyer's employees or agents makes  
10 initial use of the product of the service in New Mexico or takes  
11 delivery of the product of the service in New Mexico.

12 The statute does not explicitly classify or exclude receipts based solely on the identity of a  
13 buyer, such as a governmental entity. Instead, it only requires that a buyer be out-of-state. This  
14 element is important because in this protest, all of Taxpayer's buyers, also referred to as customers,  
15 are agencies of the federal government.

16 Yet, the Department maintains that Section 7-9-57 does not apply to the facts in this  
17 protest because services sold to an agency of the federal government are always taxable, "unless  
18 contrary to federal law[.]" because "there is no statute [in New Mexico] that clearly and  
19 unambiguously sets out a deduction for the sale of services to a governmental agency."  
20 **[Department's Closing Brief, page 6]** Instead, the Department asserts that the controlling statute  
21 is NMSA 1978, Section 7-9-54, which provides a deduction for *tangible goods* sold to agencies of  
22 the federal government, but which also excludes services from its function.

23 Although the Department's construction of Section 7-9-54 requires further discussion, the  
24 analysis will begin with the longstanding precedent of the New Mexico Supreme Court in *TPL,*  
25 *Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-007, 133 N.M. 447, 64 P.3d 474. That case  
26 acknowledged, contrary to the Department's current argument, that Section 7-9-57 afforded a  
27 deduction for the sale of certain service to governmental agencies.

1 In that case, the taxpayer’s customer was the United States Army, Industrial Operations  
2 Command (“IOC”), which contracted with the taxpayer to demilitarize and dispose of weapons.  
3 The taxpayer claimed a deduction for receipts deriving from its services to that agency pursuant to  
4 Section 7-9-57, which the Department disallowed, but which the Court ultimately reversed stating  
5 “[the taxpayer] met its burden to prove that its buyer, IOC, neither made initial use nor took  
6 delivery of [the taxpayer’s] services in New Mexico.” *TPL, Inc.*, 2003-NMSC-007, ¶32.

7 The Court’s conclusion infers, having been fully briefed and well aware of the customer’s  
8 status as a federal agency and the applicable law, that it was immaterial to the taxpayer’s claim  
9 that its buyer was an agency of the federal government. Had that aspect of the case been  
10 significant to the Court, then it need not rely on the parties to enlighten it on a clear issue of law.  
11 “It is permissible, indeed required, [...] for our trial and appellate courts to take judicial notice of  
12 the law necessary for the resolution of all cases in front of the courts.” *City of Aztec v. Gurule*,  
13 2010-NMSC-006, ¶12, 147 N.M. 693, 228 P.3d 477.

14 The Department’s position in this protest suggests that the Court’s decision in *TPL* was  
15 either legally misinformed because it failed to consider the consequence of Section 7-9-54, or that  
16 it should be disregarded or discounted because the Court did not have the opportunity to consider  
17 the Department’s new argument emphasizing the consequence of Section 7-9-54. Either way, the  
18 Department’s position appears to represent a significant departure from its long-established  
19 interpretation of Section 7-9-57. As recently as 2018, the undersigned Hearing Officer found in  
20 favor of the Department in another protest, concluding that a taxpayer selling services to the  
21 United States Drug Enforcement Agency had failed to overcome the statutory presumption of  
22 correctness, that attached to an assessment, when it unsuccessfully asserted entitlement to a  
23 deduction under Section 7-9-57. *In the Matter of the Protest of Advanced Environmental*

1 *Solutions, Inc.*, D&O 18-42 (non-precedential). That Decision and Order made no reference to any  
2 argument suggesting that the Department, as of that time, had adopted a position that “there is no  
3 statute [in New Mexico] that clearly and unambiguously sets out a deduction for the sale of  
4 services to a governmental agency.” **[Department’s Closing Brief, page 6]**

5         Yet, the Department suggests that *TPL*, and even *Advanced Environmental Solutions*, may  
6 be distinguished because they did not consider the Department’s new argument: that Section 7-9-  
7 54 essentially abolished the application of Section 7-9-57 with respect to receipts derived from  
8 services sold to agencies of the federal government, and therefore, “there is no statute [in New  
9 Mexico] that clearly and unambiguously sets out a deduction for the sale of services to a  
10 governmental agency.”

11         The Hearing Officer finds no support for the Department’s suggestion that *TPL*’s  
12 importance should be minimized or disregarded. If *TPL* did not consider the Department’s present  
13 argument, it was because this protest may represent the first instance in which the Department has  
14 claimed that receipts from sales of services to agencies of the federal government are *never*  
15 deductible. Yet, *TPL* unequivocally concluded that a taxpayer deriving receipts from the sale of  
16 services to an agency of the federal government “established that it was eligible for the deduction  
17 granted under Section 7-9-57[.]” *TPL, Inc.*, 2003-NMSC-007, ¶31. *TPL* remains the law of this  
18 State, and the Hearing Officer finds no support for the Department’s claim that there is no statute  
19 permitting a deduction for the sale of services to a governmental agency, when the New Mexico  
20 Supreme Court concluded in *TPL* that Section 7-9-57 *did just that*.

21         Perhaps the Department has a view of the law now, that it did not have at the time of *TPL*.  
22 Perhaps its view of the law might evolve over time, but that does not provide the basis to disregard  
23 longstanding legal authority. For this reason, the Department’s reliance on *State v. Erickson K.*,

1 2002-NMCA-058, ¶20, 132 N.M. 258, 46 P.3d 1258, for the rule that cases may not be relied upon  
2 for propositions not considered, is misplaced. *TPL* expressly concluded that Section 7-9-57  
3 allowed a deduction for receipts deriving from services sold to agencies of the federal government,  
4 and this holding may not be circumvented merely because the Department has an opinion of the  
5 law now, that it did not have or advance 16 years ago when the Court decided *TPL*.

6 Still, “[w]hen two statutes cover the same subject matter, we attempt to harmonize and  
7 construe them together in a way that facilitates their operation and the achievement of their goals.”  
8 *See Sinclair v. Elderhostel, Inc.*, 2012-NMCA-100, ¶14, 287 P.3d 978. The relevant portions of  
9 Section 7-9-54 states as follows:

10 A. Receipts from selling tangible personal property to the United  
11 States or New Mexico or a governmental unit, subdivision, agency,  
12 department or instrumentality thereof may be deducted from gross  
13 receipts or from governmental gross receipts. Unless contrary to  
14 federal law, the deduction provided by this subsection does not  
15 apply to:

16 ...

17 (4) that portion of the receipts from performing a “service” that  
18 reflects the value of tangible personal property utilized or produced  
19 in performance of such service.

20 It is apparent that had the Legislature not excluded services, as it did in Section 7-9-54,  
21 then the consequence in combination with Section 7-9-57, might have been to provide two  
22 deductions, both potentially applicable to the same taxable event. Perhaps not unheard of, that  
23 situation could deliver inconsistent results which are undesirable in the field of tax administration.  
24 Instead, “tax administration requires predictability.” *Ramah Navajo Sch. Bd., Inc. v. N.M.*  
25 *Taxation & Revenue Dep’t*, 1999-NMCA-050, ¶41, 127 N.M. 101, 977 P.2d 1021 *quoting Okla.*  
26 *Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459-60 (1995). Predictability, in turn, enables

1 proper operation of statutes, and the accomplishment of their goals. *Sinclair*, 2012-NMCA-100,  
2 ¶14.

3 This purpose is clearly evident within the Legislature’s choice of words, particularly in  
4 reference to Section 7-9-54. Prior to enumerating the circumstances in which Section 7-9-54  
5 should not apply, it stated in clear and unambiguous terms, “the deduction provided by *this*  
6 subsection does not apply to[.]” It then proceeds to establish various exclusions. The  
7 Legislature’s choice of words indicates a clear expression of intent that the exclusions contained in  
8 Section 7-9-54 were intended only to limit the availability of that section. There is no  
9 manifestation of intent to disallow all deductions for receipts deriving from services sold to  
10 agencies of the federal government. Otherwise, the Legislature would not have limited its scope  
11 with the use of a single determiner, “this.”

12 Therefore, Section 7-9-54 does not provide the basis for disqualifying Taxpayer from other  
13 potentially-applicable deductions, particularly that provided by Section 7-9-57, and especially in  
14 light of precedent to the contrary. *TPL, Inc.*, 2003-NMSC-007.

15 This conclusion is wholly consistent with the Department’s historic comprehension of the  
16 law. In its most recent revision to Regulation 3.2.212.9 NMAC in 2001, nearly 18 years ago, it  
17 explained that “[r]eceipts from the sale of a service to a governmental agency are not deductible  
18 pursuant to Section 7-9-54 NMSA 1978.” (Emphasis added). This regulation demonstrates the  
19 Department’s interpretation of the law consistent with the enactment itself, that the exclusion  
20 contained in Section 7-9-54 only applied to the application of Section 7-9-54. There was no  
21 indication that the Department interpreted the statute as enacting a wider or broader general  
22 prohibition on the deductibility of all receipts derived from services sold to agencies of the federal

1 government. Instead, the Department simply echoed the language that was already contained in  
2 the statute, limiting the availability of that single deduction.

3 This construction of Section 7-9-54 and Section 7-9-57 is also consistent with the  
4 Department's own publications. For example, *FYI-270 (Information on Research and*  
5 *Development)* (Rev. 3/14) makes no exceptions for services sold to an agency of the federal  
6 government, whether or not such services are designated as research and development. At page 3,  
7 *FYI-270* states:

8 **SALES TO OUT-OF-STATE BUYERS**

9 Receipts from performing a *service* (including R & D services)  
10 inside New Mexico are deductible from gross receipts if: 1) the sale  
11 is made to an out-of-state buyer; 2) the buyer makes initial use of the  
12 product of the service outside New Mexico and 3) the buyer takes  
13 delivery of the product of the service outside New Mexico (Section  
14 7-9-57 NMSA 1978). All three conditions must be met.

15 *FYI-270* never suggests the possibility that the deduction under Section 7-9-57 might be  
16 curtailed by Section 7-9-54, which "is presumed to be a proper implementation of the provisions  
17 of the laws that are charged to the [D]epartment[.]" NMSA 1978, Section 9-11.6.2 (G).

18 However, there is more to consider. Nearly six years after *TPL*, in Revenue Ruling No.  
19 405-09-2 (September 9, 2009), the Department concluded that "receipts from performing program  
20 management, administrative services and facility support may be deductible under Section 7-9-57  
21 if the product of these services is delivered to and initially used by the Air Force outside New  
22 Mexico." It is noteworthy to observe that the agency at issue in the ruling was the Air Force, an  
23 entity having a significant presence in New Mexico, but the full relevance of this fact will be  
24 addressed later. In the meantime, there was no indication in the ruling that the Department  
25 perceived Section 7-9-54 as abrogating Section 7-9-57 with respect to receipts derived from the  
26 sale of services to agencies of the federal government, which is the position now taken.

1           Although issued approximately six years after *TPL*, Revenue Ruling No. 405-09-2 was not  
2 considerably different from the position the Department took as long ago as 1993, nearly ten full  
3 years preceding *TPL*. Ruling No. 405-93-5 (December 20, 1993) similarly concluded that the  
4 same deduction, Section 7-9-57, was allowable for receipts deriving from the sale of services to an  
5 agency of the federal government, even if that agency had a local New Mexico presence, so long  
6 as the product of the services was delivered and initially used outside of New Mexico. Once again,  
7 there was no suggestion that the deduction under Section 7-9-57 was truncated by Section 7-9-54.

8           At this point, it is important to note that if the Legislature had any genuine disagreement  
9 with the outcome in *TPL*, or the Department's implementation of the law, as seen in its  
10 regulations, publications, or rulings, more than 16 years have elapsed since *TPL* without any  
11 legislative enactment addressing the consequence of its holding, or the Department's subsequent  
12 implementation of the law.

13           Section 7-9-57 is most definitely applicable in this protest. Finding otherwise would  
14 require that a new path be forged, which the Department has not taken, and which the Legislature  
15 has not authorized, since *TPL* concluded that a contractor to the federal government *was eligible*  
16 for the deduction which the Department now disputes. Section 7-9-57 clearly controls the dispute  
17 subject of this protest. Accordingly, that is where the balance of the analysis should reside. There  
18 is simply no precedent cited by the Department, or otherwise known to the Hearing Officer, which  
19 would support finding, under the facts of this protest, that Section 7-9-57 is nullified or limited by  
20 Section 7-9-54.

21 **Taxability of Custom Software.**

22           There is no dispute that a significant number of Taxpayer projects involved some amount  
23 of custom software engineering, whether to facilitate the detection of nuclear detonations under

1 Project No. 135518, or to simulate natural and manmade disasters in aid of preparation practices  
2 under Project No. 131119. These specifically-referenced projects represent merely two projects  
3 from the sample of 65, and there is no dispute among the parties that engineering of custom  
4 software is correctly designated as a service. *See e.g.* Regulation 3.2.1 NMAC.

5 With respect to those projects which involved elements of custom software development,  
6 the Department's position was that "[t]he Department also adopted Regulation 3.2.212.24 (A)  
7 NMAC that provides that the receipts from development of custom software for governmental  
8 entities are not deductible because the development of custom software is a *service*."

9 **[Department's Closing Argument, page 7 (Emphasis in Original)]** Therefore, the Department  
10 argues that because Section 7-9-54 prohibits a deduction for services sold to agencies of the  
11 federal government, and because "there is no statute [in New Mexico] that clearly and  
12 unambiguously sets out a deduction for the sale of services to a governmental agency."  
13 **[Department's Closing Brief, page 6]**, receipts derived from Taxpayer's development of custom  
14 software are never deductible.

15 However, a closer reading of the referenced regulation illustrates that it is merely  
16 classifying custom software as a service for the purpose of Section 7-9-54, thereby permitting a  
17 reader to differentiate between a software package sold as tangible personal property and custom  
18 software engineered as a service. Regulation 3.2.212.24 (A) NMAC clearly provides that  
19 "[b]ecause it is a service, receipts from developing or selling custom software for governmental  
20 entities *are not deductible under Section 7-9-54[.]*" (Emphasis Added). Yet, nothing in the  
21 regulation prohibits deductibility as provided by other relevant deductions, including Section 7-9-  
22 57, which is also pertinent to services.

1 The Department relies on *Gonzales v. Allstate Ins. Co.*, 1996-NMSC-041, ¶ 23, 122 N.M.  
2 137, 921 P.2d 944 for the general rule that the statutory interpretations of the agency charged with  
3 administration of the statute are persuasive and will be given deference by the courts. The  
4 interpretation of the Department in this instance is clearly limited to the application of Section 7-9-  
5 54, and places no restriction on the application of Section 7-9-57.

6 Meanwhile, Section 7-9-57 does not differentiate between types of services. It concentrates  
7 instead on the place where the product of the service is delivered and initially used for its intended  
8 purpose.

9 **Application of Section 7-9-57 – TPL Does Not Impose Additional Evidentiary Requirements**  
10 **or Elements.**

11 The Department argues that if Section 7-9-57 applies to the facts of this protest, then it still  
12 affords no entitlement to the refund Taxpayer seeks. Because the Hearing Officer finds that  
13 Section 7-9-57 controls, the Hearing Officer will consider the Department’s alternative arguments  
14 in opposition to the refund sought.

15 Now, in reliance on *TPL*, the Department explains that from the perspective of the  
16 Legislature, “[t]he competitive posture of businesses providing services in New Mexico *was more*  
17 *important than any other single criteria* in determining whether to impose a gross receipts tax.”

18 **[Department’s Closing Brief, page 14 (Emphasis in Original)]**. Therefore, the Department  
19 argues that a significant component of establishing entitlement to a deduction under Section 7-9-  
20 57 requires Taxpayer to demonstrate that the gross receipts tax impaired its ability to compete with  
21 out-of-state business rivals who were not subject to an equivalent tax. However, neither the  
22 Legislature nor the Department, by regulation, has ever expressed such requirement. Contrary to  
23 the Department’s assertion, the Taxpayer was not required to prove, as a condition of eligibility, that  
24 “[Taxpayer] was ever competitively disadvantaged because [New Mexico] imposed a gross receipts

1 tax on [receipts deriving from] the sale of its services.” **[Department’s Closing Brief, Page 15]**

2           Instead, Section 7-9-57 requires that an out-of-state buyer “deliver to the seller either an  
3 appropriate nontaxable transaction certificate or other evidence acceptable to the secretary unless the  
4 buyer of the service or any of the buyer’s employees or agents makes initial use of the product of the  
5 service in New Mexico or takes delivery of the product of the service in New Mexico.” As discussed  
6 in the previous section, on no occasion since *TPL* has the Department expressed a divergent view, nor  
7 has the Legislature enacted any measure to effectively overrule it.

8 **Application of Section 7-9-57 – Characterizing the Products of Taxpayer’s Services.**

9           Second, the Department disputes Taxpayer’s characterizations of the products of its  
10 services. It argues that Taxpayer “fails to recognize the significance of the services performed and  
11 benefits derived” by choosing to concentrate on the delivery of a tangible product, such as a  
12 report. **[Department’s Closing Brief, page 18]** It suggests that the products of its services are far  
13 more extensive than what can be contained in any tangible object, and proposes that the actual  
14 product of Taxpayer’s services could be something akin to the pursuit of “global peace” because  
15 much of its work tends to have broad national, and even global benefits. **[Department’s Closing**  
16 **Brief, page 18]**

17           As illustrated in cases such as *TPL* and even the more recent, yet non-precedential  
18 *Advanced Environmental Solutions*, the manner in which a product of a service is characterized  
19 can be significant because that could determine or define how, or where, a product of a service is  
20 delivered or initially used for its intended purpose. Accordingly, the Department’s position in  
21 reference to this specific issue might be reduced to the following: if the product of a service  
22 having some potential national or global benefit is sold to an agency of the federal government,  
23 which might then use the product in a manner that benefits New Mexico, then the product may be

1 deemed to be delivered or initially utilized in New Mexico. The Hearing Officer is unpersuaded by  
2 this notion.

3 The Department places substantial, yet misdirected, reliance on *Advanced Environmental*  
4 *Solutions*, but the facts of that protest are fundamentally incongruous with the facts in the current  
5 protest. *Advanced Environmental Solutions* involved facts in which a taxpayer was engaged in the  
6 business of removing and arranging for the destruction of hazardous materials from clandestine  
7 drug laboratories located in New Mexico. Among other arguments, the taxpayer asserted that  
8 because the hazardous materials collected from sites in New Mexico were eventually delivered  
9 out-of-state for final destruction, its receipts should be deductible under Section 7-9-57. The  
10 undersigned Hearing Officer did not agree and observed that although destruction of hazardous  
11 materials represented the final component of the service provided, that single element did not  
12 represent the product of the service, which was to remove hazardous materials from locations in  
13 New Mexico. *Advanced Environmental Solutions* went on to evaluate the product of the taxpayer's  
14 services and how it was delivered in New Mexico, and why that was the determinative issue  
15 instead of the final destination of the material for destruction.

16 In the present matter, portraying the product of Taxpayer's services as broadly as "global  
17 peace" or anything in furtherance of such a broad, and perhaps subjective concept is illogical, and  
18 would lead to an unreasonable construction and application of Section 7-9-57. In fact, Section 7-9-  
19 57 would be rendered virtually meaningless for any New Mexico business that regards the product  
20 of its services as having any sort of global benefit, because that class of product could theoretically  
21 be initially used and delivered anywhere that might potentially realize some benefit, including  
22 New Mexico, as the Department suggests in this protest.

23 However, the deficiency in the Department's argument may best be illustrated by referring

1 to the plain language of the relevant statute and its accompanying definitions. It states that  
2 “[r]eceipts from performing a service may be deducted from gross receipts if the sale of the service is  
3 made to an out-of-state buyer who delivers to the seller either an appropriate nontaxable transaction  
4 certificate or other evidence acceptable to the secretary unless the buyer of the service or any of the  
5 buyer's employees or agents makes *initial use* of the product of the service in New Mexico or takes  
6 delivery of the product of the service in New Mexico.” Section 7-9-57 (Emphasis Added). The terms  
7 “initial use” and “initially used” mean “the first employment for the *intended purpose*[.]” NMSA  
8 1978, Section 7-9-3 (D) (Emphasis Added). Although the product of any service may eventually  
9 lead to a broader benefit, it is clear when reviewing thousands of pages of project details in the  
10 evidentiary record of this protest, that the first employment for the intended purpose of each  
11 project was far more specific, even if it might eventually confer a broader global benefit.

12 Referring to Project No. 128331 for illustrative purposes, it would be reasonable to  
13 presume that New Mexico has an interest in the success of the national space program, and  
14 particularly with regard for the safe return of men and women engaged in space flight, recalling  
15 the tragedy of Space Shuttle Columbia. However, the specific product of the service under Project  
16 No. 128331 was to engineer and manufacture a system that would enable NASA to inspect a  
17 shuttlecraft’s heatshield while in orbit, and to provide technical support and consultation. This  
18 represented the intended purpose of the project, even if other benefits flowed from its success,  
19 such as a local sense of satisfaction or pride in the successful completion of a shuttle flight.

20 The same may be observed for Project Nos. 102904 and 139627 which required Taxpayer  
21 to develop a methodology and corresponding software to assist in the restoration of airport  
22 operations following a chemical attack. Although any one of New Mexico’s airports might benefit  
23 from the product of Taxpayer’s services, the intended purpose was far more specific and focused.

1 The Department of Homeland Security in Washington, D.C. acquired the results of Taxpayer’s  
2 research and engineering which it then utilized to enhance its ability to respond to a possible  
3 chemical attack in an airport. That represented the first employment for the intended purpose of  
4 Taxpayer’s services, and yet again, the possibility that the product of Taxpayer’s services might be  
5 used in New Mexico, or that it is available for use in New Mexico, does not also mean that the  
6 product was delivered or initially used in New Mexico such that Taxpayer should be disqualified  
7 from claiming a deduction under Section 7-9-57.

8 **Application of Section 7-9-57 – Buyers with an In-State Presence.**

9 As momentarily touched upon in a previous section, the Department also disputes that  
10 various agencies of the federal government can be “out-of-state buyers” under Section 7-9-57.  
11 Yet, the Department has already adopted the opposing view that an agency of the federal  
12 government, even one having a substantial in-state presence, such as the United States Air Force<sup>4</sup>,  
13 can be regarded as an out-of-state buyer under Section 7-9-57. Ruling No. 405-09-2 (September 9,  
14 2009); Ruling No. 405-93-5 (December 20, 1993).

15 But, the referenced revenue rulings do not represent the only inconsistencies in the  
16 Department’s position. Its regulations seem to clearly contemplate scenarios in which out-of-state  
17 buyers maintain, or even deploy employees or agents to New Mexico to oversee the performance  
18 of services. Although all of the examples provided by Regulation 3.2.215.12 (B) NMAC are  
19 directly on point, the following example seems to most succinctly address the issue at hand:

20 **3.2.215.12 GENERAL EXAMPLES:** For transactions occurring on  
21 or after July 1, 1989, the following statements illustrate  
22 circumstances which:

23 ...

---

<sup>4</sup> The Hearing Officer takes administrative notice of the following United States Air Force bases in New Mexico: 1) Cannon Air Force Base; 2) Holloman Air Force Base; 3) Kirtland Air Force Base.

1 B. do not contravene the conditions set forth in Section 7-9-57  
2 NMSA 1978, thereby allowing the deduction for the receipts from  
3 the transaction:

4 ...

5 (4) the purchaser maintains a place of business in New Mexico  
6 and is performing work in this state related to the subject matter of  
7 the contract but the product of the service is delivered to the  
8 purchaser outside of this state and the purchaser initially uses the  
9 product of the service outside of this state.

10 [12/29/89, 11/26/90, 3/15/95, 3.2.215.12 NMAC - Rn, 3 NMAC  
11 2.57.12 & A, 10/31/2000]

12 Therefore, the fact that an agency of the federal government may have a presence in New  
13 Mexico does not prohibit Taxpayer's eligibility for a deduction under Section 7-9-57 so long as  
14 the product of the service is delivered to the purchaser outside of this state and the purchaser  
15 initially uses the product of the service outside of this state.

16 For these reasons, Taxpayer is not disqualified, for any of the previously discussed  
17 reasons, from claiming a deduction under Section 7-9-57. Ultimately, however, whether or not any  
18 particular project will qualify for a deduction will depend on the facts underlying that specific  
19 project.

20 **Sufficiency and Reliability of Taxpayer's Records.**

21 The Hearing Officer was persuaded that Taxpayer maintained records and documents  
22 sufficient to permit the accurate computation of state taxes in compliance with NMSA 1978,  
23 Section 7-1-10, which requires every taxpayer to "maintain books of account or other records in a  
24 manner that will permit the accurate computation of state taxes[.]"

25 Taxpayer introduced thousands of pages of accounting records, including data from its  
26 accounting system, work papers for original and amended returns from its tax reporting module,  
27 thousands of pages of supporting gross receipts tax reports, source documents, and project

1 proposals for the relevant periods. The Hearing Officer found that the records are sufficient to  
2 permit computation of tax due, or in this protest, the amount of any refund. Moreover, Taxpayer  
3 established that it calculated its gross receipts tax for both the original and amended CRS-1 returns  
4 underlying its refund claims in compliance with Department Directive 93-1 [Exh. 46.877 to  
5 46.882] and Ruling 403-93-5 [Exh. 46.908 to 46.912]. The amounts in the CRS-1 returns were  
6 calculated from audited financial information that derived from Taxpayer's accounting reporting  
7 system.

8 The Department's claim that Taxpayer was not able to reconcile its original CRS-1 returns  
9 to its amended returns is not entirely accurate. Taxpayer provided the Department with  
10 reconciliations of the original returns to the amended returns with its refund claim application, but  
11 the Department evidently requested a reconciliation containing more detail than it had previously  
12 required from Taxpayer, and which was not required at the time it submitted its original CRS-1  
13 return workpapers. Mr. Conron credibly testified that Taxpayer's GRT Module retrieves  
14 information from its Oracle accounting system, which maintains all accounting data used to  
15 prepare CRS-1 returns, but the system would not accommodate per-project, per-month data for its  
16 amended returns that corresponded precisely with the data as it was compiled in its original  
17 returns. By the time the Department requested this information, three to four years after the refund  
18 claims had been filed, the parameters used to compile information from the system to create the  
19 New Mexico gross receipts tax reports had changed. Mr. Conron credibly testified that the change  
20 in parameters did not modify the underlying accounting data, but only affected the manner in  
21 which the data could be compiled.

22 The Hearing Officer was persuaded based on the evidence presented, that the underlying  
23 accounting data remained static, and its accuracy was reliable. The Department, through Ms.

1 Shannon's testimony did not dispute that the final refinement of Taxpayer's CRS-1 returns was  
2 correct, and as Taxpayer points out, the Department even relied on the adequacy of Taxpayer's  
3 records to independently calculate Taxpayer's liability.

4 The Hearing Officer was persuaded that the Taxpayer presented records in a manner that  
5 would permit the accurate computation of state taxes pursuant to Section 7-1-10. The fact that  
6 those records may not have been in the format preferred by the Department did not necessarily  
7 render them inadequate or unreliable. In fact, they were sufficient to resolve nearly two-fifths of  
8 the projects in dispute, representing more than \$5,000,000 in previously disputed gross receipts.

9 The Department also asserted that Taxpayer "took liberties with the projects financials  
10 destroying the validity of the sample." The Hearing Officer does not agree. Taxpayer's witnesses,  
11 whether addressing individual projects or Taxpayer's general accounting practices were  
12 exceptionally detailed and credible. To the extent any questions arose regarding the sufficiency or  
13 accuracy of Taxpayer's records, its witnesses effectively addressed those questions to the  
14 satisfaction of the Hearing Officer. This issue will be addressed further with respect to the specific  
15 project central to the Department's concern.

16 Finally, the Hearing Officer was persuaded with respect to each project that Taxpayer  
17 satisfied that component of Section 7-9-57 which allowed it to provide "other evidence acceptable  
18 to the secretary" in lieu of non-taxable transaction certificates. Regulation 3.2.215.10 NMAC  
19 defines "other evidence acceptable to the secretary" to include "invoices, contracts, photostatic  
20 copies of checks and letters which show that the sale is to an out-of-state buyer and which indicate  
21 that the initial use of the product of the service did not occur in New Mexico." Regulation  
22 3.2.215.10 (A) NMAC; *See e.g.* Regulation 3.2.215.10 (C) (1) (b) ("agent certifies in writing that  
23 all of [writer's] work is published or otherwise initially used outside New Mexico[.]")

1 With respect to each project in dispute, Taxpayer presented reliable, trustworthy, and  
2 credible evidence, of the sort clearly coming within the Department's definition of "other evidence  
3 acceptable to the secretary." In each instance, that evidence credibly established that the products  
4 of Taxpayer's services were delivered to and first used by the customers outside New Mexico.

5 Even with concern for Taxpayer's most sensitive and highly classified projects, the DOE  
6 went a step further and provided a sworn affidavit from its Associate Deputy Director, Keith E.  
7 Harlow, that the products of Taxpayer's services were delivered to and first used by the customer  
8 *outside New Mexico*.

9 **Undisputed Projects Among the Sample of 65.**

10 Of the 65 projects contained in the sample, the parties are in agreement with regard for 24.  
11 Of those 24 projects not in dispute, 19 have been determined to be non-taxable, and Taxpayer  
12 withdrew its claims to the remainder which it agreed were taxable and non-deductible. The  
13 projects which parties agreed are non-taxable are as follows:

Sample No.	Project No.	Amount	Citation
1	97744	\$54,426.45	Department's Closing Brief, Page 76
2	124793	\$139,225.42	Department's Closing Brief, Page 76
3	126319	\$163,815.00	Department's Closing Brief, Page 76
4	127114	\$49,725.43	Department's Closing Brief, Page 76
5	128373	\$54,721.88	Department's Closing Brief, Page 76
6	130120	\$292,236.43	Department's Closing Brief, Page 76
7	134131	\$84,809.43	Department's Closing Brief, Page 76
8	136745	\$39,285.63	Department's Closing Brief, Page 76
9	138162	\$345,261.49	Department's Closing Brief, Page 76
10	138300	\$116,602.83	Department's Closing Brief, Page 76
11	139858	\$2,826,994.43	Department's Closing Brief, Page 76
12	139997	\$54,559.13	Department's Closing Brief, Page 77
13	140884	\$20,225.75	Department's Closing Brief, Page 77
14	141269	\$16,038.65	Department's Closing Brief, Page 77 <sup>5</sup>

<sup>5</sup> The Department's Closing Brief takes inconsistent positions with regard for the deductibility of Project 141269. On Page 47, it argues that no deduction should be permitted. However, it later concedes deductibility of the same project on Page 77.

15	141431	\$41,402.82	Department's Closing Brief, Page 77
16	141975	\$372,485.20	Department's Closing Brief, Page 77
17	143724	\$65,988.99	Department's Closing Brief, Page 77
18	149432	\$132,577.26	Department's Closing Brief, Page 77
19	150669	\$46,783.55	Department's Closing Brief, Page 77

1 The parties also agreed that the following projects are fully taxable and not deductible:

Sample No. No.	Project No.	Amount	Citation
20	131152	\$9,022.88	Taxpayer's Closing Argument, Page 77, FN 34
21	133680	\$222,958.60	Taxpayer's Closing Argument, Page 77, FN 34
22	137736	\$552,473.66	Taxpayer's Closing Argument, Page 77, FN 34
23	138475	\$6,980.60	Taxpayer's Closing Argument, Page 77, FN 34
24	141874	\$125,701.03	Taxpayer's Closing Argument, Page 77, FN 34

2 In addition to the foregoing, there were also two additional projects among the sample of  
3 65 which Taxpayer asserted were no longer in dispute, but which the Department did not include  
4 in its list of undisputed projects. With regard for the first, the Department stipulated on the record  
5 of the hearing that it would no longer dispute the deductibility of Project No. 127066. Therefore,  
6 Project No. 127066 is not in dispute.

7 Turning to the second project within this category, the treatment of Project No. 123172 is  
8 less consistent. Although the Department's Closing Brief and its Exhibit A suggest that it disputed  
9 the deductibility of this project, the pre-filed testimony of Ms. Mehta-Campbell and Ms. Janice  
10 Shannon establish their initial conclusions that a deduction should be allowed, and Ms. Shannon's  
11 testimony was that the project should be deductible.

12 Since the arguments of counsel are not evidence, the ambiguity should be resolved  
13 consistently with the evidence in the record. For that reason, Taxpayer is entitled to a deduction  
14 for Project No. 123172. Therefore, the following projects are also deductible:

Sample No.	Project No.	Amount	Citation
------------	-------------	--------	----------

<b>No.</b>			
25	123172	\$91,882.37	Taxpayer Ex. 54.3; 55.21; Rcrd. Pt. 2, 00:54:30 to 00:54:55; 01:06.30 to 01:06:45
26	127066	\$21,784.39	Rcrd. Pt. 3, 00:02:33 to 00:02:45

1 Therefore, the total amount of projects numbered 1 through 26 in this section is  
2 \$5,947,969.30 of which \$5,030,832.53 are non-taxable.

3 **Sample Projects in Dispute.**

4 Among the sample of 65 projects, the parties dispute the taxability of the remaining 39  
5 projects, which are discussed as follows. A handful of the projects were addressed by live  
6 testimony. Those which were not addressed by live testimony were addressed by written  
7 testimony, per agreement of the parties. The disputed projects are:

<b>Sample No.</b>	<b>Project No.</b>	<b>Amount</b>
27	135518	\$52,393,781.22
28	24121	\$1,957,353.06
29	102904	\$399,319.08
30	139627	\$1,462,447.92
31	137043	\$631,046.93
32	131119	\$2,874,539.63
33	143841	\$144,921.48
34	138914	\$1,631,654.14
35	139709	\$105,702.48
36	128331	\$1,281,587.78
37	120930	\$33,337.48
38	140001	\$192,216.48
39	139847	\$24,197.92
40	125912	\$32,633.45
41	126261	\$46,736.95
42	132231	\$203,955.03
43	132645	\$835,232.34
44	134415	\$793,122.40
45	135841	\$317,648.79
46	136454	\$444,748.37
47	136941	\$285,931.54
48	138750	\$210,971.60

49	139429	\$93,786.41
50	139470	\$55,926.45
51	139721	\$262,436.99
52	140580	\$580,284.72
53	141982	\$225,759.85
54	144655	\$214,122.58
55	144883	\$331,482.70
56	137337	\$287,622.23
57	123514	\$726,154.56
58	127024	\$135,785.60
59	127150	\$4,552.84
60	127777	\$4,637,043.32
61	127957	\$43,213.25
62	130380	\$747,952.05
63	137386	\$18,168.42
64	137766	\$241,306.60
65	139019	\$351,137.79

1 Projects Addressed by Live Testimony (Sample No. 27 – 36):

2 a. Project No. 135518 (Sample No. 27).

3 The receipts derived from Project No. 135518 represent the vast majority of disputed  
4 receipts in the sample of 65, totaling \$52,393,781.22. Taxpayer’s customer for Project No. 135518  
5 was the SMC situated in Los Angeles, California, which is a division of the USAF-SC.

6 The USAF-SC is located in Colorado. Although the United States Air Force has a  
7 considerable presence in New Mexico, Taxpayer did not interact with local Air Force personnel at  
8 any time regarding this project. Even if it had, the Department has previously recognized with  
9 specific regard for the Air Force that a taxpayer was not disqualified from a deduction under  
10 Section 7-9-57 so long as the product of the service was delivered and initially used outside New  
11 Mexico, explaining that receipts from performing various services may be deductible under  
12 Section 7-9-57, if the product of the services is delivered to, and initially used by the Air Force  
13 outside New Mexico. *See* Ruling No. 405-09-2 (September 9, 2009).

1 On the other hand, the Department is similarly quite clear within its ruling that the opposite  
2 is also true. If the product of the services is delivered to the Air Force in New Mexico, or used by  
3 the Air Force in New Mexico, then “initial use” of the product of the service occurs in New  
4 Mexico, and the receipts are subject to gross receipts tax. The issue under this project then turns to  
5 the location where the products of services were delivered and initially used for their intended  
6 purpose.

7 Taxpayer’s work on the project consisted of updating computer equipment and servers  
8 with integrated modeling tools and software designed to support the SMC’s ground support  
9 trailers, which are stationed in Colorado, and equipped to receive data from in-orbit, satellite-  
10 based sensors. The data is then examined for indications of above-ground nuclear explosions.

11 Taxpayer delivered computer equipment and servers with integrated modeling tools and  
12 software to the USAF-SC in Colorado, where the hardware was installed and initially used. The  
13 work also required Taxpayer to deploy personnel to the USAF-SC in Colorado to deliver initial  
14 operational capability support, and ongoing support and analysis. Delivery and initial use of all  
15 products of services occurred in Colorado. Taxpayer had no relevant interactions with local Air  
16 Force personnel, but even if it had, those contacts would not have been germane under the facts of  
17 this protest, because delivery and initial use of the product of the services occurred outside New  
18 Mexico.

19 Another component of the project required Taxpayer to manage an antenna in New Mexico  
20 that enabled it to perform in-orbit satellite testing, the results of which were delivered to the  
21 USAF-SC at Buckley Air Force Base in Colorado. Additionally, Taxpayer also operated a test-bed  
22 in New Mexico, intended to assess software upgrades and fixes for those systems maintained  
23 outside New Mexico. Results were delivered to Buckley Air Force base in Colorado, the

1 Cheyenne Mountain military base in Colorado, the U.S. Strategic Command, and the Pentagon in  
2 Virginia.

3 However, Taxpayer did not claim any deduction for receipts it determined to be generated  
4 from the test-bed and the antenna. It concluded that the test-bed and antenna services represented  
5 16 percent of its total receipts on Project No. 135518, and capped its claim to the difference of 84  
6 percent.

7 Taxpayer provided reliable, trustworthy, and credible evidence from the United States Air  
8 Force, in the form of a Certification as to Purchase and Use of Products of Services Performed, in  
9 which the Air Force certified that the products of the services were received and initially used “at  
10 locations outside New Mexico, including bases in California, Colorado, and other classified out-  
11 of-state locations.” The costs of the products of the services delivered and initially used outside  
12 New Mexico, as verified by the United States Air Force’s certification, are reflected in Exhibit  
13 47.12, which is a report that Taxpayer used to identify the percentage of non-taxable gross receipts  
14 under Section 7-9-57.

15 The Department disputes deductibility for a number of reasons, one of which is that the  
16 product of the service essentially reduced to custom software which is not deductible under  
17 Regulation 3.2.212.24 NMAC. However, that regulation, while implementing Section 7-9-54 does  
18 not expressly limit the deduction for services under Section 7-9-57. In fact, as of the most recent  
19 amendment to Regulation 3.2.212.24 NMAC in 2001, the Department limited the application of  
20 the regulation to the implementation of Section 7-9-54, which the Hearing Officer has determined  
21 in a previous discussion, does not limit or supersede Section 7-9-57.

22 The Department also argues in a single, brief paragraph, that because sensors are located  
23 on satellites, they would qualify as a satellite-related input. “If so, the operator of a national

1 laboratory, i.e., Sandia, is legislatively barred from deducting from gross receipts the sales of  
2 satellite related inputs from the United States department of defense [pursuant to the deduction  
3 provided by NMSA Section 7-9-115 (E) (3).]” **[Department’s Closing Argument, Page 32]**

4 However, the statute cited does not limit the application of Section 7-9-57 which is the statute  
5 through which Taxpayer seeks its deduction and refund. In fact, in addition to a variety of other  
6 objectives, the deduction provided by Section 7-9-115 is intended to attract new employers to New  
7 Mexico, which may represent the basis for excluding national laboratory facilities or their  
8 operators because they are already here. NMSA 1978, Section 7-9-115 (B) (2015).

9 Finally, this project represents the portion of Taxpayer’s refund claim in which the  
10 Department asserted that Taxpayer “took liberties with the projects financials destroying the  
11 validity of the sample.” **[Department’s Closing Brief, page 21]** It argues that the portion of the  
12 receipts Taxpayer does not assert to be deductible, representing 16 percent of its total gross  
13 receipts for this project, should be part of the formula in which the percentage of non-taxable  
14 receipts is computed.

15 For example, if the total sample size represents \$81,162,881.56 in gross receipts, of which  
16 \$76,265,940.74 is determined to be taxable, then the final taxable percentage is 0.94 percent. The  
17 deductible percentage would be represented by the difference, or 0.06 percent.

18 However, the Department asserts that if 16 percent of the total gross receipts deriving from  
19 this project, that the Taxpayer never claimed as part of its refund, were added into the sample total,  
20 then the result would cause the percentage of deductibility to decrease. This is observed by  
21 increasing the total sample by 16 percent to \$91,142,649.34 and the dis-allowed, non-deductible  
22 amount by the same amount to \$86,245,708.52, in which the taxable percentage increases to

1 0.946, and the deductible percentage decreases to 0.054, representing a slightly more than a ½  
2 percent difference in favor of the Department.

3 The Department conducts a similar calculation, but rather than add back 16 percent, it adds  
4 back \$16,000,000.00 which represents more than 25 percent of the total gross receipts on this  
5 project. **[Department’s Closing Brief, page 21]** Performing the same calculations with the  
6 Department’s figures, however, results in a difference in its favor of slightly under one percent.

7 Yet, Taxpayer does not claim a deduction for 16 percent of its receipts deriving from this  
8 project. Thus, if the intention of the parties is to ascertain the deductible percentage from the  
9 receipts *actually claimed* as deductible, then 16 percent representing \$9,979,767.78 is properly  
10 excluded from the computation because Taxpayer has never asserted that to be deductible, unlike  
11 other receipts which it may have asserted as deductible, but which it later conceded to be taxable,  
12 as observed in the resolution of Sample Nos. 21 – 24.

13 Pursuant to Section 7-9-57, 84 percent of Taxpayer’s receipts from performing services for  
14 Project No. 135518 are deductible because the sale of the services was made to an out-of-state  
15 buyer, the product of which was delivered and initially used by the buyer for its intended purpose  
16 outside New Mexico. Therefore, 84 percent of receipts deriving from Project No. 135518,  
17 representing the sum of \$52,393,781.22, are deductible from Taxpayer’s gross receipts. The  
18 remaining 16-percent of receipts derived from this project, which Taxpayer did not claim as  
19 deductible, should not be added into the sample.

20 b. Project No. 24121 (Sample No. 28).

21 Taxpayer’s customer for Project No. 24121 was the DOE facility at Argonne National  
22 Laboratories in Illinois. Although the DOE has an office in New Mexico, that office is not part of

1 the division of the DOE responsible for the ARM program, and Taxpayer did not interact with the  
2 local DOE office for Project No. 24121, other than perhaps for administrative purposes.

3 The project required that Taxpayer provide technical expertise and equipment as part of the  
4 ARM program located in Barrow, Alaska. Although there are ARM sites in other regions, none of  
5 them are located in New Mexico.

6 Taxpayer's work included providing support to contractors managing the ARM site in  
7 Alaska, including routine, and occasional daily maintenance of the ARM. Taxpayer was also  
8 available for technical expertise and troubleshooting, and regularly dispatched employees to  
9 Alaska to calibrate instruments, replace parts, or perform other tasks essential to assure the proper  
10 operation of the various instruments, and reliability of the data they collected.

11 The Department argued that the services performed under the project occurred primarily in  
12 New Mexico. However, as previously explained, the location where services are performed does  
13 not necessarily establish where the product of those services were delivered or initially used for  
14 their intended purposes pursuant to Section 7-9-57 (A). In this case, the Hearing Officer was  
15 persuaded that the product of the services performed were delivered and initially used outside of  
16 New Mexico.

17 The Department also argues that because an essential component of the services provided  
18 involved development of custom software systems, that Taxpayer's receipts are not deductible  
19 under Regulation 3.2.212.24 (A) NMAC or Section 7-9-54. The Hearing Officer has previously  
20 rejected these arguments in reference to other projects, and sees no facts under this project which  
21 should compel a different conclusion. Neither Regulation 3.2.212.24 (A) NMAC nor Section 7-9-  
22 54 restrict the availability of Section 7-9-57. *See also* Ruling No. 405-09-2 (September 9, 2009).

1 Therefore, receipts derived from performing services for Project No. 24121 may be  
2 deducted from Taxpayer's gross receipts because the sale of services was made to an out-of-state  
3 buyer, the product of which was delivered and initially used outside of New Mexico.

4 Taxpayer presented sufficient evidence to support the deduction, and its receipts from  
5 Project No. 24121 which total \$1,957,353.06 are deductible from its gross receipts.

6 c. Projects Nos. 102904 (Sample No. 29) and 139627 (Sample No. 30).

7 Taxpayer's customer for Project Nos. 102904 and 139627 was the DHS in or near  
8 Washington, D.C. Project Nos. 102904 and 139627 required that Taxpayer develop a system and  
9 corresponding software to aid in the restoration of airport operations following a chemical attack.  
10 Taxpayer performed all work from its location in New Mexico, but delivered the system and  
11 software to DHS in Washington, D.C., in the form of electronic media files, an audiovisual  
12 demonstration on DVD, and software on CDs and DVDs. All materials were shipped by common  
13 carrier.

14 The Department's principal arguments in reference to these projects were that they  
15 consisted primarily of custom software development, an argument that has already been addressed  
16 and rejected. The Department also argues that because any one of New Mexico's airports might  
17 benefit from the product of Taxpayer's services, "the product of the service was initially used at  
18 the time the software was written and that occurred in New Mexico." [**Department's Closing**  
19 **Brief, Page 27**] The Department's perception of delivery and initial use is misplaced because the  
20 product of the service could not be used for its intended purpose until it was delivered to its buyer,  
21 which in this case was the DHS in Washington, D.C. Delivery and initial use did not occur in New  
22 Mexico, even if New Mexico is a potential beneficiary of the product of Taxpayer's service, in the  
23 unfortunate occurrence of a chemical attack.

1 Pursuant to Section 7-9-57 (A), Taxpayer's receipts from performing services for Project  
2 Nos. 102904 and 139627 may be deducted from its gross receipts because the sale of the services  
3 were made to an out-of-state buyer, the DHS in Washington, D.C., the product of which was  
4 delivered to and initially used by the buyer outside of New Mexico. Taxpayer presented sufficient  
5 evidence to support the deduction, and therefore, its receipts from Project No. 102904, in the  
6 amount of \$399,319.08, and receipts from Project No. 139627, in the amount of \$1,462,447.92,  
7 are deductible from Taxpayer's gross receipts.

8 d. Project No. 137043 (Sample No. 31).

9 Taxpayer's customer for Project No. 137043 was the DTRA of the Department of Defense.  
10 DTRA is located outside of New Mexico, in or near Washington, D.C. While DTRA has a  
11 presence at Kirtland Air Force Base in New Mexico, that was not Taxpayer's point of contact on  
12 the project. *See also* Ruling No. 405-09-2 (September 9, 2009).

13 Project No. 137043 required Taxpayer to conduct research, generate reports, and engineer  
14 software to assist in developing recovery processes and decontamination options in the event of a  
15 biological weapon attack. The products of Taxpayer's services for Project No. 137043 were  
16 software and reports, delivered to DTRA outside of New Mexico, in or near Washington, D.C., in  
17 the form of electronic files installed on CDs and DVDs. The software and reports that were  
18 delivered to DTRA were all initially used by DTRA outside of New Mexico.

19 The arguments the Department advances with respect to this project are similar, if not  
20 identical to the previous project, and are rejected for the same reasons.

21 Taxpayer's receipts from performing services for Project No. 137043 may be deducted  
22 from Taxpayer's gross receipts because the sale of the services were made to an out-of-state buyer,  
23 the product of which was also delivered to and initially used outside of New Mexico. Taxpayer

1 presented sufficient evidence to support the deduction pursuant to Section 7-9-57 (A), and  
2 therefore, Taxpayer's receipts from Project No. 137043 during the periods at issue, which total  
3 \$631,046.93, are deductible from its gross receipts.

4 e. Project Nos. 131119 (Sample No. 32) and 143841 (Sample No. 33).

5 Taxpayer's customer for Project No. 131119 was DHS, and its customer for Project No.  
6 143841 was the United States Army ("Army"). Taxpayer did not have any local interactions with  
7 Army or DHS staff in New Mexico with respect for its work on Project Nos. 131119 and 143841.

8 Project No. 131119 required Taxpayer to engineer software for modeling and simulating  
9 various manmade and natural disasters, intended to aid FEMA in preparing its response. The  
10 majority of Taxpayer's services for Project No. 131119 were performed at Taxpayer's facility in  
11 California where it developed presentations, briefings, publications and reports. The products of  
12 its services were then delivered to DHS outside of New Mexico, in or near Washington, D.C.  
13 None of the presentations, briefings, publications and reports were used by DHS in New Mexico.

14 Project No. 143841 required Taxpayer to develop an agent-based modeling software  
15 toolset to evaluate indicators of social activity and engagement in overseas military campaigns.  
16 Taxpayer developed the software toolset at its locations in New Mexico and California, and then  
17 delivered the software toolset to the Army at the Naval Post Graduate School in Monterey,  
18 California. The Army did not use the software toolset in New Mexico.

19 The arguments the Department advances with respect to these projects are similar, if not  
20 once again identical to arguments made with respect to previous projects, which are rejected for  
21 the same reasons. However, it is worth emphasizing with respect to Project 131119 that the  
22 product of Taxpayer's services was delivered and initially used outside of New Mexico. The  
23 assertion that Taxpayer could not prove how much of the work occurred in New Mexico was not

1 pertinent, because the material issue concerns the location where the product of the service is  
2 delivered and initially used. With regard for Project No. 131119, delivery and initial use clearly  
3 occurred outside of New Mexico.

4 Therefore, pursuant to Section 7-9-57 (A), Taxpayer's receipts from performing services  
5 for Project Nos. 131119 and 143841 may be deducted from Taxpayer's gross receipts because the  
6 sale of the services were made to an out-of-state buyer, DHS in or near Washington, D.C., the  
7 product of which was delivered and initially used by the buyer outside of New Mexico.

8 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
9 receipts from Project No. 131119, which total \$2,874,539.63, and Taxpayer's receipts from  
10 Project No. 143841, which total \$144,921.48, are deductible from Taxpayer's gross receipts.

11 f. Projects Nos. 138914 (Sample No. 34) and 139709 (Sample No. 35).

12 Taxpayer's customer for Project Nos. 138914 and 139709 was the JMC, located at the  
13 Defense Munitions Center in McAlester, Oklahoma. JMC did not have any presence in New  
14 Mexico related to Project Nos. 138914 and 139709.

15 Pursuant to the requirements of Project Nos. 138914 and 139709, Taxpayer assisted in  
16 designing systems that included equipment, hardware, and software for disposing of outdated  
17 cluster ammunitions, including small mines and grenades. Taxpayer developed the systems in  
18 New Mexico, and then delivered and installed the equipment, hardware, and software at the  
19 customer's facilities in Oklahoma and Nevada. The equipment, hardware, and software were not,  
20 and could not be used by Taxpayer in New Mexico, because it does not have facilities capable of  
21 handling the disposal of live explosives.

22 JMC provided Certification as to Purchase and Use of Products of Services Performed to  
23 Taxpayer in which the JMC certified, pursuant to the contracts for Project Nos. 138914 and

1 139709, that the products of the services were delivered to the Army “at locations outside the state  
2 of New Mexico” and that “the deliverables were used at [JMC–Demil Capabilities Division]  
3 facilities to demilitarize munitions in both McAlester, Oklahoma and Hawthorne, Nevada[.]”

4 The arguments the Department advances with respect to these projects are similar, if not  
5 identical to the arguments made regarding previous projects, particularly in regard to custom  
6 software, which is rejected for the previously discussed reasons. Similar to the previous project,  
7 the Department also asserts that the majority of services were performed in New Mexico. Once  
8 again, this argument is not well-taken because the critical issue with respect to this project is the  
9 location where the product of the services was delivered and initially used, which in this case was  
10 outside of New Mexico.

11 Pursuant to Section 7-9-57 (A), Taxpayer’s receipts from performing services for Project  
12 Nos. 138914 and 139709 may be deducted from Taxpayer’s gross receipts because the sale of the  
13 services were made to an out-of-state buyer, JMC in McAlester, Oklahoma, the product of which  
14 was also delivered and initially used by the buyer, outside New Mexico.

15 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer’s  
16 receipts from Project No. 138914, which total \$1,631,654.14, and Taxpayer’s receipts from  
17 Project No. 139709, which total \$105,702.48, are deductible from its gross receipts.

18 g. Project No. 128331 (Sample No. 36).

19 Taxpayer’s customer for Project No. 128331 was NASA. Project No. 128331 required  
20 Taxpayer to develop software upgrades for a laser radar system installed on NASA’s space  
21 shuttles, which allowed it to detect and evaluate damage, or other irregularities in a shuttle’s  
22 thermal protection system, while in orbit.

1 Taxpayer delivered software to NASA at its ground station in Houston, Texas where the  
2 software was installed in NASA's computer systems. Therefore, the product of the services  
3 performed by Taxpayer for Project No. 128331 was delivered and initially used outside the state of  
4 New Mexico.

5 None of the deliverables provided to NASA under Project No. 128331 were delivered or  
6 initially used in New Mexico. Although NASA operates a facility in New Mexico at the NASA  
7 White Sands Test Facility, including a back-up landing strip, Taxpayer did not interact with  
8 NASA in New Mexico or use NASA's New Mexico facilities for the performance of its work for  
9 Project No. 128331. *See* Ruling No. 405-09-2 (September 9, 2009)

10 Taxpayer also sent personnel to NASA's Mission Control in Houston, Texas and to the  
11 Kennedy Space Center in Florida, where they provided expert analysis and interpretation of data  
12 generated by the sensors. Approximately 80 percent of Taxpayer's work for Project No. 128331  
13 was done in Houston, and approximately 10 percent of the work was done in Florida, but the  
14 products of all services were delivered out of state.

15 In similar fashion with regard to other disputed projects thus far discussed, the Department  
16 asserts the project consisted primarily of a custom software package. However, the Hearing  
17 Officer has already concluded that receipts from engineering custom software are not disqualified  
18 from the deduction provided by Section 7-9-57. To the extent the Department also asserts that the  
19 majority of services were performed in New Mexico, this argument is not well-taken. The  
20 products of the services were delivered and initially used outside of New Mexico, particularly  
21 Texas and Florida.

22 Therefore, pursuant to Section 7-9-57 (A), Taxpayer's receipts from performing services  
23 may be deducted from Taxpayer's gross receipts because the sale of the services were made to an

1 out-of-state buyer, NASA, the product of which was delivered and initially used by the buyer  
2 outside of New Mexico.

3 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
4 receipts from Project No. 128331 during the periods at issue, which total \$1,281,587.78, are  
5 deductible from its gross receipts.

6 h. Project Nos. 120930 (Sample No. 37), 140001 (Sample No. 38), and 139847  
7 (Sample No. 39).

8 Taxpayer provided reliable, trustworthy, and credible evidence establishing the facts  
9 underlying the performance of Project Nos. 120930, 140001, and 139847. That evidence included  
10 copies of relevant statements of work and associated records for each project, demonstrating that  
11 Taxpayer's customers for Project Nos. 120930, 140001, and 139847 were located outside of New  
12 Mexico, that the products of the services performed for such projects was delivered to the  
13 customer outside of New Mexico, and that such products were initially used by the customer  
14 outside of New Mexico.

15 Taxpayer's customer for Project No. 120930 was the DHS. The primary goal of Project  
16 No. 120930 required that Taxpayer assist in evaluating and identifying sites for a next-generation  
17 biological and agricultural defense facility, intended to replace the existing facility at Plum Island,  
18 New York. More specifically, "[Taxpayer was to] provide a high-level analysis with rankings of  
19 the threats and the physical security features that are unique to each site. The consequences and  
20 mitigation techniques will only be presented in a high-level discussion format." [Exs. 45.69 –  
21 45.70] The product of Taxpayer's services was delivered and initially used by its customer outside  
22 of New Mexico.

23 Taxpayer's customer for Project No. 140001 was the Office of New Reactors in or near  
24 Washington, D.C. The primary goal of Project No. 140001 required that Taxpayer provide

1 technical expertise, program management, and administrative support “related to activities aimed  
2 at ensuring the overall safety and adequacy of nuclear power plant design, construction, and  
3 operations.” [Exs 45.108] The product of Taxpayer’s services was delivered and initially used by  
4 its customer outside of New Mexico.

5 Taxpayer’s customer for Project No. 139847 was the Air Force Research Lab at Eglin Air  
6 Force Base in Florida. The primary goal of Project No. 139847 required that Taxpayer research  
7 thin-pulse initiation phenomena for the Air Force Research Laboratory (“AFRL”). [Ex. 45.322]  
8 The product of its services included the development of a test matrix of input parameters,  
9 procuring test units, conducting tests, and analysis of data. The product of Taxpayer’s services was  
10 delivered and initially used by its customer outside of New Mexico.

11 In reference to each project, Taxpayer established that its receipts from performing  
12 services may be deducted from its gross receipts because the sale of the services were made to an  
13 out-of-state buyer, the product of which was delivered and initially used by the buyer outside of  
14 New Mexico. Therefore, Taxpayer’s receipts during the periods at issue from Project No. 120930,  
15 which total, \$33,337.48, Project No. 140001, which total, \$192,216.48, and Project No. 139847,  
16 which total, \$24,197.92, are deductible from its gross receipts.

17 Although the Department asserted that the witness Taxpayer proffered to address these  
18 projects was not a subject matter expert, the Hearing Officer nevertheless found his testimony  
19 competent, trustworthy, reliable, and credible to establish where the products of services were  
20 delivered and initially used.

21 Projects Addressed by Written Testimony via Stipulation of the Parties.

- 22 i. Project No. 125912 (Sample No. 40) (Pre-Filed Testimony).

1 Project No. 125912 concerned Rooftop Critical Experiments which required Taxpayer to  
2 evaluate the value of a radio frequency tag to the search and rescue of U.S. military personnel  
3 through experiments and subsequent papers and reports. Taxpayer's customer for Project No.  
4 125912 was the U.S. Army Materiel Command, which at that time had a site at Ft. Monmouth,  
5 New Jersey, which also served as the location to which all of the products were delivered and  
6 initially used. The product of Taxpayer's service was neither delivered nor initially used in New  
7 Mexico. Although, as the Department asserts, services were performed in New Mexico, the critical  
8 issue remains where the product of the services was delivered and initially used for its intended  
9 purpose. The evidence established that to be outside of New Mexico.

10 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
11 receipts from Project No. 125912, which total \$32,633.45, are deductible from Taxpayer's gross  
12 receipts.

13 j. Project No. 126261 (Sample No. 41) (Pre-Filed Testimony).

14 Project No. 126261 required Taxpayer to define requirements and develop multiple  
15 versions of the Miniaturized RF Tags for the U.S. Army. Taxpayer's deliverables consisted of a:  
16 (i) a final report; and (ii) five printed wiring assemblies. Those items were delivered to the U.S.  
17 Army at Fort Monmouth, New Jersey, where their first intended use by the Army occurred. The  
18 product of Taxpayer's service was neither delivered nor initially used in New Mexico.

19 The Department's opposition to Taxpayer's claim rests on arguments that the project  
20 involved custom software, and that the product of the services was delivered or initially used in  
21 New Mexico, in similar fashion to arguments made in opposition to other previously discussed  
22 projects. As previously addressed, the Hearing Officer finds the Department's arguments to be  
23 unpersuasive.

1 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
2 receipts from Project No. 126261, which total \$46,736.95, are deductible from Taxpayer's gross  
3 receipts.

4 k. Project No. 132231 (Sample No. 42) (Pre-Filed Testimony).

5 Project No. 132231 required Taxpayer to define threat scenarios, identify requirements for  
6 future detection systems from end users, develop a decision response model, gather and synthesize  
7 input from subject-matter experts, generate requirements for detection of next-generation threat  
8 agents, and perform interagency reviews performing services in connection with Bioassays Next  
9 Generation. Taxpayer's customer was the DHS Office of Science and Technology. The products  
10 of the services for the project consisted of briefings for an interagency group and a final report. All  
11 products were delivered electronically or in person to the DHS in Washington, DC, or to an  
12 interagency group in Virginia, where they were initially used for their intended purpose. Neither  
13 delivery nor initial use of the product of the services occurred in New Mexico.

14 The Department's primary argument in opposition to the project's deductibility is that  
15 Section 7-9-54 nullifies the application of Section 7-9-57, an argument that the Hearing Officer  
16 has already rejected.

17 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
18 receipts from Project No. 132231, which total \$203,955.03, are deductible from Taxpayer's gross  
19 receipts.

20 l. Project No. 132645 (Sample No. 43) (Pre-Filed Testimony).

21 Project No. 132645 concerned DET Threat Engineering for the MDA within the U.S.  
22 Department of Defense, located in Virginia. The project required Taxpayer to conduct research  
23 and report its findings to the MDA through electronic slide presentations delivered by email.

1 Taxpayer also provided a CAD (computer aided design) model to the customer via email. The  
2 products of Taxpayer's research were delivered to the MDA in Washington, DC and to the  
3 National Air and Space Intelligence Agency in Dayton, Ohio where employees of those agencies  
4 made initial use of Taxpayer's products for their intended purpose. Neither delivery nor initial use  
5 of the product of the services occurred in New Mexico.

6 The Department's primary arguments in opposition to the project's deductibility are that  
7 Section 7-9-54 nullifies the application of Section 7-9-57, and prohibits as a universal rule, the  
8 deductibility of custom software. The Hearing Officer has previously discussed and rejected these  
9 arguments.

10 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
11 receipts from Project No. 132645, which total \$835,323.34, are deductible from Taxpayer's gross  
12 receipts.

13 m. Project No. 134415 (Sample No. 44) (Pre-Filed Testimony).

14 Project No. 134415 concerned work on the re-design of a HASP, the component  
15 responsible for sensing the trajectory on a thermonuclear warhead re-entry vehicle. Taxpayer's  
16 customers for this project were the NNSA and the U.S. Air Force. As part of this effort, Taxpayer  
17 created prototypes of the HASP in New Mexico, but the final products were: (i) a report; (ii)  
18 drawings; and (iii) schematic diagrams for the design of the HASP. These various items were sent  
19 to the Honeywell Federal Manufacturing & Technology facility in Kansas City, Missouri, where  
20 they were used to produce the HASPs. The manufactured HASPs were then sent to the Pantex  
21 facility in Amarillo, Texas. The first intended use of the deliverables (the design reports,  
22 schematics and drawings) occurred in Missouri. Neither delivery nor initial use of the product of  
23 the services occurred in New Mexico.

1 The Department asserts that “[t]he direct result or consequence from the services occurred  
2 in New Mexico when the work was performed and which work made all America and Americans  
3 safer.” [Department’s Closing Brief, Page 75] However, the Hearing Officer has previously  
4 discussed and rejected such an overly broad construction of Section 7-9-57, instead of the first  
5 employment for the intended purpose.

6 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer’s  
7 receipts from Project No. 134415, which total \$793,122.40, are deductible from Taxpayer’s gross  
8 receipts.

9 n. Project No. 135841 (Sample No. 45) (Pre-Filed Testimony).

10 Project No. 135841 concerned research and development work to model and validate the  
11 genesis of traumatic brain injury in order to understand the mechanisms of blast-induced traumatic  
12 brain injury and improving helmet design. Taxpayer’s customer for this project was the Office of  
13 Naval Research for the U.S. Navy. The final product consisted of a white-paper report that was  
14 provided to the Office of Naval Research Force Protection in Arlington, Virginia. The first  
15 intended use of the report occurred at that location. Neither delivery nor initial use of the product  
16 of the services occurred in New Mexico.

17 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer’s  
18 receipts from Project No. 135841, which total \$317,648.79, are deductible from Taxpayer’s gross  
19 receipts.

20 o. Project No. 136454 (Sample No. 46) (Pre-Filed Testimony).

21 Project No. 136454 involved research concerning Influence Operations. Taxpayer’s  
22 customer for this project was the U.S. Air Force at Wright-Patterson AFB in Ohio. The  
23 deliverables for the project were monthly updates, quarterly reviews, regular briefings, an

1 assessment document, and computational models. These deliverables were delivered to the U.S.  
2 Air Force in Ohio, where they were initially used by the Air Force for their intended purpose.  
3 Neither delivery nor initial use of the product of the services occurred in New Mexico.

4 The Department asserts once again that a major component of the project involved the  
5 engineering of custom software, which it asserts is never deductible. Having previously  
6 considered that argument, the Hearing Officer remains unpersuaded by the Department's argument  
7 with regard to this project. Moreover, the Department asserts that Taxpayer never offered a  
8 "subject matter expert" to discuss the project. Despite the subsequent assertion that the record in  
9 reference to this project is insufficient, the Hearing Officer finds that the evidence was sufficient  
10 to make an ruling regarding its deductibility under Section 7-9-57.

11 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
12 receipts from Project No. 136454, which total \$444,748.37, are deductible from Taxpayer's gross  
13 receipts.

14 p. Project No. 136941 (Sample No. 47) (Pre-Filed Testimony).

15 Project No. 136941 concerned "Modernization of MACCS 2," or in other words, to  
16 modernize software used by the NRC to evaluate effects of severe accidents involving the release  
17 of radioactive material into the environment. The products of the service consisted of MACCS 2  
18 software documentation and associated reports. These products were written to compact discs and  
19 delivered by mail to the NRC in Washington, DC and Bethesda, Maryland where NRC staff  
20 employed them for their intended purposes. The products of Taxpayer's services were neither  
21 delivered nor initially used for their intended purpose in New Mexico.

1 The Department asserts that a primary component of the project involved the engineering  
2 of custom software, which it asserts is never deductible. The Hearing Officer once again rejects  
3 that argument for the reasons previously discussed.

4 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
5 receipts from Project No. 136941, which total \$285,931.54, are deductible from Taxpayer's gross  
6 receipts.

7 q. Project No. 138750 (Sample No. 48) (Pre-Filed Testimony).

8 Project No. 138750 concerned Systems Engineering and Analysis Support for the MDA, in  
9 Huntsville, Alabama. All of the work occurred in Huntsville, Alabama. None of the work occurred  
10 in New Mexico. In fact, Taxpayer dispatched an employee to the MDA, in Huntsville, Alabama,  
11 where he lived and worked on the project.

12 The product of the service for the project included: (i) status reports, as requested by the  
13 customer; and (ii) semi-annual program reviews. Taxpayer also provided updates and reports to  
14 the MDA, in connection with the project, all of which were provided to the MDA in Huntsville  
15 Alabama, where they were used.

16 None of the services provided occurred in New Mexico, nor were any of the products of  
17 these services used or delivered in New Mexico.

18 The Department does not seem to dispute that Taxpayer performed all services pertinent to  
19 this project in Alabama. It concedes that "[t]he Missile Defense Agency sent [Taxpayer] funds for  
20 work performed out-of-state. The work did not return to New Mexico." **[Department's Closing**  
21 **Brief, pages 53 – 54]** Yet, it argues that "[u]nder [Section] 7-9-94 (B), [Taxpayer] is not entitled  
22 to a deduction for transformation acquisition programs."

1           However, Section 7-9-94 did not represent the basis for denying Taxpayer's claim in  
2 reference to this project. Instead, Ms. Mehta Campbell explained at page 5 of her written  
3 testimony, filed May 22, 2017:

4                   138750—This was disallowed. The contract was for missile defense  
5 network engineering with a contractor in Huntsville, Alabama.  
6 Research and development was performed in New Mexico, and  
7 there was no evidence of a deliverable made elsewhere or trips out  
8 of state that would suggest an apportionment was in order.

9           Despite the foregoing conclusion, the evidence clearly established that all services were  
10 performed in Alabama. The Department does not contest that fact, but asserts application of  
11 Section 7-9-94 as an alternative basis for denying the deduction, which was not actually  
12 considered at the time Ms. Mehta Campbell evaluated Taxpayer's claim. Even if Section 7-9-94  
13 was previously relied upon for the denial of Taxpayer's claim, with respect to this project, the  
14 Department's argument fails to persuade. Receipts from services performed outside New Mexico  
15 are not taxable as gross receipts under Section 7-9-3.5 (A), except in specific circumstances which  
16 the evidence fails to support.

17           Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
18 receipts from Project No. 138750, which total \$210,971.60, are deductible, or in the alternative,  
19 excluded from Taxpayer's gross receipts.

20           r.       Project No. 139429 (Sample No. 49) (Pre-Filed testimony).

21           Project No. 139429 involves Directed Assembly of High Performance Thermal Interfaces.  
22 Taxpayer's customer for this project was Lockheed Martin Corporation. Some of Taxpayer's work  
23 on this project took place in Albuquerque and involved research and development to assist  
24 Lockheed Martin to better understand the structural and thermal properties of carbon nanotube-

1 based composite materials, primarily through performing scanning electron microscopy and  
2 transmission electron microscopy on samples provided by Lockheed Martin.

3 The product of the research and development services performed under Project No. 139429  
4 were written reports comprised of emails to Lockheed Martin, delivered to Lockheed Martin in  
5 Bethesda, Maryland where it made initial use of the product of the services for its intended  
6 purpose. None of the products were delivered in New Mexico, and no initial use of the product of  
7 the services occurred in New Mexico.

8 The Department asserts that Taxpayer may have qualified for a partial deduction for the  
9 receipts derived from the services to Lockheed Martin, but that it failed to provide adequate  
10 records. The Hearing Officer is persuaded however, that Taxpayer met its burden based on the  
11 evidence presented.

12 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
13 receipts from Project No. 139429, which total \$93,786.41, are deductible from Taxpayer's gross  
14 receipts.

15 s. Project No. 139470 (Sample No. 50) (Pre-Filed Testimony).

16 Project No. 139470 required that Taxpayer provide technical expertise to assist in the  
17 evaluation of the effectiveness of proposed and existing missile defense elements. Under the terms  
18 of Taxpayer's agreement with the MDA, Taxpayer agreed to provide technical analysis consisting  
19 of engineering design, modeling, simulation, and analysis to the customer in Washington, DC. The  
20 product of the service for Project No. 139470 consisted of technical analysis involving  
21 engineering design, modeling, simulation, and analysis. All of the products and services were  
22 delivered to the MDA in the Washington, DC area, where initial use occurred. Neither delivery  
23 nor initial use of the product of the services occurred in New Mexico.

1           The Department asserted, at page 75 of Department’s Closing Brief, that Taxpayer waived  
2 its claim to Project No. 139470, but fails to show how, when, or where it did so. In contrast, this  
3 project appears to remain in contention according to Taxpayer’s Closing Argument at pages 24 –  
4 25.

5           The Hearing Officer finds that Taxpayer presented sufficient evidence to support the  
6 deduction, and therefore, Taxpayer’s receipts from Project No. 139470, which total \$55,926.45,  
7 are deductible from Taxpayer’s gross receipts.

8           t.       Project No. 139721 (Sample No. 51) (Pre-Filed Testimony).

9           Project No. 139721 concerned “Feasibility of Electronically Tagging and Tracking of  
10 Portable Radiation Sources.” This involved technical advice to the DNDO concerning the  
11 detection and reporting of illicitly transported radiological materials by evaluating and analyzing  
12 the current technical, economic and operational feasibility of electronically tagging and tracking  
13 portable radiation sources. The product of the service for Project No. 139721 was a written report  
14 that was delivered to the DNDO in Washington, DC. The staff of the DNDO used the report in  
15 Washington, DC. Neither delivery nor initial use of the product of Taxpayer’s services occurred in  
16 New Mexico.

17           Once again, the Department argues that the product of the service was delivered or initially  
18 used in New Mexico because the project was intended to protect United States from radiological  
19 and nuclear terrorist attacks. As previously discussed, the Hearing Officer rejects the Department’s  
20 overly broad construction of Section 7-9-57 and *TPL*, and finds that its reliance on *Advanced*  
21 *Environmental Solutions* is misplaced.

1 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
2 receipts from Project No. 139721, which total \$262,436.99, are deductible from Taxpayer's gross  
3 receipts.

4 u. Project No. 140580 (Sample No. 52) (Pre-Filed Testimony).

5 Project No. 140580 concerned "Casimir Force Engineering with Metamaterials." The  
6 customer for Project No. 140580 was DARPA, an agency of the U.S. Department of Defense. The  
7 purpose of Project No. 140580 was to design, characterize and fabricate innovative metallic and  
8 dielectric based metamaterials.

9 The product of the service was two written reports delivered to DARPA's offices in  
10 Arlington, Virginia. The staff of the DARPA first used the reports at that location. Neither  
11 delivery nor initial use occurred in New Mexico.

12 The Department asserts that a central component of the work consisted on engineering  
13 custom software which it asserts is not deductible. As previously explained, the Hearing Officer is  
14 unpersuaded under the facts of this project in similar regard for all of the other projects in which  
15 the Department has asserted a similar basis for denying Taxpayer's refund.

16 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
17 receipts from Project No. 140580, which total \$535,284.72, are deductible from Taxpayer's gross  
18 receipts.

19 v. Project No. 141982 (Sample No. 53) (Pre-Filed Testimony).

20 Project No. 141982 concerned Insensitive Munitions Materials Shock Characterization for  
21 the U.S. Air Force Research Laboratory at Eglin AFB in Florida. Taxpayer's work consisted of  
22 experimentation, modeling and analysis at its location in Albuquerque and as-needed technical  
23 consultation. The purpose of this work was to determine the shock response of several energetic

1 and inert materials and to support integration of the results into hydrocode models for simulating  
2 insensitive munitions threats. The product of the service consisted of data and calculations  
3 presented on a spreadsheet that delivered to Taxpayer's customer at out-of-state locations,  
4 including California and Florida. The initial use of the data and calculations produced by Taxpayer  
5 under Project No. 141982 occurred at those out-of-state locations. Neither delivery nor initial use  
6 of the product of the services occurred in New Mexico.

7 The Department once again asserts that custom software engineering is not deductible, and  
8 the Hearing Officer rejects that assertion for previously stated reasons. Interestingly, the  
9 Department also conceded that the product of Taxpayer's service was delivered to out-of-state, in  
10 Florida, and that initial use of the product was not in New Mexico. **[Department's Closing Brief,**  
11 **page 60]** However, it argues that because the work was performed in New Mexico, and because  
12 the customer had a presence in the state, no deduction should be permitted. This argument fails to  
13 persuade in light of Section 7-9-3.5 and the Department's previous rulings, specifically Ruling No.  
14 405-09-2 (September 9, 2009) in which it determined that sales of services to agencies of the federal  
15 government are not disallowable because the agency has an in-state presence. The determinative  
16 factor is the location where the product of the service is delivered and initially used for its intended  
17 purpose.

18 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
19 receipts from Project No. 141982, which total \$225,759.85, are deductible from Taxpayer's gross  
20 receipts.

21 w. Project No. 144655 (Sample No. 54) (Pre-Filed Testimony).

22 Project No. 144655 concerned Multiplexed Measurements of Protein Dynamics and  
23 Interactions at Extreme Resolution on behalf of the NIH, in Bethesda, Maryland, in which

1 Taxpayer agreed to provide novel imaging methods to measure protein complex formation and  
2 protein networks. This involved the design of new hardware and a report that summarized the  
3 hardware design; and a list of journal publications and patents that resulted from the project. The  
4 deliverables were delivered to the NIH, in Maryland and initially used for their intended purpose  
5 at that location by employees of the NIH. Neither delivery nor initial use of the product of  
6 Taxpayer's services occurred in New Mexico.

7 The Department asserts that a central component of the project consisted of taxable  
8 custom-software engineering. For reasons previously stated, the Hearing Officer does not agree  
9 with the Department's view that the custom software is always taxable, at least under the  
10 circumstances of this protest. The Department also apparently asserts that the project should be  
11 taxable because Taxpayer retained a license for use of a patented instrument. However, the  
12 Hearing Officer finds this fact to be irrelevant since Section 7-9-57 is concerned largely with the  
13 location to which the product of services are delivered and the location of their initial use, not the  
14 taxpayer's subsequent right or privilege to the use of the equipment assisting with performing the  
15 service or generating a product.

16 The final basis for disallowing a deduction for this project is best summarized by Ms.  
17 Mehta Campbell who stated with regard for Project No. 144655, "[t]his was disallowed. This was  
18 a research grant from NIH to do fundamental scientific research. There is an annual report. There  
19 is a requirement for publication to a scientific journal, but this does not constitute an out-of-state  
20 deliverable." Yet, the Hearing Officer is persuaded that the product of Taxpayer's service was  
21 delivered and initially used out of state. *See e.g.* Regulation 3.2.215.10 (C) NMAC.

1 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
2 receipts from Project No. 144655, which total \$214,122.58, are deductible from Taxpayer's gross  
3 receipts.

4 x. Project No. 144883 (Sample No. 55) (Pre-Filed Testimony).

5 Project No. 144883 concerned Zeno Effect Switching Technology/Zeno Based Electro-  
6 Optics. In its agreement with its customer, DARPA, Taxpayer agreed to deliver fabricated  
7 microdisk chips to DARPA at Northwestern University in Illinois and Applied Physics Laboratory  
8 in Maryland where they were first used for their intended purpose. The product of Taxpayer's  
9 service was neither delivered nor initially used in New Mexico.

10 The Department suggests that a deduction may be inappropriate under Section 7-9-57  
11 because "[Taxpayer] still has the chips that were fabricated." **[Department's Closing Brief, page**  
12 **65]** If so, that does not abrogate Taxpayer's claim to a deduction under Section 7-9-57. For  
13 example, an attorney performing services in New Mexico, who delivers the product of those  
14 services to an out-of-state client where the client initially uses the product for its intended purpose,  
15 is not thereafter disqualified from a tax deduction under Section 7-9-57 because he or she acquires  
16 experience from the work performed, or because he or she may retain materials from performing  
17 those services that can be reused in the future. The same example is also pertinent to the argument  
18 made in reference to Project No. 144655 (Sample No. 54) above, as well.

19 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
20 receipts from Project No. 144883, which total \$331,482.70, are deductible from Taxpayer's gross  
21 receipts.

22 y. Project No. 137337 (Sample No. 56) (Pre-Filed Testimony).

1 Project No. 137337 concerned the Missile Defense System Engineering Program. The  
2 customer for Project No. 137337 was the MDA, Washington, DC. The work of Project No.  
3 137337 was to support the MDA with on-site technical advice regarding programmatic analyses  
4 and assessments of threats, lethality, and countermeasures as part of a missile defense system  
5 evaluation. The product of the service for Project No. 137337 consisted of on-site technical advice  
6 delivered to the MDA in Washington, DC, where initial use occurred. The product of Taxpayer's  
7 service was neither delivered nor initially used in New Mexico. The Department conceded that the  
8 services were performed by a staff member on permanent assignment in Washington, DC.

9 Taxpayer presented sufficient evidence to support the deduction, and therefore, Taxpayer's  
10 receipts from P Project No. 137337, which total \$287,622.23, are deductible from Taxpayer's  
11 gross receipts.

12 z. Classified Project Nos. 123514 (Sample No. 57), 127024 (Sample No. 58), 127150  
13 (Sample No. 59), 127777 (Sample No. 60), 127957 (Sample No. 61),  
14 130380 (Sample No. 62), 137386 (Sample No. 63), 137766 (Sample No. 64),  
15 and 139019 (Sample No. 65).

16 In addition to the foregoing projects, Taxpayer is also engaged in various other projects  
17 that are classified, meaning that Taxpayer is prohibited from revealing the details of those projects  
18 for various reasons, one of which may include national security. The classified projects at issue  
19 among the sample of 65 are Project Nos. 123514, 127024, 127150, 127777, 127957, 130380,  
20 137386, 137766, and 139019. However, the DOE provided a sworn affidavit by its Associate  
21 Deputy Director, Keith E. Harlow, stating:

22 For each of the projects ... the Customer/Sponsor purchased the  
23 services of [Taxpayer] ... prior to or during the periods December  
24 2009 through September 2011. Each Customer/Sponsor received the  
25 respective project deliverables, the product of the Services, at its  
26 respective location, and not in New Mexico. \*\*\* The product of the  
27 Services was delivered to, and initially used at, the  
28 Customer/Sponsor's location outside the State of New Mexico. The

1 product of the Services was thus delivered and initially used outside  
2 New Mexico.

3 Exhibit 45.6 – 45.8, May 25, 2017 Affidavit of Keith E. Harlow.

4 The certification is persuasive evidence that the projects addressed therein are deductible.  
5 The Hearing Officer finds the affidavit to be exceptionally credible, observing that the affiant is a  
6 non-interested witness speaking on behalf of the DOE. Regulation 3.2.215.10 NMAC.

7 Taxpayer presented sufficient evidence to support the deductions on its classified projects  
8 and therefore, Taxpayer's receipts from Project No. 123514 in the amount of \$726,154.56, Project  
9 No. 127024 in the amount of \$135,785.60, Project No. 127150 in the amount of \$4,552.87, Project  
10 No. 127777 in the amount of \$4,637,043.32, Project No. 127957 in the amount of \$43,213.25,  
11 Project No. 130380 in the amount of \$747,952.05, Project No. 137386 in the amount of  
12 \$18,168.42, Project No. 137766 in the amount of \$241,304.60, and Project No. 139019 in the  
13 amount of \$351,137.79, which total \$6,905,314.43, are deductible from Taxpayer's gross receipts.

14 With respect to all projects contained within the sample of 65, except for those designated  
15 Sample Nos. 1 – 24, which were resolved by stipulation, Taxpayer met its burden of proof under  
16 Regulation 22.600.1.18 (A) (2/1/2018) by establishing through a preponderance of the evidence  
17 that it was entitled to a deduction under Section 7-9-57.

18 The total receipts contained in the sample of 65 are \$81,162,881.56 of which  
19 \$1,030,803.53 are taxable, representing the total amounts associated with Sample Nos. 20 – 24.  
20 The difference represents non-taxable receipts in the amount of \$80,132,078.03. Based on the  
21 foregoing, the non-taxable percentage is 0.987. The taxable percentage is 0.013.

22 Consistent with the stipulation of the parties, Taxpayer's refund shall be calculated as the  
23 total refund request for all projects multiplied by the percentage of receipts determined to be non-  
24 taxable less the amount of any refund already remitted to Taxpayer. The result is \$15,320,085.05

1 (\$15,521.869.35 x 0.987 = \$15,320,085.05) less \$195,965.35, for a total refund of **\$15,124,119.13**.

2 Taxpayer shall also be entitled to interest as provided by Section 7-1-68.

3 Taxpayer shall not, however, be entitled to administrative costs pursuant to NMSA 1978,  
4 Section 7-1-29.1 (2015) because although the Hearing Officer ultimately found in favor Taxpayer,  
5 the Department's position, although determined incorrect, was based on a reasonable application  
6 of the law to the facts of the protest. Taxpayer's protest should be GRANTED.

7 **Concluding Remarks.**

8 It was evident that the parties expended a great deal of effort and resources to present their  
9 respective cases. The evidentiary record alone consists of three days of testimony, and thousands  
10 of pages of exhibits.

11 The Hearing Officer also recognizes the tremendous effort that was required to prepare this  
12 protest for hearing, consisting of hundreds, or more likely thousands of cumulative hours of labor  
13 from all those involved from the inception of the matter through its conclusion.

14 The Hearing Officer commends counsel for their zealous advocacy and diligence, all the  
15 while maintaining the uppermost level of professionalism and cordiality, especially within the  
16 contentious atmosphere of an ardently disputed tax protest.

17 **CONCLUSIONS OF LAW**

18 A. Taxpayer filed timely, written protests to the Department's denials of its claims for  
19 refund, and jurisdiction lies over the parties and the subject matter of the protests consolidated herein.

20 B. Hearings were timely set and held within 90-days of Taxpayer's protests under  
21 NMSA 1978, Section 7-1B-8 (2015).

22 C. A tax statute must be given a fair, unbiased, and reasonable construction, without  
23 favor or prejudice to either the taxpayer or the State, to the end that the legislative intent is

1 effectuated and the public interests to be subserved thereby are furthered. *Wing Pawn Shop*, 1991-  
2 NMCA-024, ¶16 (quoting *Chavez v. Comm’r of Revenue*, 1970-NMCA-15 116, ¶7, 82 N.M. 97,  
3 476 P.2d 67)

4 D. Receipts deriving from sales of services to out-of-state buyers where the initial use  
5 and delivery of the product of the services occurred out-of-state are deductible from taxable  
6 receipts pursuant to NMSA 1978, Section 7-9-57 (A).

7 E. NMSA 1978, Section 7-9-54 neither limits nor abrogates the application of NMSA  
8 1978, Section 7-9-57 with respect to sales of services to agencies of the federal government.

9 F. Sales of services to agencies of the federal government may be eligible for  
10 deduction under NMSA 1978, Section 7-9-57. *TPL, Inc. v. N.M. Taxation & Revenue Dep’t*, 2003-  
11 NMSC-007, 133 N.M. 447, 64 P.3d 474.

12 G. Sales of services to federal agencies having a presence in New Mexico may be  
13 eligible for a deduction under NMSA 1978, Section 7-9-57 provided the product of the services  
14 are delivered and initially used outside of New Mexico. Regulation 3.2.215.12 (B) NMAC; Ruling  
15 No. 405-09-2 (September 9, 8 2009); Ruling No. 405-93-5 (December 20, 1993).

16 For the foregoing reasons, Taxpayer’s protest **IS GRANTED**. Taxpayer is entitled to a  
17 refund in the amount of **\$15,124,119.13** plus interest as provided by Section 7-1-68 and  
18 Regulation 3.1.9.14 NMAC.

19 DATED: April 18, 2019

20 

21 Chris Romero  
22 Hearing Officer  
23 Administrative Hearings Office  
24 P.O. Box 6400  
25 Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this  
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the  
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this  
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the  
6 requirements of perfecting an appeal of an administrative decision with the Court of Appeals.  
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative  
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative  
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a  
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,  
11 which occurs within 14-days of the Administrative Hearings Office receipt of the docketing  
12 statement from the appealing party. *See* Rule 12-209 NMRA.

1 **CERTIFICATE OF SERVICE**

2 On April 18, 2018, by agreement of the parties as to the service method, a copy of the  
3 foregoing Decision and Order was electronically mailed as follows:

4 *Email Only* *Email Only*

5 INTENTIONALLY BLANK

6  
7 \_\_\_\_\_  
8 John D. Griego  
9 Legal Assistant  
10 Administrative Hearings Office  
11 Post Office Box 6400  
12 Santa Fe, NM 87502  
13 PH: (505)827-0466  
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## GLOSSARY OF ACRONYMS

<b>Acronym</b>	<b>Compound Term</b>
ACG	Accounting and Consulting Group
AFRL	Air Force Research Laboratory
ARM	Atmospheric Radiation Measurement
CAS	Cost Accounting Standards
DARPA	Defense Advanced Research Projects Agency
DHS	Department of Homeland Security
DNDO	Domestic Nuclear Detection Office
DOE	United States Department of Energy
DOE-IN	Office of Intelligence and Counterintelligence
DTRA	Defense Threat Reduction Agency
ERP	Oracle Enterprise Resource Planning
FEMA	Federal Emergency Management Agency
FFRDC	Federally Funded Research and Development Center
HASP	High-Accuracy Separation Package
IOC	United States Army, Industrial Operations Command
JMC	Joint Munitions Command, a division of the United States Army
MDA	Missile Defense Agency
NASA	National Aeronautics and Space Administration
NIH	National Institutes of Health
NMGRT	New Mexico Gross Receipts Tax
NNSA	National Nuclear Security Agency
NRC	Nuclear Regulatory Commission
NRO	Office of New Reactors
NTTC	Non-Taxable Transaction Certificate
OMB A-123	Office of Management and Budget Circular A-123
SCIC	Statements of Costs Incurred and Claimed
SMC	Space Missile Center
SNL	Sandia National Laboratories
SPP	Strategic Partnership Projects
TCBR	Test Bed Control Room
USAF-SC	United States Air Force Space Command
WFO	Work for Others