New Mexico
TAXATION AND REVENUE DEPARTMENT
P.O. Box 630 • Santa Fe, New Mexico 87509-0630

AGREEMENT

This Agreement, executed on behalf of the parties hereto on the dates of their respective signatures set forth below, evidences their agreement upon the subjects, terms, and conditions and for the duration specified below:

ARTICLE I

THE PARTIES TO THE AGREEMENT

A. The parties to this agreement are:

(1) The Taxation and Revenue Department of the State of New Mexico (hereinafter referred to as the "Department") whose address is Post Office Box 630, Santa Fe, New Mexico 87509-0630; and

(2) United States Department of Health and Human Services (hereinafter referred to individually as "Contracting Agency").

ARTICLE II

THE PURPOSES OF AND AUTHORITIES FOR THE AGREEMENT

The purposes of this Agreement are to facilitate the expeditious and economical accomplishment of the lawful objectives of the United States, to facilitate the equitable administration and enforcement of the revenue laws of the State of New Mexico, and to prevent any further litigation between the parties, and between the Department and persons who claim to be contractors to and/or agents and instrumentalities of the United States. The authorities for this Agreement are found in federal and state law and regulations.

ARTICLE III

THE SUBJECT MATTER OF THE AGREEMENT

The parties agree that the liability for state and local gross receipts taxes and compensating taxes imposed pursuant to the Gross Receipts and Compensating Tax Act of the State of New Mexico, Chapter 7, Article 9 NMSA 1978, of persons, firms, and corporations who in fact and in law are prime contractors to the Contracting Agency and their subcontractors of the types and characters described within Article IV of this Agreement shall be determined in accordance with the provisions hereof and with other applicable provisions of Federal law and regulations and the revenue laws of the State of New Mexico and applicable regulations of the Department. The duties, obligations, rights, and privileges of said contractors to the Contracting Agency shall also be determined in accordance herewith and with said other applicable provisions of law.

ARTICLE IV

THE SCOPE OF THE AGREEMENT

A. The provisions of this Agreement shall bind the parties hereto from and after the effective date hereof set forth below and shall prevail until this Agreement is terminated by the will of one of the parties hereto, and it may be applied at and upon a date earlier than the effective date set forth below if and only to the extent and degree, if any, provided herein. This Agreement shall also become applicable to any prime contractor of the Contracting Agency or its subcontractors (hereinafter referred to individually as a "qualified contractor") which meets each of the three following conditions throughout the entire period of its contract (hereinafter referred to as a "qualified contract") from the date of execution of said qualified contract to its completion or its termination:

(1) that the contractor's or subcontractor's compensation for its purchases of tangible personal property or for performance of its contract is made exclusively upon a cost basis or cost reimbursement basis, with or without an added fee; and

(2) the contract or subcontract contains provisions by virtue of which the contractor or subcontractor is directed or authorized to purchase or otherwise acquire tangible personal property pursuant to which title to all property purchased by the contractor or subcontractor, for the cost of which the contractor or subcontractor is entitled to be reimbursed as a direct item of cost under its contract, shall pass directly to and vest in the United States upon delivery of the property by the vendor; and

(3) the subject of the contract or subcontract for the accomplishment of which the contractor or subcontractor is responsible to the Contracting Agency is a service rendered in whole or in part within the State of New Mexico, as the term "service" is presently defined within Section 3(K) of the Gross Receipts and Compensating Tax Act of the State of New Mexico, Section 7-9-3(K) NMSA 1978.

B. The parties hereto further agree that no part of this Agreement shall have any application to, or effect, or consequence upon any liability to the state of New Mexico for gross receipts and compensating taxes on the part of the contractor's non-Federal business or of any contractor to the Contracting Agency, which liability may have accrued or may be claimed or asserted to have accrued under a qualified contract prior to the effective date of this Agreement.

ARTICLE V

THE EFFECTIVE DATE OF THE AGREEMENT

A. This Agreement shall become effective between the parties upon the date of signature of this Agreement set forth below at the place provided for the signatures of the parties. It shall continue in effect unless and until it is terminated by will of one of the parties as provided hereafter.

B. The nontaxable transaction certificates issued under this Agreement shall be applicable from and after January 1, 1986 to each qualified contractor with respect to any qualified contract awarded to said contractor prior to the effective date of this Agreement. The Contracting Agency shall amend or cause to be amended any said qualified contract or otherwise require the qualified contractor to comply with the provisions of this Agreement. This Agreement shall remain applicable to each qualified contractor until the earliest occurrence of any of the following contingencies;

(a) the termination of this Agreement by the will of the Department or the Contracting Agency for its qualified contracts, or

(b) the qualified contractor ceases during the term of its qualified contract to meet each of the criteria set forth within the provision of Article IV of this Agreement.

ARTICLE VI

TERMINATION

A. This Agreement may be terminated at the will of either of the parties hereto, by the delivery of written notice of one party's election to terminate the Agreement to the other party. The termination of this Agreement shall be effective upon the date set forth within said written notice, which date each party agrees shall be upon the last day of a calendar month and shall not be earlier than sixty days after the date of delivery of any said notice.

B. The Contracting Agency may terminate its rights and obligations under this Agreement in accordance with paragraph A above without terminating this Agreement for the other Executive Agencies. The Department shall retain its rights to terminate this Agreement.

ARTICLE VII

THE PRINCIPLES OF THE AGREEMENT

A. The receipts of a vendor derived from selling tangible personal property, other than nonfissionable metalliferous mineral ore, in New Mexico to a qualified contractor, which contractor furnishes the nontaxable transaction certificate described in the ensuing Article of this Agreement to the vendor may be deducted from said vendor's gross receipts otherwise subject to taxation pursuant to the Gross Receipts and Compensating Tax Act of the State of New Mexico. If a vendor does not possess such a nontaxable transaction certificate, no deduction will be allowed.

B. The receipts of a vendor, including but not limited to contractors to the Contracting Agency of any character, derived from the rendition of service to the United States in New Mexico are subject to taxation pursuant to the Gross Receipts and Compensating Tax Act of the State of New Mexico.

C. The receipts of a qualified contractor derived from the performance within New Mexico of its qualified contract or any part or portion thereof are subject to taxation pursuant to the Gross Receipts and Compensating Tax Act of the State of New Mexico.

D. A qualified contractor may deduct from its gross receipts paid by the Contracting Agency for the performance of its qualified contract or a part or portion thereof in New Mexico and otherwise subject to New Mexico gross receipts taxes, an amount equal to the amount reimbursed to it by the Contracting Agency for the purchase to of tangible personal property in New Mexico pursuant its qualified contract, the possession and custody of which property, as well as the title thereto, is transferred by the vendor thereof directly to the United States and not to the qualified contractor in New Mexico, and the property is not used by the qualified contractor.

ARTICLE VIII

UNDERTAKINGS OF THE PARTIES TO EFFECTUATE THE AGREEMENT

A. The Contracting Agency will:

(1) Upon or before the award of any qualified contract of the character set forth within Article IV of this Agreement, advise the qualified contractor that it will be responsible for registration with the periodic reports to the Department pursuant to the Tax Administration Act of the State of New Mexico, and will be liable for the payment of New Mexico gross receipts taxes upon any portion of the contract fee and costs to be paid on account of the performance of the contract or of any part or portion thereof within New Mexico. The qualified contract will also contain provisions to the effect that:

(a) any gross receipts taxes or local option taxes lawfully paid to the State of New Mexico by the qualified contractor may be an allowable cost, in accordance with the applicable cost principles, to the qualified contractor by the Contracting Agency;

(b) the qualified contractor will be obligated to accept and use the New Mexico nontaxable transaction certificates referred to below in the performance of its contract or any part or portion thereof in New Mexico, strictly in accordance with its qualified contract, this Agreement, and the instructions of the Department;

(c) the qualified contractor will be obligated to the State of New Mexico for the payment of New Mexico compensating tax upon the cost or value of any tangible personal property which is purchased pursuant to a nontaxable transaction certificate issued under this Agreement by the Department to the qualified contractor only if such property is not used for Federal purposes;

(d) out-of-state purchase of tangible personal property by qualified contractors which would be otherwise subject to compensating tax shall be governed by the principles of this Agreement. Accordingly, compensating tax shall be due from a qualified contractor only if such property is not used for Federal purposes;

(e) the Contracting Agency may receive information regarding its qualified contractors from the Department and, at the discretion of the Contracting Agency, may participate in any matters or proceedings pertaining to this Agreement. This shall not preclude the contractor from having its own representative nor does it obligate the Contracting Agency to represent its contractor;

(f) the qualified contractor shall advise the Department promptly whenever a qualified contract in which the qualified contractor is required or authorized to perform any part or portion thereof within New Mexico is awarded; and further advise the Department of the number or other identification of said contract, and the name and address of the qualified contractor;

(g) said qualified contract provisions shall be null and void should this Agreement be terminated provided, however, that by such termination neither party may nullify obligations already incurred prior to the date of termination.

(2) Cause each such qualified contractor to comply with the provisions of this Agreement.

(3) If it elects to amend any contract already in being on the effective date of this Agreement or otherwise to constitute its contractor as a qualified contractor thereafter, cause the contract amendment to contain similar provisions to those set forth above, obligate its qualified contractor thereafter to comply therewith, and promptly notify the Department of said amendment and of the identifying data of the amended contract and its qualified contractor.

(4) Upon demonstration of qualification and a need to know by the applicants, issue security clearances to a suitable number of auditing personnel of the Department in order that said personnel may have access to classified documents and operations of the Contracting Agency and its qualified contractors when necessary for the administration of this Agreement.

B. The Department will:

(1) Prepare an appropriate form of nontaxable transaction certificate for use by the Contracting Agency's qualified contractors; and upon receipt of applications therefore, issue appropriate taxpayer identification documents, gross receipts and compensating tax report forms, and a supply of said nontaxable transaction certificates to each qualified contractor identified by notification as provided above.

(2) Accept properly executed nontaxable transaction certificates issued to vendors by the Contracting Agency's qualified contractors as conclusive evidence that said vendors may deduct their gross receipts derived from sales of tangible personal property arranged by said qualified contractors from the vendor's gross receipts otherwise subject to gross receipts and compensating taxation by the State of New Mexico.

(3) In the administration and enforcement of the Gross Receipts and Compensating Tax Act, limit its audits of vendors to qualified contractors with respect to the business conducted between them to the verification of the authenticity of nontaxable transaction certificates furnished and the nature and volume of business conducted thereunder; and limit its audits of qualified contractors with respect to their activities pursuant to the qualified contracts to their gross receipts therefrom and their use of said nontaxable transaction certificates, their payments made thereunder and the character and use of the tangible personal property acquired by means thereof.

(4) Promptly advise the Contracting Agency of any instance of which it gains knowledge in which an otherwise qualified contractor has misused or failed to use New Mexico nontaxable transaction certificates in connection with the performance of its qualified contract, or has incurred liability for unpaid New Mexico compensating taxes on account of tangible personal property acquired by the use of a New Mexico nontaxable transaction certificate, or whose continuing privilege to use New Mexico nontaxable transaction certificates in connection with the performance of its qualified contract is to be or has been suspended by the Department.

ARTICLE IX

OTHER NEW MEXICO NONTAXABLE TRANSACTION CERTIFICATES AND EXEMPTIONS

Nothing in this Agreement is intended to or shall preclude the Contracting Agency or its qualified contractors from asserting appropriate exemptions or from using New Mexico nontaxable transaction certificates other than that described above which are or may hereafter be regularly constituted and generally authorized for use by the Department.

ARTICLE X

AGREEMENT NOT TO SUE

The parties agree that neither of them will bring any action at law of any kind regarding matters expressly addressed in or arising from this Agreement against the other in any court of the United States or of the State of New Mexico pertaining to the Gross Receipts and Compensating Tax Act of the State of New Mexico at any time during which this Agreement remains in effect and has not been terminated at the will of a party. The Contracting Agency agrees that it will not request the United States Department of Justice or any United States Attorney to bring any such action on its behalf during said period, and the Department agrees that it will not request the Attorney General of New Mexico to bring any such action on its behalf during said period. The Contracting Agency also agrees that it will not direct or authorize its qualified contractors to bring any action regarding matters expressly addressed in or arising from this Agreement in any court during said period. The Department agrees the Contracting Agency may participate in New Mexico administrative tax proceedings pertaining to a matter arising from the award and performance of one or more of the Contracting Agency's qualified contracts. Nothing in this Article shall be interpreted to prohibit either party from filing suit regarding any matter not covered by or arising from this Agreement.

ARTICLE XI

LIMITATION OF LIABILITY

Notwithstanding any provision of this Agreement, the United States shall not be held liable directly to the State of New Mexico for payment of New Mexico taxes, interest and penalties that are allegedly payable by a qualified contractor. Moreover, if the Contracting Agency or the Department should fail to meet the undertakings agreed to by the parties to this Agreement, the sole remedy of the party who may be damaged shall be to terminate this Agreement, after appropriate consultation and negotiations in good faith. In the event of such terminations no damages shall be payable by one party to the other for breach of this Agreement.

ARTICLE XII

NEW OR AMENDED LAWS

Each party shall promptly notify all other parties of the enactment of any new law, and of the amendment of any existing law or any decision by a court of competent jurisdiction, either of the United States or of the State of New Mexico which in the opinion of the notifying party may reasonably affect the validity of this Agreement, or which may affect or impair its ability to proceed to carry out and continue to perform its obligations under this Agreement.

ARTICLE XIII
PUBLICITY AND REGULATIONS

A. The Department will generally bring the existence, terms and effect of this Agreement to the attention of prospective and potential vendors to the Contracting Agency and to its qualified contractors throughout New Mexico, and issue instructions with respect to the use and consequences of the new nontaxable transaction certificates to be made available to said contractors. The Department further will in due course promulgate and publish one or more regulations as may be deemed appropriate pursuant to the Gross Receipts and Compensating Tax Act and the Tax Administration Act of the State of New Mexico as its official expression of the Agreement.

B. The Contracting Agency will inform its appropriate bureaus, offices, and personnel concerning this Agreement, and issue instructions concerning its implementation and administration.

ARTICLE XIV

CONTINUED COOPERATION BY THE PARTIES

Each party subscribes to the principles of cooperation and negotiation in the resolution of issues concerning the subject matter of this Agreement. Accordingly, each party assures the other of its desire and intention to respond accordingly to any request from the other for consultation, and to negotiate in good faith for their mutual benefit concerning any requests which either may initiate with respect to constructions, interpretations, or modifications of or supplements to this Agreement, a written memorial of any and all of which shall be made in the form of a supplement to this Agreement.

ARTICLE XV

CONTRACTUAL RELATIONSHIPS NOT ALTERED

Nothing herein shall alter the relationship between the Contracting Agency and its prime contractors and their subcontractors or the relationship of a prime contractor and its subcontractor under existing law and regulations.

WHEREFORE, this Agreement has been signed by the authorized representatives of the parties hereto.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

By: Terrence J. Tychan

Terrence J. Tychan, Dir.
Off. of Acq. & Grants Mgmt.
OS/ASMB/OMAC

DATED: APR 13 1989

TAXATION AND REVENUE DEPARTMENT OF NEW MEXICO

Secretary

DATED: 5/1/89