



STATE OF NEW MEXICO
COUNTY OF EDDY

AGREEMENT A-24-50
RFP 24-02 Emulsified Sealing Services

THIS AGREEMENT ("Agreement") is made by and between Eddy County, hereinafter referred to as the "County" and **Desert West Enterprises, LLC**, hereinafter referred to as the "Contractor", and collectively referred to as the "Parties".

WHEREAS, pursuant to the Procurement Code, NMSA 1978 13-1-28 *et. seq.* and Procurement Code Regulations, NMAC 1.4.1 *et. seq.* the Contractor has held itself out as an entity with the ability to provide the required services to implement the Scope of Work as contained herein and has represented and warranted that Contractor is professionally qualified to render the contractor services required by the County and possess any licenses and/or certificates required under state or federal law to perform the services required under this Agreement; and

WHEREAS, the County has selected the Contractor as an offeror advantageous to Eddy County; and

WHEREAS, all terms and conditions of the RFP 24-02 and the Contractor's response to such document(s) are incorporated herein by reference;

NOW, THEREFORE, County and the Contractor further agree as follows:

1. SERVICES.

- 1.1. The Services.** The Contractor shall perform those services (the "Services") described in the "Purpose" outlined in RFP 24-02, incorporated herein by reference as though fully set forth. The Contractor shall perform the Services as expeditiously as is consistent with good professional skill and care and the orderly progress of the Services. Contractor is aware and understands that "time is of the essence" in the provision of these Services.
- 1.2. Services Fee.** County will pay Contractor for services rendered at the rates set forth and as agreed to in the cost proposal provided within RFP 24-02.

- 1.3. Representative.** Contact person available for inquiries or questions for services provided.

"Contractor"

Desert West Enterprises, LLC.
Attn: Larry C. Parker
5323 W. 2nd St.
Roswell, NM 88201
Phone: 575-623-3990

"County"

Eddy County
Attn: Jason Burns
101 W. Greene St
Carlsbad, NM 88220
Phone: 575-887-9511 EXT 4001

- 1.4. Substitution.** With respect to any substitution of this representative, the Contractor must provide detailed justification documenting the necessity for the substitution. The Contractor shall forward a request to substitute staff to County for consideration and approval. No substitute personnel are authorized to begin work until the Contractor has received written approval to proceed from County.

2. LIABILITY, INDEMNIFICATION, AND INSURANCE

- 2.1. Liability.** As between the parties, each party acknowledges that it will be responsible for claims or damages arising from personal injury or damage to persons or property to the extent they result from negligence of that party's employees. Contractor understands, acknowledges and agrees that neither County nor any of its components is indemnifying Contractor or any of its employees. The liability of County will be subject in all cases to the immunities and limitations of the New Mexico Tort Claims Act, Sections 41-4-1 *et seq.* NMSA 1978.
- 2.2. Insurance.** The Contractor is required to carry insurance, meeting the requirements in the Section labeled "Insurance Requirements", or as noted in the specifications of RFP 24-02 herein, listing County as an additional insured. Contractor must submit proof of insurance in the form of a "Certificate of Insurance" with their response and prior to commencing work under the resulting contract. Contractor's insurance shall remain in effect for the entire term of the contract and must be extended to coincide with any future contract extensions.
- 2.3. Indemnification.** In addition to any and all other indemnification and remedies provided herein, Contractor agrees to indemnify, defend and hold harmless County and its officers, governing board, and employees from and

against any and all damages, liabilities, obligations, losses, deficiencies, actions, costs (including reasonable attorneys' fees and expenses), demands, suits, judgments, or assessments (hereafter "Claims") arising out of (i) Contractor's negligence in the performance of this Contract; (ii) any defect in the Services (iii) any acts or omissions of Contractor, its employees, subcontractors, or agents in connection with the performance of this Contract; or (iv) any breach of this Contract by Contractor, its employees, subcontractors, or agents. In the event of any Claim to which this indemnification applies, County will promptly notify Contractor of such Claim pursuant to the notice provisions of section 8.14; provided, however, the failure to give such notice will not relieve Contractor from its indemnification obligations. This obligation will survive termination or expiration of this Contract.

2.3.1. To the extent Section 56-7-1 NMSA applies, this indemnity will not extend to liability, claims, damages to property caused by or resulting from, in whole or in part, the negligence, act or omission of County.

3. TERM AND TERMINATION. This Agreement will be effective June 1, 2024 thru May 31, 2025. The County reserves the right to extend this contract, on an annual basis (or any portion thereof) automatically without notice, for up to three (3) additional years. Under no circumstances will the term of this contract, including any extensions thereto, exceed four (4) years. Terms governing Termination are set forth hereafter:

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

3.2. Notice; County Opportunity to Cure.

3.2.1. Except as otherwise provided in sub-paragraph 3.1 of this Clause and the Appropriations Clause of this Agreement, the County shall give Contractor written notice of termination at least thirty (30) days prior to the intended date of termination.

3.2.2 Contractor shall give County written notice of termination at least thirty (30) days prior to the intended date of termination, which notice shall (i) identify all the County's material breaches of this Agreement upon which the termination is based, and (ii) state what the County must do to cure such material breaches. Contractor's notice of termination shall only be effective (i) if the County does not cure all material breaches within the thirty (30) day

notice period or (ii) in the case of material breaches that cannot be cured within thirty (30) days, the County does not, within the thirty (30) day notice period, notify the Contractor of its intent to cure and begin with due diligence to cure the material breach.

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

- 3.3** Liability. Except as otherwise expressly allowed or provided under this Agreement, the County's sole liability upon termination shall be to pay for acceptable work performed prior to the Contractor's receipt or issuance of a notice of termination; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination.

THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE COUNTY'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

4. CONTRACTOR MUST MEET OR EXCEED THE REQUIREMENTS BELOW

- 4.1.** Contractor shall make sure that all services and products offered are adequately described.
- 4.2.** Contractor must have the ability to work within the security, regulatory and internal policy requirement needs of various County facilities.
- 4.3.** Contractor must be authorized to sell/resell the services and products being proposed. Contractor may be asked to provide certificates of authorization or verifications of such facts.
- 4.4.** Contractor shall guarantee that the services and products offered will meet or exceed specifications identified in this Agreement.
- 4.5.** Contractor must perform all work compliant with applicable industry standards and recommended practices.

5. EXISTING, NEW PRODUCTS, SERVICES, TECHNOLOGIES AND PRICE ADJUSTMENTS

- 5.1.** Any and all Contractor's existing and new product and service additions, technological advancements or new technology within the scope of work and support to be provided, may be added under the terms and conditions of this agreement provided they meet the acceptability and financial objectives of County. Contractor must first inform County of such additions or changes for obsolete items at least 60 days prior or at the earliest time possible to any changes taking effect.
- 5.2.** Contractor will be expected to maintain product, service and technological parity with its competitors to ensure County is offered state of the art products, services and technology. Failure to maintain such parity may be considered cause for removal of the specific named products or services or termination of contract.
- 5.3.** New technologies are to be defined as a significant material or function change of an existing product/service line. All new innovative and revolutionary technologies need to be approved by County prior to any use. Pricing on new services and technology will be commensurate with the level of discount provided on existing services in the same category. The new services and prices will not be enforceable without an addendum to this agreement.

6. INDEPENDENT CONTRACTOR STATUS

- 6.1. Independent Contractor.** It is expressly understood that Contractor is an independent contractor and not the agent, partner or employee of County. Contractor shall have complete charge and responsibility for persons employed by Contractor and engaged in the performance of the specified work. Neither Contractor nor any of its agents shall be treated as an employee of County for any purpose whatsoever. Contractor declares that Contractor has complied with all federal, state and local laws regarding business permits and licenses of any kind that may be required to carry out the said business and the tasks to be performed under this Agreement. Contractor further declares that it is engaged in the same or similar activities for other clients and that Eddy County is not Contractor's sole or only client or customer.

- 6.2. Tax Withholding.** No federal, state, or local income, payroll or employment taxes of any kind shall be withheld or paid by County with respect to payments to or on behalf of Contractor, its agents or employees. Contractor shall withhold and pay any taxes on behalf of its employees as required by law. The payroll or employment taxes that are the subject of this paragraph include but are not limited to FICA, FUTA, federal personal income tax, state personal income tax, state disability insurance tax, and state unemployment insurance tax. If Contractor is not a corporation, Contractor further understands that Contractor may be liable for self-employment (social security) tax, to be paid by Contractor according to law.

7. MONTHLY PROGRESS REPORT, MEETINGS AND SCHEDULES

- 7.1. Progress Reports.** The Contractor may be required to file with County a monthly or as needed progress reports and schedule(s) for the Project. One copy shall be forwarded to County in sufficient time to be received no later than the ten days immediately following the time frame covered by the report.
- 7.2. Project Review Meetings.** If so requested by County, or if required as set forth in Attachment A, the Contractor shall meet as soon as possible after execution of this Agreement with County staff to discuss final details relative to commencement of and performance of this Project.

8. MISCELLANEOUS

- 8.1. Acceptance and Rejection.** If prior to final acceptance, any goods or services are found to be defective or not as specified, or if County is entitled to revoke acceptance of them, County may reject or revoke acceptance, require Contractor to correct without charge within a reasonable time, or require delivery at an equitable reduction in price, at County's option. Contractor shall reimburse County for all incidental and consequential cost related to unaccepted goods or services. Notwithstanding final acceptance and payment, Contractor shall be liable for latent defects, fraud, or such gross mistakes as amount to fraud. Acceptance of goods or services shall not waive the right to claim damages for breach of contract.
- 8.2. Appropriations.** The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Board of County or other sponsoring agency for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Board or other

sponsoring agency, this Agreement will terminate upon delivery of written notice by Eddy County to Contractor. The decision of County as to whether sufficient appropriations are available will be accepted by Contractor and will be final.

- 8.3. **Assignment.** Contractor may not assign the rights or obligations under this Agreement without Eddy County's prior written approval.
- 8.4. **Binding Effect.** This Agreement is binding upon, and inures to the benefit of, the parties to this Agreement and their respective successors and assignees.
- 8.5. **Changes.** This Agreement may be amended with the consent of both parties. Amendments may not change significantly the scope of the Agreement.
- 8.6. **Certification.** County Supplier Conflict of Interest and Debarment/Suspension Certification Form has been signed, as appropriate, and is included as part of this Agreement.
- 8.7. **Cooperation and Dispute Resolution.** The parties agree that, to the extent compatible with the separate and independent management of each, they will maintain effective liaison and close cooperation. If a dispute arises related to the obligations or performance of either party under this Agreement, representatives of the parties will meet in good faith to resolve the dispute.
- 8.8. **Delays and Extension of Time.** The Contractor agrees to execute the work continuously and diligently and no charges or claims for damages shall be made by it for any delays or hindrances from any cause whatsoever during the progress of any portion of the work specified in this Agreement. Time extensions will be granted only for excusable delays that arise from unforeseeable causes beyond the control and without fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the State in either its sovereign or contractual capacity, acts of another Contractor in the performance of a contract with the State, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of either the Contractor or the subcontractors or suppliers

- 8.9. Entire Agreement.** This Agreement, inclusive of the RFP 24-02 terms, condition and requirements incorporated herein by reference, and the terms and conditions included in the purchase order are made part of this Agreement. This represents the entire contract between the parties and, except as otherwise provided herein, may not be amended, changed, modified, or altered without the written consent of the parties hereto. All of the conditions, agreements, and understandings between the parties concerning the subject matter of this Agreement, and all such conditions, understandings, and agreements have been merged into this written Agreement. No prior condition, agreement, or understanding, verbal or otherwise, of the parties or their agents, shall be valid or enforceable unless embodied in this written Agreement.
- 8.10. Force Majeure.** Neither party shall be in default or otherwise liable for any delay in or failure of its performance under this Agreement if such delay or failure arises by any reason beyond its reasonable control, including any act of God, any acts of the common enemy, the elements, earthquakes, floods, fires, epidemics, riots, failures or delay in transportation or communications, or any act or failure to act by the other party or such other party's employees, agents or contractors; provided however, that lack of funds shall not be deemed to be a reason beyond a party's reasonable control. The parties will promptly inform and consult with each other as to any of the above causes, which in their judgment may or could be the cause of delay in the performance of this Agreement.
- 8.11. Governing Law.** This Agreement will be construed, interpreted, governed and enforced in accordance with the statutes, judicial decisions, and other laws of the State of New Mexico.
- 8.12. Inconsistencies.** In the event there are any inconsistencies in any documentation, the terms of this agreement shall take precedence over any term identified on a PO or made during discussion, outside of the original agreement terms.
- 8.13. Nondiscrimination in Employment.** The Contractor agrees not to discriminate in any manner against an employee or applicant for employment because of race, color, religion, creed, age, sex, marital status, national origin, ancestry, or disability of a qualified individual with a disability and post and to cause subcontractors to post in conspicuous places available to employees and applicants for employment, notices setting forth the substance

of this clause.

- 8.14. Notices.** Any notice required to be given pursuant to the terms and provisions of this Agreement will be in writing and will be sent by certified mail, return receipt requested, postage prepaid. **Notices will be sent to the following addresses:**

"Contractor"

Desert West Enterprises, LLC
Larry C. Parker
5323 W. 2nd Street
Roswell, NM 88201

"County"

Eddy County Finance Director
Breanna Shields
101 W Greene Street
Carlsbad, NM 88220

- 8.15. Press Releases.** Neither the Contractor nor any member of the Contracting Team shall issue any press release to any publication, including newspapers, without first clearing the text with and receiving prior written approval from County's Project Coordinator.
- 8.16. Suspension of Work.** The County Chief Procurement Officer unilaterally may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of County.
- 8.17. Waiver.** No provision of this Agreement shall be deemed to have been waived by either party unless such waiver be in writing signed by the party making the waiver and addressed to the other party; nor shall any custom or practice which may evolve between the parties in the administration of the terms hereof be construed to waive or lessen the right of either party to insist upon the performance by the other party in strict accordance with the terms hereof. Further, the waiver by any party or a breach by the other party, of any term, covenant, or condition hereof, shall not operate as a waiver of any subsequent breach of the same or any other term, covenant, or condition thereof.
- 9. SEVERABILITY.** All terms of this Agreement are severable such that if any provision is declared by a court of competent jurisdiction to be illegal, void or unenforceable, the remainder of the provisions shall continue to be valid and enforceable.
- 10. WORKPLACE SAFETY.** Contractor will ensure that its staff and those of any

subcontractor will, when working on any site in connection with the Agreement, comply with all applicable environmental, occupational health and safety legislation and any other appropriate standards, policies and procedures of which County notified Contractor.

11. COMPLIANCE WITH FEDERAL AND STATE LAWS

- 11.1.** Contractor certifies and agrees by this Agreement to comply and act in accordance with all applicable provisions of the federal Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the New Mexico Human Rights Act and all other applicable federal statutes and executive orders, New Mexico statutes and Eddy County ordinances relating to the enforcement of civil rights all as amended from time to time.
- 11.2.** The New Mexico Procurement Code **Sections 13-1-28 through 13-1-199 NMSA 1978** imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kickbacks.
- 11.3.** Contract Utilization by Other Agencies: In accordance with **13-1-129 NMSA**, Contractors are hereby notified that other governmental entities within the State of New Mexico, or as otherwise allowed by their respective governing directives, may contract with the awarded Contractor for services outlined if applicable contractual engagements accomplished under this provision shall be solely between the awarded contractors and the contracting entity with no obligations by the Board of Commissioners of Eddy County.

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with the Signature Page to Follow.

BY SIGNING BELOW, THE CONTRACTOR CERTIFIES THAT HE/SHE IS
AUTHORIZED TO OBLIGATE HER/HIS FIRM TO THE TERMS AND CONDITIONS
OF THIS CONTRACT.

"CONTRACTOR"

Desert West Enterprises, LLC

By: _____

Print Name: Larry C Parker

Title: OWNER

"COUNTY"

**EDDY COUNTY BOARD OF
COUNTY COMMISSIONERS**

By: _____

Print Name: James (Bo) Bowen

Title: Commission Chairman

Date: May 21, 2024

Attest:

Cara A Cooke
Cara Cooke, County Clerk

