

# Agreement between the Owner and the Contractor

## 2008 Edition, APS

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION

Project (short title): Invitation to Bid No.: \_\_\_\_\_

Location: APS Contract No.: \_\_\_\_\_

Distribution to:            Owner (2)            Contractor            Design Professional

This Agreement entered into this            day of            , 20\_\_\_\_, by and between the parties  
as follows:

**THE OWNER:**

THE BOARD OF EDUCATION  
ALBUQUERQUE MUNICIPAL  
SCHOOL DISTRICT NO. 12  
("ALBUQUERQUE PUBLIC  
SCHOOLS")  
6400 UPTOWN BLVD, NE  
ALBUQUERQUE, NM 87110  
Telephone: (505) (880-3700)

**THE CONTRACTOR:**

Telephone: \_\_\_\_\_  
Fax: \_\_\_\_\_

and, hereinafter "Owner".

**APS CONSTRUCTION MANAGEMENT:**

ALBUQUERQUE PUBLIC SCHOOLS  
FACILITIES DESIGN & CONSTRUCTION  
915 OAK STREET, SE  
ALBUQUERQUE, NM 87106  
Telephone: (505) 848-8810  
Fax: (505) 246-9020

**DESIGN PROFESSIONAL OF RECORD:**

Telephone: \_\_\_\_\_  
Fax: \_\_\_\_\_

### RECITALS

WHEREAS, Contractor has represented to APS that it is specifically qualified to perform construction services of the nature contemplated by this Agreement; and

WHEREAS, Albuquerque Public Schools (APS) desires to engage the construction services of Contractor and Contractor desires to perform such services for APS.

The OWNER and the CONTRACTOR agree as set forth below.

## **ARTICLE 1**

### **THE CONTRACT DOCUMENTS**

The Contract Documents consist of the following:

Bid Form	Notice to Proceed
Agreement Between Owner and Contractor	Conditions of the Contract (General, Supplementary, and Other Conditions)
Performance Bond	Drawings
Labor and Material Payment Bond	Specifications
Agent's Affidavit	All Addenda Issued Prior to and All Modifications Issued after Execution of This Agreement
Certificate of Insurance	Exhibits A – G, attached
Assignment of Antitrust Claims	
Notice of Award	

These documents form the Contract, and all are as fully a part of the Contract as if attached to this Agreement or repeated herein. An enumeration of the Contract Documents appears in Article 7.

## **ARTICLE 2**

### **THE WORK**

The Contractor shall perform all the Work required by the Contract Documents for the following:

## **ARTICLE 3**

### **TIME OF COMMENCEMENT AND SUBSTANTIAL COMPLETION**

The Work to be performed under this Contract shall commence not later than ten (10) consecutive calendar days after the date of written Notice to Proceed. Substantial Completion shall be achieved not later than \_\_\_\_\_ calendar days after the date of written Notice to Proceed, except as hereafter extended by valid written Change Order by the Owner.

Should the Contractor neglect, refuse, or otherwise fail to complete the Work within the time specified for Substantial Completion, the Contractor agrees, in partial consideration for the award of this Contract, to pay to the Owner, by lump sum or by monthly payments if required by the Owner, the amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) per consecutive calendar day, not as a penalty, but as liquidated damages for such breach of this Contract.

Phased Construction: If the project contains multiple phases of construction, each phase shall be subject to the amount of liquidated damages per consecutive calendar day indicated in the paragraph above, if so noted below:

Phase 1:	calendar days. Liquidated Damages	apply this phase.
Phase 2:	calendar days. Liquidated Damages	apply this phase.
Phase 3:	calendar days. Liquidated Damages	apply this phase.

**ARTICLE 4**  
**CONTRACT SUM**

The Owner shall pay the Contractor in current funds for the performance of the Work, subject to additions and deductions by Change Order as provided in the Contract Documents, the Contract Sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

The Contract sum is determined as follows:

Base Bid Amount.....	\$	_____
Bid Lot 1 - HVAC warranty/maintenance...	\$	_____
Bid Lot 2 - PV System.....	\$	_____
Alternates (if any).....	\$	_____
Award Amount .....	\$	_____
Gross Receipts Tax* @      %.....	\$	_____
Contract Sum .....	\$	_____

\* Gross receipts tax (GRT) shall be added as a line item to the Schedule of Values and in each approved Modification / Change Request (MCR) amount for change in the Work. During the course of the Project, any change in GRT rate will be applied to the remaining balance of Contract Sum by approved MCR.

**ARTICLE 5**  
**PROGRESS PAYMENTS**

Based upon Applications for Payment submitted to the Design Professional by the Contractor and Certificates for Payment issued by the Design Professional, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided in the Contract Documents for the period ending the last day of the month as follows:

Not later than twenty-one (21) days following the end of the period covered by the Application for Payment of the portion of the Contract Sum properly allocable to labor, materials, and equipment incorporated in the Work and the portion of the Contract Sum properly allocable to materials and equipment suitably stored at the site or some other location agreed upon in writing for the period covered by the Application for Payment, less the aggregate of previous payments made by the Owner; less such amounts as the Design Professional shall determine for all incomplete Work and unsettled claims as provided in the Contract Documents.

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate provided by State statute regulating prompt payment.

## ARTICLE 6

### FINAL PAYMENT

Final payment, constituting the entire unpaid balance of the Contract Sum, shall be paid by the Owner to the Contractor within thirty (30) calendar days after notification of the Owner by the Design Professional that all incomplete and unacceptable work that was noted during the Substantial Completion Inspection and listed on the attachment to the Certificate of Substantial Completion has been corrected, and provided the Contract has been fully performed, a Certificate for Final Completion and final Certificate for Payment has been issued by the Design Professional; and the Contractor has provided to the Owner a certified statement of Release of Liens (AIA Document G706A or approved form) and Consent of Surety and such other documents required by the General Conditions.

## ARTICLE 7

### GENERAL AND SPECIAL PROVISIONS

**7.1** This document shall be executed in no less than four (4) counterparts, each of which shall be deemed an original.

**7.2** **Owner Provided Insurance.** See General Conditions for the Contract for Construction.

**7.3** This Agreement shall be governed exclusively by the provisions hereof and by the laws of the State of New Mexico as the same from time to time exist.

**7.4** Terms used in this Agreement which are defined in the Conditions of the Contract shall have the meanings designated in those Conditions.

**7.5** As between the parties to this Agreement: As to all acts or failures to act by either party to this Agreement, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the relevant Date of Substantial Completion of the Work; and as to any acts or failures to act occurring after the relevant Date of Substantial Completion, not later than the date of the Owner's approval of the Final Certificate of Payment.

**7.6** The Contractor shall hold harmless and indemnify the Owner against any and all injury, loss, or damage, including cost of defense - including but not limited to court costs and attorneys' fees - arising out of the negligent acts, errors, or omissions of the Contractor.

**7.7** This Agreement shall not become effective until signed by all parties required to sign this Agreement.

**7.8** The Contractor and his agents and employees are independent contractors and are not employees of the Owner. The Contractor and his agents and employees shall not accrue leave, retirement, insurance, bonding, use of Owner vehicles, or any other benefits afforded to employees of the Owner as a result of this Agreement.

**7.9** The Contractor, upon Final Payment of the amounts due under this Agreement, releases the Owner, his officers and employees from his liabilities and obligations arising from or under this Agreement, including but not limited to all damages, losses, costs, liability, and expenses, including but not limited to attorneys' fees and costs of litigation that the Contractor may incur.

**7.10** The Contractor agrees not to purport to bind the Owner or the State of New Mexico to any obligation not assumed herein by the Owner unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

**7.11 Notices.** All notices herein provided to be given, or which may be given, by either party to the other shall be deemed to have been fully given when made in writing and deposited in the United States mail postage prepaid, in the instance of Notice of Termination of Work, Certified Mail, Federal Express, or similar verifiable delivery method addressed as follows:

OWNER: ALBUQUERQUE PUBLIC SCHOOLS  
FACILITIES DESIGN &  
CONSTRUCTION  
ATTN: KAREN ALARID, DIRECTOR  
915 OAK STREET, SE  
ALBUQUERQUE, NM 87106

CONTRACTOR:

Nothing herein contained shall preclude the giving of any such written notice by personal service. The address to which notices shall be mailed to either party may be changed by written notice given by such party to the other as herein above provided.

**7.12 Gender, Singular/Plural.** Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, unless the context requires otherwise.

**7.13 Captions and Section Headings.** The captions and section headings contained in this Agreement are for convenience of reference only, and in no way limit, define, or enlarge the terms, scope, and conditions of this Agreement.

**7.14 Certificates and Documents Incorporated.** All certificates and documentation required of the Contractor by the provisions of this Agreement shall be attached to this Agreement at the time of execution and are hereby incorporated by reference as though set forth in full in this Agreement to the extent they are consistent with its conditions and terms.

**7.15 Separability.** If any clause or provision of this Agreement is illegal, invalid, or unenforceable under present or future laws effective during the term of this Agreement, then and in that event it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby.

**7.16 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 performance by the other party in strict accordance with the terms hereof. Further, the waiver by any party of 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.

**7.17 Entire Agreement.** This Agreement 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. This Agreement incorporates 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.

**7.18 Interchangeable Terms.** For purposes of all provisions within this Agreement and all attachments hereto, the terms "Agreement" and "Contract" shall have the same meaning and shall be interchangeable.

**7.19 Words and Phrases.** Words, phrases, and abbreviations which have well-known technical or trade meanings used in the Contract Documents shall be used according to such recognized meanings. In the event of a conflict, the more stringent meaning shall govern.

**7.20 Relationship of Contract Documents.** The Contract Documents are complementary, and any requirement of one contract document shall be as binding as if required by all.

**7.21** Pursuant to Section 13-1-191, NMSA 1978, reference is hereby made to the Criminal Laws of New Mexico (including Sections 30-14-1, 30-24-2, and 30-41-1 through 3, NMSA 1978) which prohibit bribes, kickbacks, and gratuities, violation of which constitutes a felony. Further, the Procurement Code (Sections 13-1-28 through 13-1-199, NMSA 1978) imposes civil and criminal penalties for its violation.

**7.22** The Contract Documents, which constitute the entire Agreement between the Owner and the Contractor, are listed in Article 1 and, except for Modifications issued after execution of this Agreement, are enumerated in this Paragraph 7.22.

**7.22.1** The following documents bound in the Project Manual dated:

- Bid Form
- Agreement between Owner and Contractor
- Performance Bond
- Labor and Material Payment Bond
- Agent's Affidavit
- Certificate of Insurance
- Assignment of Antitrust Claims
- Notice of Intent to Award
- Notice of Award
- Notice to Proceed
- General Conditions

Supplementary Conditions  
Addenda and Modifications

**7.22.2 Specifications**

Specifications: Refer to **Exhibit A**, attached to this Agreement

**7.22.3 Drawings**

Drawings, dated \_\_\_\_\_ ; refer to **Exhibit B**, attached to this Agreement.

**7.22.5 Addenda**

No. \_\_\_\_\_ Description \_\_\_\_\_ Date \_\_\_\_\_

No. \_\_\_\_\_ Description \_\_\_\_\_ Date \_\_\_\_\_

No. \_\_\_\_\_ Description \_\_\_\_\_ Date \_\_\_\_\_

No. \_\_\_\_\_ Description \_\_\_\_\_ Date \_\_\_\_\_

**7.22.6 Exhibits**

- Exhibit A – Index to Technical Specifications
- Exhibit B – List of Drawings
- Exhibit C – Estimated Monthly Draw-down Schedule
- Exhibit D-1 – Modification/Change Request
- Exhibit D-2 – Change Order
- Exhibit E – Certificate of Substantial Completion
- Exhibit F – Certificate of Final Completion
- Exhibit G – Payment and Performance Bonds; Insurance
- Exhibit H -- APS Project Management System

**END OF ARTICLE 7**

Invitation to Bid No.: \_\_\_\_\_

APS Contract No.: \_\_\_\_\_

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**AGREED: This Agreement is entered into as of the day and year first written above.**

**CONTRACTOR** By: \_\_\_\_\_

Printed Name:

Title:

Date: \_\_\_\_\_

Federal Identification Number:

NM CRS Identification Number:

**OWNER:** By: \_\_\_\_\_

Printed Name: Karen Alarid

Title: Director, Facilities Design & Construction Date: \_\_\_\_\_

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