

Agreement No. 2016-0100-LD/BT

**SANTA FE COUNTY  
PROFESSIONAL SERVICES AGREEMENT  
WITH HMS ASSOCIATES, INC.  
TO PROVIDE HISTORICAL CONSULTANT  
AND EXPERT TESTIMONY OR WITNESS SERVICES**

**THIS AGREEMENT** is made and entered into this 25<sup>th</sup> day of August, 2015 by and between **Santa Fe County**, hereinafter referred to as the "County," and **HMS Associates, Inc.**, 1830 Morningside Drive NE, Albuquerque, NM 87110, hereinafter referred to as the "Contractor."

**WHEREAS**, Section 13-1-98(R) NMSA 1978, this contract and expenditure for research services and expert testimony or witness services in connection with litigation or proceedings before administrative agencies or state or federal courts are exempt from the provisions of the Procurement Code; and

**WHEREAS**, the County desires to engage the Contractor to render historical research and expert consulting, and as mutually agreed to by the parties, possibly testifying services, and the Contractor is qualified and willing to provide such services.

**NOW, THEREFORE**, in consideration of the premises and mutual obligations herein, the parties hereto do mutually agree as follows:

**1. SCOPE OF WORK**

The Contractor shall:

A. At the direction of the County Attorney, or County Attorney's designee, provide professional historical research and consulting and, as mutually agreed to by the parties, testifying services in connection with anticipated litigation or administrative proceedings concerning certain public roads located within Santa Fe County and within the boundaries of certain Indian Pueblos in New Mexico. Such services may include without limitation:

- 1) Conduct research and analysis with respect to certain County roads that are located within the exterior boundaries of the Indian Pueblos.
- 2) Analyze claims and opinions of the Pueblos and other parties and their expert and lay witnesses.
- 3) Assist the County with discovery and other trial preparation, which service may include participation in depositions and hearings, as mutually agreed to by the parties.
- 4) As mutually agreed to by the parties, provide expert testimony in connection with litigation (adversarial proceedings of any nature in any forum) or administrative proceedings.
- 5) Brief County officials, employees, counsel and consultants on matters related to this Scope of Work.

B. Provide the County with a copy of all source materials and research materials

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developed and obtained by Contractor in performing the services under this Agreement and Agreement #24-0159-MG between the County and Contractor dated April 13, 2004.

## 2. COMPENSATION AND INVOICING

- A. In consideration of its obligations under this Agreement the Contractor shall be compensated as follows:
- (i) The County shall pay Contractor at the hourly rate of one hundred thirty dollars (\$130.00) per hour, and fifty dollars (\$50.00) per hour for Contractor's research assistants, exclusive of NM gross receipts tax, for services performed.
  - (ii) In no event shall the total compensation paid to Contractor by County under this Agreement exceed Twenty Thousand Dollars (\$20,000.00), exclusive of NM gross receipts tax. Any NM gross receipts tax levied on the amounts payable under this Agreement shall be shown as a separate invoiced item on Contractor's invoices and paid by the County to the Contractor.
- B. The Contractor shall submit a written request for payment to the County when payment is due under this Agreement. Upon the County's receipt of the written request, the County shall issue a written certification of complete or partial acceptance or rejection of the contractual items or services for which payment is sought.
- The Contractor acknowledges and agrees that the County may not make any payment hereunder unless and until it has issued a written certification accepting the contractual items or services. Within thirty (30) days of the issuance of a written certification accepting the contractual items or services, the County shall tender payment for the accepted items or services. In the event the County fails to tender payment within thirty (30) days of the written certification accepting the items or services, the County shall pay late payment charges of one and one-half percent (1.5%) per month, until the amount due is paid in full.
- C. In the event the Contractor breaches this Agreement, the County may, without penalty, withhold any payments due the Contractor for the purpose of set-off until such time as the County determines the exact amount of damages it suffered as a result of the breach.
- D. Payment under this Agreement shall not foreclose the right of the County to recover excessive or illegal payment.

## 3. EFFECTIVE DATE AND TERM

This Agreement shall, upon due execution by all parties, become effective as of the date of last signature by the parties hereto and shall terminate two years later, unless earlier terminated pursuant to Section 4 (Termination) or Section 10 (Appropriations).

#### 4. TERMINATION

- A. Termination of Agreement for Cause. Either party may terminate the Agreement based upon any material breach of this Agreement by the other party. The non-breaching party shall give the breaching party written notice of termination specifying the grounds for the termination. The termination shall be effective 30 days from the breaching party's receipt of the notice of termination, during which time the breaching party shall have the right to cure the breach. If, however, the breach cannot with due diligence be cured within 30 days, the breaching party shall have a reasonable time to cure the breach, provided that, within 30 days of its receipt of the written notice of termination, the breaching party began to cure the breach and advised the non-breaching party in writing that it intended to cure.
- B. Termination for Convenience of the County. The County may, in its discretion, terminate this Agreement at any time for any reason by giving the Contractor written notice of termination. The notice shall specify the effective date of termination, which shall not be less than 15 days from the Contractor's receipt of the notice. The County shall pay the Contractor for acceptable work, determined in accordance with the specifications and standards set forth in this Agreement, performed before the effective date of termination but shall not be liable for any work performed after the effective date of termination.

#### 5. INDEPENDENT CONTRACTOR

The Contractor and its agents and employees are independent contractors and are not employees or agents of the County. Accordingly, the Contractor and its agents and employees shall not accrue leave, participate in retirement plans, insurance plans, or liability bonding, use the County vehicles, or participate in any other benefits afforded to employees of the County. Except as may be expressly authorized elsewhere in this Agreement, the Contractor has no authority to bind, represent, or otherwise act on behalf of the County and agrees not to purport to do so.

#### 6. PERSONNEL

- A. All work performed under this Agreement shall be performed by the Contractor or under its supervision.
- B. The Contractor represents that it has, or will secure at its own expense, all personnel required to discharge its obligations under this Agreement. Such personnel (i) shall not be employees of nor have any contractual relationships with the County and (ii) shall be fully qualified and licensed or otherwise authorized or permitted under federal, state, and local law to perform such work.

#### 7. ASSIGNMENT

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for

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money due or to become due under this Agreement without the advance written approval of the County. Any attempted assignment or transfer without the County's advance written approval shall be null and void and without any legal effect.

## 8. SUBCONTRACTING

The Contractor may subcontract or delegate any portion of the services to be performed under this Agreement to personnel or associates within Contractor's organization. Any attempted subcontracting or delegation to an entity or personnel outside of Contractor's organization that occurs without the County's advance written approval shall be null and void and without any legal effect.

## 9. RECORDS AND INSPECTIONS; RESEARCH AND SOURCE MATERIALS

- A. To the extent its books, records and materials relate to (i) its performance of the Scope of Work of this Agreement or any authorized subcontract or delegation entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to the County, the Contractor agrees to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under this Agreement; (ii) allow the County or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with generally accepted accounting principles ("GAAP").
- B. To the extent its books and records relate to (i) its performance of the Scope of Work of this Agreement or any authorized subcontract or delegation entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to County, the Contractor also agrees to require any subcontractor or delegatee it may hire to perform its obligations under this Agreement to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under the subcontract; (ii) to allow the County or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with GAAP.
- C. Copies of all source materials or resources obtained by the Contractor or Contractor's subcontractor(s) or delgatee(s) in performing the Scope of Work of this Agreement shall be provided to the County no later than the date of final payment to the Contractor for services completed under this Agreement.

## 10. APPROPRIATIONS AND AUTHORIZATIONS

This Agreement is contingent upon sufficient appropriations and authorizations being made for performance of this Agreement by the Board of County Commissioners of the County and/or, if state funds are involved, the Legislature of the State of New Mexico. If sufficient appropriations and authorizations are not made in this or future fiscal years, this Agreement shall terminate upon written notice by the County to the Contractor. Such termination shall be without penalty to the County, and the County shall have no duty to reimburse the Contractor for expenditures made in the

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performance of this Agreement. The County is expressly not committed to expenditure of any funds until such time as they are programmed, budgeted, encumbered and approved for expenditure by the County. The County's decision as to whether sufficient appropriations and authorizations have been made for the fulfillment of this Agreement shall be final and not subject to challenge by the Contractor in any way or forum, including a lawsuit.

**11. RELEASE**

Upon its receipt of all payments due under this Agreement, the Contractor releases the County, its Elected Officials, officers, agents and employees from all liabilities, claims, and obligations whatsoever arising from or under or relating to this Agreement.

**12. CONFIDENTIALITY**

Work performed under this Agreement is privileged under applicable rules of discovery and evidence. Work performed by the Contractor under this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without prior written approval of the County.

**13. CONFLICT OF INTEREST**

The Contractor represents that it has no and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of its obligations under this Agreement.

**14. NO ORAL MODIFICATIONS; WRITTEN AMENDMENTS REQUIRED**

This Agreement may not be modified, altered, changed, or amended orally but, rather, only by an instrument in writing executed by the parties hereto. The Contractor specifically acknowledges and agrees that the County shall not be responsible for any changes to Section 1 (Scope of Work), of this Agreement unless such changes are set forth in a duly executed written amendment to this Agreement.

**15. ENTIRE AGREEMENT; INTEGRATION**

This Agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof, and all such agreements, covenants and understandings have been merged into this written Agreement. No prior or contemporaneous agreement, covenant or understandings, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**16. SEVERABILITY**

If any term or condition of this Agreement shall be held invalid or non-enforceable by any court of competent jurisdiction, the remainder of this Agreement shall not be affected and shall be valid and enforceable to the fullest extent of the law.

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**17. COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW**

- A. In performing its obligation hereunder, the Contractor shall comply with all applicable laws, ordinances, and obligations, including Santa Fe County Ordinance 2014-1 (Establishing a Living Wage).
- B. This Agreement shall be construed in accordance with the substantive laws of the State of New Mexico, without regard to its choice of law rules. The Contractor and the County agree that the exclusive forum for any litigation between them arising out of or related to this Agreement shall be state district courts of New Mexico, located in Santa Fe County.

**18. NOTICE OF PENALTIES**

The Procurement Code, NMSA 1978, Section 13-1-28 through 13-1-199, imposes civil and criminal penalties for its violation. In addition, New Mexico criminal statutes impose felony penalties for bribes, gratuities, and kickbacks.

**19. NO THIRD-PARTY BENEFICIARIES**

This Agreement was not intended to and does not create any rights in any persons not a party hereto.

**20. FACSIMILE SIGNATURES**

The parties hereto agree that a facsimile signature has the same force and effect as an original for all purposes.

**21. LIMITATION OF LIABILITY**

The County's liability to the Contractor for any breach of this Agreement by the County shall be limited to direct damages and shall not exceed the maximum amount of potential compensation specified in Section 2 (Compensation and Invoicing), of this Agreement. In no event shall the County be liable to the Contractor for special or consequential damages, even if the County was advised of the possibility of such damages prior to entering into this Agreement.

**22. NEW MEXICO TORT CLAIMS ACT**

No provision of this Agreement modifies or waives any sovereign immunity or limitation of liability enjoyed by the County or its "public employees" at common law or under the New Mexico Tort Claims Act, NMSA 1978, § 41-4-1, et seq., as amended.

**23. INSURANCE**

- A. General Conditions. The Contractor shall submit evidence of insurance as is required herein. Policies of insurance shall be written by companies authorized to write such insurance in New Mexico.

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- B. Automobile Insurance. The Contractor shall procure and maintain during the life of this Agreement automobile insurance coverage with minimum coverage limits of \$100,000 per person/\$300,000 per occurrence. .
- C. Workers' Compensation Insurance. The Contractor shall comply with the provisions of the Workers' Compensation Act.
- D. Increased Limits. If, during the life of this Agreement, the County determines that additional insurance coverages or limits are necessary, it may require such coverages or increased limits to be procured and maintained by Contractor as a condition of continuing this Agreement.

**24. CONTRACTOR'S REPRESENTATIONS AND WARRANTIES**

The Contractor hereby represents and warrants that:

- A. It is a professional association duly organized and in good standing under the laws of the State of New Mexico and is authorized to do business in New Mexico.
- B. This Agreement has been duly authorized by the Contractor, the person executing this Agreement has authority to do so, and, once executed by the Contractor, this Agreement shall constitute a binding obligation of the Contractor.
- C. This Agreement and the Contractor's obligations hereunder do not conflict with the Contractor's articles of incorporation or by-laws or any documents filed with the New Mexico Secretary of State on Contractor's behalf.

**25. CAMPAIGN CONTRIBUTION DISCLOSURE FORM**

The Contractor agrees to complete and submit simultaneous with execution of this Agreement a Campaign Contribution Disclosure Form approved by the County

**26. NOTICES**

All notices required to be given to the County under this Agreement shall be mailed (pre-postage paid) to:

Santa Fe County Attorney  
Santa Fe County  
102 Grant Avenue  
P.O. Box 276  
Santa Fe, NM 87504-0276

All notices required to be given to the Contractor under this Agreement shall be mailed (pre-

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postage paid) to:

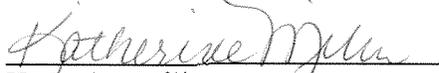
HMS Associates, Inc.  
Attn: Stanley M. Hordes, Ph.D.  
1830 Morningside Drive NE  
Albuquerque, NM 87110

**27. SURVIVAL**

The provisions of following paragraphs shall survive termination of this Contract; INDEMNITY, RECORDS AND INSPECTION; MATERIALS, RELEASE, CONFIDENTIALITY, COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW, NO THIRD-PARTY BENEFICIARIES, NEW MEXICO TORT CLAIMS ACT, INSURANCE, AND SURVIVAL.

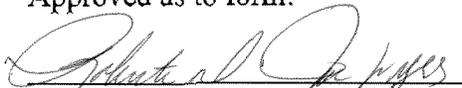
IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

**SANTA FE COUNTY**

  
Katherine Miller  
Manager

8.25.15  
Date

Approved as to form:

  
Gregory S. Shaffer  
Santa Fe County Attorney

8/20/15  
Date

Finance Department:

  
Carole H. Jaramillo  
Finance Director

8/23/15  
Date

**CONTRACTOR**

  
Stanley M. Hordes, Ph.D.  
President  
HMS Associates, Inc.

8/19/15  
Date