



# CITY OF ALBUQUERQUE

Albuquerque, New Mexico

Office of the Mayor


EC-19-468

Mayor Timothy M. Keller

August 2, 2019

## INTER-OFFICE MEMORANDUM

**TO:** Klarissa Peña, City Council President

**FROM:** Timothy M. Keller, Mayor 

**SUBJECT:** Ground Lease Agreement between City of Albuquerque and Operating Engineers Local 953 Journeyman & Apprenticeship Training Trust Fund

The City owns land along the La Semilla Way in the Montessa Park area of southwest Albuquerque.

The City of Albuquerque and Operating Engineers Local 953 Journeyman & Apprenticeship Training Trust Fund had an agreement, dated February 2, 1977, where Tenant offered an apprenticeship training program to operating engineers Local 953 and erected a building to accommodate the training program on four of the six acres that comprise the Premises and said agreement has expired. In 2017, the Council approved a lease agreement with the Local 953, which required market rents.


The Tenant wishes to continue to conduct an apprenticeship and journeyman-training program to train in crane, forklift and other heavy equipment operation for construction industries and wishes to perform in-kind services for the City in lieu of rent. The contracted rent will be \$26,220.00 annually and escalate 3% each term. The initial term will be for 5 years, with four (4) five-year possible extensions upon approval of both City and Tenant.

The Parks and Recreation Department, Albuquerque Police Department and any other user department of such services will be responsible for supervising and tracking the in-kind services in lieu of rents.

This Lease Agreement is forwarded to City Council for approval.

**Title/Subject of Legislation:** Ground Lease Agreement between City of Albuquerque and Operating Engineers Local 953 Journeyman & Apprenticeship Training Trust Fund

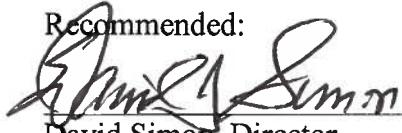
Approved:

  
Sarita Nair  
Chief Administrative Officer

9/3/19

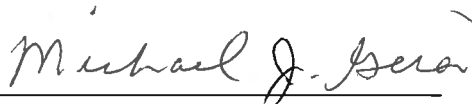
Date

Recommended:

  
David Simon, Director  
Parks and Recreation Department

8/7/19

Date

  
Michael Geier, Chief of Police  
Albuquerque Police Department

  
8/12/2019

## **Cover Analysis**

### **1. What is it?**

In-Lieu-of-Rent Services Lease to replace monetary rental agreement executed in 2017.

### **2. What will this piece of legislation do?**

Generate services in lieu of rents in the amount of \$26,220.00 annually with a three percent (3%) increase in required in lieu rents per term.

### **3. Why is this project needed?**

The Parks and Recreation Department, Albuquerque Police Department and other City departments will receive services, and the Operating Engineer Union 953 will have apprentice opportunities.

### **4. How much will it cost and what is the funding source?**

There is no cost to the City.

### **5. Is there a revenue source associated with this contract? If so, what level of income projected?**

Generate revenue of \$26,220.00 annually with three percent (3%) per term if the In-Lieu-of-Rent Services are not performed.

### **6. What will happen if the project is not approved?**

Operating Engineers Union 953 will continuing paying rent under the 2017 lease agreement, loss of productivity of city property and potential loss of available career/labor skills training for citizens of Albuquerque.

### **7. Is this service already provided by another entity?**

No.

## GROUND LEASE AGREEMENT

THIS GROUND LEASE AGREEMENT ("Lease") made and entered into by and between the City of Albuquerque ("City"), a New Mexico municipal corporation, and Operating Engineers Local 953 Journeyman & Apprenticeship Training Trust Fund ("Tenant"), a New Mexico nonprofit trust.

### I. MISCELLANEOUS REPRESENTATIONS.

WHEREAS, the City owns the real estate generally along the La Semilla Way in the Montessa Park area of Albuquerque southwest as shown on the attached Exhibit A containing six (6) acres, more or less; and

WHEREAS, the City and the Operating Engineers Local 953 Labor and Management Joint Apprentice Training Committee entered into an agreement dated February 2, 1977, where Tenant offered an apprenticeship training program to operating engineers Local 953 and erected a building to accommodate the training program on four of the six acres that comprise the Premises and said agreement has expired; and

WHEREAS, the Tenant entered into a market rent lease with the City, approved by Council on October 4, 2017 and effective October 24, 2017; and

WHEREAS, the Tenant wishes to work with the City's Parks & Recreation Department, Albuquerque Police Department and other City departments to perform in-kind services in lieu of rents; and

WHEREAS, the City and Tenant wish to enter into a new Lease.

### II. BASIC LEASE PROVISIONS.

For mutual consideration, and on the terms and subject to the conditions set forth herein, City hereby leases the Premises to Tenant, and Tenant hereby leases the Premises from the City. City and Tenant agree as follows:

#### A. Definitions.

1. "Land" means that certain real property situated in the City of Albuquerque, County of Bernalillo, State of New Mexico, generally describe on Exhibit A, attached hereto.

2. "Building" or "Buildings" means the building(s) and other improvements to be constructed or permanently placed on the Land and situated thereon at any time prior to or during the term of this Lease.

3. "Premises" means the six acres as shown on the Exhibit A attached hereto and includes the Land and Buildings.

B. Terms.

1. Effective Date: This Lease will not be binding upon the parties until it is signed by Tenant and approved by the Albuquerque City Council and signed by the Chief Administrative Officer or her designee ("Effective Date").

2. Delivery Date: Upon the Effective Date.

3. Lease Commencement Date: January 1, 2020

4. Rent Commencement Date: Same as Lease Commencement Date.

5. Expiration Date: December 31, 2024

6. Rent:

- a. Notwithstanding the provisions requiring Additional Rents as described and set forth in the Sections below, the Rent for the Premises shall be \$26,220.00 Annual Rent paid in semi-annual installments of \$13,110.00 ("Rent"), which rent will increase annually for the remaining term of the Lease, on the anniversary of the Rent Commencement Date, by three percent (3%) and in lieu of Rent, Tenant shall provide, at no cost to the City, for the leasehold interest to use and occupy the Premises, the following services ("In-Lieu-of-Rent Services"), including but not limited to:

OSHA 10-Hour Construction Industry Regulations

OSHA 30-Hour Construction Industry Regulations

Forklift Safety Certification

8 Hour Trenching & Excavation Safety

40 Hour Hazwoper

8 Hour Hazwoper Refresher

Commercial Driver License driving exam (Class A or Class B)

Confined Space  
Fall Protection

- b. City must have a minimum of four (4) individuals in order to request In-Lieu-of-Rent Services, training, to be scheduled and training must be scheduled and held by Tenant within two (2) weeks of the City's request. Such services shall be scheduled on weekdays in coordination with the City's schedule. Trainings will be held at a location agreeable by City and Tenant.
- c. Tenant shall continue to maintain portions of roadway within close proximity to the Premises, such as Los Picaros Rd. SE, Dragway Rd. SE, La Semilla Way and APD Firing Range as needed for wash outs and erosion.
- d. Tenant agrees, upon 24 hour notice from the City's APD Firing Range, to provide equipment and/or operator such as; loader, blade, forklift, dump truck or any other equipment at the Tenant's disposal.
- e. In-Lieu-of-Rent Services to be provided for the value current at the time of service, based upon reputable providers, not including online training.
- f. Semi-annual Reporting of In-Lieu-of-Rent Services: Tenant shall provide City semi-annual (6 months) statements ("Statements") documenting In-Lieu-of-Rent Services. Statements are due no later than 15 days after the end of the 6-month reporting period. The first report due no later than July 15, 2020. The form and method of accounting shall be as reasonably required by the City. If the In-Lieu-of-Rent Services do not fully cover the six months of rent, City will invoice Tenant for any remaining unpaid Rents and Tenant agrees to pay any unpaid Rents within 30-days of invoice. However, it is the parties' intent to utilize In-Lieu-of-Rent Services such that the services cover all rent due.
- g. If Tenant performs In-Lieu-of-Rent Services over and above the six-month rental amount due, those additional In-Lieu-of-Rent Services shall be carried over and applied to future rental periods as a credit. If the Tenant is in default of the use of the Premises, Rent shall commence from the earlier of the date in the change of use, the date

any In-Lieu-of-Rent Services cease or the date the new use is approved by the City pursuant to Article V, below.

- h. Tenant acknowledges that in providing services they are providing services as an independent contractor and will be responsible for all needed insurance, liability waivers and employer responsibilities.
  - i. Audits and Inspections. At any time during normal business hours and as often as the City may deem necessary, there shall be made available to the City for examination all of the Tenant's records with respect to all matters covered by this Agreement. The Tenant shall permit the City to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment and other data relating to all matters covered by this Lease. The Tenant understands and will abide by the City's Accountability in Government Ordinance, §2-10-1 et seq. and Inspector General Ordinance, §2-17-1 et seq. R.O.A. 1994, and also agrees to provide requested information and records and appear as a witness in hearings for the City's Board of Ethics and Campaign Practices pursuant to Article XII, Section 8 of the Albuquerque City Charter.
  - j. In the event of Tenant fails to pay all Rents or perform and report In Kind Services in accordance with Article II Section B Subsection 6, Tenant shall pay City, as Additional Rents, a late payment charge equal to One Hundred Fifty Dollars (\$150.00) if not paid by within fifteen (15) days of the Rent due date.
  - k. Rent and all other consideration to be paid or provided by Tenant to City shall constitute Rent and shall be paid or provided without offset.
7. Time, Place and Manner of Payments:
- a. Rent, if not paid by In-Lieu-of-Rent Services, shall be paid by check.
  - b. All rent shall be paid to the City of Albuquerque, Central Accounts Receivable and Billing Division, PO Box 27780, Albuquerque, NM 87125.
  - c. Tenant shall reference their Customer Number on all check payments.

8. The leasehold interest granted by this Lease shall be subject and subordinate to the right of the City and other owners of public utilities to operate, maintain, repair, modify, realign, replace and reconstruct all public utilities in, under, across and upon the Premises and to all easements, licenses and restrictions now or hereafter granted by the City to third parties in the Premises.

9. Option to Extend Term. So long as the Tenant is not in default (beyond the applicable period of notice and cure) at the time of any extension, and upon written request to City ninety (90) days prior to the expiration of the current Term and upon the City's approval, Tenant may extend the term of the Lease for four (4) terms of five (5) years upon the same terms and conditions as are in effect under this Lease immediately preceding the commencement of such Extended Term, except that the Annual Rent due from Tenant shall be increased three percent (3%) over the Annual Rent paid during the previous lease term. If Tenant fails to deliver to City written notice of Tenant's request to exercise an Option within the prescribed time period or if City fails to approve the extension of the term, such Option and any succeeding Options shall lapse, and there shall be no further right to extend the Lease Term.

10. Notwithstanding any other requirement, either party may terminate this lease upon six (6) months' written notice to the other party of the intent to terminate. Upon termination of this Lease, as provided below, the City and Tenant shall have no further rights, obligations or liabilities as between the City and Tenant as provided in this Lease and all future payment obligations and liabilities in this Lease will cease upon the date of termination, except as otherwise provided in this Lease, including, without limitation, as to liabilities expressly stated to survive termination of the Lease.

11. Holding Over. Holding over by the Tenant after the expiration or earlier termination of this Lease, whether with or without the consent of the City, shall not operate to extend or renew this Lease. Any such holding over shall be construed as a tenancy from month to month and Tenant shall be bound by all terms and conditions of this Lease but only as they are applicable to a month-to-month tenancy, provided however, that if the Holding Over is without consent of the City, all rents and charges shall be in an amount equal to one hundred fifty percent (150%) of the rates and charges required in this Lease and no In-Lieu-of Rent Services will be applied to the Holding Over without consent rents. Nothing in this Lease shall be construed to grant Tenant the right to hold over at any time, and City shall be entitled to exercise any and all remedies at law or in equity to recover possession of the Premises, as well as any damages incurred by City, including attorneys' fees.



12. Security Deposit. Tenant is not required to provide a Security Deposit to City. Notwithstanding the foregoing, upon three or more defaults in any twelve-month period, or upon the assignment or sub-letting of the Premises to a party that is not an Affiliate of Tenant, City may require a Security Deposit. In the event a Security Deposit is required, the deposit shall not bear interest, shall not be required to be maintained in a separate account, and shall be returned within 90 days, less any unpaid claims against Tenant, upon the expiration of this Lease and the surrender of possession of the Premises, to Tenant or the last assignee of Tenant's interest. If Tenant fails to perform with respect to any provision of this lease, City may apply the Security Deposit for the payment of any sum in default, or for the payment of any other amount that City may spend or become obligated to spend by reason of Tenant's default, or to compensate City for any loss or damage that City suffers from Tenant's default. Application of the deposit is not a cure of the default by Tenant to which the application relates. If any portion of the Security Deposit is applied, Tenant shall, within five days after written demand therefor, deposit cash with City in an amount sufficient to restore the Security Deposit to its original amount. In the event of termination of City's interest in this Lease, City shall transfer said deposit to City's successor in interest and thereafter shall have no further liability for the return of such Security Deposit.

### III. LEASE EXEMPT FROM BATEMAN ACT; APPROPRIATIONS.

By virtue of the provisions of NMSA 1978, §6-6-12 (1999), this Lease is exempt from the Bateman Act, including, without limitation as set out in NMSA 1978, §6-6-12 (1968), and it does not constitute the creation of debt. Nonetheless, as a result of Tenant's requirements and demands, if in any fiscal year of the City of Albuquerque during the term of this Lease, sufficient appropriations and authorizations are not made by the City Council to fund this Lease, or, in the event that City Council determines the property not essential for municipal purposes, this Lease may be terminated by the City at the end of the City's then current fiscal year, upon six (6) months' written notice given by the City to the Tenant. Such event shall not constitute an event of Default under this Lease. Upon termination of this Lease as provided in this Section III, the City and the Tenant shall have no further rights, obligations or liabilities as between the City and Tenant as provided in this Lease and all payments obligations and liabilities of the Tenant and of its interest in this Lease will cease upon the date of termination, except as otherwise provided in this Lease, including, without limitation, as to liabilities expressly stated to survive termination of the Lease.

### IV. QUIET ENJOYMENT.

Upon the performance of all terms, conditions, and covenants of this Lease, which the Tenant is required to perform, the Tenant shall, at all times during the Term peaceably and quietly enjoy

the Premises without any disturbance from the City. Any entry by the City pursuant to the rights, terms, and conditions of this Lease shall not be deemed a constructive or actual eviction of Tenant and shall not be considered to be a breach of City's covenant of quiet enjoyment.

V. USE OF THE PREMISES.

A. Tenant shall:

1. Continuously (except for short term closures due to fire, casualty, condemnation, permitted or approved Tenant remodeling not exceeding thirty (30) days, or other causes beyond Tenant's control ("Permitted Closures")) use the leased Premises for the purpose of operating an operating engineer apprenticeship and journeyman training program, subject to the terms, conditions and limitations set forth in this Lease and for no other purpose whatsoever without City's prior written consent.

2. The City agrees that the tenant may erect a metal shop building in an area designated by the City in order to provide further training facilities for the apprentices and/or trainees. Appropriate concrete footings and pad may be poured by the Tenant, or its agent, in order to allow and facilitate proper erection of the building; however, such structure shall not be considered a part of the real estate owned by the City, and upon completion of the training for apprenticeship, the same shall be removed from the premises by the Tenant; it being the intent of this provision to make clear that the shop building erected by Tenant shall at all times remain the property of the Tenant. After removal of the shop building, and at the request of the City, the footings and concrete pad shall be removed by the Tenant at no expense to the City.

3. Operate and maintain the Premises in a safe, sanitary and operable condition.

4. Properly handle and dispose of all Hazardous Substances pursuant to all Environmental Laws. Tenant shall take all appropriate measures necessary to prevent the release on or from the Premises of any Hazardous Substances. Neither party shall create or bring on the Premises any Hazardous Substances or permit any third party to do so in violation of Environmental Laws. Should Tenant become aware of the existence of any Hazardous Substance on the Premises, Tenant shall immediately notify City of such Hazardous Substance.

B. Go Dark (Cessation of Operation) and City's Right to Recapture. If, once operations begins, Tenant ceases to operate its business in the Premises for a period in excess of one hundred eighty (180) consecutive days and Tenant's cessation of operations

is not due to remodeling, renovating, or reconstructing the improvements as a result of a casualty or condemnation or governmental regulatory requirements, City shall have the right to terminate this Lease and recapture the Premises by delivering a thirty (30) days written notice to Tenant of City's intent to terminate. Upon City's termination of the Lease, Tenant shall pay all Rent and Additional Rent accrued as of the date of such termination, Tenant shall Surrender the Premises in accordance with Section XII, and all obligations of Tenant and City under this Lease shall terminate, except for those which arise prior to the termination date, or which survive the expiration or earlier termination of this Lease.

C. Tenant shall not:

1. Use, occupy or permit the Premises to be used or occupied for any unlawful purposes or for purposes not specified in this Lease.
2. Use, occupy or permit the Premises or any part of the Premises to be used or occupied, or do or permit anything to be done in or on the Premises in any manner, which will:
  - a. Cause or be likely to cause structural damage to the Premises or any part thereof, or adversely affect the mechanical, electrical, plumbing or other base building systems;
  - b. Constitute waste or a public or private nuisance; or
  - c. Cause the cancellation of any insurance policies related to the Property. Tenant shall reimburse City for any increases in insurance premiums payable by City as a result of Tenant's use of the Premises or the nature of Tenant's business. All property kept, stored or maintained by Tenant within the Premises shall be there at Tenant's sole risk, and if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the leakage or bursting of water pipes, steam pipes, or other pipes, by theft or from any other cause, no part of said loss or damage is to be charged to or borne by City, unless due to the negligence or willful misconduct of City, its employees, agents or contractors.
3. Allow smoking on the Premises at any time by any person in non-designated areas.

4. Allow political activities or campaigning by candidates for any elected office on the Premises, except as allowed.

D. Tenant, at its expense, may install Tenant's standard signs and logos so long as they are in compliance with applicable signage codes and are approved by the City in writing in advance of fabrication and installation. Tenant shall pay all fees and costs associated with obtaining the approval of its sign package by the City of Albuquerque, including any necessary application for a variance or an appeal thereof. All signs shall be kept in good condition and in proper operating order at all times. City reserves the right to designate a uniform type of sign for the Property to be installed and paid for by Tenant.

E. Tenant acknowledges and represents that it has examined the Premises and has determined by its own independent evaluation that the Premises are suitable and usable for the purposes, uses and activities intended by Tenant and contemplated by this Lease. Tenant acknowledges that the City has made no representation, warranty or guarantee, expressed or implied, that the Premises are now, or during the Term of this Lease, suitable or usable for purposes or uses which Tenant intends to make of the Premises or which are contemplated by this Lease.

#### VI. COMPLIANCE WITH LAW, PERMITS AND LICENSES.

A. Tenant shall at all times during the term of this Lease at its own expense, comply with all federal, state, county, municipal and other governmental statutes, ordinances, laws, rules and regulations, now or hereafter enacted or amended, affecting the Premises, or occasioned by or affecting the use thereof by Tenant, including but not limited, the Americans with Disabilities Act. Tenant shall have the right to contest by appropriate legal proceedings, without cost or expense to City, the validity of any law, ordinance, order, rule, regulation or requirement affecting Tenant's use and/or occupancy of the Premises. If compliance by Tenant may be legally held in abeyance during the contest without subjecting City or Tenant to any liability whatsoever for failure to so comply, Tenant may postpone compliance until the conclusion of the proceedings.

B. Tenant shall procure, at its sole expense, any permits and licenses required for the transaction of business in the Premises and otherwise comply with all applicable laws, ordinances and governmental regulations. Tenant shall immediately notify City in the event any permit, license or approval necessary for the operation of Tenant's business from the Premises is revoked or suspended. If such revocation or suspension is not corrected within twenty (20) days after notice to City (or such longer period as is reasonable so long as Tenant initiates such correction within the twenty (20) day period and thereafter diligently and continuously works towards correcting the revocation or suspension) then it shall be an

automatic event of Default under this Lease.

VII. OWNERSHIP OF IMPROVEMENTS.

The permanently attached buildings and all other improvements placed upon the Premises by or on behalf of Tenant shall be and remain the property of the Tenant during the term of this Lease and as otherwise stated in Section V.A.2. Upon expiration or earlier termination of this Lease, Tenant shall remove Tenant's buildings and improvements and restore the Premises to the reasonable satisfaction of the City. Tenant may leave any and all building and improvements at the expiration or earlier termination of the Lease, only with expressed written approval of the City. The City will not compensate Tenant for any of the improvements.

VIII. TENANT'S FIXTURES AND EQUIPMENT.

A. City acknowledges and agrees that all furniture, fixtures, equipment, machinery, signs and any personal property bearing any of Tenant's trade names or trademarks, whether registered or unregistered, and all other items of personal property which Tenant utilizes to conduct its business on the Premises, or which may be installed in or upon or incorporated into the Premises at Tenant's cost (collectively, "Trade Fixtures") shall not be deemed to become a part of the Premises, however attached to, or incorporated into the Premises, and whether or not they become a component part of the Premises, provided such Trade Fixtures are not paid for by City. The Trade Fixtures are and shall remain the property of Tenant and shall be treated as trade fixtures for the purposes of this Lease. Tenant may remove its Trade Fixtures from the Premises at any time prior to the termination of the Lease, so long as the Tenant repairs any damage to the Premises resulting from such removal. Tenant at its own cost and expense, may install, place, reinstall or replace upon the Premises, or remove from the Premises, any such Trade Fixtures so long as Tenant repairs any damage to the Premises, resulting from such installation, reinstallation, replacement or removal. Any replacement Trade fixtures shall not become property of the City but shall remain Tenant's personal property the same as the original Trade Fixtures.

B. City acknowledges and agrees that Tenant's Trade Fixtures may be leased from an equipment lessor ("Equipment Lessor") and that Tenant may execute and enter into an equipment lease with respect to the Trade Fixtures ("Equipment Lease"). If and to the extent required by any Equipment Lease, City shall execute and deliver to the Equipment Lessor a commercially reasonable consent or acknowledgment, in recordable form and in scope and substance reasonably satisfactory to the Equipment Lessor and City, in which City acknowledges and agrees that the Trade Fixtures which are the subject of the Equipment Lease constitute the personal property of Tenant, and shall not be considered to be part of the Premises, regardless of whether or by what means they become attached thereto, agrees that

it will not claim any interest in the Trade Fixtures, agrees that the Equipment Lessor may enter the Premises for the purpose of exercising any right it may have under the provisions of the Equipment Lease, including the right to remove the Trade Fixtures, provided that the Equipment Lessor:

1. will not take more than thirty (30) days to remove the Trade Fixtures and if Equipment Lessor does not remove the Equipment Fixtures within the thirty (30) day period, the Trade Fixtures will be deemed abandoned by the Equipment Lessor, and City may then dispose of the Trade Fixtures without liability to Equipment Lessor or Tenant;

2. agrees to repair any damage resulting from the removal of the Trade Fixtures or to pay City for the reasonable cost of removal of the Trade Fixtures plus the reasonable cost of repairing any damage to the Premises caused by the removal of the Trade Fixtures, plus fifteen percent (15%) of the total thereof;

3. will indemnify and hold City harmless from any claims and damages arising out of Equipment Lessor's entering the Premises to inspect or remove the Trade Fixtures;

4. will concurrently provide to City a copy of any notice of default to Tenant, and City shall, after written notice of Tenant's failure to cure such default, have the right, but not the obligation, for a period of sixty (60) days, in the case of a monetary default, or thirty (30) days in all other cases, or except in the case of a monetary default, such reasonable period of time to cure such default provided City promptly commences the action necessary to cure the claimed default within the thirty (30) day period and prosecutes the same to completion with diligence and continuity; and

5. will not hold any auction or secured property sale at the Premises. Notwithstanding anything in this Section VIII to the contrary, Equipment Lessor will not repossess or remove any item of Premises constituting the structure, the front windows or doors, or any fixtures or otherwise incorporated into the improvements at the Premises, including, but not limited to, lighting, electrical, wiring, HVAC units, supply fans, exhaust fans, air ducts, electric and utility lines, pipes, pumps, water heaters, tanks, conduits, switchboards, elevators, fire prevention equipment, attached carpeting and floor coverings, toilets, sinks, countertops, doors and windows, compressors, sign poles and lighting poles.

C. Tenant agrees that it will not cause or allow to occur any default under an Equipment Lease and any amounts expended by City to cure such defaults shall be subject to reimbursement by Tenant.

IX. REPAIRS AND MAINTENANCE, TENANT'S NEGLIGENCE AND SUBSTANTIAL DAMAGE.

A. Tenant at its own cost and expense shall maintain all portions of the Land and the Buildings of the Premises in good condition and repair, ordinary wear and tear excepted; including the interior and exterior, structural and nonstructural, ordinary and extraordinary, and foreseen and unforeseen including the same required to comply with building codes and other applicable municipal laws, rules, and/or regulations, if any, and keep the appearance thereof in a first class condition. Such maintenance shall include, but not be limited to, painting, landscaping (including, but not limited to if applicable, the mowing of any grass and the trimming and care of shrubs, trees and flowers,), lighting, signage, irrigation systems, paving, sidewalks, refuse area, service area, pest control, utilities, and drainage, subject to normal wear and tear, and keep the same reasonably free from snow, ice, and refuse, it being understood that City shall not be required to make any repairs to the Improvements nor any repairs or maintenance of the Premises.

B. Tenant shall make all repairs in substantially equal quality, material and workmanship to the original work.

C. Tenant shall not permit offensive or unreasonably strong odors of any kind to emanate from the Premises. If such odors are emanating from the Premises, then upon notice from Lessor, Tenant shall, within ten (10) days, install devices or put in place procedures to eliminate or contain such odors within the Premises.

D. If Tenant fails to repair or maintain the Premises or any part thereof in a manner reasonably satisfactory to City, City shall have the self-help right, upon written notice, or immediately in an Emergency, to make such repairs or perform such maintenance on behalf of Tenant. Tenant shall pay the costs incurred by City as Additional Rent within thirty (30) days after receipt of an invoice, together with interest at the Default Rate. City shall not be liable to Tenant for any loss or damage that may accrue to Tenant's Premises or business by reason of such work or its results. Notwithstanding the foregoing, City shall not have any self-help rights if Tenant has commenced the maintenance within the 30-day period (or in the case of an Emergency, if Tenant has commenced the maintenance immediately) and is diligently prosecuting the maintenance to completion.

E. Upon Surrender of the Premises and subject to Section XII.B. "Surrender of Premises", Tenant will transfer to City or otherwise make available any titles to the buildings, if applicable, and any construction or equipment warranties related to the Building(s) and the Premises, including but not limited to warranties for the roof and for the

heating and air conditioning systems. Notwithstanding anything here to the contrary, upon written notice by City, Tenant shall remove all improvements and restore the land to the original condition of the 1977 vacant land.

F. Also, notwithstanding anything herein to the contrary, in no event shall Tenant be obligated by the provisions of this Section IX to repair, replace or restore the Land and the Building in a situation covered under the other Section in this Lease entitled "DAMAGE TO OR DESTRUCTION OF IMPROVEMENTS", except as otherwise provided in such Section.

#### X. MECHANICS' AND MATERIALMEN'S LIENS

A. Tenant shall pay before delinquency all costs for alterations, maintenance, repair, replacement or other work done by or caused to be done by Tenant at the Premises and shall keep the Land and City's interest in the Premises and the Land free of mechanics' and materialmen's liens and other liens of like nature other than liens created or claimed by reason of any work done by or at the request of City or its agents. Tenant shall protect, defend and indemnify City against all such liens or claims which may ripen into such liens on the Land, or City's interest in the Premises, and against all attorney's fees and other costs and expenses caused by or incurred by reason of or on account of any such claim or lien.

B. Tenant shall immediately notify City of any such lien, claim of lien or other action of which it has knowledge that affects the title to the Premises, or any part thereof. Tenant shall cause the same to be removed within five days. Notwithstanding the foregoing, if Tenant contests the correctness or validity of any such lien and if the laws of the State of New Mexico provide for the release of real Premises from such a lien by obtaining and/or recording a surety bond, then within twenty (20) days after written demand by City, Tenant shall obtain a surety bond and shall otherwise comply with the requirements of such laws, so as to effect the release of the Premises from such lien. If Tenant fails to timely cure such liens, or to provide a surety bond as provided herein, City, in addition to all other available remedies hereunder, may take such action as City deems necessary to remove same and the entire cost thereof shall be immediately due and payable by Tenant to City as Additional Rent.

#### XI. DAMAGE TO OR DESTRUCTION OF IMPROVEMENTS

A. If the Land and/or the Building or any other improvements shall be partially or wholly damaged or destroyed by fire, windstorm, water, earthquake, flood or by any other means, Tenant may, at Tenant's option, to be evidenced by notice in writing given to City within sixty (60) days after the occurrence of such damage or destruction, elect to terminate this Lease as of the date of such notice.



B. If Tenant does not elect to terminate this Lease, the Tenant shall commence to rebuild or repair any such damage at Tenant's sole cost and expense and restore the Premises to substantially the same condition that existed immediately prior to the damage or return the Premises to its original state of land. All insurance proceeds payable under any Premises insurance policies held by Tenant covering the Premises shall be paid into escrow to be held for payment towards the cost of rebuilding or repair and, should Tenant fail to perform its obligation to rebuild or repair, such proceeds, plus any amount necessary to rebuild or repair that is not covered by insurance, shall be paid to City. Except as provided below, no damage or destruction by fire or other casualty shall cause a termination of this Lease or any abatement of Rent or Additional Rent. If Tenant elects not to restore the Premises to substantially the same condition that existed immediately prior to the damage, Tenant shall, at City's election, either raze any remaining portion of the improvements and remove all debris or demolish only the damaged portions of the improvement and remove the debris, then grade and restore the land to its original condition if City elected to have all improvements raised and removed, and assign to City all of the insurance proceeds for any casualty covered by Tenant's Special Form Insurance Coverage in connection with such event, plus deliver to City or directly to Tenant's insurer, the full cost of the deductible provided, however, that City shall have no right to receive any insurance proceeds attributed to Tenant's buildings, furniture, fixtures, and personal property.

## XII. SURRENDER UPON TERMINATION.

A. In the event that this Lease is terminated prior to the expiration of the term hereof for any reason other than default by Tenant, this Lease shall be of no further force or effect and all rights and obligations of the parties hereto shall cease and terminate concurrently with the effective date of such termination, subject, however, to the provisions of Section IX.B. below. Nothing in this subsection A shall relieve any party from its obligations under the Sections of this Lease entitled "Rent and Term", "Holding Over", "COMPLIANCE WITH LAW", "TENANT'S FIXTURES AND EQUIPMENT", "OWNERSHIP OF IMPROVEMENTS", "REPAIR AND MAINTENANCE", "MECHANICS' AND MATERIALMAN'S LIENS", "DAMAGE TO OR DESTRUCTION OF IMPROVEMENTS", "SURRENDER UPON TERMINATION", "UTILITIES", "DEFAULT AND REMEDIES", "HAZARDOUS SUBSTANCES", "FIRE OR OTHER CASUALTY LOSS TO PERSONAL PROPERTY", "INDEMNIFICATION", "ASSIGNMENT AND SUBLETTING", "TAXES AND ASSESSMENTS", "INSURANCE", "BROKER", "RIGHT OF ENTRY", "CONDEMNATION", "Governing Law", "Surrender of Premises", "Attorney's Fees", and "Security Deposit" with respect to any matter therein specified which occurred prior to the effective date of termination or that expressly survives the expiration or earlier termination of this Lease.

B. Surrender of Premises. Upon the expiration or any earlier termination of this Lease, Tenant shall surrender the Premises to City, including any the Buildings and all other improvements located thereon in good condition, subject to the provisions set forth in Section VIII of this Lease entitled "DAMAGE TO OR DESTRUCTION OF IMPROVEMENTS" and Section IX entitled "REPAIRS AND MAINTENANCE", reasonable wear and tear excepted ("Surrender"), and the Building and all other improvements shall be the property of the City (specifically excluding all of Tenant's fixtures, machinery, interior and exterior signs and any other removable personal property placed upon the Premises by Tenant, provided that Tenant removes Tenant's Fixtures and Equipment and repairs any damage caused thereby. All other fixtures and improvements shall remain at the Premises at the expiration or termination of this Lease without compensation, allowance, or credit to Tenant.) Notwithstanding the foregoing, at least six months prior to the expiration of the Lease or within thirty (30) days after the earlier termination of this Lease, City may notify Tenant in writing that City would like Tenant to remove the Building(s), in its entirety, prior to Surrender of the Premises to City, and Tenant, at its sole expense, shall do as requested. If Tenant fails to perform any repairs or restoration or fails to remove any of Tenant's property from the Premises as required hereunder, City may do so, and Tenant shall pay City the cost thereof upon demand. All of Tenant's property that remains on the Premises after the termination or expiration of the Lease, shall be deemed abandoned by Tenant and City shall have the right to remove and dispose of such Tenant property at Tenant's expense, and City shall in no event be responsible for the value, preservation or safekeeping thereof. All such Tenant's property remaining on the Premises after the termination or expiration of the Lease, excluding any furniture, fixtures, equipment and personal property leased to Tenant shall, at City's option, be conclusively deemed to have been conveyed by Tenant to City as if by bill of sale without payment by City. If City arranges for storage of any of Tenant's property, City shall have a lien against such property for costs incurred in removing and storing the same. As of the later of the termination/expiration date or the date of Surrender, all obligations of City and Tenant under this Lease shall terminate, and this Lease shall be of no further force and effect, except for any liability or obligation arising out of any indemnification provision of this Lease, or any obligation or liability which accrued prior to the expiration or earlier termination of the Lease or which survive the expiration or earlier termination of this Lease.

### XIII. UTILITIES.

All utilities for the Premises, including but not limited to water, gas, electric, telephone, and cable, shall be arranged directly by Tenant with the utility supplier, including the posting of any required deposits, and paid directly by Tenant to the utility supplier when due. From the date of Delivery through the Rent Commencement Date, Tenant shall pay for all temporary utilities needed for the construction of the Tenants Improvements and/or the operation of its business.

Tenant shall not install any equipment or fixtures, or use the same, in any manner that exceeds the safe and lawful capacity of any utility equipment or lines serving the Premises. City shall not be liable in damages or otherwise for any failure, variation, shortage or interruption of any utilities or services and Tenant shall not be entitled to terminate this Lease or abate any portion of the Rent as a result of such failure, variation, shortage or interruption. Tenant shall also arrange directly for all refuse removal services from the Premises to the central dumpsters provided by City and shall cause all refuse to be removed with sufficient frequency to prevent odors or accumulation. The location of refuse containers outside the Premises shall be subject to City's approval. If Tenant's water, sewer, refuse account is delinquent and could become a lien on the property, the City or its Property Manager will pay such accounts and invoice the Tenant. Failure to reimburse the City within 30 days of presentation of any invoice for utilities shall be deemed a material default. Such unpaid obligations to the City are deemed Additional Rent. Notwithstanding anything herein to the contrary, if a separate meter is not installed in the Premises, and City receives the bill for any utility, then the related utility charges shall be billed by City to Tenant on an equitable basis based upon the area of the Premises in relationship to the leasable area of the building or buildings utilizing the same meter.

#### XIV. DEFAULT AND REMEDIES.

A. Default. The occurrence of any one or more of the following events shall constitute a default by Tenant:

1. Failure to make payment when due.
2. The abandonment of the Premises by Tenant for a period of thirty (30) consecutive calendar days.
3. The failure by Tenant to observe or perform any of the express covenants or provisions of this Lease, where such failure shall continue for a period of ten (10) consecutive calendar days after written notice thereof from the City to Tenant, provided that if the nature of Tenant's default is such that more than ten (10) consecutive calendar days are reasonably required for its cure, then Tenant shall not be deemed to be in default if Tenant commences to cure within the ten (10) day period, and thereafter diligently and continuously prosecutes such cure to completion.
4. Tenant (a) files, or consents by answer or otherwise to the filing against it, of a petition for relief or reorganization or arrangement or any other petition in bankruptcy or liquidation or to take advantage of any bankruptcy or insolvency law of any jurisdiction; (b) makes an assignment for the benefit of its creditors; (c) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of

itself or of any substantial part of its property; or (d) takes action for the purpose of any of the foregoing.

5. A court or governmental authority of competent jurisdiction, without consent by Tenant, enters an order appointing a custodian, receiver, trustee or other officer with similar powers with respect to it or with respect to any substantial power of its property, or constituting an order for relief or approving a petition for relief or reorganization or any other petition in bankruptcy or insolvency law of any jurisdiction, or ordering the dissolution, winding up or liquidation of Tenant, or if any such petition is filed against Tenant and such petition is not dismissed within **180 days**.

6. This Lease or any estate of Tenant hereunder is levied upon under any attachment or execution and such attachment or execution is not vacated within **180 days**.

7. Tenant assigns this Lease or subleases all or any portion of the Premises without City's prior written consent.

B. City's Remedies. In the event of Default by Tenant, as defined above, the City, in addition to any other remedies set forth in this Lease, may without further notice or demand, exercise any one or more of the following remedies concurrently or in succession:

1. Terminate this Lease, in which event this Lease and the leasehold estate hereby created shall automatically terminate upon the effective date of such notice with the same force and effect and to the same extent as if the effective date of such notice was the day originally fixed in this Lease for the expiration of the Lease Term. City shall thereupon be entitled to take possession of the Premises and at the election of the City, take title to all structures, and Tenant shall immediately surrender the Premises to City and agrees to pay to City, on demand, the following damages:

- a. the unpaid rent and other amounts due at the time of termination plus interest thereon at the maximum lawful rate per annum from the due date until paid.
- b. the net present value of the balance of the rent for the remainder of the term, (had such term not been terminated by City prior to the date of expiration), less the net present value of the fair market value rental of the Premises for said period taking into consideration a reasonable lease up period and reasonable expenses that would be incurred by City in re-letting the Premises (spread evenly throughout the term of the new lease), however this sum shall not be less than zero as in no event shall City be

obligated to pay Tenant if the difference is a negative number. Both future payments computed in accordance with this provision shall be discounted to present value in accordance with accepted financial practices using a discount rate of 4% per annum.

- c. any other amount arising out of Tenant's failure to perform its obligations under the Lease, or which in the ordinary course of events would be likely to result therefrom, including the cost of recovering the Premises restoring the Premises to the original vacant state of the Land, which costs shall not include the costs of demolition or remodeling the Premises for a new tenant, and brokerage commissions.

2. Continue this Lease in effect, and as long as the City does not terminate Tenant's right to possession, and City may enforce all its rights and remedies under the Lease, including the right to recover the rent. Actions to collect amounts due by Tenant to City as provided in this Section may be brought from time to time, on one or more occasions, without the necessity of waiting until expiration of the Lease term.

3. Terminate Tenant's right of possession (but not this Lease) and repossess the Premises pursuant to the laws of the State in which the Property is located, without demand or notice of any kind to Tenant, in which event City may, but shall be under no obligation to do so (except to the extent required by the laws of the State in which the Property is located), relet the Premises for the account of Tenant for such rent and upon such terms as shall be satisfactory to City. Tenant shall be responsible for rent for the period that the Premises are vacant and all direct and reasonable costs of recovering possession, re-letting the Premises, and collecting amounts owed, as provided in Article XIV, Section (B)(7) below. Tenant shall be liable for any deficiency of such rental below the total rental and all other payments herein provided for the unexpired balance of the term of this Lease. City may, at its discretion, elect to accelerate all future payments due in this paragraph and such future payments shall be discounted to present value in accordance with accepted financial practices using a discount rate of 4% per annum. If said breach of the Lease continues, City may, at any time thereafter, elect to terminate the Lease as provided above.

4. From time to time, recover accrued and unpaid Rent and damages arising from Tenant's breach of the Lease, regardless of whether the Lease has been terminated, together with applicable late charges and interest at the rate of 18% per annum or the highest lawful rate, whichever is less.

5. Subject to any subordination of lien expressly granted by City in writing, enforce the statutory City's lien on Tenant's property.

6. With or without having terminated the Lease, enter upon and take possession of the Premises and expel or remove Tenant and any other person who may be occupying or using said Premises or any part thereof, by force if necessary, without incurring liability to Tenant or to any person occupying or using the Premises for any damage caused or sustained by reason of such entry or such removal.

7. In case of any event of default or breach by Tenant, Tenant shall also be liable for and shall pay to City, at the address specified for notice to City herein, in addition to any sum provided to be paid above, brokers' fees incurred by City in connection with re-letting the whole or any part of the Premises; the costs of removing and storing Tenant's or other occupant's property; the costs of repairing, altering, remodeling or otherwise putting the Premises into condition acceptable to a new tenant or tenant's and all reasonable expenses incurred by City in enforcing or defending City's rights and/or remedies, recovering possession, re-letting the Premises, or collecting amounts owed, including reasonable attorneys' fees (including, but not limited to, the reasonable fees and disbursements of City's legal counsel and the reasonable charges of City's internal legal counsel, litigation expenses, expert witness fees, and service of process fees).

8. Enter upon and/or take possession of the Premises and perform any obligation on Tenant's behalf, including but not limited restoring the Premises to its original vacant state, and recover from Tenant, upon demand, the entire amount paid or incurred by City for such purpose, plus 15% for special handling, supervision and overhead, which Tenant hereby acknowledges constitutes reasonable liquidated damages and not a penalty.

9. Alter all locks and other security devices at the Premises without terminating this Lease. City shall not be obligated to provide a key or other means of ingress to the Tenant or Tenant's agents, or to pay for any damage to any security system, or to provide re-entry for any reason or under any circumstances whatsoever.

10. In the event that City shall have taken possession of the Premises pursuant to the authority herein granted, then City shall have the right to keep in place and use all of the structures, furniture, fixtures and equipment at the Premises, including that which is owned by or Leased to Tenant at all times prior to any foreclosure thereon by City or repossession thereof by a lessor thereof or third party having a lien thereon. City shall also have the right to remove from the Premises (without the necessity of obtaining a

distress warrant, writ of sequestration or other legal process) all or any portion of such structures, furniture, fixtures, equipment and other property located thereon and place same in storage at any premises within the County of Bernalillo; and in such event, Tenant shall be liable to City for costs incurred by City in connection with such removal and storage and shall indemnify and hold City harmless from all loss, damage, cost, expense and liability in connection with such removal and storage. City shall also have the right to relinquish possession of all or any portion of such structures, furniture, fixtures, equipment and other property to any person ("Claimant") claiming to be entitled to possession thereof who presents to City a copy of any instrument represented to City by Claimant to have been executed by Tenant (or any predecessor of Tenant) granting Claimant the right under various circumstances to take possession of such structures, furniture, fixtures, equipment or other property, without the necessity on the part of City to inquire into the authenticity of said instrument's copy of Tenant's or Tenant's predecessor's signature thereon and without the necessity of City's making any nature of investigation or inquiry as to the validity of the factual or legal basis upon which Claimant purports to act; and Tenant agrees to indemnify and hold City harmless from all cost, expense, loss damage and liability incident to City's relinquishment of possession of all or any portion of such titled structures, furniture, fixtures, equipment or other property to Claimant. The rights of City herein stated shall be in addition to any and all other rights which City has or may hereafter have at law or in equity; and Tenant stipulates and agrees that the rights herein granted City are commercially reasonable.

11. Seek injunctive relief, including, if applicable, a mandatory injunction.

12. Pursue any other remedies provided in specific provisions of this Lease, available at law, or provided in equity.

13. If Tenant fails more than twice within and twelve month period to observe or perform any covenant, condition, or agreement of the Lease (including, without limitation, the payment of Rent), regardless of whether such failures have been cured by Tenant, the third failure will at the election of City, in its sole and absolute discretion, be deemed an automatic event of Default, without notice to Tenant or an opportunity to cure.

14. Once a failure to make a payment of Rent or a failure to perform or observe any other term or condition contained in this Lease has occurred, City, in its sole discretion, may at any time require that all future payments from Tenant pursuant to this Lease be in certified funds or made by automatic electronic bank transfers.

15. All of the remedies provided in this Article XIV shall survive the termination of this Lease.

XV. HAZARDOUS SUBSTANCES.

A. Definitions: For the purposes of this Lease, the following terms have the following meanings:

1. **“Environmental Law”** means any Federal, State or local law, statute, ordinance or regulation, rules or guidelines, now or hereafter in effect, pertaining to or governing Hazardous Substances or which relate to the protection of human health, safety, or that of the environment, including, without limitation, **CERCLA** (Comprehensive Environmental Response, Compensation and Liability Act of 1980), **RCRA** (Resources Conservation and Recovery Act of 1976) and **SARA** (Superfund Amendments and Reauthorization Act of 1986).

2. **“Hazardous Substance”** means any substance, material, waste, pollutant, or oil, which is, or becomes designated, classified or regulated as being “toxic”, “hazardous”, “radioactive”, “dangerous” or a “pollutant”, or any similar term, which is or becomes similarly designated, classified or regulated, under any Environmental Law, including asbestos, petroleum and petroleum products.

B. Tenant’s Responsibilities: At its own expense, Tenant will procure, maintain in effect and comply with all conditions of any and all permits, licenses and other governmental and regulatory approvals required for Tenant’s use of the Premises. Tenant will not cause or permit any Hazardous Substance to be brought upon, kept or used in or about the Property by Tenant, its agents, employees, contractors or invitees without the prior written consent of City. Tenant will cause any and all Hazardous Substances brought upon the Premises by Tenant to be removed from the Premises and transported solely by duly licensed haulers to duly licensed facilities for final disposal of such materials and wastes. Tenant will, in all respects, handle, treat, deal with and manage any and all Hazardous Substances in, on, under or about the Premises in total conformity with all applicable Environmental Laws and prudent industry practices regarding management of such Hazardous Substances. Upon expiration or earlier termination of the term of the Lease, Tenant will cause all Hazardous Substances placed on, under or about the Premises by Tenant or at Tenant’s direction to be removed and transported for use, storage or disposal in accordance and compliance with all applicable Environmental Laws. Tenant will not take any remedial action in response to the presence of any Hazardous Substances in or about the Premises or the Property, nor enter into any settlement agreement, consent decree or other compromise in respect to any claims relating to any Hazardous Substances in any way connected with the Premises without first notifying City of Tenant’s intention to do so and affording City ample opportunity to appear, intervene or otherwise appropriately assert and protect City’s interests with respect thereto.



C. Environmental Audit. At any time and from time to time, City may retain an environmental consultant or engineer to conduct an environmental audit or environmental assessment of the Premises and Tenant's compliance with applicable laws, rules and regulations. Tenant shall extend its full cooperation with such audit or investigation. If Tenant is found not to be substantially in compliance with applicable law, then Tenant shall pay all reasonable costs associated with such audit or assessment to City upon demand; otherwise all costs shall be borne by City. In addition, Tenant, at City's request from time to time, shall complete such questionnaires and provide such information with respect to Tenant's activities and operations on the Premises as City shall reasonably require.

D. Indemnification: If the Premises or the Property become contaminated in any manner for which Tenant is legally liable or otherwise become affected by any release or discharge of a Hazardous Substance, Tenant shall immediately notify City of the release or discharge of the Hazardous Substance. Tenant shall defend, indemnify and hold City harmless from and against any and all costs, claims, demands and damages, including attorneys' fees (including without limitation the reasonable fees and disbursements of City's legal counsel and the reasonable charges of City's internal legal counsel, litigation expenses, expert witness fees, and service of process fees) and court costs and investigatory and laboratory fees, related to any breach of this Article XV by Tenant, its agents, contractors, or employees, including, without limitation, any adverse health or environmental condition (including without limitation any violation of Environmental Laws) occurring during the Term. This indemnification obligation shall survive the expiration or earlier termination of this Lease.

#### XVI. RIGHT OF ENTRY.

The City, agents and other representatives shall have the right to enter into and upon the Premises or any part thereof at reasonable times for the purpose of inspecting the Premises, making repairs, showing the Premises to prospective lenders or purchasers of the Property and prospective tenants during the six months preceding the expiration of the term. In the event of an emergency as determined by the City, the City, agents and other representatives may enter at any time, without notice and without the presence of Tenant. Tenant will permit City at any time within **180 days** prior to the expiration of this Lease, to place upon the Premises any usual "To Let" or "For Lease" signs, and permit potential tenants to inspect the Premises, provided that such inspections do not unreasonably interfere with the operations of Tenants business activities.

#### XVII. FIRE OR OTHER CASUALTY LOSS TO PERSONAL PROPERTY.

The City shall not be liable for any damage or loss of the Tenant's personal property on the Premises from any cause, including, but not limited to, bursting or leaking of water pipes, leaking roof, fire, theft and negligence of co-Tenants. Tenant shall be solely responsible for obtaining and paying for insurance covering Tenant's personal property in the Premises, operations losses and liability insurance. Tenant shall not be insured for such losses by the City and shall not be entitled to make loss claims under the insurance coverage of the City.

#### XVIII. INDEMNIFICATION.

Tenant agrees to defend, indemnify and hold harmless the City, its officers and employees against liability, claims, damages, losses or expenses arising out of bodily injury to person, including death or damage to property caused by or resulting from Tenant's and/or its employees and agents negligent act(s) or omission(s) while Tenant and/or its employees or agents perform(s) or fails to perform its obligations and duties under the terms and conditions of this Lease. Provided, however, Tenant is not required to indemnify the City for the negligence or intentional acts, errors, or emissions of the City or of its employees or agents.

#### XIX. ASSIGNMENT AND SUBLETTING.

Tenant shall not assign this Lease or sublet the whole or any part of the Premises at any time for any reason without the City's prior written approval. Tenant acknowledges that the terms of this Lease are unique to Tenant and Tenant's situation, and that the City may not grant such terms to a potential assignee or sublessee. It being further understood that it shall be reasonable for City, among other things, to withhold consent if City is not satisfied with the financial responsibility, identity, reputation or business character of the proposed assignee or subtenant. Notwithstanding any consent by City, Tenant and its Guarantor(s), if any, shall remain jointly and severally liable (along with each approved assignee and sublessee, which shall automatically become liable for all obligations of Tenant hereunder with respect to that portion of the Premises so transferred), and City shall be permitted to enforce the provisions of this Lease directly against Tenant or any assignee or sublessee without proceeding in any way against any other party. In the event of an assignment or sublease, contemporaneously with the granting of City's consent, Tenant shall cause the assignee or sublessee to expressly assume in writing and agree to perform all of the covenants, duties and obligations of Tenant hereunder and such assignee or sublessee shall be jointly and severally liable therefore along with Tenant. Unless approved by City, no usage of the Premises, different from the usage provided for in Section I and V, above, shall be permitted, and all other terms and provisions of the Lease shall continue to apply after such assignment or sublease. City shall have the right to assign or transfer, in whole or in part, City's rights and obligations hereunder and in the Property and the Premises.

XX. TAXES AND ASSESSMENTS.

Tenant shall promptly pay all taxes and other exactions assessed or assessable and pay all license and permit fees applicable to the Tenant's operation, and acquire and keep current all licenses, municipal, state or federal, required as a result of the Tenants' operation on the Premises and shall not allow any of said taxes, excises or fees to become delinquent.

XXI. INSURANCE.

A. At its expense, the Tenant shall procure and maintain insurance in the kinds and amounts set forth below:

1. Special Form property insurance, including without limitation sprinkler leakage, in an amount equal to one hundred percent (100%) of the then full replacement cost of all property owned by Tenant or within the Premises, including, but not limited to, Tenant Improvements, contents, inventory, and all personal property within the Premises subject to a deductible of not more than \$5,000.00, against all casualties included under the "Special Form" insurance form, including coverage for the foundation and site work (such coverage to be provided by endorsement if not already included in the Special Form policy.) City shall be named as additional insured and loss payee on the Property Insurance Policy.

2. Comprehensive General Liability Insurance. Commercial general liability insurance applying to third party claims for bodily injury or property damage, including coverage for "premises/operations", "products and completed operations", and "blanket contractual" liabilities, written on an occurrence basis with limits not less than \$1,000,000 per occurrence, \$1,000,000 personal or advertising injury, \$2,000,000 products and completed operations aggregate, and \$2,000,000 general aggregate, or such higher amounts and additional coverages as City may reasonably require from time to time.

3. The policies of insurance must include coverage for all operations performed by the Tenant and contractual liability coverage, which shall specifically insure the hold harmless provisions of the Lease.

4. Workmen's Compensation Insurance. Workmen's Compensation Insurance for its employees in accordance with the provisions of the Workmen's Compensation Act of the State of New Mexico, and employer's liability insurance with a limit not less than \$1,000,000 bodily injury each accident, \$1,000,000 bodily injury by disease - each person and \$1,000,000 bodily injury by disease - policy limit, or such

higher amounts and additional coverages as City may reasonably require from time to time.

5. **Automobile Liability Insurance.** A comprehensive automobile liability insurance policy with liability limits in amounts not less than \$1,000,000 combined single limit of liability for bodily injury, including death, and property damage in any one occurrence. The policy shall include coverage for the use of all owned, non-owned or hired automobiles, vehicles and other equipment both on and off road, The City shall be named an additional insured.

**B. Policy Requirements.** Tenant's insurance policies shall:

1. Cover all operations under this Lease, whether performed by Tenant, its agents, or its sublessee(s).

2. Provide at the Tenant expense, bodily injury and property damage liability insurance covering all work on the Premises with limits of liability in the amount of \$300,000 BI and \$200,000 PD. The City shall be shown on such policies as additional named insured.

3. As to liability policies, name City, its property managers, and any mortgagee(s), and their respective directors, officers, partners, agents, employees, members, trustees, and shareholders as additional insureds, by endorsement approved by City.

4. Contain a requirement by the insurer to notify City and the holder of any encumbrance on the Property designated by City, in writing not less than thirty days prior to any cancellation, termination, or non-renewal of the policy.

5. Be reasonably satisfactory in form, substance, limits, deductibles and retentions to City.

**C. Evidence of Coverage.** Annually, Tenant shall deliver to City certificates of insurance, if required by City, certified copies of each such insurance policy as soon as practicable after the placing of the required insurance and periodically thereafter upon renewal or replacement of the policies then in force, which shall occur at least 30 days prior to the expiration or cancellation thereof. A certificate of insurance that states that the failure to give the City notice imposes no liability or obligation on the insurer shall not be in compliance with this Section. For example, certificates or policies stating that the insurance company shall "endeavor to notify" and that the "failure to give such notice imposes no

obligation” on the insurance company are not in compliance with the insurance requirement of this Lease. All certificates of insurance shall provide that thirty (30) days written notice be given to the Risk Manager, City of Albuquerque, P.O. Box 1293, Albuquerque, New Mexico 87103 and the Real Property Manager, Real Property Division, P.O. Box 1293, Albuquerque, New Mexico, 87103, before a policy is canceled, materially changed or not renewed. Various types of required insurance may be written in one or more policies. City shall have the right to request current confirmation of insurance coverage from time to time. No review or approval of any such insurance certificate by City shall derogate or diminish City’s rights or Tenant’s obligations. Tenant shall not take possession of the Premises without having complied with the requirements of this Section. If at any time Tenant fails to provide satisfactory evidence of all required coverages, City may but shall have no obligation to purchase such insurance for Tenant and at Tenant’s sole cost and expense, which shall be immediately due and payable by Tenant upon demand.

## XXII. CONDEMNATION

A. Optional Termination. If during the Term any part of the Property is taken or purchased by right of eminent domain or in lieu of condemnation, whether or not any portion of the Premises is taken, and if in the reasonable opinion of City substantial alteration or reconstruction of the portion of the Property is necessary or desirable as a result thereof, or the amount of parking available to the portion of the Property is materially and adversely affected, City shall have the right to terminate this Lease by giving Tenant at least thirty days written notice of such termination.

B. Award. City shall be entitled to receive and retain the entire award or consideration for the affected lands and improvements and Tenant shall not have, or advance, any claims against City for (i) the value of its property or its leasehold estate, (ii) the unexpired term of this Lease, (iii) costs of removal or relocation, or (iv) business interruption expense or any other damages arising out of the taking or purchase. Nothing herein shall give City any interest in or preclude Tenant from seeking and recovering on its own account from the condemning authority any separate award of compensation attributable to the taking or purchase of Tenant’s chattels or trade fixtures or attributable to Tenant’s relocation expenses provided that any such separate claim by Tenant shall not reduce or adversely affect the amount of City’s award. If any such separate award made or compensation paid to Tenant specifically includes an award or amount for City, Tenant shall promptly account therefor to City.

## XXIII. ETHICS AND CAMPAIGN PRACTICES BOARD, FAIR DEALING AND CONFLICT OF INTEREST.

A. Tenant agrees to provide the Board of Ethics and Campaign Practices of the City

of Albuquerque or its investigator (the "Board") with any records or information pertaining in any manner to this Lease whenever such records or information are within Tenant's custody, are germane to an investigation authorized by the Board and are requested by the Board. Tenant further agrees to appear as a witness before the Board as required by the Board in hearings concerning ethics or campaign practices charges heard by the Board. Tenant agrees to require that all contractors, subcontractors, or sub-consultants employed by Tenant for any of the services performed under the terms of this Lease will agree in writing to comply with the provisions of this paragraph. Tenant, will not be compensated for its time or any costs it incurs in complying with the requirements of this paragraph.

B. Upon execution of this Lease, or within five days after the acquisition of any interest described in this Section during the Term of this Lease, the Tenant shall disclose in writing to the City whether any City Councilor or other officer or employee of the City has or hereafter acquires any direct, indirect, legal or beneficial interest in the Tenant or in any contract, Lease or agreement between the City and Tenant or in any franchise, concession, right or privilege of any nature granted by the City to the Tenant in this Lease.

C. Tenant covenants and warrants that the only person or firm interested in this Lease as principal or principals is named in this Lease, and that this Lease is entered into by the Tenant without collusion on the part of the Tenant with any person or firm, without fraud and in good faith. The Tenant also covenants and warrants that no gratuities, in the form of entertainment, gifts or otherwise, were, or during the term of this Lease, will be offered or given by the Tenant or any agent or representative of the Tenant to any officer or employee of the City with a view towards securing this Lease or for securing more favorable treatment with respect to making any determinations with respect to performing this Lease.

#### XXIV. DISCRIMINATION PROHIBITED.

In the operation and use of the Location, the Tenant shall not on the grounds of race, color, religion, sexual orientation, sexual preference, national origin or ancestry, or age, discriminate or permit discrimination against any person or group of persons in any manner prohibited by Title 49 CFR Parts 21 and 23, the Civil Rights Act of 1964, as amended, the Equal Pay Act of 1963, the Rehabilitation Act of 1973, and the New Mexico Human Rights Act. Without limiting the generality of the foregoing, the Tenant shall not discriminate against any employee or applicant for employment because of race, color, religion, gender, sexual orientation, sexual preference, national origin or ancestry, age, or physical or mental handicap. Such action will include, but not be limited to: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; selection for training; and disciplinary actions and grievances. The Tenant agrees to post in

conspicuous places available to employees, and applicants for employment, notice to be provided setting forth the provisions of this non-discrimination clause.

XXV. AMERICANS WITH DISABILITIES.

Tenant agrees to meet all applicable requirements of the American with Disabilities Act of 1990, as amended, and all applicable rules and regulations, as amended, (the "ADA"), that are imposed directly on Tenant or that would be imposed on the City as a public entity. Tenant agrees to be responsible for knowing all applicable requirements of the ADA to defend, indemnify and hold harmless the City, its officials, agents and employees from and against any and all claims, actions, suits or proceedings of any kind brought against said parties as a result of any acts or omissions of Tenant or its agents in violation of the ADA.

XXVI. BROKER:

Tenant warrants and represents that it has not consulted or negotiated with any broker or finder with regard to the Premises or this Lease. If Tenant shall be in breach of the foregoing warranty, Tenant shall indemnify the City against any loss, liability and expense (including attorneys' fees and court costs) arising out of claims for fees or commissions from anyone having dealt with the Tenant.

XXVII. MISCELLANEOUS

A. Waiver Of Default. No failure by the City to insist upon the strict performance of any term, condition, or covenant of this Lease or to exercise any right or remedy available on the breach thereof, and no acceptance of full or partial rent during the continuance of any breach will constitute a waiver of any breach or of any term, condition, or covenant. No obligation of this Lease that Tenant is required to perform and no breach thereof, will be waived, altered, or modified, except by written instrument executed by the City.

B. Relation To Other Leases. This Lease is separate and distinct from and shall be construed separately from any other agreement between City and Tenant or the City and any other Tenant.

C. Time Is Of The Essence. Time is of the Essence in the performance of this Lease.

D. Governmental Right And Powers. Nothing in this Lease shall be construed or interpreted as limiting, relinquishing, or waiving any rights of ownership enjoyed by the City in the Premises or waiving or limiting the City's control over the management, operations or maintenance of the Premises except as specifically provided in this Lease, or impairing

exercising or defining governmental rights and the police powers of the City.

E. Exhibits. All certificates, documents, exhibits, attachments, riders, and addenda, if any, referred to in this Lease, including but not limited to the exhibits referred to in this Lease, are hereby incorporated into this Lease by reference and are made a part hereof as though set forth in full in this Lease to the extent they are consistent with the terms and conditions of this Lease.

F. No Partnership Or Agency. Nothing contained in this Lease is intended or shall be construed in any respect to create or establish any relationship other than that of City and Tenant, and nothing herein shall be construed to establish any partnership, joint venture or association or to make Tenant the general representative or agent of City for any purpose whatsoever.

G. Non-Liability Of City. City shall not in any event be liable for any acts or omissions of Tenant or its agents, servants, employees or independent contractors or for any condition resulting from the operations or activities of Tenant, its agents, servants, employees or independent contractors either as to Tenant or to any other person. City shall not be liable for Tenant's failure to perform any of its obligations under this Lease, or for any delay in the performance thereof, nor shall any such delay, or failure, be deemed a default by City. Notwithstanding anything to the contrary in this Lease, neither the City, nor City's administration, councilors, directors, employees, agents, representatives, successors or assigns (collectively, "City's Affiliates") shall be personally responsible or liable for any representation, warranty, covenant, undertaking or agreement contained in the Lease, and the sole right and remedy of Tenant or any subsequent sublessee or assignee shall be against City's interest in the Premises. Neither Tenant nor any subsequent sublessee or assignee shall seek to obtain any judgment imposing personal liability against the City, City's Affiliates, or their successors or assigns, nor execute upon any judgment or place any lien against any property other than City's interest in the Premises.

H. Force Majeure. In the event City or Tenant is delayed, hindered or prevented from performing any act or thing required hereunder by reason of strikes, lockouts, labor troubles, casualties, failure or lack of utilities, governmental laws or regulations, riots, insurrection, war, acts of God, or other causes beyond the reasonable control of City or Tenant, neither party shall be liable for the delay, and the period for the performance by either party shall be extended for a period equivalent to the period of such delay. The foregoing shall be inapplicable to the payment of rent by Tenant and to the delivery of the Premises by City.

I. Contract Review. City and Tenant acknowledge that they have thoroughly read



this Lease including all exhibits thereto, and have sought and received whatever competent advice and counsel was necessary for them to form a full and complete understanding of all rights and obligations herein. City and Tenant further acknowledge that this Lease is the result of negotiations between them and that this Lease shall not be construed against either party hereto by reason of that party's preparation of all or part of this Lease.

J. Notices. Any notice from one party to the other must be in writing and shall be deemed duly given three days after deposit in the United States Mail if mailed by registered or certified mail, return receipt requested, or upon receipt or refusal to accept if personally delivered or deposited with a national overnight deliver courier who obtains written confirmation of delivery, addressed to the other party at the address set below, or such other address as either party may designate in writing. The parties shall be responsible for notifying each other of any change of address. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of the notice, demand or request sent.

If and when included within the term "Tenant" as used in this instrument there are more than one person, firm or corporation, all shall jointly arrange amongst themselves and specify some individual at some specific address for the receipt of notices and payments to Tenant. All parties included with terms "City" and "Tenant" respectively, shall be bound by notices and payments given in accordance with the provisions of this Article to the same effects as if each had received such notice or payment.

1. Notice to Tenant  
Operating Engineers Local 953 Journeyman &  
Apprenticeship Training Trust Fund  
P.O. Box 9321  
Albuquerque, NM 87119
2. Notice to the City:  
City of Albuquerque  
One Civic Plaza, 11th Floor  
Attn: Chief Administrative Officer  
P.O. Box 1293  
Albuquerque, New Mexico 87103

With a copy to:  
Real Property Division Manager  
City of Albuquerque  
P.O. Box 1293

K. Estoppel Certificates. Tenant shall at any time within ten days after written request from City execute, acknowledge and deliver to City a statement in writing: (a) certifying that this Lease is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the date to which the Rent and other charges are paid in advance, if any; (b) confirming the commencement and expiration dates of the term; (c) confirming the amount of the security deposit held by City; (d) acknowledging that there are not, to Tenant's knowledge, any uncured defaults on the part of City hereunder, or specifying such defaults if any are claimed; and (e) confirming such other matters as City may reasonably request. A prospective purchaser or encumbrancer of the Premises or the Property may conclusively rely upon any such statement. If Tenant fails to respond within the required period, Tenant shall conclusively be deemed to have certified, confirmed and acknowledged all matters requested by City. If City desires to finance or refinance the Property, Tenant hereby agrees to deliver to any lender designated by City such financial statements of Tenant and any Guarantors named in this Lease as may be reasonably required by such lender. Such statements shall include the past three years' financial statements of Tenant and any Guarantors. All such financial statements shall be received by City in confidence and shall be used only for the purposes herein set forth.

L. Binding Effect. Once this Lease is made, the covenants, terms and conditions of this Lease will be binding upon and inure to the benefit of the parties, their successors, assigns, subtenants and subleases.

M. Further Actions. At any time and from time to time, each party agrees, without further consideration, to take such actions and to execute and deliver such documents as may be reasonably necessary to effectuate the purposes of this Lease.

N. Severability. In the event any covenant, condition or provision herein is held to be void, voidable, invalid, illegal, or unenforceable by any court of competent jurisdiction, such covenant, condition or provision shall be deemed amended to conform to applicable laws so as to be valid or enforceable, or, if it cannot be so amended, without material altering the intention of the parties, it shall be stricken. If stricken, all other covenants, conditions and provision of this Lease shall remain in full force and effect provided that the striking of such covenants, conditions or provisions does not materially prejudice either the City or Tenant in its respective rights and obligations contain in the valid covenants, conditions or provisions of this Lease

O. Authorization. If Tenant executes this Lease as a corporation or partnership, then

Tenant and the person(s) executing this Lease on behalf of Tenant, represent and warrant that such entity is duly qualified to do business in the State in which the Property is located and that the individuals executing this Lease on Tenant's behalf are duly authorized to execute and deliver this Lease on Tenant's behalf. City represents and warrants that it is the fee simple owner of the Premises, and that it has all requisite authority and approval to enter into this lease.

P. Joint And Several Liability: In the event that more than one person or entity executes the Lease as Tenant, all such persons and entities shall be jointly and severally liable for all of Tenant's obligations hereunder.

Q. Headings And Captions. Captions of sections and paragraphs are for convenience, not limitation, and are not to be construed as modifying text.

R. Attorneys' Fees. If either party to this Lease institutes any action or proceeding in court to enforce any provision hereof, for damage by reason of an alleged breach of any provision of this Lease, for a declaration of such party's rights or obligations hereunder, or for any other judicial remedy, each party shall be responsible for its own attorneys' fees (including the reasonable fees and disbursements and charges of internal legal counsel) and litigation expenses, including, but not limited to expert witness fees, and service of process fees.

S. Governing Law and Venue. This Lease shall be construed under the laws of the State of New Mexico. The parties agree that venue for any suit, action, or proceeding arising out of this Agreement shall be in Bernalillo County, New Mexico. The parties irrevocably admit themselves to, and consent to, the jurisdiction of said court. The parties further acknowledge that they have fully and fairly bargained for the terms of this Section S. The provisions of this Section S shall survive the expiration or earlier termination of this Lease.

T. Final Dates. If the final date of any deadline falls upon a Saturday, Sunday, or holiday recognized by the U.S. Postal Service, then in such event the time of such deadline shall be extended to the next day that is not a Saturday, Sunday, or holiday recognized by the U. S. Postal Service. Whenever the word "days" is used herein, it shall be considered to mean "calendar days" and not "business days" unless an express statement to the contrary is made.

U. Multiple Counterparts. The Lease may be signed in multiple counterparts or with detachable signature pages, but in either, or both, circumstances shall constitute one instrument, binding upon all parties thereto as if all parties signed the same document.

V. Public Document. City is a municipal corporation under the laws of the State of

**CITY:**  
**CITY OF ALBUQUERQUE**  
**A New Mexico Municipal Corporation**

Approved by the City Council  
Date and EC#

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

\_\_\_\_\_  
Sarita Nair, Chief Administrative Officer

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

Recommended by:

\_\_\_\_\_  
David Simon, Director  
Parks & Recreation Department

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

\_\_\_\_\_  
Michael Geier, Chief of Police  
Albuquerque Police Department

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

**TENANT:**

**Operating Engineers Local 953 Journeyman & Apprenticeship  
Training Trust Fund, a New Mexico Trust**

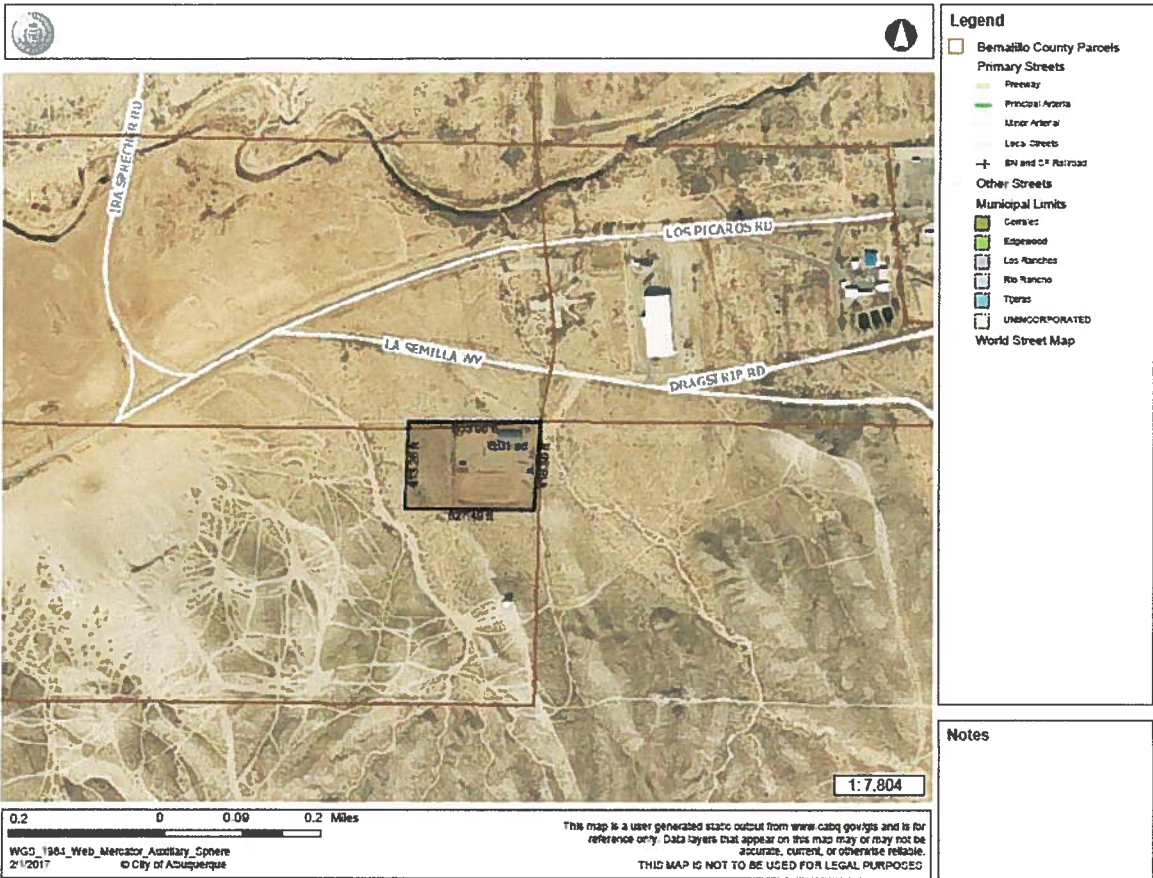
\_\_\_\_\_  
Executive Director

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

\_\_\_\_\_  
Board President

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

EXHIBIT "A"  
The Premises



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