

**ATTACHMENT 2**  
**AGREEMENT BETWEEN OWNER AND**  
**ARCHITECT FOR**  
**CHAMA ROUNDHOUSE VISITOR CENTER**  
**CUMBRES & TOLTEC SCENIC RAILROAD**

*(THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.)*

Contract No: \_\_\_\_\_

Location: \_\_\_\_\_

This Agreement entered into this day of \_\_\_\_\_, \_\_\_\_\_ 20\_\_\_\_ by and between:

Friends of the Cumbres & Toltec Scenic Railroad, Inc.  
4421 McLeod NE, Suite F  
Albuquerque, NM 87109  
505-880-1311  
FAX: 505-856-7543  
Web Site: <http://www.cumbrestoltec.org>

Hereinafter called "the Friends"; and

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

Hereinafter called "Architect."

NOTE: Professional and technical services shall be provided by the Architect through the Project Architect, Architect Name whose New Mexico Architect's seal and certificate number is \_\_\_\_\_ and New Mexico ID No. is: \_\_\_\_\_ and Federal ID Number is \_\_\_\_\_.

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## **RECITALS**

WHEREAS, the New Mexico Department of Transportation (NM DOT) has funded the Friends of the Cumbres & Toltec Scenic Railroad for the above referenced Project;

WHEREAS, the Architect was selected pursuant to the selection process as defined by the Friends' Request for Proposals for the Chama Roundhouse Visitor Center, dated \_\_\_\_\_;

WHEREAS, the Friends' organization is authorized to enter into a contract to design and construct the Project pursuant to its Cooperative Project Agreement (Control Number 5100180) with NM DOT, dated June 22, 2012;

WHEREAS, the Architect hereby represents that it employs the named Project Architect, and that such architect is a New Mexico registered architect ; and

WHEREAS, the Friends agrees to hire the Architect, and the Architect agrees to provide professional and technical services as required hereinafter for the Project in accordance with the terms and conditions set forth in this Agreement;

IT IS THEREFORE AGREED AS FOLLOWS:

### **ARTICLE 1**

#### **DEFINITIONS**

For purposes of this Agreement, the following definitions shall apply throughout the contract and to all attachments incorporated herein, unless otherwise specified.

1.1 **ARCHITECT:** The firm named in this Agreement which employs a registered architect of New Mexico or an individual registered architect of New Mexico. In the instance of a firm, the term "Architect" shall include the Project Architect.

1.2 **CODES:** All federal, state, and local codes applicable to the Project.

1.3 **DIRECT SALARY:** The gross wages, which do not include costs of employer beyond the amounts of the paychecks.

1.4 **MACC:** Maximum Allowable Construction Cost is the total sum available for construction purposes, including furnishings and equipment, but excluding professional fees, Owner's contingency funds and acquisition costs, and other costs which are the responsibility of the Owner as described in Article 5 and Article 6 of this Agreement.

1.5 **PROJECT:** The Project is the total construction of which the Work performed under the Contract Documents may be the whole or a part. The Project is further defined as follows:

**The scope of work shall include, but not be limited to the following:**

**TO BE DETERMINED AFTER AWARD**

1.6 PROJECT ARCHITECT: The individual registered architect of the State of New Mexico who shall sign and affix his New Mexico Architect's Seal to all plans, designs, drawings, specifications, and reports which involve the Project. The Project Architect shall be mutually agreed upon by the Friends and Architect at the time this Agreement is entered into by the parties and shall be named herein.

1.7 REIMBURSABLE EXPENSES: Expenses in addition to the basic services compensation (as defined in Section 2.0) which shall include actual expenditures made by the Architect or its employees in the interest of the Project (while performing architectural services pursuant to this Agreement) and limited to those items listed in Article 5 of this Agreement and authorized in writing by the Friends.

1.8 SITE: The physical location on which the Project is built, including all land acquired for the Project or associated with the Project, including all easements and rights-of-way.

1.9 FRIENDS: The Friends of the Cumbres & Toltec Scenic Railroad, Inc., the primary organization responsible for this contract work.

1.10 OWNER: The Cumbres & Toltec Scenic Railroad (C&TSRR), as represented by four Commissioners who are appointed by the Governors of the States of Colorado and New Mexico. The railroad, a bi-state entity, owns the land and facilities involved in this Project.

1.11 USER: The designated entities for whose use the Project is being constructed. For purposes of this Agreement, the Users are: the Friends, the Cumbres & Toltec Railroad Commission (C&TSRR Commission) and the operator, Heritage Railway Management, LLC (HRM).

1.12 USER REPRESENTATIVE: The individual designated by the Users with the authority to bind the Users with respect to this Agreement. For purposes of this Agreement, the User Representative is Tim Tennant, President and CEO, Friends of the C&TSRR.

**ARTICLE 2**

**ARCHITECT'S SERVICES AND RESPONSIBILITIES**

**2.0 BASIC SERVICES**

2.0.1 GENERAL: The Architect's basic services shall consist of the following:

- A. Programming Phase (provided as an additional service)
- B. Schematic Design Phase

- C. Design Development Phase
- D. Construction Documents Phase

The services to be provided during each phase are listed below and shall include all consulting services required by the Architect to provide the service.

2.0.2 The Architect shall request from the Friends' designated User Representative the following:

- A. Information sufficient for the Architect to develop program criteria including the Users' goals, objectives, and needs, and the organizational chart of individuals and equipment that shall occupy the Project.
- B. To the extent practicable and reasonable, the Architect shall incorporate the User Representative's requests into the documents for construction; however, the Architect is responsible solely to the Friends for the types of material incorporated into the construction, the size of the facilities constructed, and to design within the MACC.
- C. A list (by manufacturer and model number) of special equipment (other than 110 volt, 60HZ, requiring less than 10 amps) that requires utility services, including telecommunication equipment such as data transmission and computer lines.

2.0.3 FURNISHINGS AND EQUIPMENT: The Architect shall provide as an additional service all required work for design, selection, and preparation of contract documents, and bidding for the procurement of furniture, furnishings, and related equipment, unless otherwise noted in Article 13.

2.0.4. APPROPRIATIONS: The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the NM DOT and the Federal Highway Administration (FHWA) for the performance of this Agreement. If sufficient appropriations and authorization are not made, this Agreement shall terminate upon written notice being given by the Friends to the Architect. The Friends' determination that sufficient appropriations are not available shall be accepted by the Architect and shall be final.

2.0.5 ENGINEERING: The Architect shall acquire the services of engineers with expertise in soils, environmental and archaeological assessments or other consultants when such services are deemed necessary by the Architect. The Architect shall, during the Schematic Design Phase, submit to the Friends a statement of necessary engineering services that will be required.

2.0.6 STANDARD OF CARE: The Architect represents that he and his employees shall possess the experience, knowledge, and character necessary to qualify them individually for the particular duties they perform in connection with the services to be performed under this Agreement. These services shall be performed in accordance with the standards of the profession. The Architect further agrees that he will require his consultants, sub-consultants,

joint ventures, and agents to warrant to the Architect that they possess the experience, knowledge, and character necessary to qualify them individually for the particular duties that are performed in connection with the services to be performed for the Architect on the Project. This warranty shall further state that the services so entered shall be performed in accordance with the standards of the profession. Such warranty by consultants, sub-consultants, joint ventures, and agents shall not be construed as a diminution of the Architect's liability and responsibilities to the Friends' organization.

## **2.1 PROGRAMMING PHASE**

2.1.1 The program shall establish goals, collect facts, identify concepts, and determine functional needs necessary to complete the Project within the mandates of the Cooperative Project Agreement between the Friends and NM DOT. Based on the data provided by the User Representative and pursuant to adequate consultation with the User Representative, the Architect shall prepare a document that adequately defines the scope of the Project. This document shall reflect the limits of the MACC.

2.1.2 The Friends shall work with the Architect to ensure that the information possessed by the Users is made available to the Architect. This information and other requests concerning organization of functions shall be provided in the form of written memoranda.

2.1.3 The Friends shall schedule a meeting between the Architect, the Owner and User Representative to define the relationship among all parties. The Architect shall advise the Friends, in writing, of any information he requires which has not been provided by the Owner and User Representative, or any conflicts between the established program requirements, the MACC, and the Cooperative Project Agreement authorizing the Project.

2.1.4 The Architect shall obtain the approval of the Friends, in writing, of the Programming Phase before commencing work on the Schematic Design Phase. The Architect shall provide written confirmation, to be transmitted with the Program Document to the Friends, that the Architect has visited the site, familiarized himself/herself with the local conditions under which the work is to be performed, correlated his/her observations with current code requirements and life safety needs, and has a clear understanding of existing conditions for the Project.

## **2.2 SCHEMATIC DESIGN PHASE**

2.2.1 From the approved program, the Architect shall prepare Schematic Design drawings and documents describing the general planning concepts, probable engineering systems, types of materials envisioned, a breakdown of the budget on current area, volume, or other unit costs, and the approximate dimensions of the programmed areas. The Architect shall obtain the written approval of the Friends of the Schematic Design drawings and documents before commencing work on the Design Development Phase. The current State-adopted Uniform Building Code (UBC) is incorporated into this Agreement by reference. Where applicable, the provisions of this document shall apply. The Architect shall brief and obtain the written approval of the Friends for the Schematic Design drawings and documents. This

review and approval shall include the life cycle costs required by Subparagraph 12.1.4 of this Contract.

2.2.2 The Architect shall provide a feasibility report as part of this phase on the use of energy sources other than fossil fuels for the heating and air conditioning of the proposed building (Section 15-3-12, NMSA 1978).

2.2.3 The Architect shall request site survey data in accordance with Paragraph 3.2.

2.2.4 The responsibility for bringing the Project within the MACC and compliance with construction directives remains with the Architect, as elaborated in Subparagraph 5.2.2. Should the Architect at any time conclude that the budget and the scope of the work to be accomplished are incompatible, the Friends shall be notified immediately in writing, with proposed recommendations to reconcile the incompatibility.

### **2.3 DESIGN DEVELOPMENT PHASE**

2.3.1 From the approved Schematic Design drawings and documents, the Architect shall prepare the Design Development Documents consisting of drawings, outline specifications, and other documents to fix and describe the size and character of the entire Project as to structural, mechanical, and electrical systems materials and such other design essentials as may be appropriate. Additionally, these documents shall identify design features, program modifications, the probable Project Schedule, equipment installed in the Project or furnishings required, and a statement which identifies the need for any additional data, surveys, or tests. The Architect shall acquire the approval, in writing, of the Friends for all of the documents associated with the Design Development Phase before commencing work on the Construction Documents Phase.

2.3.2 The Architect shall submit to the Friends for review and written approval a refined statement of Probable Construction Cost at the completion of the Design Development Phase. Should the Architect conclude, at any time, that the budget and the scope of the work to be accomplished are incompatible, the Friends shall be notified immediately in writing, with proposed recommendations to reconcile the incompatibility.

### **2.4 CONSTRUCTION DOCUMENTS PHASE**

2.4.1 From the approved Design Development Documents, the Architect shall prepare Bidding Documents setting forth in detail the requirements for the construction of the entire Project, which shall at a minimum include bid forms, the Conditions of the Contract for Construction (general, supplementary, and other conditions of the contract), and the Standard Form of Agreement between the individual designated to represent the Owner and Contractor. The Invitation to Bid shall be prepared by the Architect or as directed by the designated representative for the Owner, the bid date and time, which shall be prepared by the representative of the Owner and Architect. The Architect shall assist the Owner in filing the documents with the appropriate State agencies with regulatory authority over the project.

2.4.2 The Bidding Documents shall be based upon information contained in the Design Development Drawings and other documents previously approved by the Friends. Upon completion of the Bidding Documents, the Architect shall brief the Friends, the Owner and the Users on the Bidding Documents, specifically addressing previously approved requirements contained in the Design Development Drawings and other documents. The Architect shall, at this briefing, furnish the Friends, the Owner and the Users a detailed cost estimate.

2.4.3 The responsibility for bringing the Project within the Maximum Allowable Construction Cost (MACC) and compliance with construction directives remains with the Architect, as elaborated in Article 5. Should the Architect at any time conclude that the budget and the scope of the work to be accomplished are incompatible, the Friends shall be notified immediately in writing, with proposed recommendations to reconcile same.

2.4.4 The Architect shall furnish Bidding Documents to the Friends bearing the approval of the following:

- A. Construction Industries Division, Regulation and Licensing Department;
- B. If applicable, Occupational Health and Safety Bureau, Environmental Improvement Division, Health and Environment Department;
- C. If applicable, the Licensing and Accreditation Division, Health and Environment Department;
- D. If applicable, Food Quality Section, Environmental Improvement Division, Health and Environment Department;
- E. If applicable, Engineering Section, Environmental Improvement Division, Health and Environment Department;
- F. The Energy, Minerals, and Natural Resources Department;
- G. The Telecommunications Bureau, Information Systems Division, General Services Department; and
- H. The New Mexico Division of Historic Preservation.

2.4.5 Only materials and systems available at the time of this Agreement or reasonably believed to become available prior to the expiration of the Construction Contract shall be specified in the Contract Documents. The Bidding Documents shall include a list of those items (or categories of items) for which shop drawings or submittals are required.

2.4.6 Any fees incurred in the preparation of the detailed cost estimate(s) provided by the Architect shall be paid by the Architect.

2.4.7 Project Wage Rate Determination: The Architect shall request from the State of New Mexico Labor and Industrial Division a minimum wage rate determination for the Project pursuant to Section 13-4-11, NMSA 1978. The Architect shall provide the Division a description of the Project, an estimate of construction cost, an approximate bid opening date, and any other pertinent information required by the Labor and Industrial Division. The Architect shall include the wage rate determination in the Bidding Documents.



## **2.5 ADDITIONAL SERVICES**

The following Services shall be provided when authorized in advance in writing by the Owner, and they shall be paid for by the Friends as provided in Section 13.

2.5.1 Providing financial feasibility or other special studies.

2.5.2 Providing planning surveys, site evaluations, environmental impact studies, or comparative studies of prospective sites other than those services required under Basic Services to provide a complete and operable facility.

2.5.3 Providing services related to future facilities, systems, and equipment which are not intended to be constructed during the Construction Phase.

2.5.4 Making revisions in drawings, specifications, or other documents when such revisions are inconsistent with written approvals or instructions previously given and are due to causes beyond the control or not the responsibility of the Architect. This does not apply to revisions necessary for final approval of Programming, Schematic Design Studies and Statement of Project scope, and Design Development Documents, or to revisions necessary to bring the Project within the designated MACC. The Architect shall receive written authorization from the Friends before commencing work on any change or alteration to the Contract Documents.

2.5.5 Preparing drawings, specifications, and supporting data and providing other services in connection with Change Orders, provided that the adjustment in the Basic Compensation resulting from the adjusted Construction Cost is not for work which should have been provided pursuant to Basic Services and provided that such Change Orders are required because of causes not related to the actions or responsibilities of the Architect.

2.5.6 Conducting investigations, surveys, valuations, inventories, or detailed appraisals of existing facilities when such work is not covered by this Agreement.

2.5.7 Providing consultation concerning replacement of any Work damaged by fire or other cause during construction and furnishing services as may be required in connection with the replacement of such Work.

## **2.6 TIME**

2.6.1 The Architect shall perform Basic and Additional Services as expeditiously as is consistent with professional skill and care and the orderly progress of the Work. The Architect shall submit, for the Friends' approval and as a part of this Contract, a schedule for the performance of the Architect's services and shall include allowances for periods of time required for the Friends' review and approval of submissions and for approvals of authorities having jurisdiction over the Project. This schedule, when approved by the Owner, shall not, except for reasonable cause not within the control of the Architect, be exceeded by the Architect (see Exhibit A, Time Schedule for Project Phases). Failure of the

Architect to perform within this schedule except through authorized extensions thereto shall constitute a basis for termination and/or withholding of payment until schedule compliance is achieved by the Architect.

2.6.2 Time of Essence: All time limits stated in this Agreement are of the essence in the performance of this Agreement.

2.6.3 Term: This Agreement shall terminate no later than September 30, 2016, as specified in the NM DOT Cooperative Agreement with the Friends, unless terminated sooner pursuant to Article 10 of this Agreement.

### **ARTICLE 3**

#### **OWNER'S RESPONSIBILITIES**

3.1 The Friends may designate, in writing, a representative authorized to act in its behalf; however, authority for final approval of the Program Documents or Contract Documents is retained by the Friends. The Friends shall examine documents submitted by the Architect and shall render decisions promptly to avoid unreasonable delay in the progress of the Architect's services. The Friends' representative, through the User Representative(s), shall provide information to the Architect regarding the User's requirements in the development of Program Documents for the Project.

3.2 The Friends, in collaboration with the Owner, shall furnish a legal description and a certified land survey of the site, giving, as applicable, grades and lines of streets, alleys, pavements, and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries, and contours of the site; locations, dimensions, and complete data pertaining to existing buildings, other improvements, and trees; and full information concerning available service and utility lines both public and private, above and below grade, including inverts and depths.

3.2.1 The Architect shall return all documents and drawings provided under Paragraph 3.2 to the Owner, through the Friends, upon the Owner's request, but in no case later than when the Construction Documents Phase has been completed (see Section 2.4 herein). Payment for the Construction Documents Phase will not be made to the Architect until the Owner has received said documents and drawings.

3.2.2 The Friends and the Owner reserve the right not to provide certain project-related documents or drawings to the Architect.

3.3 If the Friends or the Owner Representative observe or otherwise becomes aware of any fault or defect in the Project or non-conformance with the Contract Documents, prompt written notice thereof shall be given by the Friends to the Architect.

3.4 The Friends and the Owner shall furnish required information and services and shall render approvals and decisions as expeditiously as necessary for the orderly progress of the Architect's services and of the Work.

## **ARTICLE 4**

### **MAINTENANCE**

4.1 Ease of maintenance and the ability to repair major items of installed equipment by replacement are essential to the Project. To ensure that these services can be adequately performed after the Project is accepted by the Friends and the Owner, the Architect shall:

4.1.1 In all relevant Contract Documents, design and provide for all major installed equipment in the Project, including but not limited to removal, access, maintenance, and storage space needs. In addition, all installed equipment systems shall be appropriately identified and labeled to describe the capacities, flows, and other pertinent information related to their maintenance and safe operation;

4.1.2 Specify only equipment that can be readily maintained by the User or other qualified commercial repairmen who are proximate to the location of the Project;

4.1.3 Provide Construction Documents that accurately depict the installation of all major items of installed equipment and which provide reasonable detail on all other major systems to be installed; and

4.1.4 At the completion of the Schematic, Design Development, and Contract Documents Phases, brief the Friends, the Owner and the Users on the rationale for the selection of the major mechanical and electrical systems to be specified in the Contract Documents, together with their probable life-cycle costs.

## **ARTICLE 5**

### **5.1 MAXIMUM ALLOWABLE CONSTRUCTION COST**

The Maximum Allowable Construction Cost for the Project shall not exceed [REDACTED] including New Mexico Gross Receipts Tax at [REDACTED]%.

### **5.2 RESPONSIBILITY FOR CONSTRUCTION COST**

5.2.1 Evaluations of the Friends' and Owner's Project budget, statements of probable construction cost, and detailed estimates of construction cost prepared by the Architect represent the Architect's best judgment as a design professional familiar with the construction industry. It is recognized, however, that the Architect does not have control

over the cost of labor, materials, or equipment; over the Contractor's methods of determining bid prices; or over competitive bidding, market, or negotiating conditions.

Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Project budget proposed, established, or approved by the Friends or the Owner, or from any Statement of Probable Construction Cost or other cost estimate or evaluation prepared by the Architect.

5.2.2 The MACC is established, as a condition of this Agreement, as a fixed limit of Construction Cost for design and bidding purposes. The Architect shall be permitted to determine what materials, equipment, component systems, and types of construction are to be included in the Bidding Documents to bring Construction Cost within the MACC. With the written consent of the Friends and the Owner, the Architect may also include in the Bidding Documents either additive or deductive alternate bids to adjust the Construction Cost to the fixed limit.

5.2.3 If bidding or negotiations with potential contractors have not commenced within two months after the Architect submits Bidding Documents to the Owner Representative, the Project budget and/or MACC shall be adjusted to reflect any change in the general level of prices in the construction industry between the date of submission of the Bidding Documents to the Owner Representative and the date on which proposals are sought.

5.2.4 The MACC, therefore, is established as a condition of this Agreement. When it is exceeded by the lowest bona fide bid, the Owner Representative may;

- A. Give written approval of an increase in the MACC,
- B. Authorize re-bidding the Project within a reasonable time, or
- C. Cooperate with the Architect in revising the Project scope and, as required, to reduce the Probable Construction Cost.

If the Owner Representative elects to reduce the Probable Construction Cost, the Owner Representative shall cooperate with the Architect in revising the quality and scope of the Project; and the Architect, without additional charge for services or re-printing of the Drawings and Specifications, shall modify the Drawings and Specifications as necessary to bring the Construction Cost within the MACC. The Architect shall then assist the Owner Representative through the Bidding process (see Subparagraph 2.5.1). When the detailed cost estimate required by Subparagraph 2.4.2 or an evaluation prepared by the Architect indicates that the Project exceeds the MACC, the provisions outlined in this paragraph shall apply.

## **ARTICLE 6**

### **REIMBURSABLE EXPENSES**

6.1 Reimbursable expenses are those above and beyond Basic Services compensation and are the actual expenditures made by the Architect or his employees in the interest of the

Project. Reimbursable expenses shall be limited to the following: Survey, soils engineering and borings, environmental, archaeological and soils testing and printing bid documents.

6.1.1 Expenses of transportation when traveling in connection with the Project when specifically set out in Article 14. Such expenses are limited to per diem and mileage rates as set forth in the Per Diem and Mileage Act, Section 10-8-1 to 10-8-8, NMSA 1978, and DFA Rule 78-3 as amended, except that such travel shall be authorized in advance by the Friends.

6.1.2 Applicable gross receipts taxes on reimbursable expenses or additional services received by the Architect under the provisions of this Contract. The Architect shall use and require the use of tax exempt certificates by Consultants and Suppliers whenever allowed by law. In any event, the Architect shall not include taxes paid as a part of the base dollar amount upon which taxes are calculated. Payment pursuant to this provision does include payment for gross receipts taxes pursuant to Subparagraph 12.1.1.

6.2 No expenses for which the Architect is entitled reimbursement shall be incurred by the Architect until written approval is given by the Friends, unless specifically allowed under Article 13 of this Agreement.

## **ARTICLE 7**

### **PAYMENTS TO THE ARCHITECT**

#### **7.1 PAYMENTS ON ACCOUNT OF BASIC SERVICES**

7.1.1 Payments for Basic Services shall be made monthly and shall be in proportion to services performed within each phase of services, on the basis set forth in Article 13.

7.1.2 When portions of the Project are deleted or otherwise not constructed, compensation for such portions of the Project shall be payable to the extent services are performed on such portions, in accordance with the schedule set forth in Subparagraph 13.1.2, based on:

- A. The lowest bona fide bid or negotiated proposal, or
- B. If no such bid or proposal is received, the most recent Statement of Probable Construction Cost or detailed estimate of Construction Cost for such portions of the Project.

7.1.3 The Friends, as a 501(c)(3) non-profit, are exempt from some taxes. The Architect should incorporate this fact into its purchasing plans and budgets.

#### **7.2 PAYMENT FOR SERVICES AND COSTS**

7.2.1 The Architect shall submit monthly a fully completed request for payment for all services and costs on the form provided as Exhibit \_\_\_ to this Agreement.

7.2.2 The Architect shall submit, with his billings at the completion of the Project, certification that payment has been made to all consultants, suppliers, and others for materials and services required by this Agreement.

### **7.3 PAYMENTS WITHHELD**

7.3.1 No deductions or withholdings shall be made from the Architect's compensation on account of penalty, liquidated damages, or other sums withheld from payments to Contractors, or on account of the cost of changes in the Work other than those for which the Architect may be legally liable.

### **7.4 PROJECT SUSPENSION OR TERMINATION - OTHER PARTIES**

7.4.1 In the event of termination or suspension of the Project due to the fault of parties other than the Architect, the Architect shall be compensated for services performed to termination date pursuant to Article 10.

### **7.5 LIENS**

7.5.1 The Architect understands that the Site is owned by the Owner, the Cumbres & Toltec Scenic Railroad Commission, created by an interstate compact. Pursuant to NMSA 1978 Section 16-5-9, the Owner can only incur debt in the manner prescribed by statute and any authorized debt may not be secured by any type of security interest in real or personal property owned by the Owner. Therefore, Architect agrees that it shall not place any lien upon the Site for payment of services or materials rendered to Friends under NMSA 1978 Section 48-2-2 and shall look solely to Friends and the Cooperative Project Agreement (Control Number 5100180) with the NM DOT for payment of any services or materials furnished under the terms of this Agreement. In addition, Architect shall promptly pay any and all persons engaged by Architect under the provisions of this Agreement who provide services or materials to the Site who could place a lien upon the Site for non-payment of such services under NMSA 1978 Section 48-2-2.

7.5.2 Notwithstanding the provisions of Section 7.3.1 above, the Friends may withhold payments to be made to Architect under this Agreement if Architect fails to promptly pay any and all persons who provide services or materials to the Site and who could place a lien upon the Site for non-payment for such services under NMSA 1978 Section 48-2-2. Friends may pay such persons directly from the withheld funds from Architect under the provisions of this Agreement.

## **ARTICLE 8**

### **ARCHITECT'S RECORDS AND AUDIT**

8.1 Records of expenses by the Architect and his consultants pertaining to all services under this Agreement shall be kept on the basis of generally accepted accounting principles and shall be available at mutually convenient times to the Friends or the Owner authorized

representative. The Friends shall have the right to audit all such records and billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Friends to recover excessive or illegal payments.

8.2 Records of expenses shall be kept by the Architect and his consultants and shall be available to the Friends until all applicable Statutes of Limitations have run, and this provision shall survive and continue beyond the termination of other terms of this Agreement.

## **ARTICLE 9**

### **OWNERSHIP AND USE OF DOCUMENTS**

9.1 Original construction document drawings, designs, specifications, notes, project manuals, and/or related documents and other work developed in the performance of this Agreement by the Architect shall become the sole property of the Friends whether the Project for which they are made is constructed or not, pursuant to Section 13-1-123, NMSA 1978. These documents shall be kept on file by the Friends. The Architect may maintain a complete reproducible set of any and all record documents developed under this Agreement.

9.2 All documents, including drawings and specifications prepared by the Architect pursuant to this Agreement are instruments of service in respect to the Project. They are not intended or represented to be suitable for reuse by the Friends on any other project.

9.3 The original drawings may be marked by the Friends or the Architect to designate the restrictions of use of these documents as set forth in Paragraph 9.2.

9.4 Copyright: No reports, maps, or other documents produced in whole or in part under this Agreement shall be the subject of an application for copyright by or on behalf of the Architect.

## **ARTICLE 10**

### **TERMINATION OF AGREEMENT**

10.1 If either party should fail to fulfill in a timely and appropriate manner his obligations under this Agreement, or if either party should violate any of the covenants, agreements, or stipulations of this Agreement, the non-breaching party, in addition to remedies available under the terms of this Agreement, shall thereupon have the right to terminate this Agreement by giving written notice to the other party of such termination and specifying the effective date thereof at least five days before the effective date of such termination. The Architect shall be responsible for all consequential costs which may arise out of failure to complete the services in accordance with the schedule attached as Exhibit\_\_.

10.2 In the event that the Project is abandoned by the Friends, the Friends may terminate this Agreement at any time by giving at least seven days' notice in writing to the Architect.

10.3 In the event of termination, all finished or unfinished documents, data, sketches, calculations, estimates, records, schedules, studies, surveys, drawings, maps, models, photographs, reports, and such other information and data accumulated in the performance of services under this Agreement, whether complete or in progress, prepared by the Architect under this Agreement shall become the Friends' property, and the Architect shall be entitled to receive compensation for actual work satisfactorily completed hereunder, including reimbursable expenses authorized by the Friends which are then due.

10.4 Termination: This Agreement may be terminated by either of the parties hereto without cause upon written notice delivered to the other party at least 10 days prior to the intended date of termination. By such termination, neither party may nullify obligations already incurred for performance or failure to perform prior to the date of termination.

## **ARTICLE 11**

### **GENERAL AND SPECIAL PROVISIONS**

11.1 This Agreement shall be governed exclusively by the provisions hereof and by the laws of the State of New Mexico as cited in NM DOT Cooperative Project Agreement Control Number 5100180, dated June 22, 2012.

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

11.3 The Friends, Owner and the Architect waive all rights against each other and against the contractors, consultants, agents, and employees of the other for damages covered and paid by any property insurance during construction as set forth in the Conditions of the Contract for Construction, as provided as a part of Exhibit G of this Agreement. The Friends, Owner and the Architect each shall require appropriate similar waivers from their contractors, consultants, and agents.

11.4 The Architect shall hold harmless and indemnify the Friends, the Owner and the Users against injury, loss, or damage, including cost of defense - including but not limited to court costs and attorney's fees - arising out of the negligent acts, errors, or omissions of the Architect.



11.5 The Architect's design shall be in compliance with applicable Federal, State, and local codes and laws related to the Work, including but not limited to provisions of the Civil Rights Act of 1964 and Executive Order 11246, Title VI, Sections 3 and 109; the minimum handicapped accessibility as required by Section 60-13-44D, NMSA 1978; Section 306, New Mexico Uniform Building Code, which adopts ANSI A117.1, 1980; and parking requirements as required by Section 15-3-19, NMSA 1978.

11.6 The Architect shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written consent of the Friends and the Owner.

11.7 The Architect, upon final payment of the amounts due under this Agreement, releases the Friends and the Owner from his liabilities and obligations arising from or under this Agreement, including, but not limited to, all damages, losses, costs, liability, and expenses, including but not limited to attorney's fees and costs of litigation that the Architect may incur.

11.8 The Architect represents that he currently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement. The Architect further warrants that, in the performance of this Agreement, no person having any such interest shall be employed by the Architect. The Architect also agrees that neither he nor anyone employed by him shall have an interest, direct or indirect, in any company hired for the Project as Contractor, subcontractor, or supplier, except when the Project is a design-build project and/or the Owner Representative provides inspections independent of the Architect.

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

11.10 The Architect shall obtain professional liability insurance and provide a certificate of coverage on the form designated herein as Exhibit \_\_. Such insurance coverage shall be maintained in full force and effect at all times during the performance of Project services and for a period thereafter of not less than three years following Substantial Completion of the Work. Fees for such insurance shall be at the Architect's expense and of the following limits of liability:

Professional liability insurance, per occurrence in the aggregate of \$250,000, unless as otherwise provided in Article 13. Proof of compliance with this section shall be provided by the Architect to the Friends in each year insurance is required.

11.11 The Architect agrees to comply with state laws and rules pertaining to Workers' Compensation insurance coverage for its employees. If contractor fails to comply with the

Workers' Compensation Act and application rules when required to do so, the contract may be cancelled effective immediately.

11.12 No work requiring the approval of the Friends shall be undertaken until the Friends' approval has been requested and obtained. Any deviation from this requirement shall be considered a material breach of this Agreement and grounds for termination.

11.13 In the event that the Architect subcontracts out any portion of his duties or responsibilities under this Agreement, or if the Architect hires consultants to assist him with his duties or responsibilities under this Agreement, the Architect shall require that all terms of this Agreement applicable to the consultant, subcontractor, or joint venture shall be incorporated into any contract or agreement entered into with such consultant, subcontractor, or joint venture.

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

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

11.16 **Labor-Management Relations.** During the entire term of this Agreement, the Architect shall take good-faith steps necessary to further satisfactory labor-management relations to the end that the operations of the Architect and of the Friends and the Owner shall not be affected by strikes, picketing, boycotts, or other labor activities.

11.17 This document may be executed in counterparts, each of which shall be deemed an original.

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

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

11.20 **Waiver.** No provision of this Agreement shall be deemed to have been waived by either party unless such waiver be in writing signed by the party making the waiver and addressed to the other party; nor shall any custom or practice which may evolve between the parties in the administration of the terms hereof be construed to waive or lessen the right of either party to insist upon performance by the other party in strict accordance with the terms hereof. Further, the waiver by any party of a breach by the other party or any term,

covenant, or condition hereof shall not operate as a waiver of any subsequent breach of the same or any other term, covenant, or condition thereof.

**11.21 Mergers, Dissolution, Successors, and Assigns.** The Architect agrees that during the term hereof it will maintain its existing business structure, will not dissolve or otherwise dispose of all or substantially all of its assets, and will not consolidate with or merge into another business structure or permit one or more other business structures to consolidate or merge into it, unless the surviving, resulting, or transferred business structure, as the case may be:

- A. Assumes, is capable of, and agrees in writing to perform all of the obligations of the Architect hereunder;
- B. Qualifies to do business in the State of New Mexico, including providing a Registered architect of New Mexico as Project Architect; and
- C. The Friend, in collaboration with the Owner, approves the firm or individual architect, or new architect, if any, who is to proceed.

The terms and provisions hereof shall extend to, be binding upon, and inure to the benefit of the successors and assigns of the respective parties hereto.

11.22 The Friends shall have sole discretion to determine whether or not the Project Architect or the firm named as Architect in this Agreement shall continue to have all contract rights under this Agreement and continue to represent the Friends under this Agreement in all instances where the Project Architect ceases to be associated with the firm named in this Agreement.

**11.23 Entire Agreement.** This Agreement represents the entire contract between the parties and, except as otherwise provided herein, may not be amended, changed, modified, or altered without the written consent of the parties hereto. This Agreement incorporates all of the conditions, agreements, and understandings between the parties concerning the subject matter of this Agreement, and all such conditions, understandings, and agreements have been merged into this written Agreement. No prior condition, agreement, or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this written Agreement.

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

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

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

11.27 **Exhibits and Attachments Incorporated by Reference.** All exhibits, attachments, riders, and addenda referred to in this Agreement, including but not limited to the exhibits referred to in this Agreement, as well as those listed in Paragraph 11.33 below, are hereby incorporated into this Agreement by reference and made a part hereof as though set forth in full in this Agreement to the extent they are consistent with its conditions and terms.

11.28 The following exhibits are attached to and made a part of this Agreement:

- Exhibit A - Time Schedule for Project Phases
- Exhibit B - Architect's Errors and Omissions Insurance Certificate
- Exhibit C - List of Consultants and Consultants' Agreements

11.29 **Equal Opportunity Compliance:** The Architect agrees to abide by all Federal and State laws, rules and regulations and executive orders of the Governor of New Mexico pertaining to equal employment opportunity or deny from participation in, deny the benefits of or otherwise subject to discrimination under any activity performed under this Agreement any person on the grounds of race, color, religion, national origin, sex, sexual preference, age or disability. If the Architect or any subcontractor is found not to be in compliance with these requirements during the term of this Agreement, the Architect agrees to take appropriate steps to correct this noncompliance.

## ARTICLE 12

### BASIS OF COMPENSATION

12.0 The Friends shall compensate the Architect for the Scope of Services provided in accordance with Article 7, Payments to the Architect, and other Terms and Conditions of this Agreement, as follows:

#### 12.1 BASIC COMPENSATION

12.1.1 **FOR BASIC SERVICES**, as described in Paragraphs 2.0 through 2.6, and any other services included in Article 13 as part of Basic Services, compensation shall be computed as follows:

On the basis of a FIXED FEE of :	.....	\$
<span style="background-color: black; color: black;">[REDACTED]</span>		
plus all applicable gross receipts taxes @ <span style="background-color: black; color: black;">[REDACTED]</span> %	.....	
Subtotal.....		\$
<span style="background-color: black; color: black;">[REDACTED]</span>		
Total Additional Services.....		
Total Reimbursable .....		

**Total Contract Amount** (not to exceed) .....  
\$ [REDACTED]

12.1.2 Payments for Basic Services shall be made monthly in proportion to services performed so that the compensation at the completion of each phase, except when the compensation is on the basis of a Multiple of Direct Personnel Expense, shall equal the following percentages of the total Basic Compensation:

Schematic Design (20%) .....	\$ [REDACTED]
Design Development (35%) .....	\$ [REDACTED]
Construction Documents (45%) .....	\$ [REDACTED]
<b>TOTAL BASIC COMPENSATION (100%).....</b>	<b>\$ [REDACTED]</b>
Total Additional Services .....	\$ [REDACTED]
Total Reimbursable .....	\$ [REDACTED]
<b>Total Contract Amount (not to exceed) .....</b>	<b>\$ [REDACTED]</b>

**12.2 FOR PROJECT REPRESENTATION BEYOND BASIC SERVICES**, as described in Paragraph 2.7, compensation shall be computed separately in accordance with Subparagraph 2.7.2.

**12.3 COMPENSATION FOR ADDITIONAL SERVICES**

**12.3.1 FOR ADDITIONAL SERVICES OF THE ARCHITECT**, as described in Paragraph 2.8, and any other services included in Article 14 as part of Additional Services, but excluding additional services of consultants, compensation shall be computed as follows:

- A. Principals at the fixed rate of \$ [REDACTED] per hour
- B. Project Manager at the fixed rate of \$ [REDACTED] per hour
- C. Interior Designer at the fixed rate of \$ [REDACTED] per hour
- D. Interior Designer II at the fixed rate of \$ [REDACTED] per hour
- E. Project Architect at the fixed rate of \$ [REDACTED] per hour
- F. Technical staff at the fixed rate of \$ [REDACTED] per hour
- G. Technical staff at the fixed rate of \$ [REDACTED] per hour

H. Clerical at the fixed rate of \$ [REDACTED] per hour

12.3.2 **FOR ADDITIONAL SERVICES OF CONSULTANTS**, including but not limited to the additional structural, mechanical, and electrical engineering services, a multiple of 1.10 times the amounts billed to the Architect for such services. The Architect shall provide the Owner Representative with hourly rates for his consultants and their employees detailed by professional levels.

12.4 **FOR REIMBURSABLE EXPENSES**, if allowed, as described in this Agreement at multiples of 1.10 times the amount billed to the Architect for such expenses.

Total Reimbursable shall be set at \$ [REDACTED] for any testing, and other project related expenses, as approved by the owner, prior to expenditure.

### **ARTICLE 13**

#### **OTHER CONDITIONS OR SERVICES**

13.1 Reimbursable expenses to be provided for the Architect will include any testing, and other project related expenditures as approved in writing, by the owner prior to any expenditures by the Architect not to exceed \$ [REDACTED].

13.2 Professional Liability Insurance as called for in Article 11.15 shall be \$250,000.00. The Architect shall obtain professional liability insurance and provide a certificate of coverage on the form designated herein as Exhibit B. Such insurance coverage shall be maintained in full force and effect at all times during the performance of Project services and for a period thereafter of not less than three years following Substantial Completion of the Work. Fees for such insurance shall be at the Architect's expense and of the following limits of liability: Professional liability insurance, per occurrence and in the aggregate, of \$250,000.00. Proof of compliance with this section shall be provided by the Architect to the Friends and/or the Owner in each year insurance is required.

13.3 For asbestos reimbursable services under this Agreement, the Architect shall provide services in three parts. Part I shall include asbestos survey and asbestos sample analysis for asbestos-containing materials affected by the scope of work of the Project. These services shall include, but not be limited to, the following: physical inspection, sample, surveying reporting as required by Asbestos Hazardous Emergency Response Act (AHERA) Regulations, and preparation of Inspection Report. All services shall be performed in accordance with the Property Control Division (PCD) Guidelines, AHERA Regulations, and all other statutory and regulatory requirements. (All surfaces damaged during the inspection shall be returned to the original condition following the inspection.) In Part II, the Architect shall provide design and construction documents for asbestos abatement in coordination with project scope of work. In Part III, the Architect shall provide pre-bid services, construction administration, and quality control in compliance with PCD Guidelines. Cost of services for each Part shall be inclusive of all associated costs and applicable gross receipts tax and shall not exceed cost as identified in Subsection 13.5.

13.4 Part I, the Inspection Report, shall be submitted as part of the design documents for the First Phase submittal. Part II and III shall be incorporated and coordinated with corresponding project submittals and tasks.

13.5 Asbestos reimbursable expenses shall be payable under reimbursable cost by the Owner. No Cost shall be incurred by the Architect until a written proposal of work for each Part is submitted and approved by the Property Control Division.

Part I-Survey Sample and Inspection Report

Part II- Construction Documents

Part III- Pre-Bid and Construction Administration

13.6 The basis of this contract is the implementation of a single construction contract. If design consideration merits the implementation of multiple construction contracts the Architect will be justified in requesting and receiving additional services on negotiated basis.

**END OF ARTICLE 13**

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**PROFESSIONAL SERVICES AGREEMENT SIGNATURE PAGE**

Contract No. \_\_\_\_\_

**REVIEWED AS TO LEGAL SUFFICIENCY**

Friends' Attorney

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

**AGREED**

ARCHITECT By: \_\_\_\_\_ Date: \_\_\_\_\_

NM Seal and Certificate Number: \_\_\_\_\_

NM Tax ID No.: \_\_\_\_\_ Federal ID No.: \_\_\_\_\_

**APPROVED:**

Friends of the C&TSRR By: \_\_\_\_\_ Date: \_\_\_\_\_

