

ESCROW AGREEMENT

LESSOR:

ESCROW AGENT:

LESSEE:

City of Santa Fe, New Mexico
200 Lincoln Avenue
Santa Fe, NM 87501

THIS ESCROW AGREEMENT (this “Escrow Agreement”) dated _____, 2021, is entered into by and among _____ (in its capacity as lessor, “Lessor”), City of Santa Fe, New Mexico (“Lessee”), and _____ (in its capacity as escrow agent, the “Escrow Agent”).

Lessor and Lessee have heretofore entered into that certain Equipment Lease-Purchase Agreement dated as of _____, 2021 (the “Agreement”). The Agreement contemplates that certain Equipment described therein (the “Equipment”) is to be acquired from the vendor(s) or manufacturer(s) thereof.

After acceptance of the Equipment by Lessee, the Equipment is to be leased by Lessor to Lessee pursuant to the terms of the Agreement.

The Agreement contemplates that Lessor will deposit with the Escrow Agent cash in the amount of \$_____ from proceeds of the Agreement, to be held in escrow by the Escrow Agent and applied on the express terms and conditions set forth herein. Such deposit, together with all interest and additions received with respect thereto (hereinafter, the “Escrow Fund”), is to be applied from time to time to pay certain costs of acquiring the Equipment (a portion of which may be paid in multiple payments and prior to acceptance of all Equipment by Lessee) and, if requested by Lessee and approved by Lessor, to pay certain costs of entering into the Agreement.

The parties desire to set forth the terms on which the escrow is to be created and to establish the rights and responsibilities of the parties hereto.

NOW, THEREFORE, the parties agree as follows:

Section 1. Each of Lessor and Lessee hereby appoint, and the Escrow Agent hereby agrees, to serve as escrow agent upon the express terms and conditions set forth herein. The Escrow Agent agrees that the Escrow Fund shall be held irrevocably in trust for the account and benefit of Lessee and Lessor and all interest earned with respect to the Escrow Fund shall accrue to the benefit of Lessee and shall be applied as expressly set forth herein.

To the limited extent required to perfect the security interest granted by Lessee to Lessor in the cash and negotiable instruments from time to time comprising the Escrow Fund, Lessor

hereby appoints the Escrow Agent as its security agent, and the Escrow Agent hereby accepts the appointment as security agent, and agrees to hold physical possession of such cash and negotiable instruments on behalf of Lessor.

Section 2. On such day as determined to the mutual satisfaction of the parties (the "Commencement Date"), Lessor shall deposit with the Escrow Agent cash in the amount of \$ _____ from proceeds of the Agreement, to be held by the Escrow Agent on the express terms and conditions set forth herein. The Escrow Agent agrees to accept the deposit of the Escrow Fund by Lessor, and further agrees to hold the amount so deposited together with all interest and other additions received with respect thereto in escrow on the express terms and conditions set forth herein.

Section 3. The Escrow Agent shall at all times segregate the Escrow Fund into an account maintained for that express purpose, which shall be clearly identified on the books and records of the Escrow Agent as being held in its capacity as Escrow Agent. Securities and other negotiable instruments comprising the Escrow Fund from time to time shall be held or registered in the name of the Escrow Agent (or its nominee). The Escrow Fund shall not, to the extent permitted by applicable law, be subject to levy or attachment or lien by or for the benefit of any creditor of any of the parties hereto (except with respect to the security interest therein held by Lessor).

Section 4. Lessee hereby directs the Escrow Agent to invest the cash comprising the Escrow Fund from time to time in Qualified Investments (as hereinafter defined). Interest or other amounts earned and received by the Escrow Agent with respect to the Escrow Fund shall be deposited in and comprise a part of the Escrow Fund. No investment shall be made that would cause the Agreement to be deemed to be an arbitrage bond within the meaning of Section 148(a) of the Internal Revenue Code of 1986, as amended (the "Code"). For purposes of this Section 4, the term "Qualified Investments" means the Money Market Fund # _____, or a demand deposit account created by the Escrow Agent. The Escrow Agent shall provide to the Lessee's Finance Director all bank and investment statements for the Escrow Fund by the 5th day of the month following the month for which the statement applies or the next succeeding business day. Any monies the Escrow Agent holds on behalf of the county shall be invested according to the [City of Santa Fe Investment Policy] and Section 6-10-10, NMSA 1978.

Commented [PLF1]: Confirm and more specifically identify?

Section 5. Lessor and Lessee hereby authorize the Escrow Agent to take the following actions with respect to the Escrow Fund:

a. From time to time, the Escrow Agent shall pay the vendor or manufacturer of the Equipment or Lessee or other payee upon receipt of the following: (a) a duly executed Certificate of Acceptance and Payment Request in the form attached as Exhibit A to this Escrow Agreement approved for payment by Lessor, (b) the vendor(s) or manufacturer(s) invoice(s) specifying the acquisition price of the Equipment described in the requisition request, (c) in the event that certain costs of entering into the Agreement are described in the requisition request, invoice(s), budget(s), closing statement(s) or other additional documentation specifying the amount(s) of such costs, and (d) any additional documentation required by Lessor prior to Lessor's approval of such requisition request. Lessor's approval on the Certificate of Acceptance and

Payment Request in each case shall be conclusive evidence that all invoices, budgets, closing statements and any additional documentation requirements have been received by and are acceptable to Lessor for payment purposes. Without limiting the foregoing, Lessor shall not approve any such payment unless and until Lessee shall have provided to Lessor (i) certificates of insurance evidencing coverage in accordance with Section 22 of the Agreement and satisfactory to Lessor, and (ii) a payment and performance bond naming Lessor as a dual obligee and issued by a surety company rated "A" or better by AM Best in form and substance satisfactory to Lessor.

b. In the event that Lessor provides to the Escrow Agent and Escrow Agent actually receives written notice of the occurrence of an Event of Default as defined in the Agreement, the Escrow Agent shall thereupon promptly remit to Lessor the entire balance of the Escrow Fund *after* application of the Escrow Fund to all reasonable fees and expenses incurred by the Escrow Agent in connection herewith as evidenced by its statement forwarded to Lessor and Lessee.

c. Upon actual receipt by the Escrow Agent of a duly executed Certificate of Acceptance and Payment Request identified as the final such request, the remaining monies in the Escrow Fund shall, *first* be applied to all reasonable fees and expenses incurred by the Escrow Agent, if applicable, in connection herewith as evidenced by its statement forwarded to Lessor and Lessee; and, *second* be paid to Lessor, for application against the outstanding principal components of Rental Payments (as defined in the Agreement), including prepayment of Rental Payments under the Agreement, as provided therein, unless Lessor directs that payment of such amount be made in such other manner directed by Lessor that, in the opinion of nationally recognized counsel in the area of tax-exempt municipal obligations satisfactory to Lessor, will not adversely affect the exclusion of the interest components of Rental Payments from gross income for federal income tax purposes. If any such amount is used to prepay principal, the Payment Schedule attached to the Agreement will be revised accordingly as specified by Lessor.

d. Lessor and Lessee agree that the security procedures under this Section 5 are commercially reasonable.

e. In the event that Escrow Agent makes any payment to any payee pursuant to this Escrow Agreement and for any reason such payment (or any portion thereof) is required to be returned to the Escrow Fund or is subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid to a receiver, trustee or other party under any bankruptcy or insolvency law, other federal or state law, common law or equitable doctrine, then the party who benefited from the payment to the payee shall repay to Escrow Agent upon written request the amount so paid to the payee. Escrow Agent shall not be liable to any party or any other person by reason of such payment.

Section 6. The reasonable fees and expenses of the Escrow Agent incurred in connection herewith shall be the responsibility of Lessee and are herein further described on Schedule 1.

Section 7.

a. The Escrow Agent shall have no liability for acting upon any written instruction presented by Lessee and Lessor in connection with this Escrow Agreement which the Escrow Agent in good faith believes to be genuine. Furthermore, the Escrow Agent shall not be liable for any act or omission in connection with this Escrow Agreement except for its own negligence or willful misconduct. The Escrow Agent shall not be liable for any loss or diminution in value of the Escrow Fund as a result of the investment decisions made pursuant to Section 4, Qualified Investments at the direction of Lessee. Escrow Agent shall have only those duties and responsibilities as expressly set forth herein, and no other duty, obligation or covenant, fiduciary or otherwise, shall be implied or enforceable against Escrow Agent by any person.

b. Without limiting the effect of Section 7(a) hereof, Escrow Agent shall have no obligation or liability to any other party hereto (or any person claiming through any of them): (i) to review, examine, enforce, administer or take notice of any agreement, instrument or document other than this Escrow Agreement; (ii) to determine whether any conditions precedent to a disbursement of Escrow Funds, other than as set forth in Section 5, have been or will be satisfied or otherwise to investigate any notice received by Escrow Agent hereunder; (iii) to evaluate or determine the validity or legality of any action or omission of any third party, including any federal or state bank regulator; (iv) to make any payment to the other parties or other payees set forth in written instructions received under Section 5 from any source other than the Escrow Funds, and no such payment shall be made if the amount of Escrow Funds is inadequate; (v) to communicate with any person other than as expressly provided for in this Escrow Agreement; (vi) for any action or omission of Escrow Agent taken or made upon the oral or written, joint instructions of the parties hereto; (vii) for any other action or omission of, or for errors in judgment by, Escrow Agent under or in connection with this Escrow Agreement taken or made in good faith and without gross negligence or willful misconduct; and (viii) for special, incidental, consequential, indirect or punitive damages in any event, even if Escrow Agent has been advised or was otherwise aware of the likelihood of such loss or damages and regardless of the form of action.

Section 8. From and to the extent of legally available Pledged Energy Cost Savings Revenues (as defined in the Agreement), to the extent authorized by law, Lessee hereby agrees to indemnify and save the Escrow Agent harmless against any liabilities which it may incur in the exercise and performance of its powers and duties hereunder and which are not due to the Escrow Agent's negligence or willful misconduct. No indemnification will be made under this Section or elsewhere in this Escrow Agreement to the extent damages arise solely out of the negligence or willful misconduct by the Escrow Agent, its officers, agents, employees, successors or assigns.

Section 9. The Escrow Agent may at any time resign by giving at least 30 days' prior written notice to Lessee and Lessor, but such resignation shall not take effect until the appointment of the successor Escrow Agent. The substitution of another bank or trust company to act as Escrow Agent under this Escrow Agreement may occur by written agreement of Lessor and Lessee. In addition, the Escrow Agent may be removed at any time, with or without cause, by instrument in writing executed by Lessor and Lessee. Such notice shall set forth the effective date of the removal. In the event of any resignation or removal of the Escrow Agent, a successor Escrow

Agent shall be appointed by an instrument in writing executed by Lessor and Lessee. Such successor Escrow Agent shall indicate its acceptance of such appointment by an instrument in writing delivered to Lessor, Lessee and the predecessor Escrow Agent.

Upon the effective date of resignation or removal, the Escrow Agent will transfer the Escrow Fund then held by it to the successor Escrow Agent selected by Lessor and Lessee.

If Lessor and Lessee are unable to agree upon a successor escrow agent within 30 days after such notice, the parties hereby agree that either of them acting unilaterally shall apply to a court of competent jurisdiction within the State of New Mexico for the appointment of a successor escrow agent or for other appropriate relief. The costs and expenses (including reasonable attorneys' fees and expenses) incurred by Escrow Agent in connection with such proceeding shall be paid in accordance with Section 6.

Section 10. In the event of any dispute with respect to the Escrow Funds, the interpretation of this Escrow Agreement or the rights and obligations of the parties hereunder, or to the propriety of any action contemplated by Escrow Agent hereunder, or if Escrow Agent in good faith is in doubt as to what action should be taken hereunder, then in any such case Escrow Agent shall not be obligated to resolve the dispute or disagreement or to make any disbursement of all or any portion of the Escrow Funds, but may commence an action in the nature of an interpleader and seek to deposit such funds with a court of competent jurisdiction within the State of New Mexico, and thereby shall be discharged from any further duty or obligation with respect to any Escrow Funds. The costs of such interpleader action shall be borne by Lessee. In the event Lessee shall fail on demand to reimburse Escrow Agent for such costs, then Lessee irrevocably authorizes Escrow Agent to deduct any such amounts from the Escrow Fund without any further notice or demand to any person. Escrow Agent may, in its sole discretion in lieu of filing such action in interpleader, elect to cease to perform under this Agreement and to ignore all instructions received in connection herewith until Escrow Agent has received a written notice of resolution signed by the parties to such dispute or disagreement or an order of a court of competent jurisdiction over the matter directing a disposition of the Escrow Funds.

Section 11. This Escrow Agreement and the Escrow Fund established hereunder shall terminate upon receipt by the Escrow Agent of the written notice from Lessor specified in Section 5(b) or Section 5(c) hereof.

Section 12. All notices hereunder shall be in writing, sent by certified mail, return receipt requested, or by mutually recognized overnight carrier addressed to the other parties at their respective addresses shown on page 1 of this Escrow Agreement or at such other address as each such party shall from time to time designate in writing to the other parties; and shall be effective on the date of receipt. In addition, all notices sent to the Escrow Agent shall also be sent as follows:

Section 13. This Escrow Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns. No rights or obligations of the

Escrow Agent under this Escrow Agreement may be assigned without the prior written consent of Lessor and Lessee.

Section 14. Except as provided in the next sentence, this Escrow Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no waiver, consent, modification or change of terms hereof shall bind any party unless in writing signed by all parties. This Escrow Agreement is in addition to any related account applications and other account opening and authorizing documents and/or resolutions on file with Escrow Agent and such documents are hereby incorporated by reference into this Agreement (the "Account Agreements"). In the event that there are inconsistencies between this Agreement and any other Account Agreement, the terms of this Escrow Agreement shall control.

Section 15. The Escrow Agent may employ agents, attorneys and accountants in connection with its duties hereunder (such costs to be paid as set forth in Section 6) and shall not be liable for any action taken or omitted in good faith in accordance with the advice of counsel, accountants or other skilled persons.

Section 16. This Escrow Agreement shall be governed by and be construed and interpreted in accordance with the internal laws of the State of New Mexico (the "State").

Section 17. This Escrow Agreement may be executed in several counterparts, and each counterpart so executed will be an original. In addition, the parties agree that the transaction described herein may be conducted and related documents may be stored by electronic means. Copies, telecopies, facsimiles, electronic files and other reproductions of original executed documents shall be deemed to be authentic and valid counterparts of such original documents for all purposes, including the filing of any claim, action or suit in the appropriate court of law.

Section 18. **WAIVER OF JURY TRIAL. TO THE EXTENT PERMITTED BY LAW, EACH OF THE PARTIES HERETO EXPRESSLY WAIVES THE RIGHT TO TRIAL BY JURY IN RESOLVING ANY CLAIM OR COUNTERCLAIM RELATING TO OR ARISING OUT OF THIS AGREEMENT.**

Section 19. Lessee represents, warrants and covenants for the benefit of Escrow Agent as follows:

a. Lessee is authorized under the constitution and laws of the State to enter into this Escrow Agreement and the transaction contemplated hereby and to perform all of its obligations hereunder.

b. Lessee has been duly authorized to execute and deliver this Escrow Agreement by proper action and approval of its governing body at a meeting duly called, regularly convened and attended throughout by a requisite majority of the members thereof or by other appropriate official approval.

c. This Escrow Agreement constitutes the legal, valid and binding obligation of Lessee enforceable in accordance with its terms, except to the extent limited by applicable bankruptcy, insolvency, reorganization or other laws affecting creditors' rights generally.

d. Lessee will comply with all applicable provisions of the Internal Revenue Code of 1986, as amended, including without limitation Sections 103 and 148 thereof, and the applicable regulations of the Treasury Department. No part of the Escrow Fund shall be invested at Lessee's discretion in any securities, obligations or other investments or used, at any time, directly or indirectly, in a manner which, if such use had been reasonably anticipated on the date of issuance of the Agreement, would have caused any portion of the Agreement to be or become "arbitrage bonds" within the meaning of Section 103(b)(2) or Section 148 of the Code and the applicable regulations of the Treasury Department.

Section 20. The parties acknowledge that in order to help the United States government fight the funding of terrorism and money laundering activities, pursuant to Federal regulations that became effective on October 1, 2003 (Section 326 of the USA PATRIOT Act) all financial institutions are required to obtain, verify, record and update information that identifies each person establishing a relationship or opening an account. The parties to this Escrow Agreement agree that they will provide to the Escrow Agent such information as it may request, from time to time, in order for the Escrow Agent to satisfy the requirements of the USA PATRIOT Act, including but not limited to the name, address, tax identification number and other information that will allow it to identify the individual or entity who is establishing the relationship or opening the account and may also ask for formation documents such as articles of incorporation or other identifying documents to be provided.

Section 21. With respect to the Agreement, Sterling National Bank shall have the same rights and powers under the Agreement as any other lessor and may exercise the same as though it were not Escrow Agent. Lessor may lend money to, invest in, and generally engage in any kind of business with Lessee, all as if Sterling National Bank were not Escrow Agent. Lessee acknowledges the potential conflict of interest between Sterling National Bank as Lessor and Sterling National Bank as Escrow Agent.

[Signature page follows.]

IN WITNESS WHEREOF, the parties hereto have caused this Escrow Agreement to be duly executed as of the day and year first above set forth.

LESSOR:

By: _____
Name:
Title:

LESSEE: CITY OF SANTA FE, NEW MEXICO

By: _____
Name:
Title:

ESCROW AGENT:

By: _____
Name: _____
Title: _____

EXHIBIT A

CERTIFICATE OF ACCEPTANCE AND PAYMENT REQUEST

_____ (in its capacity as escrow agent, the “Escrow Agent”), as escrow agent under that certain Escrow Agreement dated _____, 2021 (the “Escrow Agreement”), by and among the City of Santa Fe, New Mexico (“Lessee”), _____ (in its capacity as lessor, “Lessor”) and the Escrow Agent, is hereby requested to pay from the Escrow Fund (as defined in the Escrow Agreement) established and maintained thereunder, the amount set forth below to the named payee(s). The equipment and costs described below are (i) part or all of the Equipment listed in the Equipment Schedule to that certain Equipment Lease Purchase Agreement dated as of _____, 2021 (the “Agreement”), between Lessor and Lessee, or (ii) certain costs of entering into the Agreement. The amount shown is due and payable under (i) a purchase order or contract (or has been paid by and not previously reimbursed to Lessee), or (ii) invoices, budgets, closing statements or any other additional documentation.

QUANTITY	DESCRIPTION OF EQUIPMENT OR FINANCING COST	AMOUNT	PAYEE*
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Lessee hereby certifies and represents to and agrees with Lessor as follows: (i) the Equipment described above has been delivered and installed at the location(s) set forth in the Equipment Schedule; (ii) a present need exists for such Equipment which need is not temporary or expected to diminish in the near future; (iii) such Equipment is essential to and will be used by Lessee only for the purpose of performing one or more governmental functions of Lessee consistent with the permissible scope of Lessee’s authority; (iv) the estimated useful life of such Equipment based upon the manufacturer’s representations and Lessee’s projected needs is not less than the term of lease with respect to such Equipment; (v) Lessee has conducted such inspection and/or testing of such Equipment as it deems necessary and appropriate and hereby acknowledges that it accepts such Equipment for all purposes as of the date of this Certificate; (vi) such Equipment is covered by insurance in the types and amounts required by the Agreement; and (vii) no Event of Default, as such term is defined in the Agreement and no event which with the giving of notice or lapse of time or both, would become an Event of Default under the Agreement, has occurred and is continuing on the date hereof.

Based on the foregoing, Escrow Agent is hereby authorized and directed to fund the acquisition of the Equipment set forth in the Agreement by paying, or causing to be paid, the manufacturer(s)/vendor(s), Lessee or other payee(s) the amounts set forth on the attached invoices from the Escrow Fund held under the Escrow Agreement in accordance with its terms.

The following documents are attached hereto and made a part hereof: (a) Original Invoice(s); and/or (b) Copies of Certificate(s) of Origin, when applicable, designating Lessor as lienholder if any part of the Equipment consists of motor vehicles, and evidence of filing.

IF REQUEST IS FOR REIMBURSEMENT, CHECK HERE . Lessee paid an invoice prior to the commencement date identified in the Equipment Schedule and is requesting reimbursement for such payment. A copy of evidence of such payment, together with a copy of Lessee’s Declaration of Official Intent and any other evidence required by Lessor prior to Lessor’s approval hereof that Lessee has satisfied the requirements for reimbursement set forth in Treas. Reg. 1.150-2, is hereby attached. Lessor’s approval hereof shall evidence that Lessee has delivered to Lessor such required documentation.

IF REQUEST IS FINAL REQUEST, CHECK HERE . Lessee hereby certifies that the items of Equipment described above, together with the items of Equipment described in and accepted by Certificates of Acceptance and Payment Requests previously filed by Lessee and Lessor with Escrow Agent constitutes all of the Equipment subject to the Equipment Schedule.

Date: _____, 20____.

Approved for Payment:

_____, as Lessor
and servicer for _____.

CITY OF SANTA FE, NEW MEXICO, as Lessee

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

* If required, a current IRS Form W-9 for the payee is attached or an IRS Form W-9 has been previously submitted to the Escrow Agent.

SCHEDULE 1

Attached to and made a part of the Escrow Agreement (the “Escrow Agreement”) dated _____, 2021, by and among _____ (in its capacity as lessor, “Lessor”), City of Santa Fe, New Mexico, as Lessee, and _____ (in its capacity as escrow agent, the “Escrow Agent”).

A. Based upon our current understanding of your proposed transaction, the proposed services are as follows, which shall be the responsibility of Lessee: \$0

1. New Account Acceptance

Encompassing review, negotiation and execution of governing documentation, opening of the account, and completion of all due diligence documentation.

2. Monthly Administration

Covering our usual and customary ministerial duties, including record keeping, distributions, document compliance and such other duties and responsibilities expressly set forth in the governing documents for each transaction.

B. Extraordinary Services and Out-of-Pocket Expenses

Any additional services beyond our standard services as specified above, and all reasonable out-of-pocket expenses including attorney’s or accountant’s fees and expenses will be considered extraordinary services for which related costs, transaction charges, and additional fees may be billed at Escrow Agent’s then standard rate. Disbursements, receipts, investments or tax reporting exceeding 25 items per year may be treated as extraordinary services.