

1 CITY OF SANTA FE, NEW MEXICO

2 BILL NO. 2020-11

3 INTRODUCED BY:

4
5 Mayor Alan Webber

6 Councilor Jamie Cassutt-Sanchez

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9
10 AN ORDINANCE

11 RELATING TO THE CITY OF SANTA FE ECONOMIC DEVELOPMENT PLAN
12 ORDINANCE, ARTICLE 11-11 SFCC 1987; APPROVING AND ADOPTING AN AMENDED
13 LOCAL ECONOMIC DEVELOPMENT PROJECT PARTICIPATION AGREEMENT
14 BETWEEN THE CITY OF SANTA FE AND DESCARTES LABS, INC. FOR DESIGN,
15 DEVELOPMENT, AND CONSTRUCTION OF TENANT IMPROVEMENTS; AND LEASE
16 PAYMENTS FOR EXPANSION OF A NEW WORLD HEADQUARTERS FACILITY, A
17 LOCAL ECONOMIC DEVELOPMENT PROJECT.

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19 BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

20 Section 1. Short Title. This Ordinance shall be known as the "Amended Descartes Local
21 Economic Development Project Ordinance."

22 Section 2. Recitals.

23 A. The Local Economic Development Act, NMSA 1978, Sections 5-10-1 *et seq.*
24 ("LEDA") explicitly permits municipalities to assist qualifying entities with economic development
25 projects through the use of public resources; and

1 B. The City of Santa Fe has complied with the requirements of the Local Economic
2 Development Act by adopting an Economic Development Fund Ordinance (11-14 SFCC (1987)),
3 incorporating within that ordinance its community economic development plan and its economic
4 development strategy for implementation dated May 21, 2008; and

5 C. Descartes, Labs, Inc. ("Qualifying Entity") is a software development facility that
6 serves the public by stimulating and catalyzing the growth of a high-technology industry cluster in
7 Santa Fe under the Economic Development Ordinance. The Qualifying Entity creates economic base
8 jobs as a software development facility by creating software that for cloud-based super-computing
9 platforms that predicts changes in natural resources to better understand the planet.

10 D. The State of New Mexico has appropriated seven hundred thousand dollars
11 (\$700,000.00) from the New Mexico LEDA Fund and the City of Santa Fe has provided one hundred
12 thousand dollars (\$100,000.00) from the Local Economic Development Fund to the project to build out
13 the infrastructure and tenant improvements in the facility and to contribute to lease payments with any
14 remainder from the infrastructure and tenant improvement expenses. The project is located at 100
15 North Guadalupe Street in Santa Fe, New Mexico. The loan will finance construction costs, materials
16 associated with the interior renovation of the facility, and improvements or construction of HVAC,
17 telecommunications, broad band connectivity and other infrastructure necessary to improve service to
18 the facility. This project identified as the "Project" is a world headquarters that will expand the tax
19 base and generate more taxes, fees, and other revenues for the State of New Mexico and City of Santa
20 Fe.

21 E. The new facility will be used to develop software, which causes it to fall into the
22 definition of a "manufacturer" under LEDA.

23 F. As of December 31, 2019, Descartes Labs employed seventy-five (75) people with an
24 average annual salary of over one hundred and twenty thousand dollars (\$120,000.00), which was
25 compliant with PPA 2018-0057 approved on January 10, 2018, by the Governing Body. Descartes

1 Labs was on track to earn its bonus monies of ten thousand dollars (\$10,000) per job by hiring twenty
2 (20) additional people.

3 G. Since January 31, 2019, the COVID-19 pandemic forced Descartes Labs to layoff
4 nineteen (19) employees for a current employee base of sixty-three (63) people. The pandemic has
5 delayed the company's growth plans by two (2) years.

6 H. The project participation agreement will be amended to require Descartes Labs to meet
7 its job creation schedule of seventy (70) people by June 30, 2022, and provide Descartes Labs an
8 opportunity to earn the bonus LEDA monies if Descartes Labs hires an additional twenty (20)
9 employees for a total base of ninety (90) employees by January 1, 2024, and retains the employees for
10 six (6) months. The PPA will also amend the average annual wage of one hundred and forty thousand
11 dollars (\$140,000.00) to one hundred and ten thousand dollars (\$110,000.00).

12 **Section 3. Findings.** The Governing Body hereby finds:

13 A. The City of Santa Fe has determined that it is in the interest of the welfare of the
14 citizens of Santa Fe to enter into an Economic Development Project Participation Agreement for the
15 purposes of effectuating the City's Economic Development Plan and the Project.

16 B. In compliance with the City's Economic Development Fund Ordinance, 11-14 SFCC
17 (1987), this Project Participation Agreement between Qualifying Entity and the City clearly states the
18 following:

- 19 (1) Descartes Labs, Inc. is a qualifying entity;
- 20 (2) The contributions of the City and Qualifying Entity;
- 21 (3) The specific measurable objectives upon which the performance review will
22 be based;
- 23 (4) A schedule for Project development and goal attainment;
- 24 (5) The security being offered for the City's investment;
- 25 (6) The procedures by which the Project may be terminated and the City's

1 investment recovered;

2 (7) The time period for which the City shall retain an interest in the Project; and

3 (8) The economic development goals of the project; and

4 (9) A "sunset" clause after which the City shall relinquish interest in and oversight
5 of the project.

6 **Section 4. Approval and Adoption of the Project Participation Agreement.** The
7 governing body hereby approves the 2020 PPA (attached as **Exhibit A**) whereby the City will continue
8 to be the Fiscal Agent for the State Legislative appropriation of seven hundred thousand dollars
9 (\$700,000.00) and for the one hundred thousand dollars (\$100,000.00) in City Funds. The City will
10 pass through the State Legislative appropriation of seven hundred thousand dollars (\$700,000.00) and
11 the City funds of one hundred thousand dollars (\$100,000.00) to Qualifying Entity and the funds will
12 be used for construction of tenant improvements and infrastructure in and to the facility and for lease
13 payments with any remainder from the infrastructure and tenant improvement expenses and thus will
14 continue to expand the tax base and generate more taxes, fees, and other revenues for the State of New
15 Mexico and City of Santa Fe.

16 **Section 5. Severability Clause.** If any section, paragraph, clause, or provision of this
17 ordinance, or any section, paragraph, clause, or provision of any regulation promulgated hereunder
18 shall for any reason be held to be invalid, unlawful, or unenforceable, the invalidity, illegality, or
19 unenforceability of such section, paragraph, clause, or provision shall not affect the validity of the
20 remaining portions of this ordinance or the regulation so challenged.

21 **Section 6. Effective Date.** This ordinance shall become effective immediately upon
22 adoption.

23 PASSED, APPROVED, and ADOPTED this ____ day of _____, 2020.
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ALAN WEBBER, MAYOR

ATTEST:

YOLANDA Y. VIGIL, CITY CLERK

APPROVED AS TO FORM:

ERIN K. McSHERRY, CITY ATTORNEY

**CITY OF SANTA FE
ECONOMIC DEVELOPMENT
PROJECT PARTICIPATION AGREEMENT**

THIS AMENDED PROJECT PARTICIPATION AGREEMENT ("Agreement") is made and entered into this ____ day of _____, 2020, by and between the City of Santa Fe, a municipal corporation (hereinafter referred to as the "City") and Descartes Labs, Inc. a Delaware Corporation registered as a foreign profit corporation in the State of New Mexico (hereinafter referred to as the "Qualifying Entity" or "Q/E").

WHEREAS, the State of New Mexico has deemed it in the best interest of the citizens of New Mexico to enact the Local Economic Development Act ("LEDA") (NMSA 1978, §§ 5-10-1 *et seq.*);

WHEREAS, LE DA explicitly permits municipalities to assist qualifying entities with economic development projects through the use of public resources;

WHEREAS, the City has complied with LEDA requirements by adopting an economic development plan ordinance incorporating within that ordinance its community economic development plan (11-11 SFCC (1987)), called the Community Economic Development Plan and Economic Development Strategy for Implementation dated May 21, 2008;

WHEREAS, Descartes Labs, Inc. is a "qualifying entity" under LEDA and the Economic Development Ordinance in that it is a software developer, which fall under the definition of a "manufacturer" in a primary industry that creates economic base jobs and which exports fifty percent (50%) or more of their services or goods outside of New Mexico (§ 11-11.4 (A) SFCC (1987)); (NMSA 1978, § 5-10-3 (J));

WHEREAS, all requirements under the Economic Development Ordinance have been fulfilled;

WHEREAS, the Q/E has submitted an application ("Application") to the City for assistance under the Economic Development Plan Ordinance (11-11 SFCC (1987)) and for the City to act as fiscal agent for the grant monies ("Grant Monies") granted by the City through its Office of Economic Development and through the New Mexico Economic Development Department;

WHEREAS, in the Application, the Q/E proposed an "economic development project" compliant with LEDA, in that it will use the Grant Monies for lease payments, construction costs and materials associated with the interior renovation of its facilities and to improve or construct infrastructure, including HVAC, telecommunications, broadband connectivity, and other infrastructure necessary to provide or improve service to the facility (the "Project") located at 100 North Guadalupe, Santa Fe, New Mexico, 87501;

WHEREAS, the City has determined that it is in the interest of the welfare of the citizens of the City to enter into this Agreement for the purposes of effectuating its economic development plan;

WHEREAS, the City's total maximum contribution to the Project is One Hundred Thousand Dollars and No Cents (\$100,000.00); the State of New Mexico's contribution to the Project will not exceed Seven Hundred Thousand Dollars and No Cents (\$700,000.00) from the New Mexico LEDA Fund ("NM LEDA Fund") pursuant to an intergovernmental agreement between the City and the State to be executed soon after the execution of this Agreement; and the Q/E shall contribute at least Four Million Two Hundred Nine Thousand Dollars (\$4,209,000) to the Project; and

WHEREAS, the Project addresses the following objectives from the Santa Fe Economic Development Implementation Strategy as adopted by City Resolution 2008-42: "Diversify the Santa Fe Economy with an emphasis on high wage jobs and career paths;" "Pursue overall affordability where local wages can support living in Santa Fe (reduce leakage);" and "Bolster Santa Fe's leadership position and/or potential in innovation."

WHEREAS, this Agreement clearly provides the following as required by LEDA and the Economic Development Plan Ordinance: (1) the economic development goals of the Project; (2) the contributions of the City, State, and the Q/E; (3) the specific measurable objectives upon which the performance review will be based; (4) a schedule for project development and goal attainment; (5) the security being offered for the City's and State's investment; (6) the procedures by which the project may be terminated and the City's investment recovered; (7) the time period for which the City shall retain an interest in the Project; (8) a "sunset" clause after which the City shall relinquish interest in and oversight of the Project; and (9) that the Qualifying Entity is a qualifying entity.

NOW THEREFORE, in consideration of the foregoing, the following and other good and valuable consideration, the receipt of which is hereby acknowledged the undersigned parties hereby agree as follows.

I. CONTRIBUTIONS OF THE CITY, THE STATE AND THE Q/E

A. Contributions of the State and the City. The maximum grant monies that may be disbursed under this Agreement shall be \$800,000 as described below:

(1) City Contribution. This Agreement governs the City's contribution to the Project. The City shall reimburse the Q/E in the amount of up to One Hundred Thousand Dollars and No Cents (\$100,000.00) for lease payments, infrastructure to improve the interior of the building and site, design, development, installation of infrastructure and construction of tenant improvements to the facility.

(2) State Contribution: This Agreement governs the State's contribution of up to Seven Hundred Thousand Dollars and No Cents (\$700,000.00) from the NM LEDA Fund by way of the New Mexico Economic Development Department. The City will serve as fiscal agent

pursuant to the Intergovernmental Agreement between the City and State, which was executed in 2018 and is in substantial form as **Attachment “E”**, the terms of which are incorporated into this Agreement. The State monies will be available for disbursement in the following tranches upon completion of the disbursement milestones:

- (a) \$400,000 by June 30, 2018, upon the creation of 19 new jobs with a payroll of \$2.66 million or more and the completion of Phase I and II of the Construction Schedule in **Attachment “B”**, which has already been complete by the Effective Date of this Amendment;
- (b) \$90,000 by June 30, 2019 upon the creation of 17 new jobs for a total of 36 new with a payroll of \$5.04 million, which has already been complete by the Effective Date of this Amendment;
- (c) \$10,000 by June 30, 2023, for a total of 50 new jobs and retention of previous jobs for a total of 70 jobs and upon the completion of the final performance audit and close-out.
- (d) A bonus will be disbursed at a rate of \$10,000 per job for a maximum of \$200,000, for each job created and retained for six months by June 30, 2024, in excess of the 70 new jobs requirement, in accordance with **Attachment A**.

(3) **Disbursement of Grant Monies:** Dispersal of the NM LEDA Funds by the State and the City’s economic development funds are contingent upon the following:

- (a) The City and the New Mexico Economic Development Department shall execute an intergovernmental agreement for the State to grant up to \$700,000.00 to the City as fiscal agent for the Project; and
- (b) The Q/E shall submit to the City for review, a cover letter, invoice, proof of payment, and supporting documentation of the completion of performance milestones at each project phase necessary for disbursement as referenced in the Job Creation Commitment and Schedule in **Attachment A**. Disbursement shall be made on a reimbursement basis of eligible costs under the LEDA, as further limited below:
 - (i) Lease Payments;
 - (ii) Design, development and construction of building, infrastructure and tenant improvements for the building and site;

It is expressly understood that any costs eligible for reimbursement must be incurred after this Agreement is in effect.

(c) The City shall disburse to the Q/E One Hundred Thousand Dollars (\$100,000) in City Grant Monies. The City monies will be available for disbursement in the following tranches:

- i. \$20,000 by the end of June 30, 2018, after the completion of Phase I and II of the Construction Schedule in **Attachment “B”**, which

has already been complete by the Effective Date of this Amendment;

- ii. \$30,000 by the end of June 30, 2019, after the creation of 36 new jobs as referenced in Job Creation Commitment and Schedule in Attachment "A", which has already been complete by the Effective Date of this Amendment; and
- iii. \$50,000 by the end of June 30, 2022, after the creation of 50 new jobs as referenced in the Job Creation Commitment and Schedule in Attachment "A"; and

(4) If Grant Monies from the City and State do not fully fund the Project; the Q/E shall contribute any additional funds necessary to fund the remainder of the Project.

B. Contributions of the Q/E.

(1) **Financial Investment:** The Q/E shall contribute Four Million Two-Hundred Nine Thousand Dollars (\$4,209,000) or more in matching funds to complete the Project.

(2) **Project Management:** Unless otherwise specified in this Agreement, the Q/E shall be responsible for managing all parts of the Project.

(3) **Direct Economic Output:**

The Project is anticipated to generate \$106,147,218 in direct salaries for existing and expanded operations over ten years. The total estimated direct economic output for the expansion of the facility is \$96,624,751 over ten years, as is further described in the Economic Impact Report (See page 4 of Attachment "C").

(4) **Expanded Tax Base:** As a result of the completion of the Project, the Q/E will generate contributions to the City's tax base, as enumerated in the Economic Impact Report. Net benefits for the City generated by this Project (including property taxes, gross receipts taxes, utility fees, utility franchise fees, lodger's taxes and other use taxes) are estimated \$651,983 over ten years. (See pp. 10 of Economic Impact Report of Attachment "C".)

(5) **Proportional Investment:** The Q/E at its discretion may decide to not accept the entire \$800,000 in grant monies for the Project. If the Q/E does not accept the entire granted monies, then the capital investment and job creation requirements would then decrease proportionally to the level of grant monies accepted. The Q/E shall notify the City 30 days prior to its decision.

2. PERFORMANCE REVIEW AND CRITERIA – ECONOMIC DEVELOPMENT GOALS

A. Economic Development Goals. The following Project and Economic Development Goals shall be fulfilled by the Q/E:

(1) By June 30, 2019, the Q/E shall employ at least thirty-six (36) new full-time equivalent employees in the City of Santa Fe, while retaining the prior employment, and in accordance with the minimum average wage in the Job Creation Commitment and Schedule. See Attachment "A".

(2) By June 30, 2023, the Q/E shall employ no fewer than fifty (50) new full-time equivalent employees in the City of Santa Fe, while retaining the prior employment figures, in accordance with the minimum average wage data points in Attachment A.

(3) If the Q/E employs more than 50 new full-time equivalent jobs with a headcount between 71 and 90 employees by June 30, 2024 and retains them for six months, then the Q/E shall be entitled to a bonus of Ten Thousand Dollars and No Cents (\$10,000.00) per job for up to 20 jobs for maximum amount of Two Hundred Thousand Dollars and No Cents (\$200,000.00), in accordance with Attachment A.

(4) The Q/E's contribution as set forth in Paragraph 1.B herein is incorporated into the Economic and Development Goals.

B. Reports; Certifications; Review.

(1) **Quarterly Reports.** During the term of this Agreement, the Q/E shall provide to the Office of Economic Development staff quarterly reports in the months of January, April, July, and October of each year. The Q/E's quarterly reports shall clearly indicate how the Q/E has met the job creation requirements in Attachment A, and the taxes generated and other indices contained in the Economic Impact Report (see Attachment D for recommended form) Quarterly reports shall be in the form of an affidavit signed by an officer of the Q/E. Quarterly reports shall include a copy of FORM ES-903 provided by the Q/E to the City, which the Q/E filed with the New Mexico Department of Workforce Solutions, to demonstrate compliance with this Agreement at each review cycle. In the quarterly report, the Q/E shall include number of new jobs, the average wage of the new employees, cumulative employment, retention of existing employees and total payroll. The City's review of the quarterly reports shall determine whether the Q/E is in compliance with this Agreement and is substantially achieving the goals and objectives herein.

(2) **Annual Reports.** The City may require the Q/E to provide annual reports or a presentation to the City's governing body and the Economic Development Advisory Committee (EDAC). The City will give the Q/E a minimum of 30 days' notice if a report or presentation to the governing body or EDAC is required. City staff shall review these reports to ensure the Q/E's compliance with this Agreement in accordance with the Job Creation Commitment and Schedule.

(3) **Expanded Tax Base Report:** Within a reasonable time after completion of the construction of the facilities, but in any event by the next quarterly report, the Q/E shall provide to the City a written report on the construction jobs and wages created and the economic impacts thereof.

(4) Certification of Non-Interest. The Q/E shall certify to the City that no member, officer, or employee of the City or its designees or agents, no member of the governing body of the locality of which the program is situated, and no other public official that exercises any functions or responsibilities with respect to the Project during his/her tenure, or for one year thereafter, has any interest, direct or indirect, in the Q/E or any contract or subcontract, or the process thereof, for work to be performed in connection with the Project that is the subject of this Agreement. The Q/E shall certify that such a provision shall be included in all contracts and subcontracts in connection with the Project.

D. Documentation of Completion of Construction Phases: Within a reasonable time after completion of each phase listed in Paragraph 1.A (3) (b) and (c) herein, the Q/E shall provide documentation of its completion to the City's Office of Economic Development. The Q/E shall provide documentation to the City that construction of the facilities was completed by June 30, 2018. See Construction Schedule, attached as Attachment "B".

3. RECAPTURE PROVISIONS FOR PUBLIC MONIES

A. If any Economic Development Goal set forth in Paragraph 2.A is not met and documented in a manner deemed satisfactory by the City, the Q/E shall be deemed in default ("Default") and within 60 days of the City receiving the quarterly report with the information of such Default, the City shall send a written Notice of Default to the Q/E informing the Q/E how many days it has to cure the Default or repay the Grant Monies disbursed in proportion to the Economic Development Goals not yet achieved.

B. If the Q/E remains noncompliant after any applicable cure period, then the City may elect to pursue any and all remedies available in law or equity, including but not limited to initiating foreclosure of the security interest or demanding timely repayment by the Q/E of the Grant Monies in proportion to the unmet goals, as the City in its sole discretion may determine subject to reasonable calculations.

C. In the event the Q/E ceases operations and closes its facility before the end of year three of this amended Agreement, the Q/E shall be deemed in Default and the Q/E shall reimburse 100% of all Grant Monies disbursed to the Q/E to the City of Santa Fe Economic Development Fund as identified in 11-14 SFCC (1987).

4. Q/E BUYOUT

A. The Q/E may, at its election, buyout and thereby terminate this Agreement by repaying in full to the City all Grant Monies. Such repayment by the Q/E shall be without penalty until and unless the City initiates claw back of the Grant Monies, at which point costs, expenses (including City staff time) and attorney's fees will accrue to the repayment amount.

B. The Q/E must send prior written notice to the City of the Q/E's intent to repay in full the Grant Monies at least 45 days prior to the Q/E's repayment. The City's receipt of the Q/E's repayment of all disbursed Grant Monies (including any costs, fees, and expenses resulting from

claw back proceedings) constitutes satisfaction of the Q/E under this Agreement, upon which the Q/E may request release of the security interest, and the City will release the security interest within a reasonable time after receiving the Q/E's written request.

C. Within 30 days of receiving such notice from the Q/E, the City will notify the New Mexico Economic Development Department of the Q/E's intent to exercise the buyout clause. The City will reimburse the New Mexico Economic Development Department its portion of the repaid Grant Monies within 60 days after the City receives the repaid monies from the buyout.

5. SECURITY FOR CITY'S INVESTMENT; CLAWBACK

This is a grant project only, with the City acting as fiscal agent. The Q/E has no loan obligations for repayment to the City or State, but is obligated to fulfill the Economic Development Goals of this Agreement, however if the Q/E is found by the City to be in default, then the City may elect to demand financial reimbursement by the Q/E.

A condition precedent to this PPA is securitization of the Grant Monies which may be clawed back if the Q/E fails to meet its performance goals under this PPA. As security for fulfilling the Economic Development Goals, before the City may disburse any appropriations to the Q/E, the amount of Public Monies to be reimbursed shall be securitized in a manner satisfactory to the City. The expected securitization method is an irrevocable stand-by letter of credit from an issuing financial institution, with the City as beneficiary, from which the City may immediately draw down upon the City's presentation of a demand for payment and evidence of Q/E's default ("Irrevocable Letter of Credit"). This Irrevocable Letter of Credit shall have automatic one-year extensions terminable at the sole option and discretion of the City. At any given time, the Irrevocable Letter of Credit must secure an amount, and the City shall be able to draw down an amount, at least equal to the amount of appropriations made to the Q/E for the Project, the maximum being \$800,000. Funds from the Irrevocable Letter of Credit may be drawn in one drawing or from time-to-time in one or more partial drawings on or before the expiration date. Attached hereto and incorporated herein is **Attachment A**, which sets forth the clawback terms.

During the term of this Agreement, the Q/E may request a full or partial release of the Irrevocable Letter of Credit by the substitution of collateral, repayment of the disbursed appropriation or proof that the Q/E has met the Contribution and Economic Development Goals, in part or in whole, under this Agreement. Any full or partial release of the Letter of Credit will be proportional to the value of the substitute collateral, repayment, or the portion of Economic Development Goals met which are no longer subject to clawback according to **Attachment A**. Acceptance of substitute collateral or proof of performance goals shall be within the City's sole and absolute discretion.

6. TERM; SUNSET

This Agreement shall remain in force for 10 years from the execution date of the Agreement, or until conditions of the Agreement are performed in full or to the satisfaction of the City, whichever is earlier. In the event the Q/E performs or exceeds the required

performance levels contained in this Agreement, as may be determined by the City, this Agreement may be terminated at that time in writing by the City pursuant to Paragraph 7, below.

This Agreement will not be deemed terminated and this Agreement will remain in effect unless and until the City determines that the objectives under this Agreement have been fulfilled and a closure letter by the City is provided to the Q/E.

7. **TERMINATION**

This Agreement may be terminated by the City upon written notice delivered to the Q/E at least 45 days prior to the intended date of termination in the event that the Q/E ceases to operate the Project in accordance with the terms of this Agreement. If the Q/E is found to not be in substantial compliance with the Agreement, the City reserves the right to terminate the Agreement and recall in full the Grant Monies.

The Q/E may terminate the Agreement by pre-paying in full to the City and without penalty any Grant Monies disbursed to the Q/E. The Q/E must send a written letter to the City giving notice of its intent to pre-pay the Grant Monies in full within 45 days prior to the Q/E's intent to repay in full the Grant Monies.

8. **STATUS OF THE Q/E**

The Q/E, and its agents and employees are not employees of the City. The Q/E, and its agents and employees, shall not accrue leave, retirement, insurance, bonding, use of City vehicles or any other benefits afforded to employees of the City as a result of this Agreement. The Q/E shall be solely responsible for payment of wages, salaries and benefits to any and all employees or subcontractors retained by Contractor in the performance of the services under this Agreement.

9. **ASSIGNMENT AND SUCCESSORS; BINDING EFFECT**

A. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors in interest by way of merger, acquisition, or otherwise and their permitted assigns.

B. The Q/E shall not assign or transfer any of its rights, privileges, obligations or other interest under this Agreement, voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law or any other matter, including any claims for money due or to become due under this Agreement, without the prior written approval of the City.

C. Any purported assignment of rights is a violation of subsection (B) and is void.

10. **INDEMNIFICATION; LIABILITY**

It is expressly understood and agreed by and between the Q/E and the City that the Q/E shall defend, indemnify and hold harmless the City for all losses, damages, claims or judgments

on account of any suit, judgment, execution, claims, actions or demands whatsoever resulting from the Q/E's actions or inactions as a result of this Agreement, as well as the actions or inactions of Q/E's employees, agents, representatives and subcontractors as a result of this agreement. The Q/E shall maintain adequate insurance in at least the aggregate maximum amounts which the City could be liable consistent with the provisions of the New Mexico Tort Claims Act. It is the sole responsibility of the Q/E to be in compliance with the law.

11. INSURANCE

A. The Q/E, at its own cost and expense, shall carry and maintain in full force and effect during the term of this Agreement, comprehensive general liability insurance covering bodily injury and property damage liability, in a form and with an insurance company acceptable to the City, with limits of coverage in the maximum amount which the City could be held liable under the New Mexico Tort Claims Act for each person injured and for each accident resulting in damage to property. Such insurance shall provide that the City is named as an additional insured and that the City shall be notified no less than 30 days in advance of cancellation for any reason. The Q/E shall furnish the City with a copy of a "Certificate of Insurance" as a condition prior to performing under this Agreement.

B. The Q/E shall also obtain and maintain Workers' Compensation insurance, required by law, to provide coverage for Q/E's employees throughout the term of this Agreement. The Q/E shall provide the City with evidence of its compliance with such requirement.

12. NEW MEXICO TORT CLAIMS ACT

Any liability incurred by the City of Santa Fe in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1 et seq. NMSA 1978, as amended. The City and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

13. THIRD PARTY BENEFICIARIES

By entering into this Agreement the parties do not intend to create any right, title or interest in or for the benefit of any person other than the City and the Q/E. No person shall claim any right, title or interest under this Agreement or seek to enforce this Agreement as a third party beneficiary of this Agreement.

14. RECORDS AND AUDITS

The Q/E shall maintain and keep in its possession throughout the term of this Agreement and for a period of six (6) years thereafter, all related records, including but not limited to, all financial records, requests for proposals (RFPs), invitations to bid, selection and award criteria, contracts and subcontracts, advertisements, minutes of pertinent meetings, as well as records

sufficient to fully account for the amount and disposition of the total funds from all sources budgeted hereunder, the purpose for which such funds were used, and other such records as the City or the State shall proscribe. The Q/E shall be strictly liable for receipts and disbursements related to the Project Grant Monies. These records shall be subject to inspection by the City, the New Mexico Economic Development Department, and the State Auditor upon notice within five (5) business days. The City shall have the right to audit billings both before and after payment; payments under this Agreement shall not foreclose the right of the City to recover excessive illegal payments.

15. **APPROPRIATIONS**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the City Governing Body and the New Mexico Economic Development Department on behalf of the Q/E to the City for the performance of this Agreement. If sufficient appropriations and authorization are not made by the City Governing Body and the New Mexico Economic Development Department on behalf of the Q/E to the City, this Agreement shall terminate upon written notice being given by the City to the Q/E.

16. **RELEASE**

The Q/E, upon final fulfillment of this Agreement, releases the City, its officers and employees, from all liabilities, claims, and obligations whatsoever arising from or under this Agreement. The Q/E agrees not to purport to bind the City to any obligation not assumed herein by the City unless the Q/E has express written authority to do so, and then only within the strict limits of that authority.

17. **CONFIDENTIALITY**

Any confidential information provided to or developed by the Q/E in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Q/E without the prior written approval of the City.

18. **CONFLICT OF INTEREST**

The Q/E warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under this Agreement. The Q/E further agrees that in the performance of this Agreement no persons having any such interests shall be employed.

19. **APPLICABLE LAW; CHOICE OF LAW; VENUE**

The Q/E shall abide by all applicable federal and state laws and regulations, and all ordinances, rules, and regulations of the City of Santa Fe. In any action, suit or legal dispute arising from this Agreement, the Q/E agrees that the laws of the State of New Mexico shall govern. The Parties agree that any action or suit arising from this Agreement shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or

suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

20. **AMENDMENT**

This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto.

21. **SCOPE OF AGREEMENT**

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

22. **REPRESENTATIONS AND WARRANTIES**

A. The Q/E hereby warrants the Q/E is and will remain in compliance with the Americans with Disabilities Act, 29 CFR 1630. The Q/E hereby agrees to defend, indemnify, and hold harmless the City from and against all claims, suits, damages, costs, losses and expenses in any manner arising out of or connected with the failure of the Q/E, its contractors and subcontractors, agents, successors, assigns, officers, or employees to comply with provisions of the ADA or the rules and regulations promulgated there under the Americans with Disabilities Act, 29 CFR 1630.

B. The Q/E agrees to comply with the applicable provisions of local, state, and federal equal employment opportunity statutes and regulations.

C. The Q/E shall comply with City of Santa Fe Minimum Wage, Article 28-1-SFCC 1987, as well as any subsequent changes to such article throughout the term of this Agreement.

23. **APPLICABLE LAW**

This Agreement shall be governed by the ordinances of the City of Santa Fe and the laws of the State of New Mexico.

24. **NON-DISCRIMINATION**

During the term of this Agreement, the Q/E shall not discriminate against any employee or applicant for an employment position to be used in the performance by the Q/E hereunder, on the basis of ethnicity, race, age, religion, creed, color, national origin, ancestry, sex, gender, sexual orientation, physical, or mental disability, medical condition, or citizenship status.

25. **SEVERABILITY**

In case any one or more of the provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

26. **NOTICES**

Any notices required to be given under this Agreement shall be in writing and served by personal delivery or by mail, postage prepaid, to the parties at the following addresses:

If to the CITY OF SANTA FE:
City of Santa Fe
Attn: Office of Economic Development Director
P.O. Box 909
Santa Fe, NM 87504

If to QUALIFYING ENTITY:
Attn: Chief Executive Officer
Descartes Labs, Inc.
100 North Guadalupe Street
Santa Fe, NM 87501

27. **HEADINGS**

The section headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

28. **ATTACHMENTS**

All attachments are fully incorporated herein and made a part of this Agreement.

29. **COUNTERPARTS**

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

30. **REPRESENTATION ON AUTHORITY OF SIGNATORIES**

The signatory for the Q/E represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. The Q/E represents and warrants that the execution and delivery of the Agreement and the performance of the Q/E's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.

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

CITY OF SANTA FE:

ATTEST:

Alan Webber, Mayor

Yolanda Y. Vigil, City Clerk

APPROVED AS TO FORM:

/s/ Andra Salazar for
Erin K. McSherry, City Attorney

APPROVED:

Mary T. McCoy, Finance Director

2122800.510400
Munis Org Number

QUALIFYING ENTITY:
Descartes Labs, Inc.

Phil Fraher
CEO and President

By: _____

Employer ID Number: _____
City of Santa Fe Business ID Number: 03-326950-

00

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

Notarized Affidavit

The foregoing instrument was acknowledged before me on this ____ day of _____, 2020, by PHIL FRAHER, the Chief Executive Officer and President of Descartes Labs, Inc., a foreign profit corporation, on its behalf.

Notary Public

My commission expires:

Attachment A

<i>Job Creation Commitment and Schedule (Net New Jobs)* ❖</i>						
<u>Year</u>	<u>Net New Jobs Hiring Target</u>	<u>Jobs Retained From Prior Years</u>	<u>Payroll</u>	<u>Job Determination Period</u>		<u>Clawback % on Job Creation Shortfall^{^^^}</u>
1	20 + 19 = 39	20 (starting headcount)	\$2.66 million	01-Jul 2017	30 Jun 2018	100%
2	39 + 17=56	39	\$5.04 million	01 Jul 2018	30 Jun 2019	100%
3	56 + 14 = 70	56	\$7.0 million	01 Jul 2019	06 Jun 2022	100%
4	-	70		01 Jul 2022	30 Jun 2023	75%
5	-			01 Jul 2023	30 Jun 2024	50%
Note	71-90 (Bonus)			-	01 Jan 2024	
Total	50		\$14.7 million			
		Add'l Notes: All 70 new jobs and the 20 baseline jobs must be retained until June 30, 2024 for compliance. Any bonus tier job shall be achieved prior to June 30, 2024, and must be retained for six months for the bonus.				

<u>Starting Headcount (JTIP Eligible):</u>	20	<u>As of:</u>	June 30, 2017
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^{^^^} Clawback percentage is calculated on job creation shortfall at expiration or termination of the PPA, whichever is earlier. Clawback formula = (Job Creation % Shortfall) x (Cumulative Grant Monies Distributed), where Job Creation % Shortfall is (1 - (actual jobs / cumulative hiring target))*100%.

❖ Each job must have a minimum average salary of \$110,000, not including additional benefits. Wages of jobs retained from prior years must equal to or exceed the wage requirements for those jobs as described herein. Only New Mexico based employees count towards job creation.

Attachment B
Descartes Labs, Inc.
Construction Schedule

<u>Estimated Completion Date</u>	<u>Description</u>
March 31, 2018	Phase I: Tenant Improvements - Start of Construction.
June 30, 2018	Phase II: Tenant Improvements – Receipt of Certificate of Occupancy, after completing upgrades to design, building, interior, office and workspace upgrades, and installation of infrastructure to building facility which may include, HVAC, broadband connectivity, utilities, security, electrical, and any infrastructure necessary for operations.