

**ACTION SHEET
CITY COUNCIL COMMITTEE MEETING OF 02/26/14
ITEM FROM FINANCE COMMITTEE MEETING OF 02/17/14**

ISSUE:

13. CIP High Speed Internet Project. (Sean Moody)
- A. Request for Approval of Telecommunications Services Agreement; Cyber Mesa Computer System, Inc.
 - B. Request for Approval of Memorandum of Understanding; State of New Mexico Department of Information Technology.

FINANCE COMMITTEE ACTION: APPROVED AS CONSENT ITEM

Requested approval of CIP High Speed Internet Project – a) request for approval of Telecommunications Services Agreement with Cyber Mesa Computer System, Inc. in the amount of \$132,100 inclusive of gross receipts tax for a total sum not to exceed \$882,100 and b) request for approval of memorandum of understanding with State of New Mexico Department of Information Technology. Budget is available in CIP Bond fund.

SPECIAL CONDITIONS OR AMENDMENTS

STAFF FOLLOW-UP:

VOTE	FOR	AGAINST	ABSTAIN
COUNCILOR BUSHEE	Excused		
COUNCILOR CALVERT	X		
COUNCILOR DIMAS	X		
COUNCILOR IVES	X		
CHAIRPERSON DOMINGUEZ			

3-19-12/FCMissue

**ACTION SHEET
ITEM FROM THE
PUBLIC WORKS/CIP AND LAND USE COMMITTEE MEETING
OF
MONDAY, FEBRUARY 10, 2014**

ITEM 16

CIP HIGH SPEED INTERNET PROJECT

- REQUEST FOR APPROVAL OF TELECOMMUNICATIONS SERVICES AGREEMENT – CYBER MESA COMPUTER SYSTEM INC. IN THE AMOUNT NOT TO EXCEED \$882,100
- REQUEST FOR APPROVAL OF MEMORANDUM OF UNDERSTANDING – STATE OF NEW MEXICO DEPARTMENT OF INFORMATION TECHNOLOGY (**SEAN MOODY**)

PUBLIC WORKS COMMITTEE ACTION: Approved on Consent

SPECIAL CONDITIONS OR AMENDMENTS:

STAFF FOLLOW UP:

VOTE	FOR	AGAINST	ABSTAIN
CHAIRPERSON WURZBURGER	Excused		
COUNCILOR CALVERT, Acting Chair	X		
COUNCILOR IVES	X		
COUNCILOR RIVERA	X		
COUNCILOR TRUJILLO	Excused		

**ACTION SHEET
PUBLIC UTILITES COMMITTEE MEETING OF 2/5/14**

ISSUE NO. 10

CIP High Speed Internet Project. (Sean Moody)

- a. Request for approval of Telecommunications Services Agreement – Cyber Mesa Computer Systems, Inc.
- b. Request for approval of Memorandum of Understanding – State of New Mexico Department of Information Technology. (Sean Moody)

Economic Development Review Committee – 2/3/14
 Public Utilities Committee – 2/5/14
 Public Works Committee – 2/10/14
 Finance Committee – 2/17/14
 City Business & Quality of Life Committee – 2/18/14
 City Council – 2/26/14

PUBLIC UTILITES COMMITTEE ACTION: Approved to forward to 2/10/14 Public Works Committee.

SPECIAL CONDITIONS OR AMENDMENTS:

STAFF FOLLOW UP:

VOTE:	FOR	AGAINST	ABSTAIN
COUNCILOR CALVERT, CHAIR	x		
COUNCILOR TRUJILLO	x		
COUNCILOR DOMINGUEZ	x		
COUNCILOR DIMAS	x		
COUNCILOR RIVERA	x		

City of Santa Fe, New Mexico

memo

Date: January 22nd 2014
To: Finance Committee & City Council
Via: Kate Noble, Acting Director of Housing and Economic Development *KW*
From: Sean Moody, Project Administrator *SM*
Cc: Brian Snyder, Marcos Tapia, Judie Amer, Robert Rodarte

ITEM & ISSUE

Staff recommends approval of the attached **Telecommunications Services Agreement** and associated **Memorandum of Understanding ("MOU")** to implement the **CIP High Speed Internet Project**. The turn-key **\$882,100** agreement replaces a previous draft which had been reviewed by several committees but not executed, which excluded construction services and equipment. The agreement currently proposed reimburses the vendor for the purchase of such services and equipment. The MOU provides for a mutual exchange between the City and the State of New Mexico for the use of each other's fiber optic infrastructure. The exchange is referenced in the Telecommunications Services Agreement.

BACKGROUND & SUMMARY

On November 30, 2011 the City Council approved a \$22 million gross receipts tax-financed CIP bond issue dedicating \$1 million to improve broadband speed, availability and pricing. To accomplish this goal, locally owned telephone and Internet provider **Cyber Mesa Computer Systems Incorporated** has been selected to design, procure and operate a fiber optic link between the central telephone exchange building and an existing commercial point of presence two miles away where long distance carriers are connected to the World Wide Web. The project includes a co-location facility which will allow these carriers to interconnect directly to local providers. An effective market for wholesale Internet access will thus be created for the first time. The resulting invigorated wholesale competition is expected to improve retail broadband speeds, availability and pricing throughout the city.

Under the proposed agreement the vendor will design, procure and operate two miles of buried fiber optic cable, the co-location facility and all equipment necessary to provide comprehensive open-access wholesale telecommunications services to all qualified carriers and providers. The vendor will also obtain all necessary rights, licenses and easements, and provide a connection into the central telephone exchange. The vendor's operational costs will be covered by wholesale fees agreed by the City and paid by the customers. At the end of the term the City retains the right to transfer the assets and business interests to another telephone company. The project will thus have a service life beyond the four year contract term. Contract payments will be drawn from

business unit 32817, line item 572970. The agreement is procured as an exempt utility service.

The Memorandum of Understanding between the City and the State of New Mexico Department of Information Technology will provide the City with data transport capacity to an Albuquerque-based point of presence for the World Wide Web, thereby widening the range of wholesale options and further stimulating competition in Santa Fe. In exchange, the State will be granted exclusive use of one of the Project's twelve bundles of fiber optic cable along a segment of the Project's route which passes by State-owned facilities at the Apodaca Building and the Simms Building. The value and effectiveness of the Project will be enhanced by the exchange. The data transport provided by the State under this MOU is referenced in the Telecommunications Services Agreement as a condition precedent to commencement of the work.

RECOMMENDATION

Staff recommends approval of the attached Telecommunications Services Agreement to design, procure and operate the CIP High Speed Internet Project. Staff also recommends concurrent approval of the Memorandum of Understanding to provide data transport to Albuquerque as required under the Telecommunications Services Agreement.

**CITY OF SANTA FE
PROFESSIONAL SERVICES AGREEMENT**

FOR FIBER OPTIC, TELECOMMUNICATIONS SERVICES NETWORK

THIS AGREEMENT is made and entered into by and between the City of Santa Fe, New Mexico (the "City") and Cyber Mesa Computer Systems Incorporated (the "Contractor") and, together with the City, the "Parties"). The date of this Agreement shall be the date on which it is executed by the City and the Contractor, whichever occurs last.

RECITALS

- A. Whereas, the City Council adopted Resolution 2011-67 authorizing a gross receipts tax revenue bond issue in the amount of Twenty-Two Million Dollars (\$22,000,000), of which One Million Dollars (\$1,000,000) was allocated for broadband infrastructure projects that includes the fiber optic network project described below; and
- B. Whereas, the City desires to develop and install infrastructure for a fiber optic, telecommunications services network (the "Project"), (*CIP High Speed Internet Program Description*), Schedule 1 (List of Capital Assets & Transferable Assets) and Schedule 2 (List of Described Services) hereto and Schedule 3; and
- C. Whereas, in accordance with Section 18.1.7 of the City Purchasing Manual, this agreement is exempt from the RFP and other competitive procurement requirements as a telecommunications utility and therefore, the City has procured the Contractor to advise the City in the design and installation of the infrastructure for a fiber optic, telecommunications services network and perform the Described Services (as defined below).

NOW THEREFORE, in consideration of the covenants, representations, warranties and mutual agreements hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

1. SCOPE OF SERVICES; OWNERSHIP

A. The Contractor shall:

- (1) Within six (6) months after the Effective Date (as defined below), design, procure and install telecommunications facilities to be owned by the City or its qualified transferee, as provided herein, including those listed under the headings "Capital Assets" (the "Capital Assets"), which, together with the "Transferable Assets" (the "Transferable Assets"), shall be necessary and sufficient to deliver the Described Services, and
- (2) operate and maintain the Capital Assets and Transferable Assets and provide wholesale telecommunications services (the "Described Services") which,

together with the Capital Assets and Transferable Assets, constitute the Project) to any qualified telecommunications provider or carrier being served by the Project.

- B. With prior written approval of the City, the Contractor shall enter into agreements with other entities, and subcontractors, on terms and conditions mutually acceptable to the Parties, for Capital Assets Work, related work and related services.
- (1) The Contractor shall ensure the following conditions occur, prior to commencement of work by any subcontractor with respect to any Capital Assets Work:(a) the architect, engineer, contract, subcontractors, plans, specifications and budget for the work shall have been approved by City, (b) the City shall be provided with acceptable performance and payment bonds from the prime contractor for construction contracts over fifty thousand dollars (\$50,000) which insure satisfactory completion of and payment for the work, are in an amount and form and have a surety acceptable to City, and name City as additional payee, and (c) to the extent permitted by applicable Laws, appropriate waivers of mechanics' and materialmen's liens shall have been obtained and/or filed.
 - (2) The Contractor shall certify, at the time of any request for disbursement, that no default exists and no mechanics' or materialmen's liens have been filed against any of the Capital Assets Work and remain undischarged.
 - (3) The Contractor agrees that disbursements shall be made from time to time but not more than once in any thirty (30) day period in an amount not exceeding the cost of the work completed since the last disbursement, (A) upon receipt of (i) satisfactory evidence, which may include architects' or engineers' certificates of the stage of completion, the estimated total cost of completion and performance of the work to date in a good and workmanlike manner in accordance with the contracts, plans and specifications, (ii) waivers of liens, (iii) contractors' and subcontractors' sworn statements as to completed work and the cost thereof for which payment is requested, (iv) other reasonable evidence of cost and payment so that City can verify that the amounts disbursed from time to time are represented by work that is completed, in place and free and clear of mechanics' and materialmen's lien claims and (B) upon completion of an inspection of the work by City or its representative, if requested by City.
 - (4) The Contractor agrees that each request for disbursement shall be accompanied by a certificate of the Contractor and subcontractor, signed by an authorized signatory of the Contractor and subcontractor, describing the work for which payment is requested, stating the cost incurred in connection therewith and accompanied by invoices and other documentation of costs reasonably acceptable to the City, and stating that the Contractor and subcontractor has not previously received payment for such work.

- C. The Contractor represents and hereby affirms that the Project can be designed, installed, constructed, completed and become fully operational in an amount not to exceed Eight Hundred Eighty-Two Thousand One Hundred Dollars (\$882,100.00) including gross receipts tax.
- D. All Capital Assets procured and/or installed shall be and remain the sole property of the City unless and until transferred as provided herein."

2. STANDARD OF PERFORMANCE; LICENSES

- A. The Contractor represents that it possesses the experience and knowledge necessary to perform the services described under this Agreement; and to advise the City as to whether the Capital Assets and telecommunications infrastructure installations are sufficient to enable the provision of the Described Services.
- B. The Contractor agrees to obtain and maintain throughout the term of this Agreement, all applicable professional and business licenses required by law, for itself, its employees, agents, representatives and subcontractors.
- C. The City hereby grants to the Contractor, for the term of this Agreement, a non-exclusive license to operate, maintain and use City of Santa Fe public rights-of-way to provide telecommunications services within the City of Santa Fe, in accordance with the terms and conditions of this Agreement and the Telecommunications in the Public Rights-of-Way Ordinance, Article 27-2 SFCC 1987 (as may be amended from time to time).
 - (1) The Parties agree and acknowledge that the consideration for granting this license has been paid by the Contractor to the City in the amount of Two Thousand Five Hundred Dollars (\$2,500.00); and
 - (2) at such time as the City deems appropriate after resolution of pending litigation with another potential telecommunications franchisee, the Parties shall negotiate in good faith to sign a franchise agreement (that will contain appropriate franchise fee provisions, providing a credit for the amount paid pursuant to Section 2.C(1)) in a form acceptable to the governing body of the City and in accordance with the Telecommunications in the Public Rights-of-Way Ordinance, Article 27-2 SFCC 1987 (as may be amended from time to time), to replace the non-exclusive license granted hereunder.

3. COMPENSATION AND REIMBURSEMENTS

- A. The City shall pay to the Contractor in partial payment for services rendered a sum not to exceed One Hundred Thirty-Two Thousand One Hundred Dollars (\$132,100.00), inclusive of applicable gross receipts taxes, as in Paragraph 3.D.(1) and (2). The sum total of compensation to be paid by the City under this Agreement shall not exceed Eight Hundred Eighty-Two Thousand One Hundred Dollars (\$882,100.00) including gross receipts tax. Payment shall be made for services

actually rendered and accepted by the City as specifically broken down in Paragraph 3D. herein.

- B. The Contractor shall be responsible for payment of gross receipts taxes levied by the State of New Mexico on the sums paid under this Agreement.
- C. Payment shall be made upon receipt and approval by the City of detailed statements containing a report of services completed. Compensation shall be paid only for services actually performed.
- D. The City shall compensate and/or reimburse the Contractor as follows:
 - (1) Upon Execution. For the option granted to the City under Section 6.B, the City shall pay the Contractor a fee in the amount of Twenty-Two Thousand One Hundred Dollars (\$22,100.00) as consideration.
 - (2) Construction Phase. For services rendered during the design, procurement and installation of the telecommunications infrastructure, the City shall:
 - a. pay the Contractor an amount equal to One Hundred Ten Thousand Dollars (\$110,000.00) according to a schedule of values (based on the percentage of Capital Assets Work completed), as follows:
 - (i) Preconstruction project management services completed= \$ 35,000,
 - (ii) Utility infrastructure 50% completed= \$25,000,
 - (iii) Utility infrastructure 100% completed= \$25,000, and
 - (iv) Capital Assets Work completed and commissioned= \$25,000.
 - b. grant the Contractor the right to own two (2) buffer tubes of twelve (12) strands of fiber each (indicated by the columns marked "orange" and "yellow" in the attached Schedule 3) from that which will be installed as part of the Project; and
 - c. reimburse the Contractor for materials, equipment and payments to subcontractors and other parties relating to the Project, in accordance with the procedures set forth herein in Paragraph 3D. (4).
 - (3) Operating Phase. For services rendered as an operator of the Project during the operating phase, the City shall grant the Contractor the right to retain any revenue received by the Contractor from delivery and performance of the Described Services. The Contractor is obligated to perform the Described Services under this Agreement and in return shall be entitled to receive compensation, if any, paid to the Contractor from any qualified telecommunications provider or carrier being served by the Project and the Contractor's operation of the Project.

- (4) As the Contractor incurs pre-approved, in writing, reimbursement expenses, the City agrees to reimburse the Contractor within ten (10) business days of receipt, approval and acceptance by the City of a reimbursement request from the Contractor, containing a report of services completed and expenses incurred (but not yet necessarily paid) and, where relevant, a signed Subcontractor's Lien Release & Waiver, in substantially the form attached hereto as Exhibit A. The aggregate of reimbursable expenses shall not exceed Seven Hundred Fifty Thousand Dollars (\$750,000.00), including gross receipts tax.

4. APPROPRIATIONS

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the City for the performance of this Agreement. If sufficient appropriations and authorization are not made by the City, this Agreement shall terminate upon written notice being given by the City to the Contractor. The City's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final.

5. TERM AND EFFECTIVE DATE; CONDITIONS PRECEDENT

- A. The Contractor's obligations hereunder shall commence upon the last to be satisfied of the following conditions precedent:
 - (1) The City shall properly execute agreements with the State of New Mexico (to provide transport) and at least one other third party (who has the capacity to provide internet access) necessary to enable the Contractor to perform the services under this Agreement and the Described Services on a timely basis.
 - (2) The City shall assign to the Contractor two gigabits per second of transport from a co-location facility at the Simms Building to ABQ GigaPop.
 - (3) The City shall establish and fully fund a segregated reserve account in an amount equal to Seven Hundred Fifty Thousand Dollars (\$750,000.00) from which all reimbursable payments are to be made under Paragraph 3D(4).
 - (4) The Parties shall agree to an initial list of maximum wholesale rates at which to offer the Described Services, which rates shall in any event cover the Contractor's operating costs and reasonable profit margin. The wholesale rates may, at the option of either Party, be reviewed and, at the option of the Contractor, modified from time to time without amendment to this Agreement.
- B. This Agreement shall be effective on the date (the "Effective Date") when the last of the conditions precedent listed in Section 5.A shall have been satisfied or waived in writing by both Parties, and shall terminate on the fourth (4th) anniversary of the Effective Date, unless terminated sooner pursuant to Article 6."

6. TERMINATION

A. This Agreement may be terminated by the City upon ninety (90) days' written notice to the Contractor. Upon termination, the Contractor shall:

(1) Render a final report of the services performed up to the date of termination and shall, upon request by the City, turn over to the City original copies of all work product, research or papers prepared under this Agreement.

(2) Be paid for services rendered and expenses incurred through the date that the Contractor receives notice of such termination.

B. The Contractor hereby grants to the City the Option, exercisable upon expiration of this Agreement or earlier termination of this Agreement as provided in Paragraph 6 A., to cause the Contractor to transfer to a City pre-approved, qualified third party, not to exceed 144 strands of the Contractor's fiber coming out of the Central Office to the access vault, together with the Capital Assets.

(1) The Contractor shall notify the City within 120 days before the expiration of this Agreement (i) of the upcoming Option exercise period (as specified in paragraph (2) below) and (ii) of its intention to continue to deliver the Described Services on a month-to-month basis upon the expiration of this Agreement or not continue (which intention or desire shall not be binding on the City).

(2) The City shall notify the Contractor of its intention not to or to exercise such Option no less than thirty (30) days before the expiration or termination of this Agreement.

(3) If the City exercises the Option, it shall cause to be paid to the Contractor an amount equal to One Dollar (\$1.00), upon which payment the Contractor shall transfer the Capital Assets to the City's pre-approved, designated, qualified transferee owner. C. Any funds on deposit in the Capital Assets Reserve Fund upon termination of this Agreement shall, subject to Section 6.A(2), be retained by the City.

7. STATUS OF CONTRACTOR; RESPONSIBILITY FOR PAYMENT OF EMPLOYEES AND SUBCONTRACTORS

A. The Contractor and its agents and employees are independent contractors performing services for the City and are not employees of the City. The Contractor, 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.

B. The Contractor shall be solely responsible for payment of wages, salaries and benefits to any and all employees or subcontractors retained by the Contractor in the performance of the services under this Agreement.

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

8. CONFIDENTIALITY

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

9. CONFLICT OF INTEREST

The Contractor 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 of services required under this Agreement. The Contractor further agrees that in the performance of this Agreement no persons having any such interests shall be employed.

10. ASSIGNMENT; SUBCONTRACTING

Except as provided herein, the Contractor shall not assign or transfer any rights, privileges, obligations or other interest under this Agreement, including any claims for money due, without the prior written consent of the City. The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the City.

11. RELEASE

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

12. INSURANCE

A. The Contractor, 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 arising from the Contractor's performance under this Agreement. Such insurance shall provide that the City is named as an additional insured and that the City is notified no less than thirty (30) days in advance of cancellation for any reason. The Contractor shall furnish the City with a copy of a Certificate of Insurance as a condition prior to performing services under this Agreement.

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

13. INDEMNIFICATION

The Contractor shall indemnify, hold harmless and defend the City from all losses, damages, claims or judgments, including payments of all attorneys' fees and costs on account of any suit, judgment, execution, claim, action or demand whatsoever arising from the Contractor's performance under this Agreement as well as the performance of the Contractor's employees, agents, representatives and subcontractors.

14. 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.

15. 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 Contractor. 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.

16. RECORDS AND AUDIT

The Contractor shall maintain, throughout the term of this Agreement and for a period of three (3) years thereafter, detailed records that indicate the date, time and nature of Described Services rendered, Capital Assets Work performed and Transferable Assets in place. The Contractor's records shall be subject to inspection by the City, the Department of Finance and Administration, and the State Auditor upon three (3) business days' prior written notice to the Contractor. The City shall have the right to audit the billing both before and after payment. Payment under this Agreement shall not foreclose the right of the City to recover excessive or illegal payments.

17. APPLICABLE LAW; CHOICE OF LAW; VENUE

The Parties 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 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.

18. AMENDMENT

Except as set forth in Section 5.A(4), this Agreement shall not be altered, changed or modified except by an amendment in writing executed by the Parties.

19. SCOPE OF AGREEMENT

This Agreement (including all schedules and exhibits attached hereto) incorporates all the agreements, covenants, and understandings between the Parties concerning the services to be performed hereunder, and all such agreements, covenants and understandings have been merged into this Agreement. This Agreement expresses the entire agreement and understanding between the Parties with respect to said services. No prior agreement or understanding, verbal or otherwise, of the Parties or their agents shall be valid or enforceable unless embodied in this Agreement.

20. NON-DISCRIMINATION

During the term of this Agreement, the Contractor shall not discriminate against any employee or applicant for an employment position to be used in the performance of services by the Contractor 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.

21. 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.

22. 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:

City of Santa Fe:
Sean Moody
Project Administrator
Economic Development Division
City of Santa Fe
P.O. Box 909
Santa Fe, NM 87504-0909

Contractor:
Jane Hill
President
Cyber Mesa Computer Systems
Incorporated and SF Fiber
4200 Rodeo Rd.
Santa Fe, NM 87507

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date set forth below.

CITY OF SANTA FE:

DAVID COSS, MAYOR

DATE: _____

ATTEST:

YOLANDA Y. VIGIL
CITY CLERK

APPROVED AS TO FORM:

Judith Amen for

KELLEY BRENNAN,
INTERIM CITY ATTORNEY 1/24/14

APPROVED:

MARCOS TAPIA
FINANCE DIRECTOR

CYBERMESA/CONTRACTOR:

DATE: _____

CRS# _____

CITY BUSINESS REGISTRATION # _____

**Exhibit A:
Form of Subcontractor's Lien Release & Waiver**

**Subcontractor's Release Contingent on Payment
RELEASE OF LIENS • WAIVER OF RIGHT TO CLAIM**

CERTIFICATION OF PAYMENTS MADE TO SUBCONTRACTORS AND SUPPLIERS
The undersigned hereby acknowledges that upon receipt from CONTRACTOR of the Invoice Amount, full payment shall have been made for all Work performed and all Material furnished by the Subcontractor for the CIP High Speed Internet Project in Santa Fe, New Mexico through the Invoice Date:

Previous Application Date: _____
Current Application Date: _____
Work and/or Material: _____
Location: _____
Contractor: _____
Invoice Date: _____
Invoice No: _____
Invoice Amount: _____

The undersigned certifies that Subcontractor has not already received payment for this Work and Material, and certifies that all Subcontractor's subcontractors and suppliers have been paid in full for all work performed and all material furnished to the Project through the Previous Application Date. The undersigned waives all rights to claims and liens and hereby releases any claim or lien that the undersigned may have previously made for such work or materials furnished through the Previous Application Date. This Release, Waiver and Certification shall not apply to work or materials furnished after the Invoice Date.

Signature of Subcontractor's
authorized representative or agent

Title

STATE OF NEW MEXICO)

) SS:

COUNTY OF SANTA FE)

The foregoing was acknowledged before me on _____, 201__ by _____,
individually or as the _____ of _____, a New Mexico _____.

Notary Public _____ My commission expires: _____

**Schedule 1:
List of Capital Assets & Transferable Assets**

Capital Assets

1. Fiber optic facilities (including Central Office Access Vault, conduit, manholes, hand holes/pull boxes, and fiber termination) extending from the central telephone exchange at 121 East Alameda (the "Central Office") to a co-location facility at 715 Alta Vista Street (the "Simms Building") as well as planned "meet-me" points and lateral builds along this route.
2. Equipment, including:
 - Racks
 - Routers
 - Cabling (apart from the fiber optic strands in Item 3)
 - Generators
3. A 288 strand bundle of single-mode fiber optic cable, made up of 24 buffer tubes (12 strands per tube), less the two buffer tubes (indicated by the columns labeled "orange" and "yellow" on the table in Schedule 3) that constitute a part of the Consultant's Fee, extending from the Access Vault (at the exterior portion of the Contractor's fiber entrance to the Central Office) to the Simms Building.

Transferable Assets

4. Software, software licenses and operational records (excluding proprietary information of the Contractor or SF Fiber, such as customer information and pricing).
5. Intellectual property rights relating to the name "SF Fiber", including domain name registrations.
6. Contract rights with third parties, encumbrances and easements.

**Schedule 2:
List of Described Services**

1. **Network Operation and Management**

SF Fiber will be the “single source” services vendor for the fiber optic network. SF Fiber will manage the creation and procurement of all services that will be delivered across the infrastructure. It will manage the integration, implementation, testing, and customer support functions. Operations management and customer support consist of the following:

- Infrastructure delivered services
- Marketing and sales support
- Customer care
- Network monitoring, management, and administration
- Network maintenance and field services

2. **Wholesale Open Access Services**

SF Fiber will offer the following services to qualified carriers or providers that wish to connect to the network, on a wholesale, open access basis:

- Co-location
- Interconnection
- Ethernet transport
- Dark fiber
- Internet access

Schedule 3:
Table of Buffer Tubes & Strands

Fiber Number/Bundle ID Chart

144 Fiber ct

	blue	orange	green	brown	slate	white	red	black	yellow	violet	rose	aqua
blue	1	13	25	37	49	61	73	84	97	109	121	133
orange	2	14	26	38	50	62	74	86	98	110	122	134
green	3	15	27	39	51	63	75	87	99	111	123	135
brown	4	16	28	40	52	64	76	88	100	112	124	136
slate	5	17	29	41	53	65	77	89	101	113	125	137
white	6	18	30	42	54	66	78	90	102	114	126	138
red	7	19	31	43	55	67	79	91	103	115	127	139
black	8	20	32	44	56	68	80	92	104	116	128	140
yellow	9	21	33	45	57	69	81	93	105	117	129	141
violet	10	22	34	46	58	70	82	94	106	118	130	142
rose	11	23	35	47	59	71	83	95	107	119	131	143
aqua	12	24	36	48	60	72	84	96	108	120	132	144

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

@VANTAGE FOR GENERAL LIABILITY TECHNOLOGY COMPANIES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

The following schedule lists the coverage extensions provided by this endorsement. Refer to the individual provisions to determine the extent of your coverage.

SCHEDULE OF COVERAGE EXTENSIONS	
1. Additional Insured – Broad Form Vendors	8. Coverage Territory – Worldwide
2. Additional Insured – by Contract, Agreement or Permit relating to: <ul style="list-style-type: none">o Work performed by youo Premises you own, rent, lease or occupyo Equipment you lease	9. Duties in Event of Occurrence, Claim or Suit
3. Aggregate Limit Per Location	10. Expected or Intended Injury (PD)
4. Blanket Waiver of Subrogation	11. Incidental Medical Malpractice
5. Bodily Injury Redefined – Mental Anguish	12. Medical Payments
6. Broadened Named Insured	13. Mobile Equipment Redefined
7. Broadened Property Damage <ul style="list-style-type: none">o Borrowed Equipmento Customers' Goodso Use of Elevators	14. Newly Acquired or Formed Organizations
	15. Non-Owned Aircraft
	16. Non-Owned Watercraft
	17. Personal and Advertising Injury
	18. Product Recall Expense
	19. Supplementary Payments Increased Limits

1. ADDITIONAL INSURED – BROAD FORM VENDORS

Section II – Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) (referred to below as vendor) with whom you agreed in a written contract or agreement to provide insurance, but only with respect to "bodily injury" or "property damage" arising out of "your products" which are distributed or sold in the regular course of the vendor's business, subject to the following additional exclusions:

a. This provision 1. does not apply to:

- (1) "Bodily injury" or "property damage" for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;
- (2) Any express warranty not authorized by you;
- (3) Any physical or chemical change in the product made intentionally by the vendor;
- (4) Repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;
- (5) Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
- (6) Demonstration, installation, servicing or repair operations, except such operations performed at the vendor's premises in connection with the sale of the product;
- (7) Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor; or
- (8) "Bodily injury" or "property damage" arising out of the sole negligence of the vendor for its own acts or omissions or those of its employees or anyone else acting on its behalf. However, this exclusion does not apply to:
 - (a) The exceptions contained in Subparagraphs 4. or 6.; or

MEMORANDUM OF UNDERSTANDING

And

COOPERATION AGREEMENT

Between

The City of Santa Fe

And

State of New Mexico Department of Information Technology

This Memorandum of Understanding ("MOU") is between the City of Santa Fe ("City") and the State of New Mexico Department of Information Technology ("DoIT"), (collectively, the "Parties").

I. PURPOSE This MOU is to detail a Cooperation Agreement between the City and DoIT to exchange telecommunications facilities namely, fiber optic infrastructure and Ethernet transport. The City is in the process of entering into an agreement with a telecommunications and internet provider ("Provider") to design and assist the City in construction of fiber optic infrastructure and Ethernet transport and operate a telecommunications network extending from the Century Link central office on Alameda to the City water department office at 801 West San Mateo by way of the Capitol Complex and the Simms Building (the "Project"). By this MOU, the City will provide DoIT with stand-alone connectivity between the latter two facilities in exchange for DoIT providing the City with backhaul capacity from the Simms Building to 505 Marquette in Albuquerque on existing DoIT bandwidth. Under this MOU, each party is exclusively responsible for the traffic content. Therefore, neither party shall define nor control the content of traffic carried on the network by the other party. This is not intended to be a static agreement, rather it is intended that this agreement will grow as the needs, abilities and resources of the Parties evolve. Therefore, the Parties agree to meet annually to review the progress of the Project, to identify areas of future cooperation, and to work toward implementing additional measures of mutual benefit.

II. SCOPE OF AGREEMENT

1. The City agrees to:
 - a. Designate 24 strands of fiber within 2 sections of the cable known as a "buffer tube" for the exclusive use of DoIT. The fiber will be terminated on fiber patch panel located at the Simms Building at 715 Alta Vista Street and the Apodaca Building at 300 Don Gaspar Avenue in Santa Fe.
 - b. Provide maintenance and support for City-owned fiber optic cable and equipment for the entire route path.
 - c. Provide for use by the Project, any applicable conduit space owned by the City of Santa Fe determined to be surplus by City. This will apply to conduit in the vicinity of the Education building at 300 Don Gaspar.

2. DoIT agrees to:
 - a. Provide at least one gigabit per second (1 gbps) of bandwidth which will originate in the Simms Building and terminate at a point of presence located in 505 Marquette Street in Albuquerque.
 - b. Provide at least one additional 1 gbps of bandwidth which will originate in the John Simms Building and terminate at another destination to be determined by the City and which is accessible via existing DoIT infrastructure.
 - c. Provide compatible fiber termination and patch panel interconnects
 - d. Provide access to the Simms Building for the City's choice of providers for installation and maintenance. Provide support and maintenance for all DoIT owned equipment for the entire route path.
 - e. Provide for use by the Project, any applicable conduit space owned by the State of NM determined to be surplus by DoIT. This will apply to conduit from the Simms Building, along the rail right-of-way to a manhole outside the Qwest fiber hut nearest the Faught Crossing on West San Mateo Road and in the vicinity of the Education building at 300 Don Gaspar .
 - f. Provide Simms Data Center Colocation space for 1 Rack.
 - g. Commence these actions when the fiber path between the Simms Building and the Apodaca Building is completed.

3. The expanding nature of telecommunications predicts that more than 2 gigabit of bandwidth is likely to be needed by the City in the future. Therefore DoIT agrees to upgrade equipment to accommodate up to a total of 10 gigabit of bandwidth if the City elects to accept the cost of the upgrade.

III. OWNERSHIP

This MOU confers an indefeasible right of use ("IRU") to the exchanged network resources and does not extend a capital interest in the resources used. The term "IRU" shall mean the exclusive, unrestricted, and indefeasible right to use the relevant capacity including equipment, fibers or capacity, for any legal purpose. It should be clear to all parties that when the State of New Mexico provides bandwidth it does not mean that the City of Santa Fe owns the equipment that supports the bandwidth or has any liability to maintain that equipment. It should be clear to all parties that when the City of Santa Fe provides fiber optic resources it does not mean that the State of New Mexico owns any fiber optic resource or has any liability to maintain it.

IV. TERM

This MOU shall become effective on the last date of signature by both Parties and shall remain in effect unless terminated in writing six months prior to the termination date by either party.

V. FORCE AND EFFECT

The Parties intend to conduct the aforementioned activities in this MOU in accordance with existing law. If any provisions of this MOU are determined to be inconsistent with existing laws, regulations or directives governing the signatories, then only those provisions of this MOU not affected by a finding of inconsistency shall remain in full force and effect.

VI. AMENDMENT

Any amendment to this MOU must be in writing and signed by all parties. Each party must provide at least fifteen (15) business days (excluding holidays) notice of any amendments requested to the MOU.

VII. ENTIRE AGREEMENT

This MOU supersedes all prior understandings and agreements, whether oral or written, between the Parties regarding the subject matter of this MOU. To be effective, an amendment, waiver or termination of this MOU must be in a document signed by an authorized representative of a party.

VIII. LIABILITY

The Parties are governmental entities subject to the provisions of the Tort Claims Act. Neither party shall be responsible for liability incurred as a result of the other party's acts or omissions in connection with this Agreement. Each party shall be solely responsible for fiscal or other sanctions, penalties or fines occasioned as a result of its own violation or alleged violation of requirements applicable to performance of this Agreement. Each party shall be liable for its acts or failure to act in accordance with this Agreement, subject to the immunities of the Tort Claims Act.

IX. APPLICABLE LAW

The laws of the State of New Mexico shall govern this MOU.

[Signatures begin on the following page]

WHEREFORE, the parties hereby execute this MOU through their duly authorized officials, effective as of the date of last signature.

CITY OF SANTA FE:

STATE OF NEW MEXICO
DEPARTMENT OF INFORMATION
TECHNOLOGY:

DAVID COSS
MAYOR

DARRYL ACKLEY
CABINET SECRETARY

DATE: _____

DATE: _____

ATTEST:

MARIA SANCHEZ
GENERAL COUNSEL

YOLANDA Y. VIGIL
CITY CLERK

APPROVED AS TO FORM:

Kelley Brennan

KELLEY BRENNAN
INTERIM CITY ATTORNEY

1/24/14

APPROVED:

MARCOS TAPIA
FINANCE DIRECTOR

City of Santa Fe, New Mexico

memo

Date: January 23, 2014

To: Robert Rodarte, Purchasing Director *RR*

Via: Kate Noble, Acting Director, Housing and Economic Development Department *KN*

From: Sean Moody, Project Administrator *SM*

Cc: Judie Amer, Assistant City Attorney

ITEM & ISSUE

Request to exempt from competitive procurement the purchase of telecommunications services designated the *CIP High Speed Internet Project* (the "Project") and approve the contract between the City and Cybermesa. The Contractor shall design, procure and install telecommunications facilities to be owned by the City or its qualified transferee including Capital Assets which, together with the Transferable Assets, shall be necessary and sufficient to deliver the wholesale telecommunications services. In addition, the Contractor shall operate and maintain the Capital Assets and Transferable Assets and provide wholesale telecommunications services. The Project's goal is to improve connectivity and Internet service in the City. This Project promotes the stated purpose of the New Mexico Telecommunications Act, Sections 63-9A-1 *et seq.* NMSA 1978 which states: "The legislature declares that it remains the policy of the state of New Mexico to maintain the availability of access to telecommunications services at affordable rates. Furthermore, it is the policy of this state to have comparable telecommunications service rates, as established by the commission, for comparable markets or market areas. To the extent that it is consistent with maintaining availability of access to service at affordable rates and comparable telecommunications service rates, it is further the policy of this state to encourage competition in the provision of public telecommunications services, thereby allowing access by the public to resulting rapid advances in telecommunications technology. It is the purpose of the New Mexico Telecommunications Act to permit a regulatory framework that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment. It is further the intent of the legislature that the encouragement of competition in the provision of public telecommunications services will result in greater investment in the telecommunications infrastructure in the state, improved service quality and operations and lower prices for such services."

BACKGROUND & SUMMARY

Attached find draft agreement for the purchase of a public telecommunications utility services as defined by the Act, Section 63-9A-2 M. NMSA 1978 as: "M. "public telecommunications service" means the transmission of signs, signals, writings, images, sounds, messages, data or other information of any nature by wire, radio, lightwaves or other electromagnetic means originating and terminating in this state regardless of actual call routing. "Public telecommunications service" does not include the

provision of terminal equipment used to originate or terminate such service; private telecommunications service; broadcast transmissions by radio, television and satellite broadcast stations regulated by the federal communications commission; radio common carrier services, including mobile telephone service and radio paging; or one-way cable television service;...”

Pursuant to Section 18 of the City Purchasing Manual, this agreement is exempt from the RFP and other competitive procurement requirements because it is a purchase of a publicly provided telecommunications utility services as follows:

18.1.7. Procurements exempted from competitive procurement are as follows:.....b.
purchases of publicly provided utilities such as: gas, electricity, water, telephone,
cable TV;

This agreement is for the purchase of telecommunications services because the Project requires that services be provided by a telephone company because only a telephone company is entitled to obtain a fiber entrance into the telephone exchange central office (the “C.O.”). All telecommunication service providers in Santa Fe currently rely on the existing Century Link distribution system originating in the C.O. The Project must directly interconnect at the CO and needs a fiber entrance at the CO in order for the Project to achieve its goals of promoting access to high speed internet in the City and providing telecommunications services at affordable rates, in accordance with the New Mexico Telecommunications Act. In addition, the contractor must design and procure the installation of a line extension for the Project because future potential wholesale customers will have specific requirements such as fiber destinations and routing, bandwidth, dark fiber, equipment rack space, quality-of-service specifications, etc. In order to serve those customers, the Project must be capable of expansion now and in the future via the design of facilities, the purchase, sale or transfer of capital assets, equipment, dark fiber, real property, leases, licenses or encumbrances as typical of a public utility. Thus the scope of this agreement includes the purchase of a line extension in the form of buried cable to existing facilities, required for the establishment of the telecommunications services provided under the agreement. Per standard industry practice, the City as the purchaser of such services will reimburse the contractor for the cost of the line extension.

Finally, the contractor in the Project will be able to transfer the operations in the future. For the Project to be viable and promote access to high speed internet in the City at affordable prices, a complete, functioning business entity will be transferable, including its business interests, branding, capital assets, equipment, data transport capacity, real property, leases, licenses or encumbrances necessary to provide such services. Again, this is typical of a public telecommunications services utility.

RECOMMENDATION

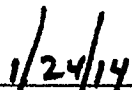
This purchase is an exempt procurement in accordance with Section 18 of the Purchasing Manual because it is the purchase of public telecommunications services and the purchase “publicly provided utility” and would best achieve the Purchasing Division’s purpose to “maximize the purchasing value of public funds”. Staff recommends approval.

APPROVAL

This request is approved.



Robert Rodarte, Purchasing Director



Date



City of Santa Fe Summary of Contracts, Agreements, & Amendments

Section to be completed by department for each contract or contract amendment

1 FOR: ORIGINAL CONTRACT or CONTRACT AMENDMENT

2 Name of Contractor Cyber Mesa Computer Systems, Inc.

3 Complete information requested Plus GRT

Inclusive of GRT

Original Contract Amount: \$882,100.00

Termination Date: Four years after effective date

Approved by Council Date: _____

or by City Manager Date: _____

Contract is for: CIP High Speed Internet Project

Amendment # _____ to the Original Contract# _____

Increase/(Decrease) Amount \$ _____

Extend Termination Date to: _____

Approved by Council Date: _____

or by City Manager Date: _____

Amendment is for:

4 History of Contract & Amendments: (option: attach spreadsheet if multiple amendments) Plus GRT

Inclusive of GRT

Amount \$ 882,100.00 of original Contract# _____ Termination Date: 4 years

Reason: CIP High Speed Internet Project

Amount \$ _____ amendment # _____ Termination Date: _____

Reason: _____

Amount \$ _____ amendment # _____ Termination Date: _____

Reason: _____

Amount \$ _____ amendment # _____ Termination Date: _____

Reason: _____

Total of Original Contract plus all amendments: \$ 882,100



City of Santa Fe
Summary of Contracts, Agreements, & Amendments

5 Procurement Method of Original Contract: (complete one of the lines)

RFP# _____ Date: _____

RFQ _____ Date: _____

Sole Source _____ Date: _____

Other Publicly provided utility exempt from competitive procurement. _____

6 Procurement History: _____
example: (First year of 4 year contract)

7 Funding Source: CIP Bond Issue BU/Line Item: 32817.57297.0112900

8 Any out-of-the ordinary or unusual issues or concerns: _____
(Memo may be attached to explain detail.)

9 Staff Contact who completed this form: Maria R. Vigil for Sean Moody
Phone # 6625 or 6350

10 Certificate of Insurance attached. (if original Contract)

Submit to City Attorney for review/signature
Forward to Finance Director for review/signature
Return to originating Department for Committee(s) review or forward to City Manager for review
and approval (depending on dollar level).

To be recorded by City Clerk:

Contract # _____

Date of contract Executed (i.e., signed by all parties): _____

Note: If further information needs to be included, attach a separate memo.

Comments:

Large empty rectangular box for comments.