

OFFICIAL MINUTES

NEW MEXICO COUNCIL FOR PURCHASING FROM PERSONS WITH DISABILITIES

MINUTES

REGULAR MEETING

May 4, 2022 1:30 PM

Conference Call

AGENDA ITEM 1: CALL TO ORDER

Chair Antoinette Holmes called the meeting to order at 1:35 p.m. MDT.

AGENDA ITEM 2: ROLL CALL

Chair Holmes asked Council member Greg Trapp to perform a roll call.

MEMBERS PRESENT

Antoinette Holmes	Council Chair, Division of Vocational Rehabilitation (participating remotely via video)
Greg Trapp	Council Secretary, New Mexico Commission for the Blind Representative (participating remotely via video)
Mark Hayden	Council Vice-Chair, State Purchasing Director (participating remotely via video)
Lisa Dignan	Council Member, New Mexico Commission for Deaf and Hard of Hearing Representative (participating remotely via video; joined meeting at 2:05 p.m.)
Roger Newall	Council Member, Disabled Veteran (participating remotely via video)
Pam Lillibridge	Council Member, Community Rehabilitation Program (CRP) Representative (participating remotely via video)
Mike Kivitz	Council Member, Community Rehabilitation Program (CRP) Representative (participating remotely via video)
Eli Fresquez	Council Member, Designee for New Mexico Children, Youth & Families Department (CYFD) Secretary Blalock (participating remotely via video)

MEMBERS NOT PRESENT

Kathleen Pinyan	Council Member, Designee for Department of Finance and Administration (DFA) Secretary Romero
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With seven council members participating remotely via telephone or video at the time of the roll call, and eight at the time Council member Lisa Dignan joined the meeting, a quorum was established.

AGENDA ITEM 3: INTRODUCTION OF GUESTS AND STAFF

Chair Holmes asked all guests and staff members participating via telephone to introduce themselves at this time.

OTHER PARTICIPANTS

Matt Loehman	Horizons of New Mexico, participating remotely via video
Fred Weber	Horizons of New Mexico, participating remotely via video
Kyle Radford	Horizons of New Mexico, participating remotely via video
Scott DeVetter	Horizons of New Mexico, participating remotely via video
Jessie Shanks	Horizons of New Mexico, participating remotely via video
Taylor McBride	Horizons of New Mexico, participating remotely via video

GUESTS

Karla Solaria	New Mexico Office of the Attorney General, participating remotely via video
Kelly Burma	New Mexico Commission for the Blind, participating remotely via video
Brian Ammerman	Adelante Development Center, participating remotely via video
Greg Block	Tresco, participating remotely via video
Luis Rios	Tresco, participating remotely via video
Chris Boston	Tresco, participating remotely via video
Patricia Savage	New Mexico Commission for the Blind, participating remotely via video
Therese Baca	Unlimited Office Management Services, participating remotely via video
Christina Baca	Procurement Director, New Mexico Department of Transportation (NMDOT), participating remotely via video
Aaron Frankland	Deputy General Counsel, NMDOT, participating remotely via video
John Newell	Assistant General Counsel, NMDOT, participating remotely via video
Angela Martinez	NMDOT, participating remotely via video
Leo Montoya	NMDOT, participating remotely via video
Melissa Torres	NMDOT, participating remotely via video
Adrian Apodaca	NMDOT, participating remotely via video
Trent Doolittle	District 1 Engineer, NMDOT, participating remotely via video
Mallery Manazanares	NMDOT, participating remotely via video
Gene Paulk	NMDOT, participating remotely via video

AGENDA ITEM 4: APPROVAL OF POSSIBLE CHANGES TO THE ORDER OF THE AGENDA AND DELETION OF AGENDA ITEMS

There were no changes to or deletions from the agenda at this time, and the meeting continued as outlined on the published agenda.

AGENDA ITEM 5: APPROVAL OF THE MINUTES OF APRIL 6, 2022

Chair Holmes outlined the following change requests to the April 6, 2022 council meeting minutes on behalf of Council member Dignan: that the minutes be changed to reflect Chair Holmes as the Council Chair; that a spelling correction be reflected for Mr. Matt Loehman, Horizons of New Mexico (Horizons), in agenda item 9; and a note that agenda item 14 reflected a request to include the PowerPoint presentation from Tresco alongside the minutes, and that was not completed. Council member Mark Hayden added that he was listed as participating remotely via telephone when he participated remotely via video.

Council member Hayden moved to approve the April 6, 2022 meeting minutes, inclusive of the

amendments outlined by Council members Dignan and himself. Council member Trapp seconded the motion, Council member Eli Fresquez abstained, and the minutes were approved in a 6-0-1 (Approved – Denied – Abstained) roll call vote, with members Hayden, Holmes, Mike Kivitz, Pam Lillibridge, Roger Newall and Trapp voting yes.

AGENDA ITEM 6: CHAIR UPDATE, ANTOINETTE HOLMES

There was no chair update at this time.

AGENDA ITEM 7: CENTRAL NONPROFIT AGENCY, MATT LOEHMAN

Mr. Loehman informed the Council that a meeting had taken place between Horizons and NMDOT to discuss the District 1 rest area janitorial service contracting issue, which would be discussed later in the council meeting. He thanked Mr. Trent Doolittle, NMDOT for his time and for participating in that meeting, as well as the current council meeting.

Mr. Loehman then announced that the replacement for Mr. Arturo Soliz would begin the following Monday, May 9, and that he planned to introduce that individual during the next council meeting.

AGENDA ITEM 8: DISCUSSION OF DEPARTMENT OF TRANSPORTATION DISTRICT 1 CONTRACT

Mr. Loehman informed the Council that he met with Mr. Doolittle, and briefly with Mr. Apodaca, to discuss the issues that had arisen on the NMDOT District 1 rest area janitorial contract, currently held with Tresco. He added that ongoing discussions have taken place between all three parties, but that there was no substantive update to report from those meetings, at this time.

AGENDA ITEM 9: APPROVAL OF WAIVER OF ATTORNEY-CLIENT PRIVILEGE FOR THE ASSISTANT ATTORNEY GENERAL OPINION LETTER REGARDING DEPARTMENT OF TRANSPORTATION DISTRICT 1 REST AREA CONTRACT

Council member Trapp moved to waive attorney-client privilege in order to present the Assistant Attorney General opinion letter regarding the Department of Transportation District 1 rest area contract. Council member Hayden seconded the motion and the Council voted unanimously to approve the waiver in a roll call vote, with members Fresquez, Hayden, Holmes, Kivitz, Lillibridge, Newall, and Trapp voting yes.

AGENDA ITEM 10: DISCUSSION OF ASSISTANT ATTORNEY GENERAL OPINION LETTER REGARDING DEPARTMENT OF TRANSPORTATION DISTRICT 1 REST AREA CONTRACT

Council member Dignan joined the meeting at this time, 2:05 p.m.

Ms. Karla Soloria, Assistant Attorney General, presented her opinion letter regarding the Department of Transportation District 1 rest area contract. After summarizing the opinion letter aloud to the Council and attendees, she outlined the following findings:

1. The facts in documentation likely do not support a finding that either Tresco or Horizons has materially breached the contract.
2. DOT did not give a reasonable opportunity for Tresco and Horizons to cure alleged breaches of the contract.
3. The parties may seek relief in court should they not resolve the alleged performance issues through alternative means.

4. The performance issues alleged by DOT are likely insufficient to establish an adverse impact because Tresco or Horizons have likely not materially breached the contract.
5. DOT's termination of the contract does not violate the State Use Act.
6. Upon termination of the contract, DOT may select another contractor to perform the subject janitorial services, however DOT's selection is still subject to the State Use Act
7. It is unclear whether DOT may properly solicit the contract's scope of work in the open market to establish fair market value. DOT may proceed with obtaining price quotes from the open market, subject to certain imitations intended to preserve the integrity of the State Use Act scheme.

AGENDA ITEM 11: APPROVAL OF COUNCIL POSITION ON THE APPLICATION OF THE STATE USE ACT TO THE DISTRICT 1 REST AREA CONTRACT, AND COUNCIL POSITION ON THE ASSERTION BY THE DEPARTMENT OF TRANSPORTATION OF AN ADVERSE IMPACT BASED ON BREACH OF CONTRACT AND THE APPLICATION OF FAIR MARKET VALUE

Mr. Trapp said the Executive Committee met with Ms. Soloria on Friday and discussed her draft opinion letter. He said he prepared a draft position statement based on that discussion, emphasizing that it is only a proposed draft and that the Council is free to make changes. Mr. Trapp requested Ms. Burma from his office to read the proposed position statement (attached). After it was read, Mr. Trapp noted that Community Rehabilitation Provider should be changed to Community Rehabilitation Program. After further discussion there were no additional changes.

Council member Trapp moved to approve the position statement, inclusive of a change from the word "provider" to "program" as outlined in the draft read aloud by Ms. Burma and the request by Council member Hayden that the position statement be incorporated as part of the minutes. Council member Kivitz seconded the motion and the Council voted unanimously to approve the waiver in a roll call vote, with members Dignan, Fresquez, Hayden, Holmes, Kivitz, Lillibridge, Newall, and Trapp voting yes.

AGENDA ITEM 12: APPROVAL OF SERVICE CONTRACTS

*Note: Contracts may have minor adjustments up or down from the dollar amounts listed.

*Note: Please contact Horizons of New Mexico for additional information about any contracts listed on the agenda.

a) New Contracts \$5,000 and Under

(None)

b) New Contracts Over \$5,000

1. *City of Albuquerque and member Buddy Check II; Mailing Services, Human Resources -- \$11,180.33*

Council member Lillibridge moved to approve contract B1. Council member Newall seconded the motion and the Council voted unanimously to approve the contract in a roll call vote, with members Dignan, Fresquez, Hayden, Holmes, Kivitz, Lillibridge, Newall and Trapp voting yes.

c) FY23 Renewal Contracts \$5,000 and Under

(None)

d) FY23 Renewal Contracts Over \$5,000

1. *New Mexico Department of Transportation and member Adelante Development Center; Janitorial Services, Santa Fe: FY 22 -- \$42,159.68, FY 23 -- \$52,395.84*

Council member Newall moved to approve contract D1. Council member Lillibridge seconded the motion, Council member Kivitz abstained, and the Council voted to approve the contract in a 7-0-1 roll call vote, with members Dignan, Fresquez, Hayden, Holmes, Lillibridge, Newall and Trapp voting yes

2. *New Mexico Educational Retirement Board and member Adelante Development Center; Janitorial Services: FY 22 -- \$26,653.68, FY 23 -- \$27,706.68*

Council member Dignan moved to approve contract D2. Council member Trapp seconded the motion and the Council voted unanimously to approve the contract in a roll call vote, with members Dignan, Fresquez, Hayden, Holmes, Kivitz, Lillibridge, Newall and Trapp voting yes.

3. *New Mexico Department of Transportation and member Crystal Clear Maintenance; Janitorial Services, Albuquerque: FY 22 -- \$6,531.48, FY 23 -- \$8,754.24*

Council member Lillibridge moved to approve contract D3. Council member Dignan seconded the motion and the Council voted unanimously to approve the contract in a roll call vote, with members Dignan, Fresquez, Hayden, Holmes, Kivitz, Lillibridge, Newall and Trapp voting yes.

4. *New Mexico Department of Transportation and member ENMRSH; Janitorial Services, Texico: FY 22 -- \$6,454.20, FY 23 -- \$7,108.56*

Council member Lillibridge moved to approve contract D4. Council member Newall seconded the motion and the Council voted unanimously to approve the contract in a roll call vote, with members Dignan, Fresquez, Hayden, Holmes, Kivitz, Lillibridge, Newall and Trapp voting yes.

e) Changes & Increases

1. *New Mexico Human Services Department and member Adelante Development Center; Printing and Mailing Services, Income Support Division, Santa Fe: Current -- \$16,310,000.00, New -- \$18,899.732.70 (\$6,034,379.72 annual amount)*

Council member Dignan moved to approve contract E1. Council member Hayden seconded the motion, Council member Kivitz abstained, and the Council voted to approve the contract in a 7-0-1 roll call vote, with members Dignan, Fresquez, Hayden, Holmes, Lillibridge, Newall and Trapp voting yes

AGENDA ITEM 13: SERVICE CONTRACTS DIRECTLY DISTRIBUTED UNDER CENTRAL NONPROFIT AGENCY AUTHORITY

a) New Service Contracts Directly Distributed Under CNA Authority

1. *13th Judicial Court and member Adelante Development Center; Document Destruction, Los Lunas --- \$427.81*
2. *Horizons West Academy and member Adelante Development Center; Document Destruction, Albuquerque --- \$450.77*
3. *New Mexico Administrative Hearings Office and member Adelante Development Center; Document Destruction, Santa Fe -- \$181.32*
4. *New Mexico Administrative Office of the Courts and member Adelante Development Center; Document Destruction, Santa Fe -- \$376.77*
5. *New Mexico Children, Youth, and Families Department and member Adelante Development Center; Document Destruction, Albuquerque -- \$152.15*
6. *New Mexico Compilation Commission and member Adelante Development Center; Document Destruction, Santa Fe --- \$1,040.97*
7. *New Mexico Department of Public Safety and member Adelante Development Center; Document Destruction, Albuquerque -- \$233.62*
8. *New Mexico Taxation and Revenue Department and member Adelante Development Center; Document Destruction, Santa Fe -- \$212.70*
9. *New Mexico Tech and member Adelante Development Center; Document Destruction, Socorro -- \$1,474.86*
10. *San Juan College and member Adelante Development Center; Document Destruction, Farmington -- \$117.93*
11. *Workforce Connections of Central New Mexico and member Adelante Development Center; Document Destruction, Albuquerque -- \$173.54*
12. *City of Albuquerque and member Buddy Check II; Printing Services, Albuquerque Police Department -- \$2,186.24*
13. *City of Albuquerque and member Buddy Check II; Printing Services, Human Resources -- \$1,605.36*
14. *New Mexico Department of Cultural Affairs and member Buddy Check II; Printing Services, New Mexico Space History Museum, Alamogordo -- \$352.17*
15. *City of Albuquerque and member Greetings, Etc.!.; Printing Services, Department of Senior Affairs -- \$2,339.46*
16. *New Mexico Department of Cultural Affairs and member Greetings, Etc.!.; Printing Services, Albuquerque -- \$2,370.38*

b) FY22 Renewal Service Contracts Directly Distributed Under CNA Authority

(None)

c) Contracts Directly Distributed Under CNA Authority in Cases of Urgent and

Immediate Need, or in Cases of State or National Emergency

(None)

AGENDA ITEM 14: APPROVAL OF ADDED AND REMOVED SUITABLE SERVICES

There were no added or removed services to approve at this time.

AGENDA ITEM 15: SUBCOMMITTEE UPDATES

There were no subcommittee updates at this time.

AGENDA ITEM 16: OPEN PUBLIC FORUM AND PUBLIC COMMENTS

Mr. Doolittle requested a copy of the Assistant Attorney General Opinion Letter Regarding the Department of Transportation District 1 Rest Area Contract be provided to NMDOT for reference by the agency in an executive staff meeting scheduled to take place between Horizons, Tresco and NMDOT.

Mr. Aaron Frankland, Deputy General Counsel, NMDOT, also requested a copy of the questions outlined in the original letter sent from Horizons to the Attorney General's Office requesting their response opinion letter. Council member Trapp informed that those questions were outlined as part of the opinion letter that would be provided to NMDOT, as requested previously by Mr. Doolittle.

AGENDA ITEM 17: COUNCIL DISCUSSION

There was no council discussion at this time

AGENDA ITEM 18: SUGGESTED AGENDA ITEMS FOR FUTURE MEETINGS

Council member Hayden requested that Horizons be prepared to present an update about the progress on the NMDOT District 1 rest area contract at the next Council meeting, alongside proposed draft changes to Horizons contracting documents that outline measurable metrics in regards to the scope of work.

AGENDA ITEM 19: DATE AND LOCATION OF NEXT MEETING

The dates of the next council meetings were scheduled for Wednesday, June 1, 2022, and Wednesday June 22, 2022, both to take place at 1:30 p.m. MDT, remotely via video conference.

AGENDA ITEM 20: ADJOURN

With no further business, the meeting was adjourned at 3:00 p.m.

Antoinette Holmes

Antoinette Holmes, Chair

8/3/2022

Date

ATTORNEY-CLIENT PRIVILEGED, CONFIDENTIAL MEMORANDUM

To: New Mexico Council for Purchasing from Persons with Disabilities

From: Karla Soloria, Assistant Attorney General

Date: April 29, 2022

Re: Janitorial Services Contract between Tresco, DOT, and Horizons – Termination of Contract and Alleged Adverse Impact

Questions Presented

1. Where the New Mexico Department of Transportation (“DOT”), Horizons of New Mexico (“Horizons”) and Tresco, Inc. (“Tresco”) entered into a contract for janitorial services pursuant to the State Use Act, are Horizons and Tresco in material breach of the contract?
2. Did DOT give Horizons and Tresco a reasonable opportunity to cure any alleged material breach of the contract?
3. If the parties cannot resolve their issues regarding performance, would a court decide such issues?
4. Are the performance issues alleged by DOT sufficient to establish an adverse impact?
5. Would DOT’s termination of the contract as of the contract’s expiration date violate the State Use Act?
6. Does DOT have a right to cancel the contract, meaning DOT may select another contractor to perform the subject janitorial services upon contract termination?
7. May DOT solicit the contract in the open market to establish fair market value?

Short Answers

1. Likely no based on the facts in documentation provided for this analysis; however, whether a material breach has occurred is a question of fact that could turn on facts later more fully developed or discovered for purposes of litigation.
2. No based on facts in documentation provided for this analysis.
3. Yes; the parties may seek relief in court but also have the option of availing themselves of the Council’s appeal procedures or other means of alternative dispute resolution.
4. Likely no, assuming there has been no material breach of the contract by Tresco or Horizons. *See* discussion as to Question 1.

5. No; termination of the contract for cause would not in and of itself violate the State Use Act.
6. Yes; however, DOT would still be obligated to obtain the subject janitorial services pursuant to the State Use Act.
7. Unclear; there is an absence of direct authority governing whether DOT may use a solicitation to establish fair market value, and, under the facts presented, using a solicitation for such a purpose raises larger implications as to the integrity of the State Use Act scheme. For the purpose of establishing fair market value, DOT may obtain quotes from the open market, subject to certain limitations intended to maintain consistency with the State Use Act's purpose.

Factual Background

Pursuant to the State Use Act, DOT, Tresco, and the Council's designated central nonprofit agency ("CNA"), Horizons, entered into Contract No. D-1/A – F/Y 22 ("Contract") on June 30, 2021 for the provision of janitorial services at certain DOT rest area sites. The Contract terminates on June 30, 2022 unless otherwise terminated by a party for cause or for lack of sufficient legislative appropriation. DOT, Horizons, and Tresco have informed the Council for Purchasing from Persons with Disabilities ("Council") that DOT intends to terminate the Contract for cause, effective June 30, 2022.

On February 16, 2022 DOT issued a letter to Horizons wherein DOT alleged it had received numerous complaints in regard to the cleanliness and customer service at the rest areas covered by the Contract. The February 16 letter expressed that DOT is stating a breach of contract due to the "lack of performance issues Tresco is having as well as Tresco not providing information that has been requested [by DOT]." *See* February 16, 2022 letter (Attachment 1).

On March 14, 2022 DOT issued a letter to Horizons wherein DOT stated it "continues to have unanswered questions regarding the actual expenses to justify the \$2,257,461.24 rest area contract." The March 14 letter referenced and attached complaints related to customer service and quality of service at the Contract's subject rest areas. Further, the letter stated that "Tresco has

failed to comply with our request for information.” DOT stated that “our inquiries were not answered and the quality of service issues with the employees of Tresco both past and present are considered non-compliance with our contract.” DOT stated it is “submitting an adverse impact statement for breach of [the Contract] due to the subcontractor¹ not being able to satisfactory (sic) maintain the rest areas. Per section “5. Termination” of the current contract. [DOT] is terminating [the Contract] effective June 30th.” *See* March 14, 2022 letter (Attachment 2).

Relying on its decision to terminate the Contract for cause, DOT intends to solicit the scope of work covered by the Contract for the purpose of establishing the fair market value for the services covered by the Contract.

Relevant Authority Regarding Council’s Responsibility

The purpose of the State Use Act (“Act”), NMSA 1978 § 13-1C-1 to -7 (2005), is to encourage and assist persons with disabilities to achieve maximum personal independence through useful and productive employment by ensuring an expanded and constant market for services delivered by persons with disabilities, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and entitlements. NMSA 1978, § 13-1C-2. The Act provides that the Council shall adopt rules that, among other objectives: determine which services provided by persons with disabilities are suitable for sale to state agencies and local public bodies; verify the fair market prices of such suitable services and periodically revise the fair market prices in accordance with changing market conditions to ensure that services offer the best value for state agencies and local public bodies; and address any other matter necessary to the proper administration of the State Use Act. *See* NMSA 1978, § 13-1C-5.

¹ This analysis assumes DOT is referencing Tresco when stating “subcontractor.” Tresco is the contractor party to the Contract and not a subcontractor.

Per rule, it is the Council's responsibility to identify, respond to, and equitably distribute, to as broad a base of eligible participants as possible, all relevant contract opportunities. *See* 2.40.5.14(B) NMAC. The Council reserves the authority to make final contract distribution decisions based on that policy, as well as any other unique factors or special circumstances. *Id.* Further, the Council shall address any other matter necessary to the proper administration of the State Use Act. *See* 2.40.5.14(E) NMAC.

This analysis is provided in view of these statutory and rule-based responsibilities and the Council's desire to address the specific dispute among the parties to the Contract, which dispute also implicates broader issues as to implementation of the Statue Use Act. It is noted that this analysis is attorney to client advice and is not an official Attorney General Opinion² and as such is not subject to publication unless so desired by the Council.

Analysis

1. The facts in documentation likely do not support a finding that either Tresco or Horizons has materially breached the contract.

DOT has alleged two bases for breach of contract. First, DOT alleges Tresco's non-compliance with Appendix A of the Contract which provides that "the contractor shall provide all labor, equipment, and materials required to effectively clean; maintain; and make minor repairs, make adjustments, and service the twelve (12) rest area sites at nine (9) locations." *See* Contract, Appendix A (Attachment 3). The factual basis provided by DOT for this claim consists of 12 complaints received or made by DOT about rest area conditions between October 15, 2020 and November 25, 2021.

² NMSA 1978, Section 8-5-2 provides that the attorney general shall give his opinion in writing upon any question of law submitted to him by the legislature or any branch thereof, any state official, elective or appointive, or any district attorney on any subject pending before them or under their control with which they have to deal officially or with reference to their duty in office.

Second, DOT alleges Tresco failed to comply with the Contract's requirement that Tresco "maintain all books, documents, papers, accounting records, and other evidence pertaining to costs incurred and to make such materials available at their respective offices at all reasonable times during the Agreement and for three (3) years from the date of final payment under the Agreement for inspection by the State." *See* Contract, Section 10. The factual basis provided by DOT for this claim are DOT's requests on January 5, 2022, February 4, 2022, and February 9, 2022 for certain cost information from Tresco. *See* February 16 letter. DOT also implied in its March 14 letter that Tresco's response to DOT's inquiry regarding amortization was inadequate. *See* March 14 letter ("When asked how the amortization was calculated for vehicles, we received a response of these are merely projections").

Breach based on inadequate quality of service

Whether a material breach of contract has occurred is a fact-specific inquiry. *See Famiglietta v. Ivie-Miller Enterprises, Inc.*, 1998-NMCA-155, ¶ 16, 126 N.M. 69, 74. Here, regarding Tresco's obligations under Appendix A to effectively clean the subject rest areas, Tresco could likely prevail against a claim that Tresco breached the Contract. DOT presented 12 quality of service complaints as the factual basis for breach. Of those 12, 4 complaints were made outside of the contractual 8:00 am to 4:30 pm service hours or on holidays where Tresco provides service only on an on-call basis. Two of the complaints, made in October 2020, were made prior to the applicable contract term and, therefore, arguably, cannot support a claim of breach under the instant Contract. *See* Complaint summary provided by Tresco, via Horizons (Attachment 4).

Because the Contract provides for specific service hours, i.e. 8:00 am to 4:30 pm and certain holidays, a reasonable fact-finder could likely conclude that service complaints which resulted from these limited service hours do not support a claim of breach against Tresco. As to

the remaining complaints, there is a factual question as to whether these complaints are attributable to a lack of sufficient Tresco personnel staffing the subject rest areas. The contract states that “at least two Janitorial/Ground’s care employees” will be at each of the rest area locations, except one location that requires only one such employee. *See* Contract, Exhibit A to Appendix A. A fact-finder could reasonably conclude that the quality of service provided by Tresco at the subject areas was reasonable given the staffing level. Further, a reasonable fact-finder could conclude that an increase in staffing level would have warranted an increase in the Contract price, which increase does not appear to have been negotiated between the parties. Therefore, based on the documentation provided for this analysis, Tresco likely did not breach the Contract with regard to its performance obligations under Appendix A.

Breach based on failure to provide requested information

As to DOT’s claim that Tresco did not provide requested information in compliance with Section 10 of the Contract, DOT’s correspondence does not establish that Tresco unreasonably withheld information or failed to provide information in a reasonable timeframe. DOT’s March 14 letter does not specify which of the information requests stated in its February 16 letter were not cured in a reasonable time or remain outstanding. The March 14 letter merely states, vaguely, that DOT “continues to have unanswered questions regarding the actual expenses to justify the \$2,257,461.24 rest area contract.”

Further, the March 14 letter refers to an information request regarding amortization, but there is no subsequent correspondence available to indicate whether or not that issue was clarified to DOT’s satisfaction. This is relevant as to establishing an additional grounds for breach. If DOT considers Tresco’s response to its amortization inquiry so inadequate as to constitute a breach of the Contract, and it first gave written notice of such inadequacy on March 14, the Contract

obligates DOT to give Tresco a reasonable time to cure the inadequacy of Tresco's response. There is no documentation from DOT to establish Tresco failed to cure this alleged inadequacy. Accordingly, based on the documentation provided for this analysis, Tresco likely did not breach the Contract with regard to its performance obligations under Section 10 of the Contract.

The conclusions stated herein with regard to a potential material breach of the Contract by Tresco or Horizons are subject to more detailed facts that may be discovered or developed should the dispute between the parties head toward litigation. A reasonable fact finder in that instance could reach opposite conclusions based on additional documentary evidence and witness testimony not available to the Council at this time.

2. DOT did not give a reasonable opportunity for Tresco and Horizons to cure alleged breaches of the Contract.

The Contract provides that either party may terminate the Agreement for cause based upon any material breach of this Agreement by the other party, provided that the non-breaching party gives the breaching party written notice specifying the breach and affords the breaching party a reasonable opportunity to correct the breach. *See* Contract, Section 5. If within thirty (30) days after receipt of a written notice, the breaching party has not corrected the breach or, in the case of a breach which cannot be corrected in thirty (30) days, the breaching party has not begun and proceeded in good faith to correct the breach, the non-breaching party may declare the breaching party in default and terminate the agreement effective immediately. *Id.*

This analysis takes DOT's February 16 letter as the written notice of material breach required by Section 5 of the Contract. Accordingly, the Contract afforded Tresco and Horizons 30 days from the February 16 letter to either cure the noticed breach or to begin proceeding in good faith to cure the noticed breach if such breach could not be cured in 30 days. *See id.*

The March 14 letter, in turn, purports to terminate the Contract. DOT states it “is terminating this contract with Horizons and Tresco...effective June 30th.” Thus, it appears DOT did not give Tresco and Horizons a reasonable opportunity to cure its alleged breach, because as of March 14 only 26 days had passed since Tresco and Horizons were notified of an alleged breach via the February 16 letter. DOT is required by the Contract to give the other parties at least 30 days either to cure any noticed breach or to proceed in good faith toward curing a noticed breach if such breach could not be cured in 30 days. It does not appear from the March 14 letter that DOT complied with this contractual opportunity to cure requirement.

Moreover, again assuming DOT’s February 16 letter is a written notice of material breach, the subsequent March 14 letter does not demonstrate that the noticed material breach remained uncured as of March 14. The March 14 letter wholly lacks sufficient detail from which to conclude Tresco or Horizons did not cure the breach or breaches of contract noticed in DOT’s February 16 letter. The March 14 letter merely references service complaints, but does not indicate in what way Tresco or Horizons failed to resolve those complaints, nor does the letter specify what “quality of service” issues remain uncured. Similarly, the March 14 letter does not specify which of DOT’s information requests remain outstanding. Thus, the March 14 letter does not specify which breaches pursuant to Section 10 of the Contract remain uncured.

Accordingly, it appears that DOT did not give a reasonable opportunity for Tresco to cure an alleged breach of contract. Additionally, by being wholly nonspecific in its March 14 letter, DOT did not establish Tresco or Horizons failed to cure any noticed, alleged breach.

3. The parties may seek relief in court should they not resolve the alleged performance issues through alternative means.

Should the parties fail to resolve their issues with regard to Tresco and Horizon’s performance under the Contract, they may seek relief by filing a breach of contract action in court.

It is noted that at this juncture, the parties may still avail themselves of alternative dispute resolution, such as mediation, or the Council's Appeals Process Procedures (Attachment 5).³

4. The performance issues alleged by DOT are likely insufficient to establish an adverse impact because Tresco or Horizons have likely not materially breached the Contract.

The State Use Act and attendant rules do not establish a procedure for addressing a potential adverse impact by a state agency. An agency's allegation of an adverse impact is subject to the Procedure for Determining and Responding to Significant Adverse Impact and Verification of Fair Market Price, adopted by the Council on January 14, 2015. See Council Procedure (Attachment 6). The Procedure provides that where discussions between the CNA and agency fail to reach agreement as to the suitability of State Use eligible services, it may be appropriate to seek a determination of significant adverse impact directly from the State Purchasing Division.

The Procedure provides that a significant adverse impact may be established upon a showing of specific circumstances, including that proceeding under the State Use Act would create a significant adverse impact due to an excessive cost to the agency, or proceeding under the State Use Act would create "some other form of a significant adverse impact, provided that there is substantial evidence of an actual significant adverse impact upon an agency or public body." See Council Procedure, Section III(1)(e) and (1)(g).

DOT has stated that it is "submitting an adverse impact statement for breach of [Contract], due to the subcontractor not being able to satisfactory (sic) maintain the rest areas." See March 14 Letter. Thus, DOT is relying on its claim that Tresco breached its performance obligations under Appendix A of the Contract to establish a significant adverse impact. An agency alleging a breach of contract would fall under the "some other form of a significant adverse impact" condition set

³ The extent, if any, to which a determination made by the Council pursuant to the Appeals Process Procedures would be binding on a court is beyond the scope of this analysis.

forth at Section III(1)(g) of the Council Procedure. It follows that DOT can only establish a significant adverse impact if “there is substantial evidence of an actual significant adverse impact upon an agency or public body.” *See* Council Procedure, Section III(1)(g). As previously discussed herein, DOT likely cannot prove a material breach of Contract by Tresco. Given this, DOT lacks “substantial evidence of an actual significant adverse impact upon [the agency]” and cannot establish a significant adverse impact under the Council Procedure.

5. DOT’s termination of the Contract does not violate the State Use Act.

Setting aside whether DOT properly alleged or can sufficiently prove a breach of the Contract by Tresco or Horizons, should DOT terminate the Contract pursuant to Section 5 of the Contract, such termination would not in and of itself violate the State Use Act. Nothing in the State Use Act or its associated rules exempts State Use Act contracts from normal contract principles. In other words, if parties enter into a contract for suitable services pursuant to the State Use Act, any party can terminate such contract for cause pursuant to the terms of the subject contract.

6. Upon termination of the Contract, DOT may select another contractor to perform the subject janitorial services, however DOT’s selection is still subject to the State Use Act.

Upon termination of the Contract, whether by expiration of the Contract term or for cause, DOT has the right to select another contractor other than Tresco to perform the subject janitorial services. However, because janitorial services is a listed suitable service pursuant to the State Use Act, DOT would still be required to select a qualified contractor under the State Use Act unless DOT establishes a significant adverse impact justifying procuring the subject janitorial services from a non-State Use Act contractor. In other words, termination of the Contract, even if for cause, does not in and of itself negate Horizon’s right of first refusal as to a contract for the subject janitorial services. Even if DOT were to terminate the Contract for cause, DOT would have to

establish a significant adverse impact to procure the subject janitorial services through the Procurement Code and not the State Use Act.

7. It is unclear whether DOT may properly solicit the Contract's scope of work in the open market to establish fair market value. DOT may proceed with obtaining price quotes from the open market, subject to certain limitations intended to preserve the integrity of the State Use Act scheme.
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The Council has the sole authority to verify the fair market prices of suitable services and periodically revise the fair market prices in accordance with changing market conditions to ensure that services offer the best value for state agencies and local public bodies. NMSA 1978, § 13-1C-5(3). In verifying the fair market value of services, the Council shall consider amounts being paid for similar services purchased by the federal government, the state and local public bodies and by private businesses, and the actual cost of performing the services at a community rehabilitation program, taking into consideration the benefits associated with employing persons with disabilities. *Id; see also* 20.40.5.10(A) NMAC.

There is no direct authority suggesting an agency in need of a designated suitable service may solicit the scope of work in the open market to establish fair market value. Where, as here, an agency is dissatisfied with a State Use Act contractor, such agency may want to seek price information from the open market for the purposes of establishing fair market value. The agency in that case could use the information obtained to establish an adverse impact based on excessive cost, thereby justifying the agency obtaining the services per the Procurement Code rather than the State Use Act.

Allowing an agency to issue a solicitation outright under these circumstances would directly contradict the purposes of the State Use Act. Permitting an agency to issue a solicitation for a service designated as suitable under the State Use Act would effectively negate the State Use

Act's application to that service and undermine the market for services delivered by persons with disabilities as contemplated by the State Use Act.

The Council must balance this risk against its responsibility to pursue best value in establishing fair market price, as well as an agency's reasonable need to obtain pricing information from the open market if there is a question of potential excessive cost to the agency. *See* Council Procedure (providing agency may establish significant adverse impact upon showing "any cost that is more than 10 percent than what would be incurred should the agency or public body procure the services through the Procurement Code"). Allowing agencies to obtain price quotes for State Use suitable services, rather than permitting such agencies to issue solicitations, strikes a reasonable balance between upholding the purposes of the State Use Act and the need to ensure best value and avoid excessive cost for agencies.

It is essential agencies obtaining price quotes for designated State Use Act suitable services do so fairly so as to not undermine the State Use Act's purposes. In particular, any such call for price quotes must fairly and accurately represent the same scope of work the agency would proffer to a qualified State Use act contractor or the CNA. This will ensure an "apples to apples" comparison of the price quotes obtained from the open market and that offered by a qualified State Use Act contractor or through the CNA. Finally, nothing about this approach disturbs the CNA's right of first refusal regarding contracts for suitable services under the State Use Act. That is, agencies may obtain price quotes as described herein, but they must still establish a significant adverse impact before being permitted to solicit designated State Use Act suitable services through the Procurement Code.

Conclusion

Tresco and Horizons likely have not committed a material breach of the Contract. DOT did not establish Tresco or Horizons failed to cure an alleged material breach within a reasonable

time. Should informal means of resolution fail, the parties may seek relief through a breach of contract action in court. It is unlikely DOT can establish a significant adverse impact based on a purported breach of contract by Tresco and Horizons. Termination of the Contract in and of itself does not violate the State Use Act. DOT may seek an alternative contractor upon termination of the Contract, but DOT is obligated to obtain the subject janitorial services through the State Use Act unless DOT establishes a significant adverse impact. Subject to certain limitations intended to preserve the integrity of the State Act Use scheme, DOT may obtain price quotes from the open market for the purpose of establishing fair market value if there is a question of potential excessive cost.

NEW MEXICO COUNCIL FOR PURCHASING FROM PERSONS WITH DISABILITIES

POSITION ON DISTRICT 1 REST AREA CONTRACT

The New Mexico Council for Purchasing from Persons with Disabilities (Council) having met in regular meeting this 4th day of May, 2022, and having discussed and considered Contract No. D-1/A – F/Y 22 (Contract) between the Department of Transportation and Tresco to operate the District 1 rest area, and having duly considered the legal opinion of Assistant Attorney General Karla Soloria, hereby adopts the following position with respect to the District 1 contract:

1. It is the position of the Council that Horizons is not in breach of the Contract.
2. It is the position of the Council that the Department of Transportation has not given Horizons an adequate opportunity to cure the alleged performance deficiencies related to the Contract.
3. It is the position of the Council that the Department of Transportation has not established an adverse impact related to the alleged performance deficiencies.
4. It is the position of the Council that using a Request for Proposals or Invitation to Bid to establish an alleged adverse impact based on Fair Market Value creates numerous issues that may conflict with the Procurement Code and with the State Use Act.
5. It is the position of the Council that the State of New Mexico derives a significant benefit from the performance of the Contract by Tresco, a local Community Rehabilitation Program that employs persons with disabilities in the operation of the Contract.
6. It is the position of the Council that the Department of Transportation and Horizons should work cooperatively together to identify solutions so that any outstanding District 1 contract issues can be satisfactorily resolved. In the event the Department of Transportation and Horizons are unable to resolve the outstanding contract issues, the Council recommends the parties agree to mediation.

Adopted by the New Mexico Council for Purchasing from Persons with Disabilities this 4th day of May 2022

Antoinette Holmes

Antoinette Holmes, Chair