

APR 1 2011

NMMCF-DC Agreement

**NEW MEXICO MUSIC COMMISSION FOUNDATION  
GENERAL OPERATING AGREEMENT**

This agreement (the, "Agreement") is entered into by and between NEW MEXICO ARTS, a division of the Department of Cultural Affairs, State of New Mexico ("NMA"), The NEW MEXICO MUSIC COMMISSION and the NEW MEXICO MUSIC COMMISSION FOUNDATION, a New Mexico non-profit corporation ("Foundation"), [jointly, the "Parties"] effective on the date last entered below.

**1. Purpose of this Agreement** The purpose of this Agreement is to establish the Foundation as the entity that may complement and support functions that are the statutory responsibility of the NMA pursuant to the provisions of Section 6-5A-1, NMSA 1978.

**2. Representations**

2.1 The Foundation has been granted exemption from the federal income tax by the United States Commissioner of Internal Revenue as a Foundation described in Section 501(c) of the Internal Revenue Code of 1986, as amended or renumbered, and whose principal and authorized purpose is to complement, contribute to and support, aid the function of or forward the purposes of the New Mexico Music Commission, which is a New Mexico state board under the auspices of NMA, through financial support, the contribution of services, goods, data or information that help or aid the NMA in carrying out its statutory purpose and goals.

2.2 The Foundation's principal purpose is to support the NMA's statutory responsibilities and authority. The programs of the Foundation's programs that support the NMA's statutory responsibilities and authority are listed in section 4 below.

2.4 The Foundation has furnished copies of its bylaws to NMA and shall provide NMA with all amendments to such bylaws until the termination of this Agreement.

2.5 The NMA has reviewed the bylaws of the Foundation in effect at the time of the execution of this Agreement and found them acceptable. The Foundation's legal address will not be at the location of the Commission.

2.6 The Foundation is registered with the New Mexico Attorney General Registry of Charitable Foundations in compliance with the New Mexico Charitable Solicitations Act, Chapter 57, Article 22, NMSA 1978 and shall keep its registration and compliance with the Act current at all times.

**3. Relationship of the Parties** The Foundation is an independent non profit whose articles and by laws specify its principal purpose is to support appropriate projects of the New Mexico Music Commission, a New Mexico state board under the auspices of NMA.

As an independent non profit organization, the Foundation will consider funding requests from the NMA and the Foundation's board will determine which such requests to fund consistent with

the Foundation's resources and priorities. The Foundation will maintain records of income and expense and will provide an annual report to NMA as well as interim reports upon reasonable advance notice.

The Foundation and its agents and employees are independent from the NMA and are not employees of the NMA or the State of New Mexico. The Foundation and its agents and employees shall not accrue leave, retirement, insurance, bonding, or have the use of state vehicles or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Foundation acknowledges that it is solely responsible for reporting income received due to this for tax purposes, including without limitation, employment and business income tax. The Foundation agrees not to purport to bind the NMA or State of New Mexico unless the Foundation has express written authority to do so from NMA, and then only within the strict limits of that authority.

#### **4. Foundation's Duties**

The Foundation may complement and support functions that are the statutory responsibility of the NMA by performing the following:

- Foster appreciation of the value of music;
- Make New Mexico a music destination for both visitors and music professionals;
- Encourage the educational, creative and professional musical activities of the residents of New Mexico and attract outstanding musicians to New Mexico through appropriate programs of publicity, education and coordination and through direct activities, such as sponsorship of music;
- Protect, promote and preserve the musical traditions of New Mexico; and
- Accept on behalf of the state donations of money, property and other things of value as, in the division's discretion, are suitable and will best further the aims of the Music Commission Act.

This section is consistent with the statements in the Foundation's bylaws

**4.1 Fundraising** Foundation shall have the responsibility to fundraise and/or provide goods and services to support the NMA's programming. The Foundation shall write grant proposals and prepare other resource solicitations in support of NMA's programming. Foundation shall advise the NMA/MUSIC COMMISSION Director of the proposals or other solicitations for the benefit of same as they are developed. The Foundation may fundraise for activities consistent with the NMA/COMMISSION program such as the Foundation's own operational costs as described hereafter and student scholarship, as may be authorized by the NMA/COMMISSION.

**4.2 Operating Expenses** Unless donors or grantors specify otherwise, a reasonable percentage of funds received by Foundation may be retained by Foundation to cover reasonable operating expenses of the Foundation. Reasonable operating expenses shall include but not be limited to employee salaries, office operational costs, advertising for solicitation of donations and rent but shall not include compensation to Foundation's governing body. Employees and volunteers shall not be given a percent of funds raised or bonus based on the amount of funds raised through contributions and grants.

**4.3 Requesting Funds** Foundation shall act diligently to seek funding and other resources for requests submitted annually by NMA. NMA may also submit interim request and provide its priorities to Foundation. However, the Foundation shall determine which projects it wishes to fund.

**4.4 Autonomous Operation** Foundation shall operate separately and autonomously from NMA. Foundation shall employ its own administrative staff, provide expenditures for salaries, benefits, office rental, equipment, materials supplies, printing, promotions and advertising, postage, communication costs and other operating costs in support of the Foundation and its mission and may raise funds for the sole purpose of covering its own expenses. Foundation shall employ its own staff and NMA shall not be involved in the hiring or discharge of Foundations' employees. Foundation shall create, maintain and enforce policies concerning the hiring and discharge of employees and the qualifications for employees, including background checks when appropriate, and provide such policies and any amendments thereto to NMA

**4.5 Compliance with Laws** The Foundation shall follow its internal procedures and protocols and all applicable laws, regulations and NMA policies in discharging its responsibilities under this Agreement. Foundation shall create, maintain and enforce policies proscribing use of Foundation computers including but not limiting access to such computers to authorized personnel and prohibiting use of such computers not directly related to Foundation's mission and compliance with this Agreement. Foundation shall provide such policy and any amendments thereto to NMA.

## **5. NMA Responsibilities**

**5.1 Coordination of fundraising** The NMA/Commission Director shall provide the Foundation information to facilitate fundraising and grant writing on its behalf, including but not limited to a summary of program content, operating costs, capital outlay needs and strategies for resource development.

**5.2 NMA Determinations** The NMA/Commission shall have the sole responsibility for program planning and implementation and determining capital improvement priorities.

**5.3 Annual Funding Request** The NMA/Commission shall submit a written annual funding and resource request to the Foundation. The NMA may request additional funds and resources at any time during the year for the Foundation's consideration. NMA may decline to accept funds or other resources offered by donors through the Foundation. The Foundation shall determine which NMA/Commission projects it shall endeavor to fund.

**5.4 Compliance with Laws** In discharging its responsibilities under this agreement NMA shall follow its internal procedures and protocols and all applicable laws, regulations and Center Policies.

**6. Audit Requirements** For all gross annual income of Foundation, Foundation shall have a financial accounting system considered adequate under customarily and currently accepted accounting standards. The financial affairs of the Foundation shall be audited annually in accordance with generally accepted governmental auditing standards by an independent

professional auditor who shall be required to furnish to the NMA copies of the annual audit, which, exclusive of any lists of donors or donations, shall be a public record, and to make the associated working papers available to the NMA for review upon its written request for a period of three years after the audit report date. This requirement is waived should all income and expense be managed through the New Mexico Community Foundation or comparable community organization.

**6.1 Quarterly Financial and Fundraising Statement** Foundation shall provide NMA with a quarterly financial statement and a quarterly fundraising update.

**7. Transfer of Funds and Property** "Transferred" means given or otherwise transferred, with or without consideration. Any funds or property transferred to the NMA by the Foundation shall be considered subject to all state laws and regulations governing the disbursement and administration of public funds and public property, except to the extent of any specific conditions of the transfer that are accepted in writing by the NMA prior to such transfer and do not require actions that are punishable as crimes under state law.

**8. Services Provided to Foundation** In the event that NMA provides any services, facilities or other benefits in support of the Foundation, Foundation shall pay NMA fair market value for such services, facilities or other benefits it receives from NMA. Use of NMA facilities and or equipment by Foundation shall be by a separate rental agreement.

**9. Claims and Insurance** The Parties agree that within the limits of the New Mexico Tort Claims Act, Sections 41-4-1 through 41-4-27 NMSA 1978, each Party shall be responsible for its own negligent acts of omission that may occur during the performance of this Agreement and that may result in claims by claimants not Parties to this Agreement. Claims may arise against both the Foundation and the NMA. Both Parties agree to provide their own defense to such claims. The NMA and Foundation shall cover any risks or liability appropriate insurance coverage. The NMA shall insure pursuant to Section 41-4-20 and the Foundation shall purchase insurance coverage to cover its risks or liabilities. Both Parties shall maintain coverage within the limits of liability set forth in Section 41-4-19 NMSA 1978. The Foundation shall provide written proof of insurance coverage to NMA annually and at such additional times as the insurer and/or insurance coverage is changed. This requirement shall trigger at such time as the Foundation actually operationally begins its professional activities.

**10. Investments** The Foundation shall apply and meet the standard described in Section 6-8-10 NMSA 1978 as the standard for evaluating investments of the Foundation. Specifically, Foundation shall make investments in accordance with the prudent investor rule set forth in the Uniform Prudent Investor Act [45-7-601 et seq., NMSA 1978].

**11. Open Meetings and Public Records** Pursuant to Section 6-5A-1 NMSA 1978, nothing in this Agreement subjects the Foundation to the provisions of the Open Meetings Act [10-15-1.1 NMSA 1978] or makes its records, other than the annual audit required under this Agreement, public records within the purview of Sections 14-2-1 through 14-2-3 NMSA 1978.

**12. Term** The Term of this Agreement shall begin on the last date entered below and shall continue until terminated as provided hereafter.

**13. Termination** This Agreement may be terminated without cause by either party by giving the other party thirty consecutive calendar days notice at the address listed below by first class United States prepaid postage or by hand delivery to the physical address listed below.

**13.1 Accounting and payment of funds and transfer of property.** In the event of termination, Foundation shall provide a full account of funds on hand and all in-kind donations received by Foundation not yet transferred to NMA within the thirty day notice period required above. After payment of Foundation expenses related to NMA programs, all remaining funds shall be transferred to NMA. All in-kind contributions received by Foundation and not conveyed to NMA shall be, upon written consent of NMA be transferred to NMA within the thirty day notice period required above.

**13.2 Effect of Termination.** Upon receipt of notice of termination by Foundation, or on the date of the notice of termination if given by Foundation, Foundation shall immediately cease use of the name "NEW MEXICO MUSIC COMMISSION FOUNDATION" and shall immediately cease solicitations of funds or in-kind contributions for the benefit of NMA.

#### **14. General Provisions**

**14.1 Governing Law and Venue** The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be in a New Mexico State court of competent jurisdiction in Santa Fe County, New Mexico.

**14.2 Non-Discrimination** Foundation with respect to employment of staff and to those persons receiving services from Foundation shall not discriminate unlawfully with respect to race, sex, national origin, age, religion or as to any other class protected against discrimination by applicable state or federal laws.

**14.3 Merger** This Agreement incorporates all the Agreements, covenants and understandings between the Parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the Parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**14.4 No Third Parties Benefited** The terms and provisions of this Agreement are for the sole benefit of NMA and Foundation and no third party shall benefit under this Agreement. This Agreement recognizes that the principal, but not exclusive, purposes of the foundation are to benefit NMA and also that some circumstances for the benefit of NMA may necessitate the direct payment of funds to providers

**14.5 Survival** Any terms and provisions of this Agreement pertaining to rights, duties, or liabilities extending beyond the expiration or termination of this Agreement shall survive the end of the Term of this Agreement.

**14.6 Invalid Term or Condition** If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

**14.7 Independent Counsel** NMA and Foundation declare that each has had independent legal advice by counsel of their own selection; that each fully understands the facts and has been fully informed of all legal rights or liabilities; that after such advice or knowledge, each believes the Agreement to be fair, just, reasonable and that each signs this Agreement freely and voluntarily.

**14.8 Amendment** This Agreement shall not be altered, changed or amended except by instrument in writing executed by the Parties hereto.

**14.9 Notice**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid or by hand delivery to the locations listed below. Notice given in accordance herewith will be effective upon receipt at the address of the addressee, as evidenced by the executed postal receipt or other receipt for delivery. For purposes of notice the addresses of the Parties hereto will, until changed, be as follows:

NMA: New Mexico Arts Commission

Attn: Loie Fecteau, Executive Director

Physical address for hand delivery: Bataan Memorial Building, 407 Galisteo St. Suite 270, Santa Fe NM 87501

Mailing address: Bataan Memorial Building, 407 Galisteo St. Suite 270, Santa Fe NM 87501

Facsimile: (505) 827-6043

Foundation: New Mexico Music Commission Foundation

Attn: David Schwartz, President

Mailing Address 723 Agua Fria Street Suite A  
Santa Fe, NM 87501

Physical address for hand delivery

723 Agua Fria Street Suite A

Santa Fe, New Mexico 87501

Facsimile: ( ) \_\_\_\_\_


The Parties hereto will have the right from time to time to change their respective addresses for purposes of notice hereunder to any other location within the United States by giving a notice to such effect in accordance with the provisions of this Section.


**14.10 Authority** The individual signing this Agreement on behalf of Foundation represents and warrants that he or she has the power and authority to bind Foundation, and that no further action, resolution, or approval from Foundation is necessary to enter into a binding contract

**14.11 Authorization** This Agreement shall not go into effect until ratified by the Board of Directors of the New Mexico Music Commission Foundation.

**NEW MEXICO ARTS**

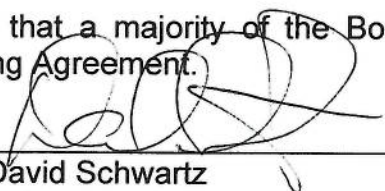
By:   
Name: Veronica Gonzales  
Title: DCA Cabinet Secretary  
Date: 5/11/12

By:   
Name: Loie Fecteau  
Title: Executive Director, NMA  
Date: 4-13-12


By:   
Name: Mark Shoesmith  
Title: Counsel, DCA  
Date: 5-7-12

**NEW MEXICO MUSIC COMMISSION FOUNDATION**

I certify that a majority of the Board of Directors has reviewed and approved this General Operating Agreement.

By:   
Name: David Schwartz  
Title: President  
Date: 4-13-12

**NEW MEXICO MUSIC COMMISSION**

By:   
Name: ~~Ken Beah~~ Ken Beah  
Title: Chairman  
Date: 5/14/12

Approved by the New Mexico Music Commission at its meeting of 5/4/12 2012.

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