

**AGREEMENT FOR SERVICES FOR THE BUSINESS INCUBATOR AND
ACCELERATOR**

**CITY OF FLAGSTAFF
and
NORTHERN ARIZONA TECHNOLOGY & BUSINESS INCUBATOR, INC.,
DBA NACET**

Agreement made by and between the City of Flagstaff (the "City"), a municipal corporation with offices at 211 W. Aspen Avenue, Flagstaff, Coconino County, Arizona, and Northern Arizona Technology & Business Incubator, Inc., dba NACET (the "Provider"), an Arizona corporation, with offices at 2225 North Gemini Drive, Flagstaff, Arizona, 86001 effective as of the date written below.

RECITALS

- A. The City is the Landlord, and NACET is the Tenant under the Business Incubator and Accelerator Master Lease Agreement (the "Master Lease") executed contemporaneously herewith.
- B. The previous Agreement for Services for the Business Incubator and Accelerator between the parties, and Amendments thereto, are hereby terminated, null and void, as they are superseded and replaced by this Agreement for Services for the Business Incubator and Accelerator; and
- C. The City desires to enter into a contract with Provider for purposes of using Provider's expertise to provide business development services for the City; and
- D. Provider has available and offers to provide personnel necessary to accomplish services in accordance with the Services set forth in Section 2 of this Agreement;

For the reasons recited above, and in consideration of the mutual covenants contained in this Agreement, the City and Provider agree as follows:

1. TERM

- 1.1. The term of this Agreement (the "Term") shall be five years and shall commence on January 1, 2019 (the "Commencement Date"), and shall expire on December 31, 2023 (the "Termination Date"), unless the Term is extended as hereinafter provided. Both parties shall have the right to extend this Agreement for one or more of the Extension Terms pursuant to Section 1.2 of this Agreement.
- 1.2. Options to Extend Term. The parties shall have the option to elect to extend the Term of this Agreement for up to two (2) consecutive five (5) year extension terms (each, an "Extension Term"). In order for a party to extend the Term of this Agreement for any one or more Extension Terms:

- 1.2.1. Provider shall not then be in default under this Agreement;
- 1.2.2. Provider shall provide written notice to the City of its desire to elect to extend the Term of this Agreement not later than one hundred eighty (180) days prior to the end of the initial Term or the then current Extension Term, as applicable;
- 1.2.3. Provider shall have been in substantial compliance with the terms of this Agreement at all times during the Term or the then-current Extension Term, as applicable;
- 1.2.4. Provider shall have been in substantial compliance with the terms of the Master Lease at all times during the Term or the then-current Extension Term, as applicable; and
- 1.2.5. Provider shall be in good standing with the Arizona Corporation Commission as an Arizona 501(c)(3) nonprofit corporation.

If Provider has met all the above conditions and if the City, in its sole and absolute discretion, wishes to extend this Agreement, then the City may accept the Provider's request to extend for an Extension Term and all terms and conditions of this Agreement shall remain in full force and effect and shall define the legal relationship between Provider and the City during each Extension Term.

- 1.3. Mutual Cancellation/Termination. The parties may cancel and terminate this Agreement upon mutual consent. In the event the parties desire to mutually cancel/terminate this agreement, a date of cancellation/termination shall be mutually agreed upon by the parties. If a mutual termination occurs, each party shall be entitled to, and obligated under this agreement on a pro-rated basis up to and including the date of cancelation/termination.
- 1.4. Cancellation to Repurpose Building(s). Upon six (6) months written notice to Provider, the City may cancel and terminate this Agreement to repurpose or sell either the Incubator or Accelerator buildings, with no further obligation or liability to Provider under this Agreement.

2. RIGHTS AND OBLIGATIONS OF PROVIDER

- 2.1. Independent Contractor. The parties agree that the Provider performs specialized services and that Provider enters this Agreement with the City as an independent contractor. Nothing in this Agreement shall be construed to constitute the Provider or any of Provider's agents or employees as the agent, employee or representative of the City. As an independent contractor, Provider is solely responsible for all labor and expenses in connection with this Agreement and for any and all damages arising out of this Agreement caused by Provider and subject to the indemnification provision set forth in Section 5.

- 2.2. **Provider's Control of Services.** All services to be provided by Provider will be performed at Provider's place of business or as otherwise determined by Provider. Provider will furnish the qualified personnel, materials, equipment and other items necessary to carry out the terms of this Agreement. Provider will be responsible for and in full control of the services of all such personnel.
- 2.3. **Reports, Budgets and Plans to the City.** Although the Provider is responsible for control and supervision of services performed under this Agreement, the services provided must be acceptable to the City and will be subject to a general right of inspection and supervision to ensure satisfactory completion. This right of inspection and supervision includes periodic activity reports provided by Provider to the City Council. The City shall have the right to audit Provider's records related to the performance of this Agreement. Provider will submit to City a written report of the following on a quarterly basis: the occupancy of the buildings, the estimated number of direct project jobs, the number of jobs created, the number of jobs retained, and the private investment generated as a result of the Economic Development Administration ("EDA") investment, in a manner that conforms with the requirements of the Government Performance and Results Act Data Collection Form, including reporting at three, six, and nine years following project completion. In addition, Provider will submit on a semi-annual basis a report with actual numbers, and Provider will prepare and provide to the City during the term of this Agreement annual budgets, not including other income streams, an annual business plan, and an annual Programming Services Plan as set forth below. Provider will provide all the information contained in this Section at least once per year to the City Council.
- 2.4. **Provider's Performance Criteria.** Evaluation of Provider will be based on Provider's successful completion of its annual business plan and implementation of Programming Services Plan, Provider's compliance with EDA grant criteria, and Provider's compliance with all the terms of this Agreement. For guidance purposes only, reference may be made to selected pages of the application and agreement for the U.S. Department of Commerce, Economic Development Administration Grant for Public Works and Facilities for the Northern Arizona Technology & Business Incubator and Business Accelerator (the "Grant"). Upon request, the City will provide a full and complete copy of the Grant application and agreement to Provider, and the City's authorized representative will work with Provider to clarify EDA grant criteria.
- 2.5. **Marketing, Attraction, and Provision of Services.** Provider will attract and retain qualified subtenants to include business start-ups, Tier 2 companies and entrepreneurs to both the Business Incubator and Accelerator; Provider will provide services, such as business consulting, mentoring and coaching, including but not limited to strategic planning, marketing, distribution, logistics, operation and financial analysis to those in the Business Incubator and the Accelerator. Provider will work with outside funding agencies and groups to locate capital and venture capital for startup businesses and seek long-term partnerships and the

accompanying financial commitments from government and private sector partners.

- 2.6. **Programming Services Plan.** Provider will annually prepare a detailed plan outlining the anticipated programming services to be provided to Incubator and Accelerator tenants and other service recipients throughout the year (the “Programming Services Plan”). The Programming Services Plan is due to the City by January 31 of each year. The City will review and approve the Programming Services Plan within 30 days of submission. The Programming Services Plan will include the number and types of education being provided (classes, lunch and learns, etc.); coaching and mentoring to be facilitated; outreach and marketing efforts; and other relevant information. Upon City approval, Provider will implement the Programming Services Plan as approved. Changes to the overall deliverables will require both entities to agree to the changes. Provider’s first Programming Services Plan is due to the City by March 1, 2019.
- 2.7. **Permitted Uses; Uses Limited to Those Permitted Under Grant.** Except for the housing of the Gemini Emergency Operations Center (the “Gemini EOC” or “EOC”) when activated or otherwise in use, Provider acknowledges that the use of the premises is restricted to the purposes of research and development, science, technology, clean energy, bio-science, healthcare, manufacturing, digital products, emerging technology, tourism, and astronomy consistent with and strictly in accordance with the Grant obtained by the City from the EDA, which use shall include the lease of portions of the Premises to Tenants who (a) meet the requirements set forth in *Section 5.1* of the Master Lease, (b) are approved by the City pursuant to the provisions set forth in *Sections 13.1 and 13.2* of the Master Lease, and (c) shall utilize such leased portions of the Premises only for the purposes permitted under the Grant. In no event shall Provider utilize the Premises for any other purpose without the prior written approval of the City and the EDA, which approval may be given or withheld in the sole and absolute discretion of the City and the EDA, respectively. In connection with the foregoing, Provider hereby acknowledges, covenants and agrees that it shall not use or permit the use of the Premises for any purpose that is not consistent with the general and special purpose of the Grant. In addition, Provider hereby acknowledges, covenants and agrees that, in its use of the Premises, it shall observe and comply with all requirements of the EDA as described in the Grant, including, without limitation, prohibitions against discrimination on the basis of race, color, national origin, handicap, age, religion or sex, and all requirements regarding environmental impacts which any uses within the Premises may have on the environment.
- 2.8. Provider will exercise good faith efforts to promote the Business Incubator and Accelerator, both within and outside the northern Arizona region and State of Arizona. Provider may consult with the City to develop mutually agreeable plans for implementation.
- 2.9. Provider will create a desirable and optimum transition of clients from the

Business Incubator to the Business Accelerator and ultimately to a local commercial facility when Provider determines that such transition is appropriate. Graduates of the Incubator have first option to move into the Accelerator.

- 2.10. Provider will exercise good faith efforts to maintain the confidentiality of any Provider and/or Business Incubator and Accelerator client proprietary information gained in the process in updates, reviews, etc., subject to any disclosure requirements imposed upon the City by law.**
- 2.11. The Provider will appoint an Advisory Board. The Advisory Board will be expected to:**
 - 2.11.1. Meet bi-monthly, review performance of the Business Incubator and Accelerator, and report back to the City Council at least annually or on an as needed basis (executive committee meets in the months between board meetings);**
 - 2.11.2. Provide public outreach and recruitment to regional communities for the Business Incubator and Accelerator, create awareness for the Business Incubator and Accelerator, invite guests to tour, and create remote speaking engagements regarding the Business Incubator and Accelerator;**
 - 2.11.3. Provide ongoing recommendations of clients to be reviewed for admittance into the program under the Provider's review and admission process;**
 - 2.11.4. Provide all necessary information to the City regarding prospective tenant applicants to allow the City to review tenant qualifications and timely process all sublease agreements. This information will be received prior to occupancy to ensure grant compliance.**
- 2.12. Provider will provide the City with information required by the Government Performance and Results Act of 1993, including: (1) private investment generated as a result of the Economic Development Administration investment, and (2) the number of direct jobs created, jobs retained, and other jobs that are otherwise related to the project. This information must be provided on the Government Performance and Results Act Data Collection Form (ED-915). This information must be provided to the City by August 15, 2021, and every third year thereafter, and a final report must be provided to the City upon contract termination.**
- 2.13. Provider will comply with all applicable laws, ordinances, rules, regulations and executive orders of the federal, state and local government, which may affect the performance of this Agreement. Any provision required by law, ordinances, rules, regulations, or executive orders to be inserted in this Agreement shall be deemed inserted, whether or not such provisions appear in this Agreement.**
- 2.14. Sponsorships (after grant period). Provider is eligible to conduct fundraising**

efforts for building improvements, amenities, supplies or any purpose that Provider deems important to strengthen the services or operations of the programs and facilities.

3. RIGHTS AND OBLIGATIONS OF CITY

- 3.1. City will exercise good faith efforts to promote the Business Incubator and Accelerator, both within and outside the northern Arizona region and State of Arizona. City may consult with the Provider to develop mutually agreeable plans for implementation of this Section 3.1.
- 3.2. The City will review subleases and shall have the sole discretion to approve or disapprove of each sublease with justification. Such approval shall not be unreasonably withheld.
- 3.3. City will exercise good faith efforts to maintain the confidentiality of Provider and/or Business Incubator and Accelerator client proprietary information gained in the process in updates, reviews, etc., subject to any disclosure requirements imposed upon the City by law.
- 3.4. The City of Flagstaff will pay NACET two hundred eight thousand and eight dollars (\$208,008.00) annually for the services provided under this Agreement. Payment will be made by the City on a monthly basis in the amount of seventeen thousand three hundred thirty-four dollars (\$17,334.00), within thirty (30) days of receipt of invoice.
- 3.5. The City will provide the information submitted to the City pursuant to Section 2.12 to EDA in the Government Performance and Results Act Data Collection Form.

4. NOTICE PROVISIONS

- 4.1. Notice. Any notice concerning this Agreement must be in writing and sent by certified or registered mail, return receipt requested, as follows:

To the City's Authorized
Representative:

Economic Vitality Director
City of Flagstaff
211 West Aspen Avenue
Flagstaff, Arizona 86001
(928) 213-2905

To the Provider:

President/CEO
Northern Arizona Center for
Entrepreneurship and Technology
2225 North Gemini Drive
Flagstaff, Arizona 86001
(928) 213-9234

5. INDEMNIFICATION AND INSURANCE

5.1. **Indemnification.** To the fullest extent permitted by law, Provider agrees to indemnify, defend and hold harmless the City and its officers, officials, council members, citizens, agents, employees and volunteers (hereinafter referred to as "Indemnatee") for, from and against any and all claims, demands, actions, liabilities, damages, losses, or expenses (including court costs, reasonable attorney's fees, and costs of claim processing, investigation and litigation) (hereinafter collectively referred to as "Claims") including but not limited to personal injury (including death) or property damage caused, in whole or in part, by the alleged acts, errors, omissions, negligence, or alleged negligence of Provider or any of Provider's directors, officers, agents, employees, volunteers or subcontractors, or of any Tenant or Subtenant. This indemnity includes any claim or amount arising or recovered under the Workers' Compensation Law or arising out of the failure of Provider to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree. It is the specific intention of the parties that the Indemnatee shall, in all instances, except for Claims arising solely from the negligent acts of the Indemnatee, be indemnified by Provider for, from and against any and all Claims. It is agreed that Provider will be responsible for primary loss investigation, defense, and judgment costs where this indemnification is applicable.

5.2. **Insurance.** Provider shall procure and maintain, for the duration of the Agreement, insurance against claims for injury to persons or damage to property, which may arise from or in connection with this Agreement by Provider, Provider's agents, representatives, employees or contractors, and commercial property insurance. The insurance requirements herein are minimum requirements for this Agreement and in no way limit the indemnity covenants contained herein. The City does not represent or warrant that the minimum limits set forth herein are sufficient to protect Provider from liabilities that might arise out of this Agreement, and Provider is free to purchase such additional insurance as Provider may determine is necessary.

5.2.1. **Minimum Scope and Limits of Insurance.**

5.2.1.1. **Commercial General Liability - Occurrence Form**

General Aggregate -- \$2,000,000
Each Occurrence -- \$1,000,000

5.2.1.2. **Workers' Compensation and Employer's Liability**

Workers' Compensation -- Statutory
Employer's Liability: Each Accident -- \$500,000
Disease - Each Employee -- \$500,000
Disease - Policy Limit -- \$500,000

5.2.1.3. Umbrella/Excess Liability

Umbrella/Excess Liability insurance with a limit of not less than \$4,000,000 per occurrence combined limit Bodily Injury and Property Damage, that “follows form” and applies in excess of the Commercial General Liability and Employer’s Liability, as required above. Primary per occurrence coverage may be used to fulfill this requirement.

5.2.3. Other Insurance Requirements. The policies shall contain, or be endorsed to contain, the following provisions:

5.2.3.1. Commercial General Liability and Automobile Liability Coverages.

5.2.3.1.1. For insurance coverage, other than Workers’ Compensation, Provider agrees to procure and maintain at its own cost and expense, during the entire term of this Agreement and any extensions thereof, comprehensive public liability insurance covering the Subleased Premises as set forth in the Master Lease, which insurance shall also name the City of Flagstaff as additional insured. The liability coverage under such insurance shall not be less than One Million Dollars (\$1,000,000.00) for injury, illness or death to persons or damage to property in any one incident. Provider will provide the City with certificates of such insurance and appropriate endorsement, satisfactory to the City, evidencing Provider’s compliance with the requirements of this section.

5.2.3.1.2. Provider’s insurance shall contain broad form contractual liability coverage.

5.2.3.1.3. Coverage provided by Provider shall not be limited to the liability assumed under the indemnification provisions of this Agreement.

5.2.3.2. Workers’ Compensation and Employee’s Liability Coverage. The insurer agrees to waive all rights of subrogation against the City, its officials, officers, agents, employees and volunteers for losses arising from Provider’s operations, occupancy and use of the Premises subject to this Agreement.

5.2.4. Notice of Cancellation. Each insurance policy required by the insurance provisions of this Agreement shall not be suspended, voided, cancelled,

reduced in coverage or in limits except after thirty (30) days' prior written notice has been given to the City.

5.2.5. Acceptability of Insurers. Provider shall place insurance hereunder with insurers duly licensed or approved unlicensed companies in the State of Arizona and with a "Best's" rating of not less than A-: VII. The City does not represent or warrant that the above required minimum insurer rating is sufficient to provide Provider from potential insurer insolvency.

6. DEFAULT AND TERMINATION

6.1. Events of Provider Default Defined. The following will be Events of Provider Default under this Agreement:

6.1.1. Any material misrepresentation made by Provider to the City;

6.1.2. Any failure by Provider to perform its obligations under this Agreement including, but not limited to, the following:

6.1.2.1. Failure to perform the work in a manner reasonably satisfactory to the City;

6.1.2.2. Discontinuance of the work for reasons not beyond Provider's reasonable control, not including normal weekends and holidays;

6.1.2.3. Failure to comply with a material term of this Agreement, including, but not limited to, the provision of insurance; and

6.1.2.4. Any other acts specifically stated in this Agreement as constituting a default or a breach of this Agreement.

6.2. Events of City Default Defined. The following will be Events of City Default under this Agreement:

6.2.1. Any material misrepresentation made by the City to Provider;

6.2.2. Any failure by the City to perform its obligations under this Agreement including, but not limited to, the following:

6.2.2.1. Failure to comply with a material term of this Agreement; and

6.2.2.2. Any other acts specifically stated in this Agreement as constituting a default or a breach of this Agreement.

6.3. Remedies.

6.3.1. Subject to the dispute resolution provision under **Section 7.10**, upon the occurrence of any Event of Default of a party, the non-defaulting party

may declare the defaulting party in default under this Agreement by providing written notice thereof and specifying the nature of the default. The defaulting party will have forty-five (45) days to cure the default, unless the nature of the default is such that it cannot be cured within such time period with reasonable diligence, and the defaulting party commences to cure the default within the forty-five (45) day time period and continues diligently to take all reasonable steps necessary to cure the default. If the defaulting party fails to cure the default as set forth herein, the non-defaulting party, upon written notice to the defaulting party, may invoke any or all of the following remedies:

6.3.1.1. The right to cancel this Agreement;

6.3.1.2. The right of specific performance, an injunction or any other appropriate equitable remedy;

6.3.1.3. The right to monetary damages;

6.3.1.4. The right to withhold all or any part of funds payable under this Agreement;

6.3.1.5. The right to seek recoupment of public funds spent for impermissible purposes.

7. GENERAL PROVISIONS

- 7.1. **Headings.** The article and section headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision of this Agreement.
- 7.2. **Jurisdiction and Venue.** This Agreement shall be administered and interpreted under the laws of the State of Arizona. The Provider hereby submits itself to the original jurisdiction of those courts located within Coconino County, Arizona.
- 7.3. **Severability.** If any part of this Agreement is determined by a court to be in conflict with any statute or constitution or to be unlawful for any reason, the parties intend that the remaining provisions of this Agreement shall remain in full force and effect unless the stricken provision leaves the remaining Agreement unenforceable.
- 7.4. **Assignment.** This Agreement is binding on the successors and assigns of the parties hereto. The Agreement may not be assigned by either the City or Provider without prior written consent of the other.
- 7.5. **Conflict of Interest.** The Provider covenants that it presently has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of services required to be performed under this

Agreement. The Provider further covenants that in the performance of this Agreement it will not engage any employee or apprentice having any such interest. The parties agree that this Agreement may be cancelled for conflict of interest in accordance with Arizona Revised Statutes § 38-511.

- 7.6. **Authority to Contract.** Each party represents and warrants that it has full power and authority to enter into this Agreement and perform its obligations hereunder, and that it has taken all required acts or actions necessary to authorize entering into this Agreement.
- 7.7. **No Waiver.** Except as otherwise expressly provided in this Agreement, any failure or delay by either party in asserting any of its rights or remedies as to any default will not operate as a waiver of any default, or of any such rights or remedies, or deprive any such party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.
- 7.8. **Integration.** This Agreement represents the entire understanding of City and Provider as to those matters contained in the Agreement, and no prior oral or written understanding shall be of any force or effect with respect to those matters. This Agreement may not be modified or altered except in writing signed by duly authorized representatives of the parties.
- 7.9. **Nonappropriation.** In the event that no funds or insufficient funds are appropriated and budgeted in any fiscal period of the City for payments to be made under this Agreement, the City will notify Provider of such occurrence, and this Agreement will terminate on the earlier of the last day of the fiscal period for which sufficient appropriation was made or whenever the funds appropriated for payment under this Agreement are exhausted. No payments shall be made or become due to Provider under this Agreement beyond these amounts appropriated and budgeted by the City to fund payments under this Agreement.
- 7.10. **Dispute Resolution.**
 - 7.10.1. **Mediation.** If a dispute arises out of or relates to this Agreement, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to resolve the dispute by mediation before resorting to litigation or some other dispute resolution procedure. Mediation will be self-administered and conducted under the CPR Mediation Procedures established by the CPR International Institute for Conflict Prevention & Resolution, Inc., 30 East 33rd St., 6th Floor, New York, New York 10016, (212) 949-6490, www.cpradr.org, with the exception of the mediator selection provisions, unless other procedures are agreed upon by the parties. Unless the parties agree otherwise, the mediator(s) shall be selected from panels of mediators trained under the Alternative Dispute Resolution Program of the Coconino County Superior Court. Each party

agrees to bear its own costs in mediation. The parties will not be obligated to mediate if an indispensable party is unwilling to join the mediation. This section does not constitute a waiver of the parties' right to arbitrate or initiate legal action if a dispute is not resolved through good faith negotiation or mediation, or if provisional relief is required under the Arizona Rules of Civil Procedure.

7.10.2. Litigation and Attorneys' Fees. Except as otherwise agreed by the parties, any litigation brought by either party against the other to enforce the provisions of this agreement must be filed in the Coconino County Superior Court. In the event any action at law or in equity is instituted between the parties in connection with this agreement, the prevailing party in the action will be entitled to its costs including reasonable attorneys' fees and court costs from the non-prevailing party.

7.11. Relationship of Parties. Provider shall perform all work and services as described herein as an independent contractor. No person performing any of the work or services described herein shall be considered an officer, agent, servant or employee of the City. Provider shall be solely responsible for the acts or omissions of its officers, agents, employees and subcontractors. Nothing herein shall be construed as creating a partnership or joint venture between City and Provider.

8. DURATION OF THE AGREEMENT

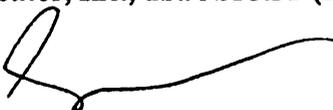
This Agreement shall be effective on the date set forth in Section 1.1 above, indicated below, and shall continue in force as provided in Section 1, unless sooner terminated as provided above.

City of Flagstaff

Northern Arizona Technology & Business Incubator, Inc., dba NACET (Provider)

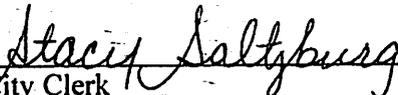


Coral Evans, Mayor



Scott Hathcock, President and CEO

Attest:



City Clerk

Approved as to form:



City Attorney

Date of Execution: 3/15/19