

NDSU Vice President for Research, through its Office of Business Development, has approved the use of a new Testing Services Agreement (TSA).

The TSA is intended to provide deliverables to a sponsor which may include data, reports and/or prototype items but must not have as an objective, the creation of new intellectual property.

The TSA will serve as a contracting arrangement to utilize when NDSU research personnel desire to work with a sponsor to provide certain services which:

- (i) require use of unique or special NDSU facilities or expertise that either do not exist elsewhere or are not readily available or
- (ii) are performed pursuant to a sponsor developed protocol and require the use of the sponsor's proprietary materials or
- (iii) involve established, pre-existing methods of a primarily technical nature which do not require original, creative thought.

The TSA cannot be used in any of the following situations:

- Any project that includes the use of any previously developed NDSU intellectual property
- Any project that has a goal of, or is likely to lead to, the development of intellectual property, including the development of software or improvement to a sponsor's product
- The project deliverables include anything other than a prototype, testing results, report, or data
- Any project in which NDSU personnel desire to publish the results of the project – including NDSU or Extension Center Field Trials
- Any project that requires the use of a subaward
- Any project that requires the use of match funding or cost sharing
- Any project which will support student thesis or other degree requirements for NDSU students
- Any project that includes any export controlled information, materials or data
- Any project that involves any federal funding or federal flow through funding
- The sponsor does not pay the full cost of the services, including NDSU's applicable F&A charges
- Any project in which there is any perceived conflict of interest between NDSU personnel and the sponsor

For Additional Information, contact the VPR, Office of Business Development:  
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## TESTING SERVICES AGREEMENT

This Agreement is entered into between North Dakota State University (hereinafter referred to as "NDSU") and the undersigned (hereinafter referred to as "Company").

WHEREAS, NDSU has developed certain expertise and has equipment and facilities which NDSU utilizes in fulfillment of its role as a Land Grant University which NDSU is able to offer on a limited basis to its various constituencies including private companies; and

WHEREAS, this Agreement is only intended for use when NDSU will provide certain services which (i) require use of unique or special NDSU facilities or expertise that either do not exist elsewhere or are not readily available or (ii) require the use of Company's proprietary materials and involve established, pre-existing methods of a primarily technical nature which do not require original, creative thought (hereinafter "Services");

THEREFORE Company and NDSU have entered into this Testing Services Agreement ("Agreement") and agree as follows:

1. **Scope of Work.** NDSU shall perform the Services as detailed herein and fully set forth in Appendix A (as attached hereto) under the direction of the Principal Investigator (hereinafter "PI") identified in Appendix A. NDSU shall use reasonable efforts to perform Services substantially in accordance with the terms of this Agreement.
2. **Payment.** Company shall pay NDSU a fixed sum in the amount set forth in Appendix A for the performance of Services. The cost of the Services will be in an amount equal to the reasonable and necessary expenditures, including an applicable overhead charge, which are more fully set forth in the budget of Appendix A. Overhead costs are facilities and administration (F&A) costs incurred in support of NDSU activities and will generally be charged for all Services as a percentage of the total direct costs to fully fund the performance of the Services. Should processing of this Agreement require Company to issue a purchase order or other contractual/financial document in association with the payment(s) hereunder, all terms and conditions of said document are hereby deleted and are inapplicable to this Agreement and the performance of Services.
3. **Equipment and Supplies.** NDSU shall retain title to any supplies or equipment purchased for the performance of the Services. If Company loans any equipment or supplies to NDSU, Company shall bear all risk of damage or loss to the equipment or supplies, except to the extent due to NDSU's willful or intentional acts. Company shall insure and maintain all such equipment or supplies while in NDSU's custody.
4. **Materials.** Company shall retain sole ownership of all materials it provides to NDSU which are necessary for the performance of the Services. Company provided materials shall be considered CONFIDENTIAL and protected in accordance with Article 5 herein. NDSU acknowledges that Company materials are provided "as is". NDSU's use of Company materials is strictly limited to performance of the Services as set forth in Appendix A and NDSU may not use Company materials for any other purpose.
5. **Confidential Information.** "Confidential Information" shall mean information and materials that Company discloses to NDSU and which are conspicuously marked "**CONFIDENTIAL**". Confidential

Information shall also include information that is identified as "**CONFIDENTIAL**" at the time of an oral disclosure, provided that within seven (7) days Company reduces such to writing and provide a copy to NDSU that is conspicuously marked as "**CONFIDENTIAL**". NDSU shall hold Company's Confidential Information in strict confidence, and shall not disclose it to any third party. NDSU shall not use Company's Confidential Information for any purpose other than to perform its obligations under this Agreement or to evaluate a potential license under Article 9.

This Agreement shall not be construed to prevent NDSU from disclosing information that: (a) at the time of receipt is public knowledge, or later becomes public knowledge through no fault of NDSU; or (b) is shown by written records to have been in the possession of NDSU prior to its disclosure; or (c) is received from a third party who, insofar as is known to NDSU, neither directly nor indirectly obtained it from Company; or (d) is determined to be an open record in accordance with ND open records law, N.D.C.C. § 44-04-18 -- provided in such a case that Company is given reasonable notice of the request and opportunity to contest the requested disclosure should it elect.

These confidentiality obligations shall continue in full force and effect for three years following the Performance Period or any early termination of the Agreement.

6. **Publications.** NDSU does not expect to produce any publishable results from the performance of the Services described herein. However NDSU, at all times, retains the right to publish any new scientific findings or methodologies so long as no Company Confidential Information is included in the publication. NDSU will submit any proposed publications to Company for review and comment at least thirty (30) days prior to any planned submission or presentation. Company should notify NDSU within twenty (20) days of receipt of such materials with any claims that the proposed publication materials contain any Company Confidential Information.
7. **Reports, Data and Deliverables.** The reports, data and or deliverables set forth in Appendix A shall be considered Company Confidential Information and protected under Article 5.
8. **Publicity.** Without prior written approval, neither party may make any use whatsoever of the name, marks, insignia, or logos of the other party in any news releases, advertisements, promotional materials, or otherwise. However each party is permitted to factually report each party's involvement in the performance/solicitation of services. In no circumstance may Company state or imply that NDSU endorses a particular investment, product, process, or treatment.
9. **Intellectual Property.** It is not expected that inventions or any other form of intellectual property will be developed in the performance of Services. Any invention which does arise in the performance of Services will be promptly disclosed to Company. Inventorship of such shall be determined in accordance with US patent law. University shall not obtain or attempt to obtain patent coverage on Company provided materials or information. All inventions, patent applications, or patents (IP) resulting from performance of Services shall be owned as follows:
  - a. Inventions which involve the use of, composition of, or improvement to Company provided materials or information, or a derivative, analogue thereof shall belong to Company despite any NDSU personnel being a named inventor;
  - b. Inventions which cover a scientific process, technique, procedure, medium, device or other process which is not unique to Company's materials or information and which is invented

solely by NDSU or Company personnel, shall be owned respectively by NDSU or Company. Company shall be given an option to negotiate a license to all NDSU IP; and

- c. Inventions which cover a scientific process, technique, procedure, medium, device or other process which is not unique to Company's materials or information and which is invented jointly by NDSU and Company personnel, shall be jointly owned. Company shall be given an option to negotiate an exclusive license to NDSU's undivided interest in IP.

10. **Term and Termination.** This Agreement is effective during the Performance Period as noted in Appendix A, unless terminated earlier in accordance with the terms herein. Either party may terminate this Agreement for convenience. If the P.I. becomes unable or unwilling to continue the Project, and a mutually acceptable substitute is not available, Company shall have the right to terminate this Agreement. If either party commits a material breach of this Agreement, and fails to remedy that breach within thirty (30) days of written notice, the other party may, at its option, in addition to any other legal remedies, terminate this Agreement immediately upon written notice.

Notwithstanding anything in this Agreement to the contrary, in the event of any early termination of this Agreement Company shall pay all costs accrued by NDSU as of the date of termination, including any non-cancelable obligations.

Neither expiration of this Agreement or any early termination of this Agreement shall affect rights and obligations accrued prior to termination, nor release the parties from their respective rights and obligations under Articles 3, 4, 5, 6, 7, 8, 9, 12, 13, 14 and 15.

11. **Capacity of the Parties.** In the performance of all obligations under this Agreement each party shall be an independent contractor. Neither party is authorized to act as agent for the other for any purpose. Neither party shall be bound by the acts of the other party. Each party represents that it is acting on its own account and not on behalf of another private or governmental party. Company represents that none of the funding to be provided under this Agreement is derived from a contract or grant from the United States government. Neither this Agreement nor any rights under this Agreement may be assigned by either party without the prior written consent of the other party. Further Company represents and agrees that it shall not use or rely upon these Services or the results thereof for any legal or litigation purposes.
12. **Warranties, Indemnity and Liability.** NDSU in no way guarantees the Services performed pursuant to this Agreement and MAKES NO WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE RESULTS OF THE SERVICES OR THE QUALITY OF PRODUCT PRODUCED UNDER THIS AGREEMENT. Company agrees to indemnify and hold harmless NDSU against any claims and costs arising out of Company's use, sale or distribution of any products or processes, or its use or reliance upon the data, reports or other deliverables. Each party shall be responsible for its negligent acts or omissions and the negligent acts or omissions of its employees, officers, or directors, to the extent allowed by law.
13. **Chemicals.** If Company supplies chemicals or other potentially hazardous materials to NDSU, then upon NDSU's request, Company shall accept the return of any unused portions of such, including the containers in which it was shipped. Further, for every chemical supplied, Company shall furnish NDSU with sufficient information to identify precautions necessary to protect health and safety, including a Safety Data Sheet in accordance with 29 CFR 1910.1200.

- 14. **Export Controls.** As an institution of higher education with many foreign employees, students and visitors, NDSU intends to conduct the Services as fundamental research under U.S. export regulations. Accordingly, Company warrants that it will not transfer any export-controlled materials or information to NDSU.
  
- 15. **Jurisdiction.** This Agreement shall be construed in accordance with the laws of the State of North Dakota. Any controversy arising out of or related to this Agreement that cannot be resolved by the parties shall be adjudicated only in a court of competent jurisdiction in Cass County, North Dakota. Both parties consent to such venue and jurisdiction.
  
- 16. **Entire Agreement.** This Agreement constitutes the entire understanding between Company and NDSU, and supersedes any prior agreement or understanding on the same subject matter. Any modifications or amendments to this Agreement shall only be effective upon signed, written agreement between the parties. Nothing in this Agreement shall be construed to limit the freedom of the P.I. or any other NDSU personnel from engaging in research in the same field that is covered by this Agreement.

AGREED TO AND APPROVED BY:

**NDSU**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**Company**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_