**University of Southern Mississippi**

**TESTING & EVALUATION / SERVICES AGREEEMENT**

This Agreement is between \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, hereinafter referred to as “SPONSOR”, a

corporation organized and existing under the laws of the State of \_\_\_\_\_\_\_\_\_\_\_\_\_\_ with its corporate address being \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and the University of Southern Mississippi, a governmental entity of the State of Mississippi, hereinafter referred to as “USM”, for and on behalf of its [Department/Center/Institute] with its address at 118 College Drive #5157,

Hattiesburg, Mississippi 39406. SPONSOR and USM are collectively referred to as the “parties.”

WHEREAS, SPONSOR desires to obtain certain, specific testing, evaluation or other services from USM.

WHEREAS, in return, USM must obtain market value consideration and compensation for providing the services.

**I. TERMS**

1. **Term of Contract.** This agreement shall not be effective unless and until both parties have executed this agreement. The effective date of this agreement shall be the date of last signature. The period of performance is from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. The project period may be changed by mutual consent of the parties by written amendment to this agreement.

1. **Scope of Work**. USM will perform the work as described Addendum A. (insert PI NAME), a USM faculty/staff member, will supervise all work to be performed under the terms of this Agreement. In the event the USM faculty/staff member is unable or unwilling to continue with this project, the parties will attempt to find a mutually acceptable substitute. In the event a mutually acceptable substitute is not found, the Agreement may be terminated in accordance herein.
2. **Payment**. Both parties agree this is a fixed price agreement. SPONSOR shall pay to USM $(amount) according to the following schedule:

Upon invoice following execution of this Agreement: ($amount)

Remaining payment schedule: ($amount and payment dates)

Payment shall be sent to:

(USM payment address)

1. **Publicity**. SPONSOR shall not use the names, logos, trademarks, or any other mark or image considered by USM to be identified with or protected by USM, or those of any of the institution's employees or former employees, or any adaptation thereof, in any advertising, promotional or sales literature without prior written consent being obtained from the USM University Counsel and the Vice President for Research, in each case, except that SPONSOR may state that SPONSOR has employed USM to perform services for the SPONSOR under this Agreement.

**II. CONDITIONS**

**A. Availability of Funds.** It is expressly understood and agreed that the obligation of USM to proceed under this agreement is conditioned upon the availability and receipt of funds by USM to specifically perform the obligations set forth for USM under this agreement.

**B. No USM Funding.** It is expressly understood and agreed that the obligation of USM to proceed under this agreement is conditioned upon the receipt by USM of funds or other mutually agreed upon consideration from SPONSOR to specifically perform the obligations set forth for USM under this agreement. No USM funds are obligated for payment or disbursement or envisioned as being encumbered under this agreement to any party at any time.

**C. Representation Regarding Contingent Fees and Gratuities.** SPONSOR represents that it has not retained a person to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee. Further, SPONSOR represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities set forth in state law.

**D. Authority to Contract.** SPONSOR warrants (a) that it is a validly organized business with valid authority to enter into this agreement; (b) that it is qualified to do business and is in good standing in the State of Mississippi; (c) that entry into and performance under this agreement is not restricted or prohibited by any loan, security, financing, contractual, or other agreement of any kind, and (d) notwithstanding any other provision of this agreement to the contrary, that there are no existing legal proceedings or prospective legal proceedings, either voluntary or otherwise, which may adversely affect its ability to perform its obligations under this agreement.

**E. Disputes.** The parties agree that any and all disputes between the parties to this agreement may, if mutually agreeable to both parties, be subjected to voluntary mediation and that such disputes are subject to final resolution if said voluntary mediation efforts result in a written resolution agreement executed by both parties.

**F. Failure to Enforce.** The failure by either party at any time to enforce the provisions of this agreement shall not be construed as a waiver of any such provision. Such failure to enforce shall not affect the validity of the contract or any part thereof or the right of either party to enforce the provision at any time in accordance with its terms.

**G. Indemnification.** SPONSOR and its officers shall indemnify, defend, save and hold harmless, protect, and exonerate the State of Mississippi, the Board of Trustees of State Institutions of Higher Learning, USM, and each of their officers, agents, employees, and representatives, both in their official and in their individual capacities from and against all claims, demands, liabilities, suits, actions, damages, losses and costs of every kind and nature whatsoever, including, without limitation, court costs, investigative fees and expenses, attorneys’ fees, arising out of or caused by SPONSOR and its’ partners, principals, officers, agents, employees and representatives

related to actions or inactions of SPONSOR, its partners, principals, officers, agents, employees and representatives. In USM’s sole discretion, SPONSOR may be allowed to control the defense of any such claim, suit, etc., but in such an event, SPONSOR shall use legal counsel acceptable to USM. SPONSOR shall be solely responsible for all costs and/or expenses associated with such defense and USM shall be entitled to participate in said defense. SPONSOR shall not settle any claim, suits, etc., without USM’s written concurrence, which concurrence USM shall not unreasonably withhold.

**H. No Warranty.** USM makes no representations or warranties, either express or implied, as to any matter including but not limited to the condition or quality of the Deliverables or their merchantability or fitness for a particular purpose. USM will have no liability or responsibility for or regarding any claims, damages or losses arising out of the use by the Sponsor or by any party acting on behalf of or under authorization from the Sponsor of the deliverables, or out of any use, sale or other disposition by the Sponsor or by any party acting on behalf of or under authorization from the Sponsor of any product or technique which is the subject of the Services or is created or modified based on the deliverables.

**I. USM Responsibility.** USM shall be responsible for liability resulting from the actions/inactions of its officers, agents, and employees acting within the course and scope of their official duties with USM to the degree and within the parameters permitted under §§11-46-1, et seq., Mississippi Code Annotated of 1972.

**J. Intellectual Property.**

(1) *Background Intellectual Property*. "Background Intellectual Property" means intellectual property and the legal right therein of either or both parties developed before or independent of this Agreement including inventions, patent applications, patents, copyrights, trademarks, mask works, trade secrets and any information embodying proprietary data such as technical data and computer software. This Agreement shall not be construed as implying that either party hereto shall have the right to use Background Intellectual Property of the other in connection with the services provided except as otherwise provided by mutual agreement.

(2) SPONSOR covenants to save, defend, keep harmless, and indemnify the State of Mississippi, the Board of Trustees of State Institutions of Higher Learning, USM, and each of their officers, agents, employees, and representatives, both in their official and in their individual capacities, from and against all claims, losses, damages, injury, fines, penalties, and costs, including court costs and attorneys’ fees, charges, and any other liability and exposure however caused for or on account of any copyright or patent infringement that may result from the activities related to this agreement and the actions/inactions thereunder by the parties that derive from submissions provided to USM by SPONSOR or from the use of publications which SPONSOR may otherwise request USM to utilize. This indemnification is not separate from that set forth elsewhere in this agreement and is not a limitation thereon, but instead is in conjunction therewith and is recited to ensure that the full breadth of the indemnification provisions contained elsewhere in this agreement are understood by the parties.

(3) *Ownership of Documents and Work Papers*. USM shall own all documents, files, reports, work papers and working documents, electronic or otherwise, created by USM in connection with this agreement. Rights to initial publication, formal release or other disclosure of data generated from these services will be retained by USM. Results of this investigation are not to be published by the SPONSOR or others before publication by USM except by written permission from USM.

(4) *Publications.* The Principal Investigator(s) shall have the right to publish or otherwise publicly disclose information gained in the course of the work conducted by USM on the Project, provided, however, that no SPONSOR Confidential Information, as hereinafter defined, shall be published and that SPONSOR Intellectual Property shall not be compromised.

(5) *Confidential Information*. "Confidential Information" means information consistent with the purpose stated in Addendum A which is disclosed in any tangible form and is clearly labeled or marked as confidential, proprietary or its equivalent, or information which is disclosed orally or visually, is designated confidential, proprietary or its equivalent at the time of its disclosure and is reduced to writing and clearly marked or labeled as confidential, proprietary or its equivalent within thirty days of disclosure. To the extent allowed by law, the party receiving Confidential Information shall restrict the use of the Confidential Information to the purpose set forth in Addendum A and shall safeguard against disclosure of the Confidential Information to third parties using the same degree of care to prevent disclosure as it uses to protect its own information of like importance, but at least reasonable care. A party may make only the minimum number of copies of any Confidential Information required to carry out the purpose of this Agreement. All proprietary and copyright notices in the original must be affixed to copies or partial copies.

Neither party shall be obligated to maintain any information in confidence or refrain from use if:

a. The information was in the receiving party's possession or was known to it prior to its receipt from the disclosing party;

b. The information is independently developed by the receiving party without the utilization of Confidential Information of the disclosing party;

c. The information is or becomes public knowledge without fault of the receiving party.

d. The information is or becomes available on an unrestricted basis to the receiving party from a source other than the disclosing party;

e. The information becomes available on an unrestricted basis to a third party from the disclosing party or from someone acting under its control; or

f. The information is publicly disclosed (i.e., not under adequate protective order) by the receiving party under an order of a court or government agency, provided that the receiving party provides prior written notification to the disclosing party of such obligation and the opportunity to oppose such order.

g. Ordered to release by a court of competent jurisdiction or otherwise required to release by law.

**K. USM - Independent Contractor.** USM shall at all times be regarded as and shall be legally considered an independent contractor and neither USM nor its employees shall, under any circumstances, be considered servants, agents or employees of SPONSOR, and USM shall at no time be legally responsible for any negligence or other wrongdoing by SPONSOR, its principals, officers, agents, employees or representatives.

**L. Equal Employment Opportunity.** SPONSOR represents and understands that USM is an equal opportunity employer and therefore maintains a policy which prohibits unlawful discrimination. SPONSOR agrees that during the term of this agreement that SPONSOR will strictly adhere to this policy in its employment practices and the provision of its services.

**M. Assignment Prohibition.** SPONSOR agrees that it shall not attempt to nor shall it assign this agreement to any party and that any attempt to do so shall be void.

**N. No Third Parties.** There are no other parties to this agreement. No obligations to third parties are provided herein, whether by the express or implied terms and conditions. Neither party shall be liable to any third party based upon this agreement, its terms and conditions, or a party’s actions taken hereunder.

**O. No Other Terms, Conditions, or Understandings.** The parties hereto acknowledge that this Agreement sets forth the entire Agreement and understanding of the parties hereto as to the subject matter hereof and constitutes the full and complete Agreement in this matter by and between the parties hereto, and shall not be subject to any change or modification except by the execution of a written instrument subscribed to by the parties hereto. Should SPONSOR issue a purchase order to USM for work performed under this agreement, both parties agree that any purchase order terms preprinted or referenced on a website DO NOT APPLY to the work being performed under this agreement.

**P. Modifications to Agreement.** This agreement may be modified only by a written amendment authorized by and executed by the parties. No oral statements of any person shall modify or otherwise affect the terms, conditions or specifications stated in this agreement.

**Q. Notices.** All notices required or permitted to be given under this agreement must be in writing and personally delivered or sent by certified U.S. Mail, postage prepaid, return receipt requested, to the persons at the addresses shown below. The parties agree to notify the other in writing of any change of address.

For SPONSOR: For USM jointly at:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

AND

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**R. Severability.** If any part of this agreement is declared to be invalid or unenforceable, such invalidity or unenforceability shall not affect any other provision of the agreement, and to that end the provisions hereof are severable. In such an event, the parties shall amend the agreement as necessary to reflect the original intent of the parties and to bring any invalid or unenforceable provisions in compliance with applicable law.

**S. Termination for Convenience.** USM may, when the interests of USM so require, terminate this agreement in whole or in part for the convenience of USM. Written notice of the same is required to be provided by USM and shall allow no less than 60 days’ notice prior to the effective date of the termination.

**T. Termination for Cause.** Either party may terminate this agreement upon issuance of written notice if the other party fails to perform the obligations to the other party under this agreement. The party issuing such a termination notice may allow 30 days within which the other party may attempt to cure the failure to fulfill its obligations, but such 30 day cure time is not required.

**U. Applicable Law.** This contract shall be governed by and construed in accordance with the laws of the State of Mississippi, excluding its choice of laws and conflict of laws provisions, and any litigation with respect thereto shall be brought in the courts of Mississippi. SPONSOR shall comply with applicable federal, state, and local laws and regulations.

**V.** **Public Records.** Notwithstanding any provision to the contrary contained herein, it is recognized that University is a public agency of the State of Mississippi and is subject to the Mississippi Public Records Act, Mississippi Code Annotated §25-61-1, *et seq*., as amended. If a public records request is made for any Information provided to University pursuant to this agreement, University shall promptly notify the disclosing Party of such request. The disclosing Party shall promptly institute appropriate legal proceedings to protect its Information. No Party to this agreement shall be liable to the other Party for disclosures of Information required by Court order or required by law.

**SPONSOR**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name of Authorized Official of SPONSOR (printed or typed)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title (printed or typed)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature Date

**UNIVERSITY OF SOUTHERN MISSISSIPPI**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Vice President for Research Date

(optional)

Read and Understood:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(PI name) Date

**ADDENDUM A**

to the

**University of Southern Mississippi**

**TESTING & EVALUATION / SERVICES AGREEMENT**