

**MERCHANT SERVICES CONTRACT BY AND BETWEEN
CITY OF DENTON, TEXAS AND _____
PROPOSAL NO. _____**

THIS CONTRACT is made and entered into this _____ day of _____ A.D., 2010, by and between _____ a corporation, whose address is _____, hereinafter referred to as "Merchant," and the **CITY OF DENTON, TEXAS**, a home rule municipal corporation, hereinafter referred to as "City," to be effective upon approval of the Denton City Council and subsequent execution of this Contract by the Denton City Manager or his duly authorized designee.

For and in consideration of the covenants and agreements contained herein, and for the mutual benefits to be obtained hereby, the parties agree as follows:

**I.
SCOPE OF SERVICES**

Merchant shall provide all labor, supervision, materials and equipment necessary for _____
_____. These products and services shall be provided in accordance with the Merchant's Proposal in response thereto, a copy of which is attached hereto and incorporated herein for all purposes as **Exhibit "A"**. The Contract consists of this written agreement and the following items which are attached hereto and incorporated herein by reference:

- (a) Merchant's Proposal. (**Exhibit "A"**);
- (b) Insurance Requirements. (**Exhibit "B"**);
- (c) Form CIQ – Conflict of Interest Questionnaire (**Exhibit "C"**).

These documents make up the Contract documents and what is called for by one shall be as binding as if called for by all. In the event of an inconsistency or conflict in any of the provisions of the Contract documents, the inconsistency or conflict shall be resolved by giving precedence first to the written agreement then to the contract documents in the order in which they are listed above. These documents shall be referred to collectively as "Contract Documents."

**II.
TIME OF COMPLETION**

Merchant agrees and covenants that all work hereunder shall be complete within _____
() days following notice to proceed from City.

Or

**III.
TERM OF CONTRACT**

The term of this Contract shall be five (5) years from date of contract execution unless otherwise stated.

**IV.
WARRANTY**

Merchant warrants and covenants to City that all goods and services provided by Merchant, Merchant's subcontractors, and agents under the Agreement shall be free of defects and produced and performed in a skillful and workmanlike manner and shall comply with the specifications for said goods and services as set forth in this Agreement and the Proposal attached hereto and incorporated herein as **Exhibit "A"**. Merchant warrants that the goods and services provided to City under this Agreement shall be free from defects in material and workmanship, for a period of five (5) years commencing on the date that City issues final written acceptance of the project.

**V.
PAYMENT**

Payments hereunder shall be made to Merchant following city's acceptance of the work and within thirty (30) days of receiving Merchant's invoice for the products and services delivered.

Merchant recognizes that this Contract shall commence upon the effective date herein and continue in full force and effect until termination in accordance with its provisions. Merchant and City herein recognize that the continuation of any contract after the close of any given fiscal year of the City of Denton, which fiscal year ends on September 30th of each year, shall be subject to Denton City Council approval. In the event that the Denton City Council does not approve the appropriation of funds for this contract, the Contract shall terminate at the end of the fiscal year for which funds were appropriated and the parties shall have no further obligations hereunder.

**VI.
PROTECTION AGAINST ACCIDENT TO EMPLOYEES AND THE PUBLIC**

Merchant shall at all times exercise reasonable precautions for the safety of employees and others on or near the work and shall comply with all applicable provisions of Federal, State, and Municipal safety laws. The safety precautions actually taken and the adequacy thereof shall be the sole responsibility of the Merchant. Merchant shall indemnify City for any and all losses arising out of or related to a breach of this duty by Merchant pursuant to paragraph **VIII. INDEMNIFICATION** and paragraph **IX. COMPLIANCE WITH APPLICABLE LAWS** set forth herein.

**VII.
LOSSES FROM NATURAL CAUSES**

Unless otherwise specified, all loss or damage to Merchant arising out of the nature of the work to be done, or from the action of the elements, or from any unforeseen circumstances in the prosecution of the same, or from unusual obstructions or difficulties which may be encountered in the prosecution of the work, shall be sustained and borne by the Merchant at its own cost and expense.

**VIII.
INDEMNIFICATION**

Merchant shall release, defend, indemnify and hold the City, its elected officials, officers and employees harmless from and against all claims, damages, injuries (including death), property damages (including loss of use), losses, demands, suits, judgments and costs, including attorney's fees and

expenses, in any way arising out of, related to, or resulting from the services provided by Merchant under this Agreement or caused by the negligent act or omission or the intentional act or omission of Merchant, its officers, agents, employees, subcontractors, licensees, invitees or any other third parties for whom Merchant is legally responsible (hereinafter "Claims"). Merchant is expressly required to defend City against all such Claims.

In the event the City is a named party to a suit arising out of the subject matter of this Contract, the City shall have reasonable input into the selection of defense counsel to be retained by Merchant in fulfilling its obligation hereunder to defend and indemnify City. City reserves the right to provide a portion, or all, of its own defense; however, City is under no obligation to do so. Any such action by City is not to be construed as a waiver of Merchant's obligation to defend City or as a waiver of Merchant's obligation to indemnify City pursuant to this Contract. Merchant shall retain defense counsel within seven (7) business days of City's written notice that City is invoking its right to indemnification under this Contract. If Merchant fails to retain counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and Merchant shall be liable for all costs incurred by City.

IX. COMPLIANCE WITH APPLICABLE LAWS

Merchant shall at all times observe and comply with all Federal, State and local laws, ordinances and regulations including all amendments and revisions thereto, which in any manner affect Merchant or the work, and **shall indemnify and save harmless City against any claim related to or arising from the violation of any such laws, ordinances and regulations whether by Merchant, its employees, officers, agents, subcontractors, or representatives.** If Merchant observes that the work is at variance therewith, Merchant shall promptly notify City in writing.

X. VENUE

The laws of the State of Texas shall govern the interpretation, validity, performance and enforcement of this Contract. The parties agree that this Contract is performable in Denton County, Texas, and that exclusive venue shall lie in Denton County, Texas.

XI. ASSIGNMENT AND SUBLETTING

Merchant agrees to retain control and to give full attention to the fulfillment of this Contract, that this Contract shall not be assigned or sublet without the prior written consent of City, and that no part or feature of the work will be sublet to anyone objectionable to City. Merchant further agrees that the subletting of any portion or feature of the work, or materials required in the performance of this Contract, shall not relieve Merchant from its full obligations to City as provided by this Contract.

XII. INDEPENDENT CONTRACTOR

Merchant covenants and agrees that Merchant is an independent contractor and not an officer, agent, servant or employee of City; that Merchant shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be

responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between City and Merchant, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating a partnership or joint enterprise between City and Merchant.

**XIII.
INSURANCE AND CERTIFICATES OF INSURANCE**

Merchant shall procure and maintain for the duration of the contract insurance coverage as set forth in the Insurance Requirements marked **Exhibit "B"** attached hereto and incorporated herein by reference. Merchant shall provide a signed insurance certificate verifying that they have obtained the required insurance coverage prior to the effective date of this Contract.

**XIV.
HINDRANCES AND DELAYS**

No claims shall be made by Merchant for damages resulting from hindrances or delays from any cause during the progress of any portion of the work embraced in this Contract.

**XV.
AFFIDAVIT OF NO PROHIBITED INTEREST**

Merchant acknowledges and represents it is aware of all applicable laws, City Charter, and City Code of Conduct regarding prohibited interests and that the existence of a prohibited interest at any time will render the Contract voidable. Merchant has executed the Affidavit of No Prohibited Interest, attached and incorporated herein as **Exhibit "C"**.

**XVI.
SEVERABILITY**

The provisions of this Contract are severable. If any paragraph, section, subdivision, sentence, clause, or phrase of this Contract is for any reason held to be contrary to the law or contrary to any rule or regulation having the force and effect of the law, such decisions shall not affect the remaining portions of the Contract. However, upon the occurrence of such event, either party may terminate this Contract by giving the other party thirty (30) days written notice.

**XVII.
TERMINATION**

City may, at its option, with or without cause, and without penalty or prejudice to any other remedy it may be entitled to at law, or in equity or otherwise under this Contract, terminate further work under this contract, in whole or in part by giving at least ninety (90) days prior written notice thereof to Merchant with the understanding that all services being terminated shall cease upon the date such notice is received.

**XVIII.
ENTIRE AGREEMENT**

This Contract and its attachments embody the entire agreement between the parties and may only be modified in writing if executed by both parties.

XIX.
CONTRACT INTERPRETATION

Although this Contract is drafted by City, should any part be in dispute, the parties agree that the Contract shall not be construed more favorably for either party.

XX.
SUCCESSORS AND ASSIGNS

This Contract shall be binding upon the parties hereto, their successors, heirs, personal representatives and assigns.

XXI.
HEADINGS

The headings of this Contract are for the convenience of reference only and shall not affect in any manner any of the terms and conditions hereof.

XXII.
RIGHT TO AUDIT

The CITY shall have the right to audit and make copies of the books, records and computations pertaining to this agreement. The MERCHANT shall retain such books, records, documents and other evidence pertaining to this agreement during the contract period and five years thereafter, except if an audit is in progress or audit findings are yet unresolved, in which case records shall be kept until all audit tasks are completed and resolved. These books, records, documents and other evidence shall be available, within 10 business days of written request. Further, the MERCHANT shall also require all Subcontractors, material suppliers, and other payees to retain all books, records, documents and other evidence pertaining to this agreement, and to allow the CITY similar access to those documents. All books and records will be made available within a 50 mile radius of the City of Denton. The cost of the audit will be borne by the CITY unless the audit reveals an overpayment of 1% or greater. If an overpayment of 1% or greater occurs, the reasonable cost of the audit, including any travel costs, must be borne by the MERCHANT which must be payable within five business days of receipt of an invoice.

Failure to comply with the provisions of this section shall be a material breach of this contract and shall constitute, in the CITY'S sole discretion, grounds for termination thereof. Each of the terms "books", "records", "documents" and "other evidence", as used above, shall be construed to include drafts and electronic files, even if such drafts or electronic files are subsequently used to generate or prepare a final printed document.

XXIII.
NON-EXCLUSIVE CONTRACT

This Contract is non-exclusive and nothing contained herein shall be construed so as to prevent the City from granting other like or similar rights, privileges and contracts to any other person, firm or corporation.

IN WITNESS WHEREOF, the parties of these presents have executed this agreement in the year and day first above written.

MERCHANT

BY: _____
OWNER (SIGNATURE)

Date: _____

Name: _____

Title: _____

MAILING ADDRESS

PHONE NUMBER

FAX NUMBER

PRINTED NAME

CITY OF DENTON, TEXAS

BY: _____
CITY MANAGER

DATE: _____

DEPARTMENTAL APPROVAL

APPROVED AS TO LEGAL FORM
ANITA BURGESS, CITY ATTORNEY

BY: _____

DATE: _____

EXHIBIT B

**CITY OF DENTON
INSURANCE REQUIREMENTS FOR CONTRACTORS**

Bidder's attention is directed to the insurance requirements below. It is highly recommended that bidders confer with their respective insurance carriers or brokers to determine in advance of Bid submission the availability of insurance certificates and endorsements as prescribed and provided herein. If an apparent low bidder fails to comply strictly with the insurance requirements, that bidder may be disqualified from award of the contract. Upon bid award, all insurance requirements shall become contractual obligations, which the successful bidder shall have a duty to maintain throughout the course of this contract.

STANDARD PROVISIONS:

Without limiting any of the other obligations or liabilities of the Contractor, the Contractor shall provide and maintain until the contracted work has been completed and accepted by the City of Denton, Owner, the minimum insurance coverage as indicated hereinafter.

As soon as practicable after notification of bid award, Contractor shall file with the Purchasing Department satisfactory certificates of insurance, containing the bid number and title of the project. Contractor may, upon written request to the Purchasing Department, ask for clarification of any insurance requirements at any time; however, Contractors are strongly advised to make such requests prior to bid opening, since the insurance requirements may not be modified or waived after bid opening unless a written exception has been submitted with the bid. Contractor shall not commence any work or deliver any material until he or she receives notification that the contract has been accepted, approved, and signed by the City of Denton.

All insurance policies proposed or obtained in satisfaction of these requirements shall comply with the following general specifications, and shall be maintained in compliance with these general specifications throughout the duration of the Contract, or longer, if so noted:

- Each policy shall be issued by a company authorized to do business in the State of Texas with an A.M. Best Company rating of at least A.
- Any deductibles or self-insured retentions shall be declared in the bid proposal. If requested by the City, the insurer shall reduce or eliminate such deductibles or self-insured retentions with respect to the City, its officials, agents, employees and volunteers; or, the contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.
- Liability policies shall be endorsed to provide the following:
 - Name as additional insured the City of Denton, its Officials, Agents, Employees and volunteers.
 - That such insurance is primary to any other insurance available to the additional insured with respect to claims covered under the policy and that this insurance applies separately to each insured against whom claim is made or

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suit is brought. The inclusion of more than one insured shall not operate to increase the insurer's limit of liability.

- ***Cancellation: The City requires 30 day written notice should any of the policies described on the certificate be cancelled or materially changed before the expiration date.***
- Should any of the required insurance be provided under a claims-made form, Contractor shall maintain such coverage continuously throughout the term of this contract and, without lapse, for a period of three years beyond the contract expiration, such that occurrences arising during the contract term which give rise to claims made after expiration of the contract shall be covered.
- Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit providing for claims investigation or legal defense costs to be included in the general annual aggregate limit, the Contractor shall either double the occurrence limits or obtain Owners and Contractors Protective Liability Insurance.
- Should any required insurance lapse during the contract term, requests for payments originating after such lapse shall not be processed until the City receives satisfactory evidence of reinstated coverage as required by this contract, effective as of the lapse date. If insurance is not reinstated, City may, at its sole option, terminate this agreement effective on the date of the lapse.

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SPECIFIC ADDITIONAL INSURANCE REQUIREMENTS:

All insurance policies proposed or obtained in satisfaction of this Contract shall additionally comply with the following marked specifications, and shall be maintained in compliance with these additional specifications throughout the duration of the Contract, or longer, if so noted:

[X] A. General Liability Insurance:

General Liability insurance with combined single limits of not less than **\$1,000,000.00** shall be provided and maintained by the Contractor. The policy shall be written on an occurrence basis either in a single policy or in a combination of underlying and umbrella or excess policies.

If the Commercial General Liability form (ISO Form CG 0001 current edition) is used:

- Coverage A shall include premises, operations, products, and completed operations, independent contractors, contractual liability covering this contract and broad form property damage coverage.
- Coverage B shall include personal injury.
- Coverage C, medical payments, is not required.

If the Comprehensive General Liability form (ISO Form GL 0002 Current Edition and ISO Form GL 0404) is used, it shall include at least:

- Bodily injury and Property Damage Liability for premises, operations, products and completed operations, independent contractors and property damage resulting from explosion, collapse or underground (XCU) exposures.
- Broad form contractual liability (preferably by endorsement) covering this contract, personal injury liability and broad form property damage liability.

[X] Automobile Liability Insurance:

Contractor shall provide Commercial Automobile Liability insurance with Combined Single Limits (CSL) of not less than **\$500,000.00** either in a single policy or in a combination of basic and umbrella or excess policies. The policy will include bodily injury and property damage liability arising out of the operation, maintenance and use of all automobiles and mobile equipment used in conjunction with this contract.

Satisfaction of the above requirement shall be in the form of a policy endorsement for:

- any auto, or
- all owned, hired and non-owned autos.

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Workers Compensation Insurance

Contractor shall purchase and maintain Worker's Compensation insurance which, in addition to meeting the minimum statutory requirements for issuance of such insurance, has Employer's Liability limits of at least \$100,000 for each accident, \$100,000 per each employee, and a \$500,000 policy limit for occupational disease. The City need not be named as an "Additional Insured" but the insurer shall agree to waive all rights of subrogation against the City, its officials, agents, employees and volunteers for any work performed for the City by the Named Insured. For building or construction projects, the Contractor shall comply with the provisions of Attachment 1 in accordance with §406.096 of the Texas Labor Code and rule 28TAC 110.110 of the Texas Worker's Compensation Commission (TWCC).

Owner's and Contractor's Protective Liability Insurance

The Contractor shall obtain, pay for and maintain at all times during the prosecution of the work under this contract, an Owner's and Contractor's Protective Liability insurance policy naming the City as insured for property damage and bodily injury which may arise in the prosecution of the work or Contractor's operations under this contract. Coverage shall be on an "occurrence" basis, and the policy shall be issued by the same insurance company that carries the Contractor's liability insurance. Policy limits will be at least combined bodily injury and property damage per occurrence with a _____ aggregate.

Fire Damage Legal Liability Insurance

Coverage is required if Broad form General Liability is not provided or is unavailable to the contractor or if a contractor leases or rents a portion of a City building. Limits of not less than _____ each occurrence are required.

Professional Liability Insurance

Professional liability insurance with limits not less than _____ per claim with respect to negligent acts, errors or omissions in connection with professional services is required under this Agreement.

Builders' Risk Insurance

Builders' Risk Insurance, on an All-Risk form for 100% of the completed value shall be provided. Such policy shall include as "Named Insured" the City of Denton and all subcontractors as their interests may appear.

EXHIBIT B

Commercial Crime

Provides coverage for the theft or disappearance of cash or checks, robbery inside/outside the premises, burglary of the premises, and employee fidelity. The employee fidelity portion of this coverage should be written on a "blanket" basis to cover all employees, including new hires. This type insurance should be required if the contractor has access to City funds. Limits of not less than _____ each occurrence are required.

Additional Insurance

Other insurance may be required on an individual basis for extra hazardous contracts and specific service agreements. If such additional insurance is required for a specific contract, that requirement will be described in the "Specific Conditions" of the contract specifications.

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ATTACHMENT 1

[X] **Worker's Compensation Coverage for Building or Construction Projects for Governmental Entities**

A. Definitions:

Certificate of coverage ("certificate")-A copy of a certificate of insurance, a certificate of authority to self-insure issued by the commission, or a coverage agreement (TWCC-81, TWCC-82, TWCC-83, or TWCC-84), showing statutory workers' compensation insurance coverage for the person's or entity's employees providing services on a project, for the duration of the project.

Duration of the project - includes the time from the beginning of the work on the project until the contractor's/person's work on the project has been completed and accepted by the governmental entity.

Persons providing services on the project ("subcontractor" in §406.096) - includes all persons or entities performing all or part of the services the contractor has undertaken to perform on the project, regardless of whether that person contracted directly with the contractor and regardless of whether that person has employees. This includes, without limitation, independent contractors, subcontractors, leasing companies, motor carriers, owner-operators, employees of any such entity, or employees of any entity which furnishes persons to provide services on the project. "Services" include, without limitation, providing, hauling, or delivering equipment or materials, or providing labor, transportation, or other service related to a project. "Services" does not include activities unrelated to the project, such as food/beverage vendors, office supply deliveries, and delivery of portable toilets.

- B. The contractor shall provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code, Section 401.011(44) for all employees of the Contractor providing services on the project, for the duration of the project.
- C. The Contractor must provide a certificate of coverage to the governmental entity prior to being awarded the contract.
- D. If the coverage period shown on the contractor's current certificate of coverage ends during the duration of the project, the contractor must, prior to the end of the coverage period, file a new certificate of coverage with the governmental entity showing that coverage has been extended.
- E. The contractor shall obtain from each person providing services on a project, and provide to the governmental entity:
 - 1) a certificate of coverage, prior to that person beginning work on the project, so the governmental entity will have on file certificates of coverage showing coverage for all persons providing services on the project; and

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- 2) no later than seven days after receipt by the contractor, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project.
- F. The contractor shall retain all required certificates of coverage for the duration of the project and for one year thereafter.
- G. The contractor shall notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the contractor knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project.
- H. The contractor shall post on each project site a notice, in the text, form and manner prescribed by the Texas Workers' Compensation Commission, informing all persons providing services on the project that they are required to be covered, and stating how a person may verify coverage and report lack of coverage.
- I. The contractor shall contractually require each person with whom it contracts to provide services on a project, to:
- 1) provide coverage, based on proper reporting of classification codes and payroll amounts and filing of any coverage agreements, which meets the statutory requirements of Texas Labor Code, Section 401.011(44) for all of its employees providing services on the project, for the duration of the project;
 - 2) provide to the contractor, prior to that person beginning work on the project, a certificate of coverage showing that coverage is being provided for all employees of the person providing services on the project, for the duration of the project;
 - 3) provide the contractor, prior to the end of the coverage period, a new certificate of coverage showing extension of coverage, if the coverage period shown on the current certificate of coverage ends during the duration of the project;
 - 4) obtain from each other person with whom it contracts, and provide to the contractor:
 - a) certificate of coverage, prior to the other person beginning work on the project; and
 - b) a new certificate of coverage showing extension of coverage, prior to the end of the coverage period, if the coverage period shown on the current certificate of coverage ends during the duration of the project;
 - 5) retain all required certificates of coverage on file for the duration of the project and for one year thereafter;
 - 6) notify the governmental entity in writing by certified mail or personal delivery, within 10 days after the person knew or should have known, of any change that materially affects the provision of coverage of any person providing services on the project; and

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- 7) contractually require each person with whom it contracts, to perform as required by paragraphs (1) - (7), with the certificates of coverage to be provided to the person for whom they are providing services.
- J. By signing this contract or providing or causing to be provided a certificate of coverage, the contractor is representing to the governmental entity that all employees of the contractor who will provide services on the project will be covered by workers' compensation coverage for the duration of the project, that the coverage will be based on proper reporting of classification codes and payroll amounts, and that all coverage agreements will be filed with the appropriate insurance carrier or, in the case of a self-insured, with the commission's Division of Self-Insurance Regulation. Providing false or misleading information may subject the contractor to administrative penalties, criminal penalties, civil penalties, or other civil actions.
- K. The contractor's failure to comply with any of these provisions is a breach of contract by the contractor which entitles the governmental entity to declare the contract void if the contractor does not remedy the breach within ten days after receipt of notice of breach from the governmental entity.

EXHIBIT C

CONFLICT OF INTEREST QUESTIONNAIRE

FORM CIQ

For vendor or other person doing business with local governmental entity

This questionnaire reflects changes made to the law by H.B. 1491, 80th Leg., Regular Session.

This questionnaire is being filed in accordance with chapter 176 of the Local Government Code by a person doing business with the governmental entity.

By law this questionnaire must be filed with the records administrator of the local government not later than the 7th business day after the date the person becomes aware of facts that require the statement to be filed. See Section 176.006, Local Government Code.

A person commits an offense if the person violates Section 176.006, Local Government Code. An offense under this section is a Class C misdemeanor.

OFFICE USE ONLY

Date Received

1 Name of person who has a business relationship with local governmental entity.

2 Check this box if you are filing an update to a previously filed questionnaire.

(The law requires that you file an updated completed questionnaire with the appropriate filing authority not later than the 7th business day after the date the originally filed questionnaire becomes incomplete or inaccurate.)

3 Name of local government officer with whom filer has an employment or business relationship.

Name of Officer

This section, (item 3 including subparts A, B, C & D), must be completed for each officer with whom the filer has an employment or other business relationship as defined by Section 176.001(1-a), Local Government Code. Attach additional pages to this Form CIQ as necessary.

- A. Is the local government officer named in this section receiving or likely to receive taxable income, other than investment income, from the filer of the questionnaire?
 Yes No
- B. Is the filer of the questionnaire receiving or likely to receive taxable income, other than investment income, from or at the direction of the local government officer named in this section AND the taxable income is not received from the local governmental entity?
 Yes No
- C. Is the filer of this questionnaire employed by a corporation or other business entity with respect to which the local government officer serves as an officer or director, or holds an ownership of 10 percent or more?
 Yes No
- D. Describe each affiliation or business relationship.

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Signature of person doing business with the governmental entity

Date