

DEVIATION FROM CONTRACTUAL SERVICES CONTRACT PROCESS

47966-08

Agency: Nebraska Department of Health and Human Services Date: December 10, 2009

Contract Number: _____ (please attach **DRAFT** contract)

Service To Be Provided:

The Nebraska Broadcasters Association will provide paid television and radio spots at a reduced rate under this agreement.

Are Commodities Involved? Yes _____ No X

Reason for Request of Waiver:

- 1. Sole Source – Sole availability at location
- X 2. Sole Source – Uniqueness of service
- 3. Emergency
- 4. Other Circumstances

Justification: The Nebraska Department of Health and Human Services was offered the opportunity to be one of six non-profit agencies to have a Non-Commercial Sustaining Announcement Agreement with the Nebraska Broadcasters Association (NBA). There is no other group/organization of TV/Radio stations in Nebraska.

The announcements that are aired are not public service announcements; they are paid announcements. Under the agreement, television and radio spots are produced quarterly. NBA member stations agree to run the announcements at a return rate of at least 4:1, which means HHS gets at least four spots for the price of one. For example, in the 3rd quarter of 2009, there were 12,022 spots shown for a monetary value of \$292,277 at a ratio of 17.9:1.

The agreement has been an important resource in getting messages to the public about child abuse/neglect, Earned Income Tax Credit, Positive Parenting, Shaken Baby Syndrome, ACCESSNebraska, Safe Sleep, Domestic Violence and Foster Parenting.

Funding: (Indicate Percentage) Estimated Dollar Amount of Contract: \$ 65,000

Federal 12.5%

State 87.5%

Signature of Requesting Agency Director: 

 Reviewed

Date: _____ AS Director: _____

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**NEBRASKA BROADCASTERS ASSOCIATION
NCSA PROGRAM AGREEMENT**

This State Broadcaster Association NCSA Program Agreement (this "Agreement") is made by and between the **Nebraska Department of Health and Human Services** (the "NCSA Sponsor") and the **Nebraska Broadcasters Association** (the "Association").

WITNESSETH

WHEREAS, the NCSA Sponsor is seeking to air certain audio and video announcements over radio and television stations throughout the State of Nebraska (the "State") on as effective and efficient a basis as possible; and

WHEREAS, the Association makes available various goods and services including, but not limited to, a bank of air time for the broadcast of Non-Commercial Sustaining Announcements ("NCSA Announcements") under its Non-Commercial sustaining Announcement Program ("NCSA Program"); and

WHEREAS, the Association is willing to make its NCSA Program available to the NCSA Sponsor on the terms and conditions stated herein and the NCSA Sponsor is willing to use the Association's NCSA Program on such terms and conditions ("this NCSA Program"); and

WHEREAS, it is the intent of the parties hereto that this transaction be treated as the NCSA Sponsor's acquisition by purchase of property and services for the direct benefit, as applicable, of the United States and/or of the State; and .

WHEREAS, it is the intent of the parties hereto that this transaction be an activity of the Association substantially related to its tax-exempt purposes.

NOW, THEREFORE, in consideration of the foregoing promises and the mutual covenants and agreements set forth herein, and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1. NCSA Program. The Association represents (a) that it has established an NCSA Program whereby member and non-member radio and television broadcast stations within the State (the Stations) donate air time and related services to the Association with the intent that the Association may make available such goods and related services to Federal, state and local governmental entities and non-profit entities; (b) that the Association may retain all proceeds from such goods and related services for the Association's tax-exempt purposes; and (c) that station participation in the NCSA Program is voluntary but the Association's experience demonstrates that its NCSA Program generally affords statewide coverage of NCSA Announcements over participating Stations (the Participating Stations).

2. Applicability of Agreement. This Agreement shall only apply to NCSA Announcements approved by, and provided by or on behalf of, the NCSA Sponsor (the "NCSA Announcements"). The Association and the Participating Stations shall have the right (but not the responsibility) to review the content of any NCSA Announcement(s) provided by the NCSA Sponsor prior to broadcast. When any NCSA Announcement is provided to the Association it will be accompanied by a written identification of the source of all materials included in the NCSA Announcement. In the event that the Association or a Participating Station determines, in its sole discretion, that the content of or materials included in any NCSA Announcement violates the obligations of the NCSA Sponsor under this Agreement, and specifically Sections 7 and 8, then the Association or the Participating Station shall have the right to reject the NCSA Announcement. The right to reject any NCSA Announcement shall continue despite the broadcast of the NCSA Announcement, in the event that the Association or a Participating Station determines, in its sole discretion, that the content of or materials included in any NCSA Announcement violates the obligations of the NCSA Sponsor under this Agreement, and specifically Sections 7 and 8. Neither the exercise of the right to review the NCSA Announcement(s) by the Association of the Participation Stations, or anything contained in this Agreement shall relieve the NCSA Sponsor of its obligations under this Agreement and specifically Sections 7, 8 and 9 of this Agreement.

3. Usual and Customary Efforts. The Association shall use its usual and customary efforts to achieve statewide broadcast of the NCSA Announcements through Participating Stations on the Value Ratio set forth in Schedule A. It is understood and agreed that there is no guarantee offered or given unless such guarantee is expressly provided for on Schedule A hereto. The Association, at no additional cost to the NCSA Sponsor, shall distribute the NCSA Announcements to all broadcast stations within the State for airing under this NCSA Program at times of day which each Participating Station believes will be reasonably effective and during the period(s) set forth on Schedule B hereto on the condition that the NCSA Sponsor delivers the NCSA Announcements to the Association on a timely basis and in adequate quantities of broadcast quality master or duplicate audio cassettes, reel to reel tapes or video tape cassettes, as specified in Schedule C hereto. Delivery on a timely basis as specified herein shall mean that the NCSA Announcements shall be delivered sufficiently in advance of any anticipated broadcast to allow the Association and the Participating Stations to conduct the review of content specified in Section 2 above. The NCSA Sponsor represents and warrants that the NCSA Announcements will be shipped either from the NCSA Sponsor's facilities or from any other facility chosen by the NCSA Sponsor. Any special association/station requirements are identified in Schedule C hereto.

4. Consideration. The NCSA Sponsor shall pay the Association the consideration identified in Schedule D hereto, within the time period(s) set forth in such Schedule D.

5. Payment Schedule. The NCSA Sponsor shall make prompt payments to the Association upon the NCSA Sponsor's receipt of the Association's statement/invoice (a) reciting that the Association has performed under the Agreement during the time period covered by the statement/invoice and that proof of broadcast, in a format described in Schedule D hereto, will be sent to the NCSA Sponsor as soon as practicable, but in no event later than forty-five (45) days after the date of the statement/invoice; and (b) setting forth the amount owed for the statement/invoice. The Association shall use its usual and customary efforts to obtain from each station participating in this NCSA Program proof of broadcast in the form specified in Schedule D, it being understood that the NCSA Sponsor agrees to be flexible given that each station's participation in this NCSA Program is strictly voluntary.

6. Failure of Performance. In the event of a failure of performance by the Association under Section 3 hereof, the Association shall use its usual and customary efforts to cause a reasonably adequate number of additional NCSA Announcements to be aired over Stations

then participating in this NCSA Program and/or provide the NCSA Sponsor with a reasonable amount in refund and/or credit, the specific remedial action (e.g. additional NCSA Announcements, partial refunds, credits for future payments) to be mutually agreed upon by the parties hereto. For purposes of this Section, a failure in performance shall mean a failure to meet a guarantee over the Term (as defined) if such a guarantee is expressly made in Schedule A, or in the event no guarantee is provided, a failure to achieve at least a two (2) to one (1) value ratio measured over such Term. It shall not be deemed to be a failure in performance if the Association or a Participating Station rejects an NCSA Announcement or Announcements with written notification of the deficiencies or defects which form the basis for the rejection and the NCSA Sponsor has failed to remedy or cure the deficiencies or defects within thirty (30) days of the date of said written notification. In the event of a failure to remedy or cure by the NCSA Sponsor, remedial action set forth in this Section, including any guarantee, shall not apply.

7. Grant of Rights. The NCSA Sponsor represents and warrants that it holds all interests, rights, licenses, sublicenses, assignments, permissions, approvals, waivers and clearances (collectively, "All Rights") necessary or appropriate for it to enter into this Agreement and to authorize the Association and each Participating Station in this NCSA Program to air the NCSA Announcements within the terms of this Agreement without further authority from, or obligation or liability to any person or legal entity. The NCSA Sponsor hereby grants to the Association and to each Participating Station all Rights to air the NCSA Announcements pursuant to the terms of this Agreement.

8. Compliance with Laws. The NCSA Sponsor and the Association shall comply, in all material respects, with all federal, state and local laws applicable to them relating to the subject of this Agreement. The NCSA Sponsor represents and warrants that no NCSA Announcement will contain any material (a) which violates the Communications Act of 1934, as amended (the "Act"), the rules, regulations or policies of the Federal Communications Commission ("FCC's Rules"), the Lanham Act or the Copyright Act, (b) which violates or infringes upon any copyright, patent, trademark, trade secret or other proprietary right or right of privacy of any person or entity, (c) which creates any right of response in favor of any person or entity, including, without limitation, a candidate for public office, (d) which is defamatory, (e) which is not covered by a duly issued synchronization license(s) or (f) which includes any music which is neither in the public domain or licensed by either ASCAP, BMI or SESAC. The NCSA Sponsor further represents and warrants that each NCSA Announcement will contain the closed captioning of the verbal contents of the announcements as required by Section 711 of the Act and the sponsorship identification tag required by the FCC's Rules and such tag shall be in a format that is understandable/readable to the average listener/viewer. The NCSA Sponsor shall include the following tag on all NCSA Announcements to comply with Section 73.1212 of the FCC's Rules: "Sponsored by the Nebraska Department of Health and Human Services and aired in cooperation with the Nebraska Broadcasters Association and this Station." The NCSA Sponsor shall cause the radio tag to be aural and the television tag to be made at least visually.

9. NCSA Sponsor's Indemnities. To the extent not limited by applicable Federal and/or State Law, the NCSA Sponsor agrees to indemnify, assume all risk, defend and hold the Association harmless from all liabilities, demands, claims, suits, losses, damages, causes of action, fines, or judgments and expenses (including, without limitation, interest, penalties, court costs and reasonable attorneys' fees) incident thereto for injuries to persons and for loss of , damages to, or destruction of property arising out of or in connection this Agreement and proximately caused by the negligent or intentional acts of omission of the NCSA Sponsor, its officers, employees, assignees, or agent, asserted against, resulting from, imposed upon or incurred by any of them directly or indirectly relating to or arising out of:

- (a) The breach by the NCSA Sponsor of any of its representations or warranties, or failure by the NCSA Sponsor to perform any of its covenants, conditions or agreements set forth in this Agreement;
- (b) Any and all claims, liabilities or obligations of any nature, absolute or contingent, relating to the business and operation of the NCSA Sponsor: and
- (c) A claim by any person or entity based on any arrangement or agreement to pay a commission, finder's fee or similar payment in connection with this Agreement made or alleged to have been made of the NCSA Sponsor.

Notwithstanding the foregoing, the indemnification obligation assumed by the NCSA Sponsor herein shall be limited to all liabilities, demands, claims, suits, losses, damages, causes of action, fines or judgments and expenses (Including, without limitation, interest, penalties, court costs and reasonable attorneys' fees) incident thereto for injuries to persons and for loss of, damages to, or destruction of property arising out of or in connection this Agreement and proximately caused by the negligent or intentional acts or mission of the NCSA Sponsor, its officers, employees, assignees, or agent, asserted against, resulting from, imposed upon or incurred by any of them directly or indirectly relating to or arising out of the breach by the NCSA Sponsor of any of its representations or warranties set forth in Sections 7 and 8 of this Agreement.

For the purposes of this Section, the term "Association" shall include the Association's officers, directors, employees, and agents; and "station" shall include the person or entity owning or operating the station which participates in this NCSA Program, and each Participating Station or other station broadcasting the NCSA Announcement, including its stockholders, partners, members, officers, directors, employees and agents.

10. Cooperation. The NCSA Sponsor and the Association shall cooperate fully with each other in taking any actions necessary or helpful to accomplish fully the transactions contemplated by this Agreement; provided, however, that no party shall be required to take any action which would have a material adverse effect upon it or any affiliated entity.

11. Effective Date. This Agreement shall become effective on the date first written above. The term shall begin on **January 1, 2010**, and continue to, and including, **December 31, 2010** (the "Term"). By affirmative mutual agreement of the parties, at least sixty days prior to the end of the Term or a one-year Renewal Term, this Agreement may be renewed for up to three additional one year terms, provided however, the Total Payments listed on Schedule D for a Second Renewal Term may be increased, at the option of the Association, to an amount not to exceed \$68,000, and the Total Payments listed on Schedule D for a Third Renewal Term may be increased, at the option of the Association, to an amount not to exceed \$72,000.

12. Termination. This Agreement may be terminated by mutual agreement of the parties hereto. Either party may terminate this contract for any reason upon the submission of written notice to the other party at least thirty (30) days prior to the effective date of termination.

13. Liability. The termination of this Agreement under Section 12 shall not relieve any party of any liability for breach of this Agreement prior to the date of termination.

14. Further Assurances. Each party shall from time to time, at the request of and without further cost or expense to the other, execute and deliver such other instruments and take such other actions as may reasonably be requested in order to more effectively consummate the transactions contemplated hereby.

15. Drug Free Workplace. The Association hereby assures the NCSA Sponsor that it will operate a drug-free workplace in accordance with State guidelines and has implemented a drug-free workplace policy, which is available to the NCSA Sponsor on request.

16. Lobbying.

(a) If the Association receives federal funds through the NCSA Sponsor, for full or partial payment under this Agreement, then no Federal appropriated funds will be paid, by or on behalf of the Association, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Agreement or (a) the awarding of any Federal Agreement; (b) the making of any Federal grant; (c) the entering into of any cooperative agreement; and (d) the extension, continuation, renewal, amendment, or modification of any Federal Agreement, grant, loan, or cooperative agreement.

(b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Agreement, the Association shall complete and submit Federal Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

17. Non-Discrimination. The Association agrees to comply fully with Title VII of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, Public Law 93-112, as amended; the Americans With Disabilities Act of 1990, Public Law 101-336; and the Nebraska Fair Employment Practice Act, as amended, in that there shall be no discrimination against any employee who is employed in the performance of this Agreement, or against any applicant for such employment, because of age, color, national origin, ancestry; race, religion, creed, disability, sex or marital status. This provision shall include, but not be limited to the following: employment, promotion, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. The Association agrees that no qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of the Association.

18. Federal Financial Assistance. The Association agrees that its performance under this Agreement will comply with all applicable provisions of 45 C.F.R. §87.1(2005) et seq. The Association further agrees that it shall not use direct federal financial assistance to engage in inherently religious activities, such as worship, religious instruction, and/or proselytization.

19. Access to Records and Audit Liability. All Association books, records, and documents relating to work performed or monies received under this Agreement shall be subject to audit at any reasonable time upon the provision of reasonable notice by the NCSA Sponsor. These records shall be maintained for a period of six (6) full years from the date of final payment, or until all issues related to an audit, litigation or other action are resolved, whichever is longer. All records shall be maintained in accordance with generally accepted accounting principles. The Association agrees to correct immediately any material weakness or condition reported to the NCSA Sponsor in the course of an audit.

20. Nebraska Technology Access Standards. The parties acknowledge and agree that this agreement does not involve the purchase of an automated information system, so the provisions of Nebraska Revised Statute Section 73-205 do not apply.

21. Benefit and Assignment. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns. No party may voluntarily or involuntarily assign its interest or delegate its duties under this Agreement without the prior written consent of the other party. In the absence of such written consent, any assignment or attempt to assign shall constitute a breach of this Agreement.

22. Headings. The headings set forth in this Agreement are for convenience only and will not control or affect the meaning or construction of the provisions of this Agreement.

23. Governing Law. The construction and performance of this Agreement shall be governed by the laws of the State of Nebraska without giving effect to the choice of law principles thereof.

24. Notices. All notices, elections and other communications permitted or required under this Agreement shall be in writing and shall be deemed effectively given or delivered upon personal delivery; or twenty-four (24) hours after delivery to a courier service which guarantees overnight delivery; or five (5) days after deposit with the U.S. Post Office, by registered or certified mail, postage prepaid. In the case of courier or mail delivery, notices, elections or other communications shall be addressed as follows (or at such other address for a party as shall be specified by like notice):

If to the NCSA Sponsor: Nebraska Department of Health and Human Services
Attn: Mike Wight
PO Box 95026
Lincoln, NE 68509

If to the Association: Nebraska Broadcasters Association
Attn: Marty Riemenschneider
12020 Shamrock Plaza, Suite 200
Omaha, NE 68154

25. Counterparts. This Agreement may be signed in counterpart originals, which collectively shall have the same legal effect as if all signatures had appeared on the same physical document. This Agreement may be signed and exchanged by facsimile transmission, with the same legal effect as if the signatures had appeared in original handwriting on the same physical document.

26. Material Reliance. The parties acknowledge and agree that the Association and each station participating in this NCSA Program is relying materially upon each of the representations, warranties and covenants of the NCSA Sponsor contained in this Agreement.

27. No Third Party Beneficiaries. Nothing herein expressed or implied is intended or shall be construed to confer upon or give to any person or entity other than (a) the parties hereto, (b) their successors or permitted assigns, and (c) the Participating Stations broadcasting the NCSA Announcements pursuant to this Agreement, any rights or remedies under or by reason of this Agreement.

28. Partial Invalidity. Wherever possible, each provision hereof shall be interpreted in such manner as to be effective and valid under applicable law, but in case any provision contained herein shall, for any reason, be held to be invalid or unenforceable, such provision shall be ineffective to the extent of such invalidity or unenforceability without invalidating the remainder of such provision or any other provisions hereof, unless such a construction would be unreasonable; provided, however, that if the removal of such offending provision materially alters the burdens or benefits of either party, the parties agree to negotiate in good faith such

modifications to this Agreement as are appropriate to insure the burdens and benefits of each party are reasonably comparable to those originally contemplated and expected.

29. Amendments and Waivers. This Agreement may not be modified except by amendment made in writing and signed by the duly authorized representative of both parties to this Agreement. A waiver by a non-breaching party hereto of a breach of any provision of this Agreement by the breaching party shall not operate or be construed as a waiver of any subsequent breach by the breaching party. No waiver shall be valid unless in writing and signed by a duly authorized representative of the non-breaching party.

30. Entire Agreement. This Agreement and the Schedules attached hereto and any ancillary documents provided for herein embody the entire agreement and understanding of the parties hereto relating to the matter provided for herein, and supersede any and all prior agreements, arrangements and understandings relating to the matters provided for herein.

31. NEW EMPLOYEE WORK ELIGIBILITY STATUS. The Contractor shall use a federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska. A federal immigration verification system means the electronic verification of the work authorization program authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1324a, known as the E-Verify Program, or an equivalent federal program designated by the United States Department of Homeland Security or other federal agency authorized to verify the work eligibility status of a newly hired employee.

If the Contractor is an individual or sole proprietorship, the following applies:

1. The Contractor must complete the United States Citizenship Attestation Form, available on the Department of Administrative Services website at www.das.state.ne.us.
2. If the Contractor indicates on such attestation form that he or she is a qualified alien, the Contractor agrees to provide the U.S. Citizenship and Immigration Services documentation required to verify the Contractor's lawful presence in the United States using the Systematic Alien Verification for Entitlements (SAVE) Program.
3. The Contractor understands and agrees that lawful presence in the United States is required and the Contractor may be disqualified or the contract terminated if such lawful presence cannot be verified as required by NEB. REV. STAT. § 4-108.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first above written.

NEBRASKA DEPARTMENT OF HEALTH & HUMAN SERVICES

By: Judd L Raskin
Title: Director, Division of Children & Family Services
Dated: 02/11/2010

NEBRASKA BROADCASTERS ASSOCIATION

By: Mary Rimmer
Title: President
Dated: 2/19/10

SCHEDULE A

The Value Ratio established in this Agreement shall be 4 to 1. The value of the air time used in the broadcast of the NCSA Announcements, measured at the General Market Rate, shall be equal to or shall exceed the amount of the Total Payments, set forth in Schedule D, by a ratio of 4 to 1.

General Market Rate shall mean a rate or rates determined either the actual rate or by an average of the rate that would be charged per Non-NCSA Announcement, as defined in this Schedule, established by the Participating Stations or negotiated with the Participating Stations in an arms-length transaction. The General Market Rates may be adjusted at any time by the Participating Stations.

For the purpose of Section 3 of this Agreement and this Schedule, Non-NCSA Announcement shall mean a commercial consisting of a self-contained message generally running from 30 seconds to 60 seconds in length.

SCHEDULE B

The broadcast schedule will be on a "run-of-station" (ROS) basis. A ROS schedule of announcements consists of announcements that are scheduled to run across multiple "dayparts," with no fixed position. "Dayparts" shall mean portions of the broadcast day divided into segments running from 6-10 am, 10 am-3 pm, 3 pm-7 pm, 7 pm-Midnight, Midnight- 6 am. NCSA Announcements will run 6 am-6 am Monday-Sunday on a space available basis at the discretion of the radio or television station.

SCHEDULE C

The NCSA Sponsor shall provide tapes as specified below and the Association shall distribute them to its stations. Sponsor may also choose to distribute radio commercials via the Internet. (MP3 files).

- 55 – CD's
- 12 Video Tapes—formats to be determined
- 1 - VHS TV Tape
- 1 Cassette Radio Tape or CD for NBA files.

SCHEDULE D

1. Quarterly Payments (4)

	Amount
Per quarter billing	\$16,250
Total Payments	\$65,000

2. The Association shall not be obligated to pay any commission or other fee to NCSA Sponsor or any other person or entity under this Agreement. Accordingly, the amounts specified above are net of any commissions due.

The Association's statements/invoices will be rendered to the NCSA Sponsor quarterly, within thirty (30) days of the end of the calendar quarter, based on the specifications set forth in Section 5 of the Agreement. The Association's statements/invoices, if received by the 30th day from the end of the calendar quarter and found to be in order, shall be paid by the 20th day of the following month.

A listing of stations airing announcements, the total number of announcements per quarter, and the total dollar value per quarter of said announcements, along with affidavits when requested will be submitted at the end of each quarter, and no later than the 30th day from the end of the calendar quarter.