

Contract Committee Review Request  
 MUST BE COMPLETED IN FULL

Date: 4/17/2024

Contract/Agreement Vendor: ACT / Theodore Murray

Name of Vendor & Contact Person  
 Theodore.Murray@act.org  
Vendor Email Address

PreACT test

Describe Contract (Technology, program, consultant-prof Development, etc.)

Please use Summary below to fully explain the contract purchase, any titles, and details for the Board of Education to review.

8th/9th Grade Students

Reason/Audience to benefit

5/6/2024  
BOE Date

\$ 51,696.00  
Amount of agreement

Person Submitting Contract/Agreement for Review: Jean Brassfield

**PLEASE SEND THROUGH APPROPRIATE APPROVAL ROUTING BEFORE SENDING TO BOARD CLERK**

Principal &/or Director or Administrator: *Jean Brassfield*

Does this Contract/Agreement utilize technology? YES/NO  YES  NO  
 If yes, Technology Admin: *AK*

Cabinet Team Member: *Karl Dyer*

Funding Source: Assessment      11-010-2240-810-000-0000-000-799  
Fund/Project      OCAS Coding

**Consent**

**Action**

New service agreement for ACT to administer the PreACT 8/9 to all students in grade 8 and 9 during the 2024-25 school year to set as a baseline and familiarize them with the test structure. Cost will be paid from the local assessment budget/010.

**Summary** This area must be complete with full explanation of contract

*The Contract/Agreement should be received at least 2 weeks prior to a Board Meeting to ensure placement on the Agenda. The Contract Committee meets most Tuesdays at 8:00a.m. All Contracts/Agreements, regardless the amount, must be first approved by the Contract Committee and then presented to the Board of Education for approval and signature. The item will be placed on Electronic School Board for the board agenda by Janet Brown. By following this process, the liability of entering into an agreement is placed with the district rather than an individual.*

## ACT® Master Services Agreement

This ACT Master Services Agreement, including all incorporated Exhibits ("Agreement"), is made as of the date of the last signature hereon ("Effective Date") by and between ACT, Inc. a non-profit corporation having a principal place of business at 500 ACT Drive, Iowa City, IA 52243 ("ACT") and BROKEN ARROW SCHOOL DISTRICT 3, having an address of 701 S MAIN ST, BROKEN ARROW, OK 74012-5528 ("Customer").

1. **Purpose.** ACT provides a variety of assessments, products, and services to help individuals achieve education and career success (as applicable, "Assessments," "Products," and "Services"). This Agreement provides the terms and conditions by which Assessments, Products, and/or Services are offered to Customer by ACT.
2. **Term.** This Agreement shall commence on July 1, 2024 and shall remain in effect through June 30, 2025.
3. **Payment Terms.** Customer agrees to pay ACT the amounts set forth in the Assessment, Products and/or Services Fee Schedule, attached hereto as Exhibit 1, for the delivery of Assessments, Products and/or Services selected by Customer. Customer shall make all payments within thirty (30) days of receipt of an invoice from ACT. Customer will pay a service fee of one percent (1%) per month or the maximum rate allowed by law, whichever is less, on any fees not paid when due under this Agreement. All invoices shall be sent to the billing address provided by Customer. Customer shall be responsible for any sales, use, or other taxes due as a result of any fees paid to ACT under this Agreement, unless Customer is exempt from tax as evidenced by a valid tax exemption certificate provided to ACT. Customer shall promptly provide ACT with Customer required purchase order, as applicable, prior to the scheduled delivery of Assessments, Products, and/or Services. Any terms that are contained in any Customer purchase order which are inconsistent with, different from, or supplemental to the terms of this Agreement shall be void and of no force or effect. ACT reserves the right to discontinue access to the electronic systems for Assessments, Products, and Services if payments are delinquent. ACT has no obligation to re-issue invoices, provide credits, or issue refunds.
4. **Ownership of Materials.** ACT owns or has license for the Assessments, Products, and Services, including but not limited to, the skill definitions on which assessments are based; paper-based or online assessment documents, paper-based or online testing materials; test questions, answer choice; administration and registration materials; publications; data; text, images, graphics, button icons, illustrations, graphics, photographs, audio clips, music, sounds, pictures, videos; software, code; look-and-feel, design, layout, organization, presentation, user interface, navigation, trade dress, and stylistic convention thereof or contained therein; the score resulting from an assessment; reports; documentation; training materials, course materials; related materials; and all intellectual property rights therein, including any and all derivatives or modifications thereof (collectively included within "ACT Materials"). ACT owns copyrights in the ACT Materials. The ACT Materials are licensed on a limited, revocable, non-exclusive and non-sublicensable manner, not sold to Customer. Except as expressly granted in this Agreement, Customer does not acquire any right, title, or interest in or to the ACT Materials. Customer shall not and shall not assist or permit any third party to (a) use the ACT Materials for any purpose other than as expressly permitted, (b) assign, license, sell, loan, lease, or otherwise transfer the ACT Materials in whole or in part, (c) authorize or allow a third party to use, sell, loan or lease the ACT Materials, (d) copy, reproduce, distribute, email, post, scan, make available, display publicly, transfer, sell, modify, enhance, reverse engineer, decompile, disassemble, make derivative works from, remove information from or make any addition to the ACT Materials, in whole or in part, or allow anyone else to do so, except as permitted in writing by ACT, (e) seek to register or protect, anywhere in the world, the ACT Materials (or seek to register or protect any designation confusingly similar to the ACT Materials), (f) challenge ACT's ownership in or the validity of the ACT Materials, or (g) modify, reverse engineer, decompile, or disassemble any ACT online system. Customer shall promptly notify ACT, in writing, of any known, threatened, or suspected infringement or unauthorized use of the ACT Materials by any third party. Customer's rights to the ACT Materials expressly terminate upon the termination of this Agreement. Customer may not sell, provide access to, or otherwise transfer the ACT Materials to any other person, provided however that Customer may provide the Assessments, Products, and Services to its designated personnel, participating testing sites ("Participating Testing Sites"), and examinees solely for testing and interpretation purposes consistent with the terms of this Agreement and any related agreement for the use of the Assessments, Products, and/or Services.
5. **Grant and Scope of License.** Subject to the terms and conditions of this Agreement, ACT hereby grants to Customer a revocable, non-exclusive and non-transferable license during the Term of the Agreement to: (a) access the Assessments, Products, and/or Services, as applicable, solely for the purpose of assessing the authorized examinees, (b) administer the Assessments, Products, and/or Services to the authorized examinees and students, and (c) use any ACT Materials presented to Customer by ACT pursuant to this Agreement, including but not limited to Assessments, Products, and/or Services and other materials as described herein in connection with an authorized use of the Assessments, Products, and/or Services. Customer may administer the Assessments, Products, and/or Services, as applicable, provided Customer abides by the terms and conditions set forth in this Agreement.

6. **Confidentiality.** Customer agrees that neither it nor its employees, representatives, or agents shall at any time during or following the Term of the Agreement, either directly or indirectly, publish, display or otherwise disclose to any person, organization, or entity in any manner whatsoever any ACT Materials, except as strictly necessary for Customer to use the ACT Materials as part of the Assessments, Products, and/or Services provided hereunder. Customer shall protect the ACT Materials in accordance with ACT's policies and procedures and using a standard of care appropriate for secure test materials, but in no event less than a reasonable standard of care. All ACT Materials are and remain the property of ACT notwithstanding the subsequent termination of this Agreement. Customer shall not store and must return any unused ACT Materials (and all copies, if any) as directed by ACT and in accordance with ACT's policies and procedures. In the event Customer receives a Freedom of Information Act, public record, or open record request for any confidential information covered by this Agreement, Customer agrees to immediately notify ACT of such request in writing. Customer shall immediately notify ACT in writing in the event of any unauthorized use or disclosure of the ACT Materials and assist in remedying such unauthorized use or disclosure, as requested by ACT (which shall not limit other remedies of ACT as provided in this Agreement or by applicable law). Customer acknowledges and agrees that damages may not be adequate to compensate for the breach of this section and accordingly, Customer agrees that, in addition to any and all other remedies available, ACT is entitled to obtain relief by way of a temporary or permanent injunction to enforce the obligations described in this section.

7. **Trademarks.** ACT owns trademarks including, but not limited to, "ACT," "PreACT 8/9," "PreACT," "PreACT Secure," "Mosaic by ACT," "WorkKeys," "NCRC," "National Career Readiness Certificate," and the certification marks, "Platinum," "Gold," "Silver" and "Bronze" (collectively the "Trademarks.") Except as specifically granted in this Agreement, Customer does not acquire any right, title, or interest in or to the Trademarks. The Trademarks may not be used without ACT's prior written consent, and any authorized use of the Trademarks shall be governed by ACT's Trademark Use Guidelines.

8. **U.S. Government Licenses.** The online components of the Assessments, Products, and Services are "commercial items," as that term is defined in 48 C.F.R. 2.101 (Oct. 1995), consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212 (Sept. 1995). Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4 (June 1995), all U.S. Government End Users acquire Assessments, Products, and Services with only those rights set forth herein.

9. **Updates and Modifications.** The Assessments, Products, and Services may be modified or updated from time to time at ACT's sole discretion. ACT shall make such modifications and updates available to Customer as they are developed. ACT reserves the right to charge a fee for any new functionalities available through revised Assessments, Products, and Services.

10. **Computer Requirements, Compatible Platforms and Hardware, and System Maintenance.** ACT will provide Customer with computer configuration and other requirements as applicable. Customer acknowledges and agrees that the computer configuration requirements are required to properly access and use the Assessments, Products, and Services and that ACT shall have no liability for matters relating to the failure to comply with these computer requirements. ACT may, in its sole discretion, revise these configuration requirements from time to time. Customer is responsible for obtaining and maintaining an appropriate operating environment with the necessary hardware, operating system software, network configurations, and other items required to use and access Assessments, Products, and Services. ACT is not responsible for any incompatibility between ACT Assessments, Products, and Services and any versions of operating systems, hardware, browsers, inadequate network configurations, or other products not specifically approved by ACT for Customer's use with the ACT Assessments, Products, and Services. Assessments, Products, and Services are subject to recurring maintenance windows, and occasionally unscheduled maintenance, during which servers may be taken offline. ACT shall not be responsible for any damages or costs incurred by Customer, if any, for such down time.

11. **Username and Passwords.** Access to the Assessments, Products, and/or Services shall be granted to only those Customer and Participating Testing Site staff and students that have been authorized to use the Assessments, Products, and/or Services by Customer. Each authorized staff member and examinee will be required to use a unique username and password to access the online platforms provided as part of the Assessments, Products, and Services. Staff and examinees may not share with or otherwise divulge their password to any other person. Access to the online platform is personal to the individual authorized staff member or examinee. Customer and Participating Testing Site staff accessing the online platforms must log in using an email address having a domain affiliated with Customer or Authorized Customer Location and may not impersonate any person or entity or falsely state or otherwise misrepresent to ACT their identity or affiliation with a person or entity.

12. **Use of Third Parties.** In the event ACT Assessments, Products, and/or Services are administered by a third party on behalf of Customer ("Third Party"), Customer enters into this Agreement on its own behalf and on behalf of the Third Party. Customer represents and warrants that it has the authority to bind the Third Party to this Agreement and that such Third Party is hereby bound by the terms and conditions of this Agreement as if it were Customer. Customer agrees that it shall be jointly and severally liable for all obligations of the Third Party.

13. **Restrictions.** Except as expressly permitted herein or under applicable ACT policies and/or procedures, Customer may not (a) use the ACT Materials for any other purpose; (b) assign, license, sell, loan, lease, or otherwise transfer the ACT Materials in whole or in part; (c) authorize or allow a third party to use the ACT Materials; (d) copy, or allow anyone else to copy, in whole or in part, the ACT Materials; (e) modify, reverse engineer, decompile, or disassemble the Assessments, Products, and/or Services, including the ACT Materials; (f) store the ACT Materials at any location other than a Customer-controlled location; or (g) retain excess paper test booklets after administration of a secure assessment.

14. **Data.** The parties acknowledge and agree that ACT may use and disclose the data collected from the administration of the Assessments, Products, and Services as set forth in ACT's Privacy Policy available at [www.act.org/privacy](http://www.act.org/privacy), as amended from time to time. Examinees may activate their online account after completion of the testing process and select their data privacy preferences in such account. ACT will honor the data sharing and privacy requests of such examinee.

15. **Limitation on Damages.** ACT's liability for damages arising out of or in connection with this Agreement shall not exceed the amount Customer has paid ACT during each annual Term. In no event shall ACT be liable to Customer for special, indirect, incidental, punitive, exemplary, or consequential damages.

16. **Warranty and Limitations.** EXCEPT FOR WARRANTIES EXPRESSLY SET FORTH HEREIN, ACT EXPRESSLY DISCLAIMS ANY AND ALL REPRESENTATIONS AND WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES REGARDING GUARANTEED UPTIME, WARRANTIES ARISING BY STATUTE OR OTHERWISE IN LAW OR FROM A COURSE OF DEALING OR USE OF TRADE, AND WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PURPOSE. CUSTOMER SHALL HAVE THE SOLE RESPONSIBILITY FOR ASSURING THAT ITS USE OF THE ASSESSMENTS, PRODUCTS OR SERVICES COMPLIES WITH FEDERAL, STATE AND LOCAL LAWS AND REGULATIONS AND ALL LABOR, EMPLOYEE, OR OTHER CONTRACTS OR PRACTICES TO WHICH IT IS A PARTY.

17. **Termination and Cancellation.** Either party may terminate this Agreement upon written notice to the other party in the event that other party breaches its obligations under this Agreement and fails to cure such breach within thirty (30) days after receiving written notice of such breach. This Agreement may also be terminated without cause at any time by either party giving thirty (30) days written notice to the other. Notwithstanding the above, if Customer fails to provide student registration information and organizational files to ACT by the deadline required by ACT, Customer's participation in the Assessments, Products, and/or Services, as applicable, will be automatically cancelled and this Agreement will be deemed terminated without further notice. Customer shall pay ACT for all Assessments, Products, and Services delivered through the date of termination. Upon termination of this Agreement for any reason, Customer shall immediately discontinue use of the ACT Materials and shall immediately return all copies of the ACT Materials in its possession. Upon the expiration or termination of this Agreement, the obligations set forth in the following provisions of the Agreement shall survive: Payment, Ownership of Materials, Confidentiality, Testing Procedures, Data, Limitation on Damages and Warranty and Limitations.

18. **Force Majeure.** ACT shall not be liable to Customer for any delay or failure to perform, which delay or failure is due to causes or circumstances beyond its control, including, without limitation, the actions of Customer, national emergencies, fire, flood, inclement weather, epidemics, or catastrophe, acts of God, governmental authorities, or parties not under the control of ACT, insurrection, war, riots, or failure of transportation, communication, or power supply. ACT shall exercise commercially reasonable efforts to mitigate the extent of the excusable delay or failure and its adverse consequences; provided, however, that should any such delay or failure continue for more than sixty (60) days, this Agreement may be terminated by either party upon notice to the other.

19. **Assignment.** This Agreement may not be assigned by Customer without the express prior written consent of ACT. No permitted assignment shall relieve Customer of its obligations under the Agreement.

20. **Relationship of the Parties.** The parties to this Agreement are independent contractors. Neither party shall have the right or authority or shall hold itself out to have the right or authority to bind the other party, nor shall either party be responsible for the acts or omissions of the other.

21. **No Third-Party Beneficiaries.** The parties agree that there are no third-party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against either of the parties based upon this Agreement.

22. **Severability; Headings; Governing Law.** Should any provision of this agreement be held by a court to be unenforceable, such provision shall be modified by the court and interpreted so as to best accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of the Agreement shall remain in full force and effect. Headings used in the Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement. This Agreement shall be governed by the laws of the State of Iowa.

23. **Entire Agreement.** This Agreement, including all incorporated Exhibits, constitutes the entire agreement between the parties with respect to the Assessments, Products, and/or Services, as applicable, and supersedes all other prior agreements and understandings, both written and oral. The terms and conditions contained in this Agreement are the only conditions applying to the delivery of the Assessments, Products, and Services. Except as may be incorporated in this Agreement, ACT expressly objects to and rejects any different or additional terms included in any request for proposal, quotation, purchase order, acknowledgment form, or other documents provided by Customer that purport to bind the parties. Certain Assessments, Products, and Services may be subject to additional or different terms and conditions as set forth below as supplemental terms and conditions. No waiver, consent, modification, or amendment to this Agreement shall be binding unless in writing and signed by both parties.

24. **Notices.** Notices under this Agreement shall be deemed to be adequate and sufficient notice if given in writing and delivered via (a) registered or certified mail, postage prepaid, in which case notice shall be deemed to have been received three business days following deposit to U.S. mail; or (b) a nationally recognized overnight air courier, next day delivery, prepaid, in which case such notice shall be deemed to have been received one business day following delivery to such nationally recognized overnight air courier. All notices shall be sent to ACT at the following address: ACT, Inc. 500 ACT Drive, P.O. Box 168, Iowa City, Iowa 52243-0168, Attention: General Counsel. All notices to Customer shall be sent to the address provided in the first paragraph of the Agreement.

**Assessments Supplemental Terms and Conditions.** The following supplemental terms and conditions for the PreACT® 8/9 Assessments, Products, and Services are incorporated into the Agreement, as applicable:

1. **Testing Procedures.** Customer and its Participating Testing Sites agree to administer the Assessments in accordance with all policies and procedures established by ACT, as may be updated from time to time. Customer agrees to store ACT Materials in secure location(s) defined and described by ACT. Customer agrees that all used and unused ACT Materials (and copies, if any) will be returned to ACT, in accordance with the policies and procedures established by ACT. In the event of a test security incident or use of the ACT Materials that conflicts with the requirements of this Agreement or ACT policies and procedures, Customer and its Participating Testing Sites agree to fully cooperate with ACT, and shall cause those individuals involved in the preparation, administration, or the return of the Assessments to fully cooperate with ACT. In the event ACT identifies testing irregularities, which may include but are not limited to the use of a compromised test form, falsification by an examinee of his or her identity, impersonation of another examinee (surrogate testing), unusual similarities in the answers of examinees at the same test center, or other indicators that the test scores may not accurately reflect the examinee's level of educational development, ACT reserves the right, in its sole and absolute discretion, to cancel all related or impacted test scores and notify Customer of that cancellation.

2. **Invoicing.** ACT will charge Customer the applicable unit price per examinee as defined in the Fee Schedule. Customer will be charged for the total number of paper answer documents processed, online and online remote proctored assessments launched. The Customer will be charged for each assessment if an examinee starts an assessment regardless of whether the assessment is completed in full. If an examinee starts any one of the sub-tests within an assessment, the unit price for the entire battery of the sub-tests within the assessment will be charged to Customer, regardless of whether the entire battery is completed. The quantity and total cost provided in the Fee Schedule are estimates and for planning purposes only. Customer will be invoiced for the Assessments and Services provided upon the conclusion of testing, or on the invoicing frequency identified in herein.

**Authorization.** Each party represents and warrants (a) that it has the requisite authority to enter into this Agreement; and (b) that the individual(s) signing this Agreement on behalf of such party is (are) authorized to do so.

**ACT, Inc.**

**BROKEN ARROW SCHOOL DISTRICT 3**

DocuSigned by:

*Blake Curwen*

Name: Blake Curwen

Title: Vice President

Date: 4/17/2024

Name:

Title:

Date:

**Exhibit 1**  
**Assessments, Products and/or Services Fee Schedule**  
**2024-2025 School Year**

<b>2024 - 2025 Fees</b>				
<b>Product Name</b>	<b>Grade Level</b>	<b>Per Unit Cost</b>	<b>Estimated Enrollment*</b>	<b>Estimated Cost</b>
PreACT	8/9	\$18.00	2872	\$51,696.00
<b>Total Cost*</b>				<b>\$51,696.00</b>

\*The quantity and total cost provided are estimates and for planning purposes only.