

**ST. CHARLES COUNTY, MISSOURI**

**Request for Proposal No. 14-089  
Next Generation 9-1-1 Cloud System**

**SAMPLE CONTRACT**

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**EXHIBITS**

- A Definitions
- B Project Schedule
- C Services Agreement

SAMPLE

**CONTRACT**

This Contract (hereinafter Contract) is entered into as of \_\_\_\_\_, 2014, by and between St. Charles County, Missouri (hereinafter, Owner) and \_\_\_\_\_, (hereinafter, Contractor), with reference to the definitions contained in Exhibit A attached hereto and the following facts:

**RECITALS**

A. The Next Generation 9-1-1 Cloud System (“System”) is a cloud-based 9-1-1 system with the required redundancy and capacity to serve eight (8) Public Safety Answering Points (“PSAPs”) in St. Charles County. The System is being developed through the cooperation of Owner’s dispatch and emergency management agencies and municipal governments located in St. Charles County.

B. Owner and the Contractor both intend for the Contractor to assume full responsibility and liability with respect to the design and implementation of the Project, and Owner and the Contractor both intend for the Contractor to indemnify and hold harmless Owner and others with respect to any defects in the Project.

C. Owner has adopted Ordinance No. \_\_\_\_\_ authorizing the County Executive, on behalf of Owner, to enter into a Contract with \_\_\_\_\_ for the services described herein.

NOW, THEREFORE, in consideration of the sums to be paid to Contractor by Owner, the foregoing premises and the covenants and agreements set forth herein, the parties agree as follows.

**1. CONTRACT COMPONENTS; INTERPRETATION OF CONTRACT DOCUMENTS**

**1.1 Definitions**

**Exhibit A** attached and incorporated herein contains the meaning of specific terms and acronyms used in the Contract Documents.

**1.2 Contract Documents**

The term “Contract Documents” shall mean the documents listed in Section 1.3, including all attachments, appendices and exhibits thereto which are attached and incorporated into this Contract.

**1.3 Order of Precedence**

Each of the Contract Documents is an essential part of the Contract, and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete Contract. In the event of any conflict among the Contract Documents, the order of precedence shall be:

1. Change Orders
2. Addenda
3. Book 1, the Contract, as executed by Owner and Contractor, including all attachments and exhibits.
4. Book 2, the Proposal, including all appendices and exhibits, except if the Proposal includes statements that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the Contract Documents or to perform services in addition to those otherwise required, Contractor’s obligations hereunder shall include compliance with all such statements, offers and terms.

Notwithstanding the foregoing, in the event of conflicting requirements involving any requirement within a Book or a reference contained within a Book of the Contract Documents, Owner shall have the right to determine, in its sole discretion, which requirement(s) apply. Contractor shall request Owner’s determination of the order of precedence among conflicting provisions upon becoming aware of any such conflict.

**1.4 Interpretations**

In the Contract Documents, where appropriate:

1. The singular includes the plural and vice versa;
2. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to as of the Proposal Due Date;
3. Words such as “herein,” “hereof,” and “hereunder” refer to the entire document in which they are contained and not to any particular provision or section;
4. Words not otherwise defined that have well-known technical or industry meanings are used in accordance with such recognized meanings;

5. References to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities; and
6. Words of any gender used herein include each other gender where appropriate.

Unless otherwise specified, lists contained in the Contract Documents defining the Project shall not be deemed all-inclusive. Contractor acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the Contract Documents and to bring to Owner's attention any conflicts or ambiguities contained therein. Contractor further acknowledges and agrees that it has independently reviewed the Contract Documents with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the Contract Documents. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be construed against the Person that prepared them, and instead other rules of interpretation shall be used. Owner's final answers to the questions posed during the Proposal process for the Contract shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except as they may clarify provisions otherwise considered ambiguous.

#### **1.5 Referenced Standards, Codes, or Criteria**

Except as otherwise specified in the Contract Documents, or otherwise directed by Owner, references to standards, codes, or criteria, or to the latest version of standards, codes, or criteria, shall mean the latest version in effect on the Proposal Due Date.

#### **1.6 Omission of Details; Clarification by Owner**

Contractor shall not take advantage of any apparent Error in the Contract. Should it appear that the Work to be done or any matter relative thereto is not sufficiently detailed or explained in the Contract Documents, Contractor shall apply to Owner in writing for such further written explanations as may be necessary and shall conform to the explanation provided by Owner. Contractor shall promptly notify Owner of all Errors that it may discover in the Contract Documents and shall obtain specific instructions in writing regarding any such Error before proceeding with the Work affected thereby.

#### **1.7 Computation of Periods**

References to "days" or "Days" contained in the Contract Documents shall mean Calendar Days unless specified otherwise. If the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice "within" a specified time period) falls on a non-Business Day, such act or notice may be timely performed on the next succeeding day that is a Business Day. Notwithstanding the foregoing, requirements contained in the Contract Documents relating to actions to be taken in the event of an emergency and any other requirements for which it is clear that performance is intended to occur on a non-Business Day, shall be required to be performed as specified, even though the date in question may fall on a non-Business Day. Unless otherwise specified, any deadline dates identified in the contract documents must be met by 3:00PM on that date.

**1.8 Standard for Approvals**

In all cases where approvals, acceptances or consents are required to be provided by Owner or approvals, acceptances or consents are required to be provided by Contractor, such approvals, acceptances, or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified, and shall not be unreasonably delayed if no response time is specified. In cases where sole discretion is specified, the decision shall not be subject to Dispute resolution hereunder.

**1.9 Completion Deadlines**

All references in the Contract Documents to Completion Deadlines shall be deemed to mean the Project Completion Deadline in Section 4.3.

SAMPLE

## **2 OBLIGATIONS OF CONTRACTOR**

### **2.1 Performance Requirements**

#### **2.1.1 Performance of Work**

All tasks, Materials, services, permits and efforts necessary to achieve Final System Acceptance on or before the Final System Acceptance Deadline shall be Contractor's sole responsibility, except as otherwise specifically provided in the Contract Documents. Subject to the terms of Section 13 of the Contract, the costs of all such tasks, Materials, services and efforts are included in the Contract Price.

#### **2.1.2 Performance Standards**

Contractor shall furnish the design of the Project in accordance with all professional principles and generally accepted standards of the industry (but at a minimum meeting the terms, conditions and requirements of the Contract Documents), and in accordance with the terms and conditions set forth in the Contract Documents; and shall complete the Project as designed in a good and workmanlike manner, free from defects.

#### **2.1.3 Performance as Directed**

At all times during the term hereof, including during the course of and notwithstanding the existence of any Dispute, Contractor shall perform as directed by Owner in a diligent manner and without delay, shall abide by Owner's decision or order, and shall comply with all applicable provisions of the Contract Documents. If a Dispute arises regarding such performance or direction, the Dispute shall be resolved in accordance with Section 19.

### **2.2 General Obligations of Contractor**

Contractor, in addition to performing all other requirements outlined in the Contract Documents, shall:

1. Furnish all design and other services, provide all materials and labor and undertake all efforts necessary or appropriate (excluding only those services, materials and efforts which the Contract Documents specify will be undertaken by other Persons):
  - i. to design and implement the Project and maintain it during implementation in accordance with the requirements of the Contract Documents, including the Project Schedule, all Legal Requirements, all Governmental Approvals, Applicable Standards, and all other applicable safety, licensing and other requirements, taking into account the constraints affecting the Project, so as to achieve Project Completion by the applicable Completion Deadlines; and
  - ii. otherwise do everything required by and in accordance with the Contract Documents.
2. At all times provide a Contractor Project Manager, Approved by Owner. Contractor Project Manager:
  - i. shall have full responsibility for the prosecution of the Work including oversight of Quality Management pursuant to Section 5.5 herein;

- ii. shall act as agent and be a single point of contact in all matters on behalf of Contractor;
  - iii. shall be available (or his Approved designee shall be present) at all times that Work is performed at a Site within 1 hour notice; and
  - iv. shall have authority to bind Contractor on all matters relating to the Project.
3. Provide such assistance as is reasonably requested by Owner in dealing with any Person and/or in prosecuting and defending lawsuits in any and all matters relating to the Project, which may include providing information and reports regarding the Project, executing declarations and attending meetings and hearings, but which shall in no event be deemed to require Contractor to provide legal services. If the amount of time required to provide assistance becomes unreasonable, Owner may request such assistance at the cost of Owner.
4. Obtain all Government Approvals.
5. Comply with all applicable Legal Requirements.
6. Comply with all Applicable Standards.
7. Cooperate with Owner, Users and Governmental Persons with jurisdiction over the Project in the review and oversight of the Project and relating to the Work.
8. Payments to third parties required by the Contract Documents, if any.
9. Supervise and be responsible to Owner for acts and omissions of all Contractor-Related Entities, as though Contractor directly employed all such Persons.
10. Mitigate delay to the Project and mitigate damages due to delay in all circumstances, to the extent possible.
11. Pay all applicable federal, State, and local, consumer, use, and similar taxes, property taxes and any other taxes, fees, charges, or levies imposed by a Governmental Person, whether direct or indirect, relating to or incurred in connection with the performance of the Work.
12. Supply sufficient labor, Material and Equipment and pay when due any laborer, subcontractor or supplier for supplies furnished and otherwise prosecute the Work with diligence to prevent work stoppage and insure completion thereof within the time specified.
13. If the Contractor uses any design, device or materials covered by letter, patent or copyright, the Contractor shall provide for such use by suitable agreement with the owner of such patented or copyrighted design, device or material. It is mutually agreed and understood, without exception, that the Contract Price shall include all royalties or costs arising from the use of such design, device or materials, in any way involved in the Work.
14. The Contractor's submittals must be submitted with such promptness as to allow for review and approval so as not to cause delay in the Work. The Contractor shall coordinate preparation and processing of submittals with performance of all other Work.

**2.3 Representations, Warranties, and Covenants**

Contractor represents, warrants, and covenants for the benefit of Owner and Users as follows:

**2.3.1 Maintenance of Professional Qualifications**

Contractor and its design Subcontractor(s) shall maintain, throughout the term of the Contract and its design Subcontract(s) all required authority, license status, professional ability, skills and capacity to perform the Work, and shall perform them in accordance with the requirements of the Contract Documents.

**2.3.2 Evaluation of Constraints**

Contractor has evaluated the constraints affecting delivery of the Project and has reasonable grounds for believing and does believe that the Project can be delivered within such constraints.

**2.3.3 Feasibility of Performance**

Contractor has evaluated the feasibility of performing the Work within the time specified herein and for the Contract Price, and has reasonable grounds for believing and does believe that such performance (including achievement of Project Completion and Final System Acceptance by the applicable Deadlines, for the Contract Price) is feasible and practicable.

**2.3.4 Progression of Work**

Contractor shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve Final System Acceptance by the applicable Deadline and in accordance with the Project Schedule, including furnishing such employees, Materials, facilities and equipment and working such hours (including extra shifts, overtime operations, Sundays and Holidays) as may be necessary to achieve such goals, all at Contractor's own expense.

**2.3.5 Employee Performance Requirements**

All employees shall have the skill and experience and any licenses or certifications required to perform the Work assigned to them. If Owner determines in its sole discretion that any Person employed by Contractor or by any Subcontractor is not performing the Work properly and skillfully, then, at the written request of Owner, Contractor or Subcontractor shall remove such Person and such Person shall not be re-employed on the Project without the prior written approval of Owner. If Contractor or Subcontractor fails to remove such Person(s) or fails to furnish skilled and experienced personnel for the proper performance of the Work, then Owner may, in its sole discretion, suspend the affected portion of the Work by delivery of written notice of such suspension to Contractor. Such suspension shall in no way relieve Contractor of any obligation contained in the Contract Documents or entitle Contractor to a Change Order. Once compliance is achieved, Contractor shall be entitled to and shall promptly resume the Work.

**2.3.6 Organization**

Contractor is duly organized and validly existing under the laws of the Missouri, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. Contractor is duly qualified to do business, and is in good standing, in the State of Missouri, and shall remain in good standing until Notice of Final System Acceptance and for as long thereafter as any Contract obligations remain outstanding.



**2.3.7 Authorization**

The execution, delivery, and performance of the Contract have been duly authorized by all necessary actions of Contractor, and, if applicable, Contractor's members, and shall not result in a breach or a default under the organizational documents of any such organization or any indenture, loan, credit agreement, or other material agreement or instrument to which any such person is a party or by which its properties and assets may be bound or affected.

**2.3.8 Legal, Valid, and Binding Obligation**

The Contract constitutes the legal, valid, and binding obligation of Contractor and, if applicable, of each member of Contractor.

**2.3.9 False or Fraudulent Statements and Claims**

By signing the Contract, Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the Contract.

**3 RESPONSIBILITY FOR DESIGN**

**3.1 Responsibility for Design**

Contractor agrees that it has full responsibility for the design of the Project and that Contractor shall furnish the design of the Project.

**3.2 Professional Licensing Laws**

Owner does not intend to contract for, pay for, or receive any design services that are in violation of any State of Missouri professional licensing laws, and by execution of the Contract, Contractor acknowledges that Owner has no such intent. It is the intent of the parties that Contractor is fully responsible for furnishing the design of the Project. Any references in the Contract Documents to Contractor's responsibilities or obligations to "perform" the design portions of the Work shall be deemed to mean that Contractor shall "furnish" the design for the Project.

#### 4 TIME WITHIN WHICH PROJECT SHALL BE COMPLETED; SCHEDULING

##### 4.1 Time of Essence

Time is of the essence in the performance of the Contract.

##### 4.2 Notices to Proceed (“NTP”)

NTP1	Notice to Proceed 1 – Includes the Work (services and equipment) required to complete all project planning elements; engineered system design, project schedule, equipment list, scope of services, test plans, etc.
NTP2	Notice to Proceed 2 – Includes the Work (services and equipment) required to prepare for and complete System configuration including data validation and System programming and installation
NTP3	Notice to Proceed 3 – Includes the Work (services and equipment) required to prepare for and complete testing of the services and equipment at all PSAP Sites
NTP4	Notice to Proceed 4 – Includes the Work (services and equipment) required to prepare for and complete training at all PSAP Sites
NTP5	Notice to Proceed 5 – Includes the Work (services and equipment) required to prepare for and complete Final System Acceptance, including the migration of all agencies to the System and the successful completion of Final System Acceptance Test prior to the start of Warranty and the Maintenance Agreement.

##### 4.2.1 Issuance of Notice-to-Proceed 1

Work may not commence until Owner issues a written Notice to Proceed. Contractor shall begin performance of certain limited Work as directed and described in Notice-to-Proceed 1 (NTP1) issued by Owner. NTP1 Work that may be performed includes all Work required to achieve Project Schedules, System Design, Test Plans and Definition of Equipment List (Services, Design & Equipment Quantities). NTP1 will be issued within five (5) Business Days of execution of the Contract by Owner, provided that Owner has received from Contractor the Bonds and insurance certificates as required in Book 1, Sections 8 and 9.

##### 4.2.2 Issuance of Notices-to-Proceed 2 through 5.

Contractor shall begin performance of each subsequent phase of the Work as directed and described in each Notice to Proceed issued by Owner. Work may not commence on a subsequent phase until Owner issues a written Notice to Proceed following Acceptance and Approval of the preceding NTP scope of work (which shall include a list of all Work required to achieve that NTP).

Upon completion of the tasks authorized by each NTP, Contractor shall submit results to Owner for written Approval. After review of the Work for compliance, Owner shall provide written Approval if all requirements are met. Owner shall then issue the subsequent NTP.

The Services Agreement (**Exhibit C**), including its warranty and maintenance provisions, shall commence upon Final System Acceptance.

#### 4.3 Completion Deadlines

##### 4.3.1 Project Completion Deadline

Contractor shall achieve Project Completion by **January 15, 2015**. Said deadline for Project Completion, as it may be extended hereunder, is referred to as the “Project Completion Deadline” as defined in Sections 20.1 and 20.2.

##### 4.3.2 Final System Acceptance Deadline

Contractor shall achieve Final System Acceptance following Approval of the Final Acceptance Test (including the 90-day post-implementation testing period) with the migration of all PSAPs to the System. Said deadline for Final System Acceptance, as it may be extended hereunder, is referred to as the “Final System Acceptance Deadline.”

##### 4.3.3 No Time Extensions

Except as otherwise specifically provided in Section 13, Owner shall have no obligation to extend any Completion Deadline and Contractor shall not be relieved of its obligation to comply with the Project Schedule and the applicable Project Completion and Final System Acceptance Deadlines for any reason.

#### 4.4 Project Schedule

Contractor shall deliver the Work in accordance with **Exhibit B**, the Project Schedule.

#### 4.5 Prerequisites for Start of System Configuration

Contractor shall not start implementation, including without limitation data validation and/or System programming (or resume System configuration following any suspension) of any portion of the Project until all the following events have been fully satisfied with respect to the Work proposed to be done.

1. Owner has issued NTP2.
2. All Governmental Approvals necessary for such portion of the Project have been obtained and all conditions of such Governmental Approvals that are a prerequisite to commencement of such Work have been performed.
3. All insurance policies and bonds required to be delivered to Owner hereunder have been submitted to Owner as applicable and remain in full force and effect.
4. Any additional conditions for performance of the Work as set forth in the Contract Documents.

## **5 CONTROL OF WORK**

### **5.1 Control and Coordination of Work**

Contractor shall be solely responsible for and have control over the means, methods, techniques, sequences, procedures, and coordination of all portions of the Work under the Contract Documents, subject to all requirements contained in the Contract Documents.

### **5.2 Obligation to Minimize Impacts**

Contractor shall ensure that all of its Activities and the Activities of all Contractor-Related Entities are undertaken in a manner that will minimize the effect on the PSAP Sites, surrounding property and the public to the maximum extent practicable.

### **5.3 Quality Management**

#### **5.3.1 Contractor Quality Management**

Contractor shall coordinate and be responsible for the quality management necessary for Contractor to comply with its obligations under the Contract Documents.

#### **5.3.2 Oversight, Audit, Inspection, and Testing by Owner and Others**

All Materials and each part or detail of the Work shall also be subject to oversight, audit and testing by Owner and other Persons designated by Owner. Contractor hereby consents to such oversight, inspection and testing by Owner and other Persons. Upon request from Owner, Contractor shall furnish information to such Persons as are designated in such request and shall permit such Persons access to the Sites and all parts of the Work.

### **5.4 Effect of Oversight, Spot Checks, Audits, Tests, Acceptances, and Approvals**

#### **5.4.1 Oversight and Acceptance**

Contractor shall not be relieved of its obligation to perform the Work in accordance with the Contract Documents, or any of its other obligations under the Contract Documents, by oversight, spot checks, audits, reviews, tests, inspections, Acceptances, Approvals, or Approvals by any Persons, or by any failure of any Person to take such action. The oversight, spot checks, audits, reviews, tests, inspections, Acceptances, Approvals, and Approvals by any Person do not constitute Final System Acceptance of the particular material or Work, or waiver of any legal or equitable right with respect thereto. Owner may reject or require Contractor to remedy any Nonconforming Work and/or identify additional Work which shall be done to bring the Project into compliance with Contract requirements at any time prior to Final System Acceptance, whether or not previous oversight, spot checks, audits, reviews, tests, inspections, acceptances, or Approvals were conducted by any Person.

#### **5.4.2 No Estoppel**

Owner shall not be precluded or estopped, by any oversight or spot check pursuant to the preceding section made either before or after Final System Acceptance and payment therefor, from showing that any such oversight or spot check is incorrectly made or untrue, or from showing the true amount and character of the Work performed and materials furnished by Contractor, or from showing that the Work or materials do not conform in fact to the

requirements of the Contract Documents. Notwithstanding any such oversight or spot check made in accordance therewith, Owner shall not be precluded or estopped from recovering from Contractor and its Surety or Sureties such damages as Owner may sustain by reason of Contractor's failure to comply or to have complied with the terms of the Contract Documents.

## **5.5 Nonconforming Work**

### **5.5.1 Rejection, Removal, and Replacement of Work**

Subject to Owner's right, in its sole discretion, to accept or reject Nonconforming Work, Contractor shall remove and replace rejected Nonconforming Work so as to conform to the requirements of the Contract Documents, at Contractor's expense and without any time extension. Contractor shall promptly take all action necessary to prevent similar deficiencies from occurring in the future. The fact that Owner may not have discovered the Nonconforming Work shall not constitute Acceptance of such Nonconforming Work. If Contractor fails to correct any Nonconforming Work within five (5) days of receipt of Notice from Owner requesting correction, Owner may cause the Nonconforming Work to be remedied or removed and replaced, and may deduct the cost of doing so from any moneys due or to become due Contractor and/or obtain reimbursement from Contractor for such cost. For Nonconforming Work which cannot be corrected within five (5) days, Contractor shall provide to Owner a schedule for correcting any such Nonconforming Work Approved by Owner within such five-day period, begin correction within such five-day period and thereafter diligently prosecute such correction to completion in accordance with such Approved schedule. If Contractor fails to take such steps when the correction requires more than five (5) days, Owner may cause the Nonconforming Work to be remedied or removed and replaced, and may deduct the cost of doing so from any moneys due or to become due Contractor and/or obtain reimbursement from Contractor for such cost.

### **5.5.2 Nonconforming Work Pay Adjustment**

Owner may, in its discretion, accept any Nonconforming Work without requiring it to be fully corrected, and shall be entitled to a pay adjustment or reimbursement of a portion of the Contract Price in an amount determined by Owner. However, it may not be possible for some Nonconforming Work to be made to conform to the requirements of the Contract Documents. In general, the pay adjustment (or reimbursement) shall equal, at Owner's election:

1. the amount allocated to such Work pursuant to Section 11.2;
2. Contractor's cost savings associated with its failure to perform the Work in accordance with the Contract requirements; or
3. the amount deemed appropriate by Owner to provide compensation for impacts to affected parties such as future maintenance and/or other costs relating to the Nonconforming Work.

In certain events, Owner shall be entitled to a pay adjustment or reimbursement as expressly set forth in the Contract Documents. Such reimbursement shall be deducted from future payments or, if future payments are insufficient to cover the amount owed by Contractor, shall be payable to Owner within thirty (30) days after Contractor's receipt of an invoice therefor.

**6 ACCESS TO SITES**

Concurrently with review of the Project Schedule, Contractor and Owner shall discuss the access requirements for the PSAP Sites associated with the scheduled Activities. Contractor shall be provided access to the PSAP Sites as agreed upon by the parties.

**7 EQUAL EMPLOYMENT OPPORTUNITY; SUB-CONTRACTS; LABOR**

**7.1 Equal Employment Opportunity**

**7.1.1 Equal Employment Opportunity Policy**

Contractor confirms that it has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or disability; and that it maintains no employee facilities segregated on the basis of race, color, religion or national origin. Contractor shall comply with Owner's Equal Employment Opportunity Policy and with all applicable federal, state and local laws relating to equal employment opportunity.

**7.1.2 Non-Discrimination**

During the performance of this Contract, Contractor agrees as follows:

1. Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age or disability. Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, national origin, age or disability. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; selection for training, including apprenticeship. Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.
2. Contractor shall, in all solicitations or advertisements for employees placed by or on behalf of Contractor, state that all qualified applicants shall receive consideration for employment without regard to race, color, religion, sex, national origin, age or disability.
3. In the event of Contractor's non-compliance with the non-discrimination clause of this Contract, this Contract may be canceled, terminated, or suspended in whole or in part, and Contractor may be declared ineligible for future Owner contracts. The rights and remedies of Owner provided in this paragraph shall not be exclusive and are in addition to any other remedies provided in this Contract or as provided by law.

Contractor shall include the provisions of this Section in every Subcontract so that such provisions shall be binding upon each Subcontractor or vendor.

**7.2 Subcontracting Requirements**

Contractor shall comply with all applicable requirements of the Contract Documents relating

to Subcontracts, and shall ensure that all Subcontractors performing Work on the Project comply with all applicable requirements of the Contract Documents relating to subcontracting. Contractor shall not add, delete, or change the role of, any Major Participant without the prior written Approval of Owner.

Contractor shall be responsible for ensuring that his Subcontractors do not, in turn, Subcontract any portion of the work.

### **7.3 Assignment of Subcontract Rights**

Each Subcontract shall provide that, pursuant to terms in form and substance satisfactory to Owner:

1. Owner is a third party beneficiary of the Subcontract and shall have the right to enforce all terms of the Subcontract for its own benefit; and
2. all guarantees and warranties, express and implied, shall inure to the benefit of Owner and Users as well as Contractor.

Any acceptance of assignment of a Subcontract from Owner, its successor(s), or assign(s) shall not operate to make the assignee(s) responsible or liable for any breach of the Subcontract by Contractor or for any amounts due and owed under the Subcontract included in an invoice paid by Owner.

### **7.4 Subcontract Terms**

Each Subcontract shall include terms and conditions sufficient to ensure compliance by the Subcontractor with all applicable requirements of the Contract Documents, and shall include provisions addressing the following requirements as well as any other terms that are specifically required by the Contract Documents to be included therein.

Each Subcontract shall include terms requiring an agreement by the Subcontractor to be joined in any Dispute resolution proceeding pursuant to Section 19 if such joinder is reasonably necessary to resolve the Dispute.

### **7.5 Subcontract Data**

Contractor shall notify Owner, in writing, of the name and address of, and licenses held by, each Subcontractor (including Suppliers), as soon as the potential Subcontractor has been identified by Contractor, but in no event less than fourteen (14) days prior to the scheduled initiation of Work by such proposed Subcontractor. Contractor shall provide Owner with a list of its Subcontractors upon request by Owner, shall allow Owner access to all Subcontracts and records regarding Subcontracts and shall deliver to Owner, within ten (10) days after execution, copies of all Subcontracts with Major Participants and, within ten (10) days after receipt of a request from Owner, copies of all other Subcontracts.

### **7.6 Responsibility for Work by Subcontractors**

Notwithstanding any Subcontract or agreement with any Subcontractor, Contractor shall be fully responsible for all of the Work. Owner shall not be bound by any Subcontract, and no Subcontract shall include a provision purporting to bind Owner.

**7.7 Key Personnel**

**7.7.1 Key Personnel**

Key Personnel shall include Contractor Project Manager and certain additional key positions for the Project which Contractor may add, with Owner's Approval, at no cost to Owner. Owner shall have the right to review the qualifications and character of each individual to be assigned to a key position (including personnel employed by Subcontractors) and to Approve or deny use of such key Person prior to the commencement of any Work by such individual or during the prosecution of the Work. Contractor shall notify Owner in writing of any proposed changes in any Key Personnel and shall include a resume of same. Contractor shall not change any Key Personnel without the prior written Approval of Owner.

**7.7.2 Representations, Warranties, and Covenants**

Contractor acknowledges and agrees that the award of the Contract by Owner to Contractor was based, in large part, on the qualifications and experience of its personnel as indicated in the Proposal, and Contractor's commitment that such individuals would be available to undertake and perform the Work. Contractor represents, warrants, and covenants that such individuals are available for and shall fulfill the roles identified for them in the Proposal. Unless otherwise agreed to by Owner in writing, individuals filling Key Personnel roles shall devote the required amount of their time for the applicable role, and Contractor shall document such commitment to Owner's satisfaction upon Owner's request.

**7.8 Character of Workers**

If Owner determines in its sole discretion that any Person employed by Contractor or by any Subcontractor is intemperate or disorderly, then, at the written request of Owner, Contractor or such Subcontractor shall remove such Person and such Person shall not be re-employed on the Project without the prior written Approval of Owner in its sole discretion. If Contractor or the Subcontractor fails to remove such Person(s), then Owner may, in its sole discretion, suspend the affected portion of the Work by delivery of written notice of such suspension to Contractor. Such suspension shall in no way relieve Contractor of any obligation contained in the Contract Documents or entitle Contractor to a Change Order. Once compliance is achieved, Contractor shall be entitled to and shall promptly resume the Work.

**7.9 Employment Eligibility**

Contractor shall provide to County an affidavit showing that it participates in a federal work authorization program with respect to employees working on the System, as required by Section 285.530(2) RSMo. Contractor shall not knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Missouri.



## 8 SURETY BONDS

### Labor and Material Bonds

Per Section 107.170 RSMo., Contractor shall provide to Owner and maintain at all times during the term of the Contract security for performance of the Work as described below (or other assurance satisfactory to Owner in its sole discretion). Each bond required hereunder shall be provided by a Surety licensed as surety and qualified to do business in the State. Such bonds, among other conditions, shall be conditioned for the payment of any and all materials, incorporated, consumed or used in connection with the construction of such work, and all insurance premiums, both for compensation, and for all other kinds of insurance, said work, and for all labor performed in such work whether by subcontractor or otherwise. **These bonds must be filed with the Purchasing Manager prior to the commencement of work.**

#### 8.1 Performance Bond

Contractor has provided the Performance Bond in the amount of 100% of the Contract Price in accordance with Section 3.9 of the RFP.

#### 8.2 Bid Bond

Contractor has provided the Bid Bond in accordance with Section 3.9 of the RFP. The bid guaranty, whether check or Bid Bond, shall be retained until this Contract has been fully executed by the parties, all insurance requirements met, and the Performance Bond furnished pursuant to Section 8.1. Upon completion of the foregoing requirements, the check or Bid shall be returned.

#### 8.3 Replacement of Performance Bond

Provided that all conditions to Final System Acceptance have occurred, Contractor shall have the right to replace the Performance Bond with a replacement Performance Bond in an amount and in a form satisfactory to Owner in its sole discretion, provided that it shall not be required to exceed five percent (5%) of the Contract Price, or with such other security as is Approved by Owner in its sole discretion. This security shall guarantee due and punctual performance of all obligations of Contractor that survive Final System Acceptance.

#### 8.4 No Relief of Liability

Notwithstanding any other requirements of the Contract Documents, performance by a Surety of any of the obligations of Contractor shall not relieve Contractor of any of its obligations.

**9 INSURANCE**

**9.1 General Insurance Requirements**

**9.1.1 Evidence of Insurance**

Contractor shall provide evidence of insurance as proof of compliance for all insurance requirements contained in this Section 9. These insurance requirements are applicable to Contractor only. When Contractor requires a Subcontractor to obtain insurance coverage, the types and minimum limits of coverage may be different than those required in this Section 9. Contractor's insurance shall cover all of the Work under this Contract, whether the Work is performed by Contractor or its Subcontractors. Contractor's insurance shall cover the entire Project. The evidence of insurance shall provide for ten (10) days written notice of cancellation for nonpayment of premiums, or forty-five (45) days written notice of cancellation for any other reason, including non-renewal. Contractor shall delete the phrase "will endeavor to" preceding all references to provisions of notice by the insurance company in the evidence of insurance. A Certificate of Insurance indicating certain specified amendments and attachments shall be acceptable, but Owner reserves the right to request a complete certified copy of the policy, at Owner's sole discretion. No Work shall start until proof of insurance has been submitted to Owner. If the insurance required by this Section 9 should become no longer commercially reasonable, as determined by Owner, Owner will work with Contractor to find commercially reasonable alternatives to the required coverages that are acceptable to Owner.

**9.1.2 A.M. Best Rating**

All insurance companies providing policies obtained to satisfy the insurance requirements shall have an A.M. Best rating of A- or better.

**9.1.3 Full Force and Effect**

The commercial general liability, excess (umbrella) liability, and professional liability insurance coverage requirements shall remain in full force and effect until Project Final System Acceptance at which time Contractor shall maintain completed operations insurance throughout the term of all warranties or as otherwise required by the Contract Documents, whichever is greater.

**9.1.4 No Recourse**

There shall be no recourse against Owner for payment of premiums or other amounts with respect to the insurance provided by Contractor, or for deductibles under these policies. This provision does not affect any rights Contractor is entitled to pursuant to Section 13.

**9.1.5 Indemnification**

The insurance coverage provided hereunder shall support, but is not intended to limit, Contractor's indemnification obligations under Section 18.

**9.2 Contractor Provided Insurance**

Contractor shall procure, at its own expense, insurance acceptable to Owner, as described herein, and shall maintain such insurance in accordance with the requirements stated in Section 9.1, or as otherwise Approved by Owner in its sole discretion.

**9.2.1 Workers' Compensation and Employer's Liability Coverage**

Contractor shall furnish evidence to Owner that, with respect to the Work, Contractor carries workers' compensation insurance, or is qualified to by the Missouri Division of Workers' Compensation as self-insured, and carries insurance for employer's liability sufficient to comply with all obligations under state laws relating to workers' compensation and employer's liability. Contractor shall require each Subcontractor on the Project to make the same evidence available to Owner at Owner's request. This evidence shall be furnished to and Approved by Owner prior to the time Contractor commences Work on any Site or furnished and Approved by Owner at the time it is requested for a Subcontractor.

**9.2.2 Commercial General Liability Insurance**

Contractor shall provide commercial general liability broad form coverage for bodily injury, property damage, personal injury and advertising liability written on an occurrence form that shall be no less comprehensive or more restrictive than the coverage provided by Insurance Services Office (ISO) for CG 00 01 10 01.

1. Limits of liability. General liability:
  - i. \$2.5 million - each occurrence.
  - ii. \$2.5 million - general aggregate (annually). The general aggregate limit shall apply separately to the Project.
  - iii. \$2.5 million - personal injury/advertising liability.
  - iv. \$2.5 million - products/completed operations liability.
2. Such insurance shall include, by its terms or appropriate endorsements, bodily injury, property damage, legal liability, personal injury, blanket contractual, independent contractors, premises, operations and products and completed operations.
3. Products and completed operations coverage shall be continued for a minimum of five (5) years from Final System Acceptance.
4. Owner shall be an additional insured with respect to liability arising out of acts or omissions of Contractor or its Subcontractors, whether on or off the Sites.

**9.2.3 Automobile Liability Insurance**

Contractor shall provide occurrence-based commercial automobile liability insurance covering all owned/leased, non-owned and hired vehicles used in the performance of Work, both on and off the Sites, including loading and unloading.

The following limits of liability and other requirements shall apply:

1. \$2.5 million combined single limit for bodily injury and property damage liability.
2. Coverage shall be provided on ISO form number CA 00 01 10 01 or equivalent.
3. The policy shall be endorsed to include Motor Carrier Act endorsement – Hazardous Materials Cleanup (MCS-90), if applicable.

**9.2.4 Excess (Umbrella) Liability Insurance**

Contractor shall provide umbrella or excess liability insurance with limits of not less than \$25 million per occurrence and \$25 million annual aggregate which shall provide bodily injury,

personal injury and property damage liability at least as broad as the primary coverages set forth above, including employer's liability, commercial general liability and commercial automobile liability, as set forth in Sections 9.2.1, 9.2.2, and 9.2.3.

**9.2.5 Additional Insured**

Each policy of commercial general liability insurance, commercial auto liability and excess liability (umbrella) insurance shall name Owner and its officers, agents and employees as additional insured. Each of such policies shall also contain a separation of insured condition. The insurance afforded by Contractor shall be primary insurance.

**9.2.6 Professional Liability Insurance**

Contractor's design professionals shall provide professional liability coverage for the protection of all design professionals associated with the Project as follows:

1. Limits of Liability shall be \$2.5 million per claim and an annual aggregate of \$2.5 million.
2. The policy shall have a five- (5-) year extended reporting period from Final System Acceptance with respect to all events that occurred, but were not reported, during the term of the policy.
3. The policy shall protect against any negligent act, Error or omission arising out of design or engineering Activities with respect to the Project.
4. The policy shall have a retroactive date of no later than NTP1.

**10 RISK OF LOSS**

Contractor shall provide appropriate security and shall take all reasonable precautions and provide protection to prevent damage, injury or loss to the Work and materials and equipment to be incorporated therein, as well as all other property at the Sites, whether owned by Contractor, Owner, or any other Person.

Contractor shall maintain, rebuild, repair, restore, or replace all Work (including Design Documents, Materials, Equipment, supplies, and maintenance equipment which are purchased for permanent installation in, or for use during installation of, the Project, regardless of whether Owner has title thereto under the Contract Documents) that is injured or damaged prior to the date of Final System Acceptance. All such Work shall be at no additional cost to Owner except to the extent that Owner is responsible for such costs as provided in Section 13.

## **11 PAYMENT**

### **11.1 Contract Price**

#### **11.1.1 Contract Price**

As full compensation for the Work and all other obligations to be performed by Contractor under the Contract Documents, Owner shall pay to Contractor the Contract Price of \$\_\_\_\_\_. The Contract Price may be increased or decreased only by a Change Order issued in accordance with Section 13 or by a written Contract amendment.

#### **11.1.2 Items Included in Contract Price**

Contractor acknowledges and agrees that, subject only to Contractor's rights under Section 13, the Contract Price \$\_\_\_\_\_ includes:

1. Performance of each and every portion of the Work.
2. All designs, software, Equipment, Materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to Contractor's performance of its obligations under the Contract Documents (including all Work, Warranties, Equipment, Materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the Work).
3. The cost of obtaining all Governmental Approvals (except for approvals which are the responsibility of Owner, as specifically provided elsewhere in the Contract Documents).
4. All costs of compliance with and maintenance of the Governmental Approvals and compliance with Legal Requirements.
5. Payment of any taxes, duties, and permit and other fees and/or royalties imposed with respect to the Work and any Equipment, Materials, labor, or services included therein.

### **11.2 Invoices and Payment**

Within thirty (30) days after Approval by Owner of each final invoice, Owner shall pay Contractor the amount of the invoice Approved for payment less any amounts that Owner is entitled to withhold.

1. Contractor will invoice Owner \$\_\_\_\_\_ upon execution of the Contract. Such amount equals ten percent (10%) of the Contract Price.
2. Contractor will invoice Owner \$\_\_\_\_\_ upon the Approval of the NTP1 Work (Detailed System Design). Such amount equals ten percent (10%) of the Contract Price.
3. Contractor will invoice Owner \$\_\_\_\_\_ upon the Approval of the NTP2 Work (System Configuration). Such amount equals ten percent (10%) of the Contract Price.

4. Contractor will invoice Owner \$\_\_\_\_\_ upon the Approval of the NTP3 Work (Acceptance Tests). Such amount equals twenty percent (20%) of the Contract Price.
5. Contractor will invoice Owner \$\_\_\_\_\_ upon the Approval of the NTP4 Work (Training). Such amount equals ten percent (10%) of the Contract Price.
6. Contractor will invoice Owner \$\_\_\_\_\_ upon Project Completion. Such amount equals thirty percent (30%) of the Contract Price.
7. Contractor will invoice Owner \$\_\_\_\_\_ upon the Final System Acceptance, including Approval of the 90-day post-implementation error test sign-off. Such amount equals ten percent (10%) of the Contract Price.
8. Pursuant to the Services Agreement (**Exhibit C**), the Contract Price includes all software license and maintenance fees for the first year after Final System Acceptance (Year 1). Subsequent annual fees will be due on the anniversary of Final System Acceptance as set forth in the Services Agreement.
9. Contractor shall mail invoices to Owner to the attention of **Dwayne Kinley, St. Charles County Emergency Communications Manager, 201 N. Second St., Suite 327, St. Charles, MO 63301.**

### **11.3 Limitations on Payment**

In no event shall Owner have any obligation to pay Contractor any amount which would result in:

1. payment for any Activity in excess of the value of the Activity times the completion percentage of such Activity; or
2. aggregate payments hereunder in excess of the overall completion percentage for the Project times the Contract Price.

Owner does not have the obligation to pay Contractor for any Nonconforming Work.

### **11.4 Deductions**

Owner may deduct from any amounts otherwise owed to Contractor, including each monthly progress payment and the final payment, the following:

1. Any accrued losses, liability, Liquidated Damages or other damages for which Contractor is responsible hereunder.
2. The estimated cost of remedying any Nonconforming Work or otherwise remedying any breach of contract by Contractor.
3. The amount of any outstanding claim relating to the Work.
4. The amount for Work that Contractor is obligated to perform under the Contract, which Contractor has failed to perform.
5. Any other sums which Owner is entitled to recover from Contractor under the terms of the Contract.

6. An amount of one percent (1.0%) retention.

Owner's failure to deduct from a progress payment any amount Owner is entitled to recover from Contractor under the Contract shall not constitute a waiver of Owner's right to such amounts.

## **11.5 Final Payment**

Final payment shall be made in accordance with this Section 11.5.

### **11.5.1 Application for Final Payment**

On or about the date of delivery of its Affidavit of Final Completion, Contractor shall prepare and submit a proposed Application for Final Payment to Owner showing the proposed total amount due to Contractor. In addition to meeting all other requirements for invoices hereunder, the Application for Final Payment shall include:

1. an affidavit, on the form prescribed by Owner, certifying that all payments have been made and all Claims have been released for all Material, labor and other items covered by the Performance Bond; or
2. a list of any existing or threatened Claims, Liens and stop notices by Subcontractors, laborers or other third parties relating to the Project, including any Notices filed or to be filed with the Affidavit of Final Completion, stating the amount at issue associated with each such Notice;
3. the written consent by the Surety to such payment; and
4. such other documentation as Owner may reasonably require.

Prior applications and payments shall be subject to correction in the proposed Application for Final Payment. If a Subcontractor refuses to furnish a release or waiver required by Owner, Contractor may furnish a bond satisfactory to Owner to indemnify Owner against such Lien. If such Lien remains unsatisfied after payments are made, and is not bonded over as provided in the previous sentence, Contractor shall promptly pay to Owner all money that Owner may be compelled to pay in discharging such Lien, including all costs and attorneys' fees.

Owner will review Contractor's proposed Application for Final Payment, and changes or corrections will be forwarded to Contractor for correction. If no changes or corrections are required, Owner will Approve the Application for Final Payment.

### **11.5.2 Payment**

As a condition to its obligation to make payment to Contractor based on the Application for Final Payment, Owner shall have received a completed affidavit from Contractor certifying:

1. that it has resolved any Claims made by Subcontractors and others against Contractor or the Project;
2. that it has no reason to believe that any Person has a valid Claim against Contractor or the Project which has not been communicated in writing by Contractor to Owner as of the date of the certificate; and
3. that all guarantees and warranties are in full force and effect.

The affidavit shall survive Final Payment. The payment amount shall be reduced by any amounts deductible under Section 11.4.

All prior partial estimates and payments shall be subject to correction in the Final Payment.

Contractor's Acceptance of Final Payment shall constitute a waiver of affirmative Claims by Contractor except those previously made in writing and identified as unsettled at the time of Final Payment.

#### **11.6 Prompt Payment to Subcontractors**

Contractor is responsible to ensure that all Subcontractors and suppliers are promptly paid in accordance with the Missouri Prompt Pay Act, 34.057 RSMo. Contractor shall include in all Subcontracts a provision that this requirement for prompt payment to the Subcontractors and suppliers shall be included in all Subcontracts. If Contractor fails to comply with this requirement, Owner may withhold the amount due from any progress payment until the required payment(s) have been made.

#### **11.7 Disputes**

Subject to Owner's right to withhold from progress payments any amounts in Dispute, and except as expressly stated otherwise in this Section, any disagreement between Owner and Contractor relating to this Section shall be subject to Section 19. Failure by Owner to pay any amount in Dispute shall not alleviate, diminish, or modify in any respect Contractor's obligation to perform under the Contract Documents, including Contractor's obligation to achieve Final System Acceptance, and Contractor shall not cease or slow down performance under the Contract Documents on account of any such amount in dispute. Contractor shall proceed as directed by Owner pending resolution of the Dispute. Upon resolution of such Dispute, each party shall pay to the other any amount owed.



**12**     *This section intentionally left blank.*

**13**     **CHANGES IN THE WORK**

This Section 13 sets forth the requirements for obtaining all Change Orders under the Contract. Contractor hereby acknowledges and agrees that the Contract Price constitutes full compensation for performance of all of the Work, subject only to those exceptions specified in this Section 13, and that Owner is subject to constraints which limit its ability to increase the Contract Price or extend the Project Completion and Final System Acceptance Deadlines. Contractor hereby waives the right to make any claim for a time extension or for any monetary compensation in addition to the Contract Price and other compensation specified in the Contract, except as set forth in this Section 13.

Contractor may request a Change Order (“Request for Change Order” or “RCO”) to increase the Contract Price and for time extensions. Owner may request a Change Proposal from Contractor (“Request for Change Proposal” or “RCP”). Upon receipt of a RCP from Owner, Contractor shall, within seven (7) days, submit two (2) alternative Change Proposal forms to provide alternatives for the changes requested in Owner’s RCP.

**13.1**     **Circumstances Under Which Change Orders May Be Issued**

**13.1.1**    **Change Orders**

The term “Change Order” shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 13. A Change Order shall not be effective for any purpose unless executed by Owner. Execution of a Change Order by Owner shall mean that the Change Order has been fully executed by Owner and any other necessary parties. Change Orders may be issued for the following purposes (or combination thereof):

1. To modify the Work.
2. To revise Project Completion and Final System Acceptance Deadlines.
3. To revise the Contract Price.
4. To revise other terms and conditions of the Contract Documents.

Subject to and upon Owner’s Approval of the Change Order form, Owner will execute the Change Order form indicating Approval thereof.

**13.1.2**    **Issuance of Directive Letter**

Owner may at any time issue a Directive Letter to Contractor in the event a Dispute arises regarding the Work or for any desired change in the Work. The Directive Letter shall state that it is issued under this Section 13, shall describe the Work in question and shall state the basis for determining any compensation. Contractor shall proceed immediately with the Work as directed in the Directive Letter, pending the execution of a formal Change Order. If the Directive Letter states that the Work is within the original scope of the Work, Contractor shall proceed with the Work as directed but shall have the right pursuant to Section 13 to request that Owner issue a Change Order with respect thereto.

Receipt of a Directive Letter from Owner is a condition precedent to Contractor's right to claim that an Owner-Directed Change has occurred, provided that no Directive Letter shall be required for alleged Owner-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence or comparable tortious conduct by Owner. The fact that a Directive Letter was issued by Owner shall not be considered evidence that in fact an Owner-Directed Change occurred. The determination whether an Owner-Directed Change in fact occurred shall be based on an analysis of the original Contract Document requirements and a determination whether the Directive Letter in fact constituted a change in those requirements. The foregoing requirements shall not imply that a Directive Letter would be required in order for Contractor to have the right to receive compensation for Work within its original scope for which additional compensation is specifically allowed under this Section 13.

### **13.1.3 Performance of Changed or Extra Work**

As a condition precedent to Contractor's right to receive additional payment or an extension of Project Completion and Final System Acceptance Deadlines for changed or extra Work, Contractor shall have received either a Directive Letter from Owner issued pursuant to Section 13 or a Change Order for such work issued pursuant to Section 13.1.1. To the extent that Contractor undertakes any such Work without receiving a Directive Letter or Change Order executed by Owner, Contractor shall be deemed to have performed such Work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, Contractor may be required to remove or otherwise undo any such Work, at its sole cost.

### **13.2.1 Required Information**

At a minimum, the following information shall be submitted by Contractor with each Change Order form:

1. Redline of the changes proposed to the Contract requirements, which are involved in the proposed change.
2. A scope of work, cost estimate, impacted delay analysis, if any, and other information as required by this Section for each Change Order form and RCO.
3. Scope of Work: The scope of work shall describe in detail satisfactory to Owner all Activities associated with the Change Order, including a description of additions, deletions and modifications to the existing Contract requirements.
4. Cost Estimate: The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, Materials, Equipment, overhead (which includes all indirect costs) and profit, unless Owner agrees otherwise. The estimate shall include costs allowable under this Section 13, if any. If the Work is to be performed by Subcontractors and if the Work is sufficiently defined to obtain Subcontractor quotes, Contractor shall obtain quotes (with breakdowns showing cost of labor, Materials, Equipment, overhead and profit) on the Subcontractor's stationery and shall include such quotes as back-up for Contractor's estimate. No additional payment shall be allowed in excess of the provisions under Section 13.
5. Impacted Delay Analysis: If Contractor claims that such event, situation or change affects the Critical Path affecting Project Completion and Final System Acceptance

Deadlines, it shall provide an impacted delay analysis indicating all Activities represented or affected by the change, with Activity numbers, durations, predecessor and successor Activities, resources and cost, and with a narrative report, in form satisfactory to Owner, which compares the proposed new schedule to the Project Schedule or Revised Project Schedule, as appropriate. Except as otherwise provided in this Section, the impacted delay analysis shall only modify the Activities which have been impacted by the event which justifies the extension. Contractor may reschedule Activities not otherwise affected by the event, in order to take advantage of additional float available as a result of the requested time extension. Any such rescheduling shall be reflected in the impacted delay analysis.

6. Other Supporting Documentation: Contractor shall provide such other supporting documentation in a timely manner as may be required by Owner.
7. A narrative justification detailing all causes of the proposed change, and describing the data and documents which establish the necessity of such proposed change.
8. A sworn certification in form acceptable to Owner by Contractor (or Subcontractor, if applicable) that the amount of time and/or compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the event or matter giving rise to such proposed change and that Contractor has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.

### **13.2.2 Owner Review and Approval or Rejection**

Upon receipt of a Change Order form, Owner will process it, but shall not be liable for any delay in acting upon any Proposal submitted. Owner may Approve, in its sole discretion, in whole or in part, any Proposal submitted. Until a Order Proposal is Approved by Owner, Contractor shall remain obligated to perform in accordance with the Contract Documents. The decision of Owner as to rejection or Approval of any Change Order Proposal shall be at the sole discretion of Owner, and shall be final and not subject to partnering, Dispute resolution or appeal. Change Order Proposals that require excessive time or costs for review, evaluation or investigations, or that are not consistent with Owner's design policies and basic design criteria may be rejected. Contractor shall have no claim for any additional costs or delays resulting from the rejection of a Change Order Proposal, including development costs, loss of anticipated profit, or increased material or labor costs.

### **13.3 Limitations on Change Orders**

#### **13.3.1 Limitation on Contract Price Increases**

Any increase in the Contract Price allowed hereunder shall exclude:

1. Costs caused by the breach of contract or fault or negligence, or act or failure to act of Contractor or any Contractor-Related Entity.
2. Costs, which could reasonably have been avoided by Contractor or any Contractor-Related Entity, including by re-sequencing, reallocating, or redeploying its forces to other portions of the Work or to other Activities unrelated to the Work (including any additional costs reasonably incurred in connection with such reallocation or redeployment).

3. Costs for any rejected Work which failed to meet the requirements of the Contract Documents and any necessary remedial Work.

### **13.3.2 Limitation on Time Extensions**

Any extension of Project Completion and Final System Acceptance Deadlines allowed hereunder shall exclude any delay to the extent that it:

1. Did not impact the Critical Path affecting Project Completion and Final System Acceptance Deadlines.
2. Was due to the fault or negligence, or act or failure to act of Contractor or any Contractor-Related Entity.
3. Could reasonably have been avoided by Contractor or any Contractor-Related Entity, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves an Owner-caused delay, Owner shall have agreed, if requested to do so, to reimburse Contractor for its costs incurred, if any, in re-sequencing, reallocating, or redeploying its forces).

Contractor shall be required to demonstrate to Owner's satisfaction that the change in the Work or other event or situation which is the subject of the RCO seeking a change in Project Completion and Final System Acceptance Deadlines has caused or will result in an identifiable and measurable disruption of the Work which has impacted the Critical Path Activity affecting Project Completion and Final System Acceptance Deadlines.

### **13.4 Pricing of Change Orders**

Owner and Contractor (on its own behalf and on behalf of its Subcontractors) shall endeavor to negotiate, in good faith, a reasonable cost for each Change Order. Subject to the foregoing exceptions, in general the price of a Change Order shall be negotiated in accordance with this Section 13.8 or shall be based on Force Account records pursuant to Section 13.5.

### **13.5 Waiver**

Contractor hereby expressly waives all rights to assert any and all claims based on any change in the Work, delay or acceleration (including any change, delay, suspension or acceleration which, but for the express terms of the Contract Documents, could be inferred or implied at law) for which Contractor failed to provide proper and timely Notice or failed to provide a timely RCO, and agrees that Contractor shall be entitled to no compensation or damages whatsoever in connection with the Work except to the extent that the Contract Documents expressly specify that Contractor is entitled to a Change Order or other compensation or damages.

### **13.6 Disputes**

In cases of Disputes as to whether or not an item or service quoted or delivered met the Specifications, the decision of Owner shall be final and binding on both parties.

If Owner and Contractor agree that a request to increase the Contract Price and/or extend Project Completion and Final System Acceptance Deadlines by Contractor has merit, but are unable to agree as to the amount of such price increase and/or time extension, Owner agrees

to mark up the Change Order request or Change Order form, as applicable, provided by Contractor to reduce the amount of the price increase and/or time extension as deemed appropriate by Owner. In such event, Owner will execute and deliver the marked-up Change Order to Contractor within a reasonable period, and thereafter will make payment and/or grant a time extension based on such marked-up Change Order. The failure of Owner and Contractor to agree to any Change Order under this Section 13 (including agreement as to the amount of compensation allowed under a Force Account Change Order and the disputed amount of the increase in the Contract Price and/or time extension in connection with a Change Order as described above) shall be a Dispute to be resolved pursuant to Section 19. Except as otherwise specified in the Change Order, execution of a Change Order by both parties shall be deemed accord and satisfaction of all claims by Contractor of any nature arising from or relating to the Work covered by the Change Order. Contractor's Claim and any award by the resolver of the Dispute shall be limited to the Incremental Costs incurred by Contractor with respect to the disputed matter (crediting Owner for any corresponding reduction in Contractor's other costs) and shall in no event exceed the amounts allowed by this Section 13 with respect thereto.

**13.7 No Release or Waiver**

**13.7.1 Extension of Time for Performance**

No extension of time granted hereunder shall release Contractor's Surety from its obligations. Owner shall not be deemed to have waived any rights under the Contract (including its right to abrogate the Contract for abandonment or for failure to complete within the time specified, or to impose and deduct damages as may be provided herein) as the result of any grant of an extension of time beyond the date fixed for the completion of any part of the Work, any Acceptance of performance of any part of the Work after the Project Completion and Final System Acceptance Deadlines, or the making of any payments to Contractor after such date.

**13.7.2 No Change Order Based on Course of Conduct or Order by Unauthorized Person**

No course of conduct or dealings between the parties, nor express or implied Acceptance of alterations or additions to the Work, and no Claim that Owner has been unjustly enriched shall be the basis for any Claim, request for additional compensation or extension of Project Completion and Final System Acceptance Deadlines. Further, Contractor shall undertake, at its risk, Work included in any request, order or other authorization issued by a Person in excess of that Person's authority as provided herein, or included in any oral request. Contractor shall be deemed to have performed such Work as a volunteer and at its sole cost. In addition, Owner may require Contractor to remove or otherwise undo any such work, at Contractor's sole cost.

**14 SUSPENSION OF WORK**

**14.1 Suspension for Convenience**

Owner may, at any time and for any reason, by written Notice, order Contractor to suspend all or any part of the Work required under the Contract Documents for the period of time that Owner deems appropriate for the convenience of Owner. Contractor shall promptly comply with any such written suspension order. Contractor shall promptly recommence the Work upon receipt of written Notice from Owner directing Contractor to resume Work. Suspensions related to seasonal or climatic conditions, or compensable events shall not be considered an Owner-caused delay.

**14.2 Suspension for Cause**

Owner has the authority by written order to suspend the Work without liability to Owner wholly or in part for Contractor's failure to:

1. Correct conditions unsafe for the Project personnel or general public.
2. Comply with any Governmental Approval, Legal Requirement, or otherwise carry out the requirements of the Contract.
3. Carry out orders of Owner.

Contractor shall promptly comply with any such written suspension order. Contractor shall promptly recommence the Work upon receipt of written Notice from Owner directing Contractor to resume Work.

**14.3 Contractor Responsibilities during Suspension**

During periods that Work is suspended, Contractor shall continue to be responsible for the Work and shall prevent damage or injury to the Project and other facilities in the Project vicinity, obtain and maintain compliance with all Governmental Approvals and maintain all Contractor-provided insurance and bonds. If the suspension is for Owner's convenience, the additional Work performed by Contractor during the suspension period shall be considered an Owner-Directed Change.

## **15 TERMINATION FOR CONVENIENCE**

### **15.1 Notice of Termination**

Owner may terminate the Contract and the performance of the Work by Contractor in whole or, from time to time, in part, if Owner determines, in its sole discretion that a termination is in the best public interest to do so. Owner shall notify Contractor of its decision to terminate by delivering to Contractor a written Notice of Termination specifying the extent of termination and its effective date. Termination (or partial termination) of the Contract shall not relieve any Surety of its obligation for any claims arising out of the Work performed.

### **15.2 Contractor Responsibilities Upon Termination**

After receipt of a Notice of Termination, and except as otherwise directed by Owner, Contractor shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 15.

1. Stop Work as specified in the notice.
2. Communicate such Notice to all affected Subcontractors and that their Subcontracts are not to be further performed unless otherwise authorized in writing by Owner.
3. Place no further Subcontracts or orders for Materials, services or Equipment, except as necessary to complete the continued portion of the Work, if any, or for mitigation of damages.
4. Terminate all Subcontracts to the extent that they relate to the Work terminated.
5. Assign to Owner in the manner, at the times, and as and to the extent directed by Owner, all of the right, title and interest of Contractor under the Subcontracts so terminated, in which case Owner shall have the right, in its sole discretion, to accept performance, settle or pay any or all Claims arising out of the termination of such Subcontracts.
6. Settle all outstanding liabilities and Claims arising out of such termination of Subcontracts, with the Approval or ratification of Owner, to the extent it may be required, which Approval or ratification shall be final.
7. Provide Owner with an inventory list of all Materials previously produced, purchased or ordered from Suppliers for use in the Work and not yet used in the Work, including its storage location, as well as any documentation or other property required to be delivered hereunder which is either in the process of development or previously completed but not yet delivered to Owner, and such other information as Owner may request; and transfer title and deliver to Owner, in the manner, at the times, and as and to the extent, if any, directed by Owner:
  - i. fabricated or un-fabricated parts, the Work in process, completed Work, supplies and other Material produced or acquired for the Work terminated; and
  - ii. the Design Documents and all other completed or partially completed drawings (including plans, sections, details and diagrams), Specifications, records, samples, information and other property that would have been required to be furnished to Owner if the Work had been completed.

8. Complete performance in accordance with the Contract Documents of all Work not terminated.
9. Take all action that may be necessary, or that Owner may direct, for the safety, protection and preservation of:
  - i. the public, including public and private vehicular movement;
  - ii. the Work; and
  - iii. the Equipment, Materials and property related to the Contract Documents that is in the possession of Contractor and in which Owner has or may acquire an interest.
10. As authorized by Owner in writing, use its best efforts to sell, in a manner, at the times, to the extent, and at the price or prices directed or authorized by Owner, any property of the types referred to in Section 15.2(7); provided, however, that Contractor:
  - i. is not required to extend credit to any purchaser; and
  - ii. may acquire the property under the conditions prescribed and at prices Approved by Owner. The proceeds of any transfer or disposition shall be applied to reduce any payments to be made by Owner under the Contract Documents or paid in any other manner directed by Owner.
11. If requested by Owner, withdraw from the portions of the PSAP Sites designated by Owner and remove such Materials, Equipment, tools and instruments used by, and any debris or waste materials generated by, Contractor and any Subcontractor in the performance of the Work as Owner may direct.
12. Take other actions directed by Owner.

### **15.3 Responsibility after Notice of Termination**

Contractor shall continue to be responsible for damage to Materials after issuance of the Notice of Termination, except as follows:

1. Contractor's responsibility for damage to Materials for which partial payment has been made as provided herein shall terminate when Owner certifies that those Materials have been stored in the manner and at the locations directed by Owner.
2. Contractor's responsibility for damage to Materials purchased by Owner subsequent to the issuance of the Notice that the Contract is to be terminated shall terminate when title and delivery of those Materials has been taken by Owner.

Immediately after Owner determines that Contractor has completed the Work directed to be completed prior to termination and such other Work as may have been ordered to secure the Project for termination, Contractor will not be required to provide for continuing safety, security and maintenance at the PSAP Sites.

### **15.4 Negotiated Termination Settlement**

#### **15.4.1 Settlement Proposal**

After receipt of a Notice of Termination, Contractor shall submit a final termination



settlement Proposal to Owner in the form and with the certification prescribed by Owner. Contractor shall submit the Proposal promptly, but no later than sixty (60) days from the effective date of termination, unless Contractor has requested a time extension in writing within such 60-day period and Owner has agreed in writing to allow such an extension. Owner will then review Contractor's termination settlement Proposal and will act upon it, return it with comments or reject it. If Contractor fails to submit the Proposal within the time allowed, Owner may determine, on the basis of information available to it, the amount, if any, due Contractor because of the termination and shall pay Contractor the amount so determined.

#### **15.4.2 Negotiated Settlement Amount**

Contractor and Owner may agree, as provided in Section 15.4.1, upon the whole or any part of the amount or amounts to be paid to Contractor by reason of the total or partial termination of Work pursuant to this Section 15. Such negotiated settlement may include a reasonable allowance for profit solely on Work, which has been completed as of the termination date and subsequently accepted by Owner. Such agreed amount(s), exclusive of settlement costs, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and as further reduced by the Contract Price of Work not terminated. Upon determination of the settlement amount the Contract will be amended accordingly, and Contractor will be paid the agreed amount. Nothing in Section 15.5 prescribing the amount to be paid to Contractor in the event that Contractor and Owner fail to agree upon the whole amount to be paid to Contractor by reason of the termination of Work pursuant to this Section 15, shall be deemed to limit, restrict or otherwise determine or affect the amount(s) which may be agreed upon to be paid to Contractor pursuant to this Section 15.4. Unless otherwise agreed to by the parties as a part of a negotiated settlement, Owner's execution and delivery of any settlement agreement shall not affect any of its rights under the Contract Documents with respect to completed Work, relieve Contractor from its obligations with respect thereto, including Warranties, or affect Owner's rights under the Performance Bond and payment as to such completed or non-terminated Work.

#### **15.5 Determination of Settlement Amount If Negotiations Fail**

If Contractor and Owner fail to agree, as provided in Section 15.4.2, upon the whole amount to be paid to Contractor by reason of the termination of Work pursuant to this Section 15, the amount payable (exclusive of interest charges) shall be determined by Owner in accordance with the following, but without duplication of any amounts agreed upon in accordance with Section 15.4.

##### **15.5.1 Payment Amount**

Owner will pay Contractor the sum of the following amounts for Work performed prior to the effective date of the Notice of Termination, as such amounts are determined by Owner:

1. Contractor's actual reasonable out-of-pocket costs (without profit, and including Equipment costs only to the extent permitted by Section 13) for all Work performed, including mobilization, demobilization and work done to secure the Project for termination, including reasonable overhead and accounting for any refunds payable with respect to insurance premiums, deposits or similar items, as established to Owner's satisfaction. In determining the reasonable cost, deductions will be made for the cost of Materials to be retained by Contractor, amounts realized by the sale of

Materials and for other appropriate credits. Deductions will also be made for the cost of damaged Materials. When, in the opinion of Owner, the cost of an item of Work is excessively high due to costs incurred to remedy or replace defective or rejected Work, the reasonable cost to be allowed will be the estimated reasonable cost of performing that Work in compliance with the requirements of the Contract Documents and the excessive actual cost will be disallowed.

2. As profit on Clause 1 above, a sum determined by Owner to be fair and reasonable; provided, however, that if it appears that Contractor would have sustained a loss on the entire Contract had it been completed, no profit shall be included or allowed under this Section 15.5.1 and an appropriate adjustment shall be made by reducing the amount of the settlement to reflect the indicated rate of loss.
3. The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 15.2(6), exclusive of the amounts paid or payable on account of supplies or Materials delivered or services furnished by the Subcontractor prior to the effective date of the Notice of Termination under the Contract, which amounts shall be included in the cost on account of which payment is made under clause 1 above.
4. The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 15.2(9) and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Contract, including the reasonable cost to Contractor of handling Material returned to the Supplier, delivered to Owner or otherwise disposed of as directed by Owner, and including a reasonable allowance for Contractor's administrative costs in determining the amount due to Contractor as the result of the termination of Work under the Contract.

#### **15.5.2 Maximum Compensation**

Contractor acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 15.5.1) plus its settlement costs, and that items such as lost or anticipated profit, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of the Contract. However, the total amount to be paid to Contractor, exclusive of costs described in Sections 15.5.1(3) and (4), may not exceed the total Contract Price less the amount of payments previously made and less the Contract Price of any Work not terminated. Furthermore, if any refund is payable with respect to insurance or bond premiums, deposits or similar items which were previously passed through to Owner by Contractor, such refund shall be paid directly to Owner or otherwise credited to Owner.

#### **15.5.3 Excluded Items**

Except for normal spoilage, and except to the extent that Owner will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to Contractor under Section 15.5.1, the fair value, as determined by Owner, of Equipment, Materials and property which is destroyed, lost, stolen or damaged so as to become undeliverable to Owner, or to a buyer pursuant to Section 15.2(10). The amount set forth in the Proposal by Contractor for the Work terminated shall be a factor to be analyzed in determining the value of the Work terminated.

**15.5.4 Payment of Termination Amount**

Upon determination of the amount of the termination payment, the Contract shall be amended to reflect the agreed termination payment, and Contractor shall be paid the agreed amount.

**15.6 Partial Termination**

If a termination hereunder is partial, the Contract Price for the remainder of the Work shall be adjusted as appropriate to account for the change in the overall scope of the Project.

**15.7 Reduction in Amount of Claim**

The amount otherwise due Contractor under this Section 15 shall be reduced by:

1. all un-liquidated advance or other payments made to or on behalf of Contractor applicable to the terminated portion of the Contract;
2. the amount of any Claim which Owner may have against Contractor or any Contractor-Related Entity in connection with the Contract;
3. the agreed price for, or the proceeds of the sale of, any property, Materials, Equipment, supplies or other things acquired by Contractor or sold, pursuant to the provisions of this Section 15, and not otherwise recovered by or credited to Owner;
4. amounts that Owner deems advisable, in its sole discretion, to retain to cover any existing or threatened claims, Liens and stop notices relating to the Project;
5. the cost of repairing any Nonconforming Work, and
6. any amounts due or payable by Contractor to Owner.

**15.8 Partial Payments**

Owner may, from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against costs incurred by Contractor in connection with the terminated portion of the Contract, whenever in the opinion of Owner the aggregate of such payments shall be within the amount to which Contractor will be entitled under this Section 15. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 15, such excess shall be payable by Contractor to Owner upon demand together with interest at a rate equal to the average rate at the time being received from the investment of state funds, as determined by the State Treasurer, for the period from the date such excess payment is received by Contractor to the date on which such excess is repaid to Owner. However, no interest shall be charged with respect to any such excess payment attributable to a reduction in Contractor's claim by reason of retention or other disposition of termination inventory until ten (10) days after the date of such retention or disposition, or such later date as determined by Owner by reason of the circumstances.

**15.9 Inclusion in Subcontracts**

Contractor shall insert in all Subcontracts a requirement that the Subcontractor shall stop Work on the date and to the extent specified in a Notice of Termination from Owner in accordance with this Section 15.

**15.10 Limitation on Payments to Subcontractor**

For the purposes of Sections 15.4.2 and 15.5, upon termination under Section 15.2(4) of Work under any Subcontract, Contractor will not be entitled to reimbursement for that portion of the termination settlement with any such Subcontractor which constitutes anticipatory or unearned profit on Work not performed, or which constitutes consequential damages on account of the termination or partial termination.

**15.11 No Unearned Profit or Consequential Damages**

Under no circumstances shall Contractor be entitled to anticipatory or unearned profit or consequential or other damages as a result of a termination or partial termination under this Section 15. The payment to Contractor determined in accordance with this Section 15 constitutes Contractor's sole and exclusive remedy for a termination under this Section 15.

**15.12 No Waiver**

Anything contained in the Contract to the contrary notwithstanding, a termination under this Section 15 shall not waive any right or Claim to damages, which Owner may have, and Owner may pursue any cause of action, which it may have at law or in equity or under the Contract.

**15.13 Dispute Resolution**

The failure of the parties to agree on amounts due under this Section 15 shall be a Dispute to be resolved in accordance with Section 19.

**15.14 Allowability of Costs**

All costs claimed by Contractor under this Section 15 shall, at a minimum, be allowable, allocable and reasonable in accordance with the cost principles and procedures of 48 CFR Part 31.

**15.15 Suspension of Work**

In the event of any suspension of Work by Owner, after issuance of NTP1, for more than one hundred eighty (180) consecutive Days, Contractor shall have the right to consider the Contract to have been terminated for convenience under this Section 15. Contractor shall notify Owner of such election by delivering to Owner a written Notice of Termination Due to Suspension specifying its effective date. Upon delivery by Contractor to Owner of a Notice of Termination Due to Suspension, the provisions of this Section 15 shall apply.

**16 DEFAULT**

**16.1 Default by Contractor**

**16.1.1 Events of Default**

Contractor shall be in breach under the Contract upon the occurrence of any one of the following events or conditions:

1. Contractor fails to promptly begin the Work under the Contract Documents following issuance of NTP1 and to promptly begin each subsequent phase following issuance of NTP2 through NTP5.
2. Contractor fails to perform the Work with sufficient resources to ensure the prompt completion thereof.
3. Contractor fails to perform the Work in accordance with the Contract Documents, refuses to remove and replace rejected Materials or Nonconforming or unacceptable Work, or fails to remove and replace workers as directed by Owner.
4. Contractor discontinues or suspends the prosecution of the Work, exclusive of Work stoppage due to:
  - i. termination by Owner;
  - ii. an excusable delay; or
  - iii. nonpayment by Owner not related to a breach by Contractor.
5. Contractor fails to resume performance of Work, which has been suspended or stopped, within a reasonable time after receipt of Notice from Owner to do so or (if applicable) after cessation of the event preventing performance.
6. Contractor materially breaches any other agreement, representation or warranty contained in the Contract Documents, or Contractor fails to perform any other obligation under the Contract Documents.
7. Contractor fails to provide and maintain the required insurance and/or Performance Bond.
8. Contractor assigns or transfers the Contract Documents or any right or interest therein, except as expressly permitted hereunder.
9. Contractor fails, absent a valid Dispute, to make payment when due for labor, Equipment or Materials in accordance with its agreements with Subcontractors and applicable law, fails to comply with any Legal Requirement or Governmental Approval; or fails reasonably to comply with the instructions of Owner consistent with the Contract Documents.
10. Contractor fails to discharge or obtain a stay within ten (10) days of any final judgment(s) or order for the payment of money against it in excess of \$100,000 in the aggregate arising out of the prosecution of the Work (provided that, for purposes hereof, posting of a bond in the amount of one hundred twenty-five percent (125%) of such judgment or order shall be deemed an effective stay).
11. Contractor shall have become insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes an assignment for the benefit of creditors.

12. Insolvency, receivership, reorganization or bankruptcy proceedings have been commenced by or against Contractor and not dismissed within sixty (60) days.
13. Any representation or warranty made by Contractor in the Contract Documents or in any certificate, schedule, instrument or other document delivered pursuant to the Contract Documents shall have been false or materially misleading when made.
14. Contractor is a party to fraud.
15. Contractor fails to comply with any terms of the Contract.

Notwithstanding anything in the Contract Documents to the contrary, there shall be no Event of Default for Contractor's unexcused delay in achieving Project Completion and Final System Acceptance Deadlines so long as such delay is no greater than forty-five (45) Days.

### **16.1.2 Right to Cure**

Owner agrees to allow Contractor and Surety(ies) ten (10) days Notice and opportunity to cure any breach before declaring an Event of Default, provided that no such Notice and opportunity to cure is required for any breach, which by its nature cannot be cured. If a breach is curable but by its nature cannot be cured within ten (10) days, as determined by Owner, Owner agrees not to declare an Event of Default provided that Contractor commences such cure within such 10-Day period and thereafter diligently prosecutes such cure to completion; provided, however, that in no event will such cure period exceed sixty (60) days in total. Contractor hereby acknowledges and agrees that the events described in Subsections 16.1.1(13) and (14) are not curable. Notwithstanding the foregoing, if Owner believes a condition affecting the Project poses an immediate and imminent danger to public health or safety, Owner may, without Notice and without awaiting lapse of any cure period, rectify the condition at Contractor's cost, and so long as Owner undertakes such action in good faith, even if under a mistaken belief in the occurrence of such default, such action shall not expose Owner to liability to Contractor and shall not entitle Contractor to any other remedy, it being acknowledged that Owner has a paramount public interest in providing and maintaining safe public use of and access to the Project. Owner's good faith determination of the existence of such danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary.

## **16.2 Remedies**

### **16.2.1 Rights of Owner**

If an Event of Default occurs, then, in addition to all other rights and remedies provided by law or equity or available under the Contract or otherwise, including the rights to recover Liquidated Damages and to seek recourse against the Surety bonds required hereby and/or other performance security, Owner shall have the following rights and remedies, without further Notice, and without prejudice to any of its other rights or remedies and without waiving or releasing Contractor from any obligations, and Contractor shall have the following obligations (as applicable):

1. Owner may order Contractor to suspend or discontinue the Work or any portion of the Work.
2. Owner may terminate the Contract or a portion thereof, in which case, the provisions of Sections 15.2 and 15.3 shall apply.

3. If and as directed by Owner, Contractor shall withdraw from any PSAP Site; and shall remove such Materials, Equipment, tools and instruments used by, and any debris or waste materials generated by, Contractor or any Contractor-Related Entity in the performance of the Work.
4. Contractor shall deliver to Owner possession of any or all facilities of Contractor located on the Sites as well as any or all Design Documents and all other completed or partially completed drawings (including plans, details and diagrams), specifications, records, information, schedules, samples, shop drawings and other documents, that Owner deems necessary for completion of the Work.
5. Contractor shall confirm the assignment to Owner of the Subcontracts requested by Owner, and Contractor shall terminate, at its cost, all other Subcontracts.
6. Owner may deduct from any amounts payable by Owner to Contractor such amounts payable by Contractor to Owner, including Liquidated Damages or other damages payable to Owner under the Contract Documents.
7. Owner, without incurring any liability to Contractor, shall have the rights to:
  - i. take the performance of all or a portion of the Work from Contractor (either with or without the use of Contractor's Materials, Equipment, tools and instruments) and enter into an agreement with another Person for the completion of such Work; or
  - ii. use such other methods, as in the opinion of Owner, will be required for the completion of the Project.
8. If Owner exercises any right to perform any obligations of Contractor, in the exercise of such right Owner may, but is not obligated to, among other things:
  - i. perform or attempt to perform, or cause to be performed, such Work;
  - ii. spend such sums as Owner deems necessary and reasonable to employ and pay such engineers, consultants and contractors and obtain Materials and Equipment as may be required for the purpose of completing such Work;
  - iii. execute all applications, certificates and other documents as may be required for completing the Work;
  - iv. modify or terminate any contractual arrangements;
  - v. take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and
  - vi. prosecute and defend any action or proceeding incident to the Work.

#### **16.2.2 Liability of Contractor**

1. If an Event of Default has occurred, Contractor and Surety(ies) shall be jointly and severally liable to Owner (in addition to any other damages under the Contract Documents other than those costs intended to be covered by Liquidated Damages payable hereunder) for all costs reasonably incurred by Owner or any party acting on Owner's behalf in completing the Work or having the Work completed by another Person (including any re-procurement costs, throw away costs for unused portions of the completed Work and increased financing costs).
2. Upon the occurrence of an Event of Default, Owner shall be entitled to withhold all

or any portion of further payments to Contractor until such time as Owner is able to determine how much (if any) remains owing to Contractor. Promptly upon such determination, Owner shall notify Contractor in writing of the amount, if any, that Contractor shall pay Owner or that Owner shall pay Contractor with respect thereto.

3. All costs and charges incurred by Owner, including attorneys', accountants' and expert witness fees and costs, together with the cost of completing the Work under the Contract Documents, shall be deducted from any moneys due or which may become due to Contractor. If such expense exceeds the sum which would have been payable under the Contract, then Contractor and its Surety(ies) shall be liable and shall pay to Owner the amount of such excess.
4. It is recognized that if a default under Section 16.1.1(11) or (12) occurs, such event could impair or frustrate Contractor's performance of the Work. Accordingly, it is agreed that upon the occurrence of any such event, Owner shall be entitled to request of Contractor, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within ten (10) days of delivery of the request shall entitle Owner to terminate the Contract and to the accompanying rights set forth above.
5. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, Owner shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which shall be credited against and deducted from Owner's payment obligations hereunder. The foregoing shall be in addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Contract Documents and Performance Bond.
6. In lieu of the provisions of this Section 16.2 for terminating the Contract and completing the Work, Owner may pay Contractor for the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been included or contemplated by the Contract. No claim under this provision shall be allowed Contractor for prospective profit on, or any other compensation relating to, Work uncompleted by Contractor.
7. If the Contract is terminated for grounds which are later determined not to justify a termination for default, such termination shall be deemed to constitute a termination for convenience pursuant to Section 15.
8. If Owner suffers damages as a result of Contractor's breach or failure to perform an obligation under the Contract Documents, then Owner shall be entitled to recovery of such damages from Contractor regardless of whether the breach or failure that gives rise to the damages ripens into an Event of Default.
9. The exercise or beginning of the exercise by Owner of any one or more rights or remedies under this Section 16.2 shall not preclude the simultaneous or later exercise by Owner of any or all other rights or remedies, each of which shall be cumulative.
10. Contractor and Surety shall not be relieved of liability for continuing Liquidated Damages on account of a default by Contractor hereunder or by Owner's declaration of an Event of Default, or by actions taken by Owner under this Section 16.2.



**16.3 Right to Stop Work If Undisputed Payment Is Not Made**

Contractor shall have the right to stop Work if Owner fails to make an undisputed payment due hereunder within fourteen (14) days after receipt of Notice of nonpayment. Any such Work stoppage shall be considered a suspension under Section 14.1. Contractor shall not have the right to terminate the Contract for default as the result of any failure by Owner to make an undisputed payment due hereunder, but Contractor shall have the right to declare a termination for convenience under Section 15 upon meeting the requirements of Section 15.15.

**16.4 Notice and Opportunity to Cure Other Types of Owner Breaches**

In the event of any breach of the Contract by Owner other than a failure to make payments to Contractor, Contractor shall provide to Owner a written Notice describing the breach and the opportunity to cure such breach. Owner shall be entitled to thirty (30) days Notice and opportunity to cure any such breach; provided that if such breach is capable of cure but by its nature cannot be cured within thirty (30) days, Owner shall have such additional period of time as may be reasonably necessary to cure the breach so long as Owner commences such cure within such 30-day period, and thereafter diligently prosecutes such cure to completion. Contractor shall have no right to exercise any remedies to which it may be entitled at law or in equity until the foregoing Notice is delivered and the foregoing cure period lapses without cure of the breach.

**17 DAMAGES**

**17.1 Liquidated Damages**

**17.1.1 Failure to Meet Contract Requirements**

Contractor understands and agrees that if Contractor fails to complete the Work in accordance with the Contract Documents, Owner will suffer substantial losses and damages. Contractor agrees that it shall be liable for all such losses and damages. Contractor acknowledges and agrees that the Project Completion Deadline is critical. Contractor acknowledges and agrees that such Liquidated Damages are intended to compensate Owner solely for Contractor's failure to meet these Contract Document requirements, and shall not excuse Contractor from liability from any other breach of Contract requirements, including any failure of the Work to conform to applicable requirements.

If Contractor fails to achieve Approval of the NTP1 Work, NTP2 Work, NTP3 Work, and NTP4 Work by the applicable completion date for that NTP, or fails to achieve Project Completion by the applicable Project Completion and Final System Acceptance Deadlines, or fails to comply with the requirements of Contract Documents, Contractor agrees to pay Owner Liquidated Damages in the following amounts, unless failure to achieve Project Completion and Approval was no fault of Contractor:

1. \$\_\_\_\_\_ per Day (or portion of a Day) for Contractor's failure to achieve Approval of NTP1 Work by the NTP1 Completion Deadline.
2. \$\_\_\_\_\_ per Day (or Portion of a Day) for Contractor's failure to achieve Approval of NTP2 Work by the NTP2 Completion Deadline.
3. \$\_\_\_\_\_ per Day (or Portion of a Day) for Contractor's failure to achieve Approval of NTP3 Work by the NTP3 Completion Deadline.
4. \$\_\_\_\_\_ per Day (or Portion of a Day) for Contractor's failure to achieve Approval of NTP4 Work by the NTP4 Completion Deadline.
5. \$\_\_\_\_\_ per Day (or Portion of a Day) for Contractor's failure to achieve Project Completion by the Project Completion Deadline.
6. \$\_\_\_\_\_ per Day (or portion of a Day) for Contractor's failure to achieve Final System Acceptance by the Final System Acceptance Deadline.

**17.1.2 Multiple Assessments of Liquidated Damages**

If Contractor is subject to more than one (1) subsection under Section 17.1.1 for the same delay event, only the greater amount of Liquidated Damages under the above subsections shall be assessed.

**17.1.3 Reasonableness of Liquidated Damage Amounts**

Contractor acknowledges and agrees that the foregoing damages have been set based on an evaluation by Owner of damages, which it will incur in each of the above events, including additional interest expense as well as administrative costs. Contractor and Owner agree that the amount of such damages are impossible to ascertain as of the date of execution hereof and the parties have agreed to such Liquidated Damages in order to fix Contractor's costs and to avoid later disputes over which items are properly chargeable to Contractor. Contractor understands and agrees that any Liquidated Damages payable in accordance with this

Section 17.1 are in the nature of Liquidated Damages and not a penalty and such sums are reasonable under the circumstances existing as of the date of execution and delivery of the Contract. Contractor further acknowledges and agrees that Liquidated Damages may be owing even though no Event of Default has occurred.

**17.2 Offset; Waiver**

**17.2.1 Offset**

Owner shall have the right to deduct any amount owed by Contractor to Owner hereunder from any amounts owed by Owner to Contractor under this Contract.

**17.2.2 No Waiver**

Permitting or requiring Contractor to continue and finish the Work or any part thereof after Project Completion and Final System Acceptance Deadlines shall not act as a waiver of Owner's right to receive Liquidated Damages hereunder or any rights or remedies otherwise available to Owner.

**17.3 Payment of Liquidated Damages**

To the extent Liquidated Damages are not deducted from any amount owed to Owner by Contractor, Owner may send Contractor an invoice and the Liquidated Damages shall be payable by Contractor to Owner within ten (10) days after Contractor's receipt of the invoice therefore.

## 18 INDEMNIFICATION

### 18.1 Indemnifications by Contractor

#### 18.1.1 General Indemnities

Subject to Section 18.1.3, Contractor shall release, defend, indemnify and hold harmless Owner, Users, their respective elected and appointed officials, board members, committee members, agents, consultants, employees and all volunteers and their respective successors and assigns and their respective officers, agents and employees (collectively referred to as the "Indemnified Parties") from and against any and all third party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, penalties, fines, damages, losses, liabilities, costs and expenses, including any injury to or death of persons or damage to or loss of property (including damage to utility facilities), and including attorneys', accountants' and expert witness fees and costs, arising out of, relating to or resulting from:

1. The failure or alleged failure by Contractor or any Contractor-Related Entity to comply with any applicable Legal Requirements or Governmental Approvals in performing the Work.
2. Any alleged patent or copyright infringement or other allegedly improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information or other items furnished or communicated to Owner or another Indemnified Party pursuant to the Contract; provided that this indemnity shall not apply to any infringement resulting from Owner's failure to comply with specific written instructions regarding use provided to Owner by Contractor.
3. Any act or omission of Contractor or any Contractor-Related Entity.
4. Any and all Claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, or the use of any property or income of Contractor or any of its Subcontractors or any of their respective agents, officers or employees with respect to any payment for the Work made to or earned by any Contractor-Related Entity.
5. Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any stop notice or Lien, provided that Owner is not in default in payments owing to Contractor with respect to such Work.
6. The Claim or assertion by any contractor of inconvenience, disruption, delay or loss caused by interference by Contractor or any Contractor-Related Entity with or hindering the progress or completion of Work being performed by other contractors as described in Section 23, or failure of Contractor or any Contractor-Related Entity to cooperate reasonably with other contractors in accordance therewith.

#### 18.1.2 Design Defects

Subject to Section 18.1.3, Contractor shall release, defend, indemnify and hold harmless the Indemnified Parties from and against any and all third party claims, causes of action, suits, judgments, investigations, legal or administrative proceedings, penalties, fines, damages, losses, liabilities, costs and expenses, including any injury to or death of persons or damage

to or loss of property, and including attorneys', accountants' and expert witness fees and costs, to the extent arising out of, relating to or resulting from Contractor's design of the System.

**18.1.3 Losses Due to Negligence of Indemnified Parties**

Missouri law shall apply to Contractor's indemnity obligations under Sections 18.1.1 and 18.1.2.

**18.1.4 Claims by Employees**

For Claims by an employee of Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 18.1 shall not be limited by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

**18.1.5 Reliance on Contractor's Performance**

Contractor hereby acknowledges and agrees that it is Contractor's obligation to cause the Project to be designed and to implement the Project in accordance with the Contract Documents and that the Indemnified Parties are fully entitled to rely on Contractor's performance of such obligation. Contractor further agrees that any review, Acceptance and/or Approval by Owner and/or others hereunder shall not relieve Contractor of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations to provide indemnities hereunder.

## **19 PARTNERING, CLAIMS FOR ADJUSTMENT AND DISPUTES**

### **19.1 Partnering**

Owner intends to encourage the use of a partnering program among Owner, Contractor, its Subcontractors, and other Stakeholders. Owner anticipates a partnering team involving the executive management of these Stakeholders and others. Participation is encouraged. The partnering relationship will be structured to draw on the strengths of each organization to identify and achieve reciprocal goals. The objectives include effective and efficient Project performance and completion on schedule, within budget and in accordance with the Contract Documents. These objectives will be reviewed by the partnering team in a 2-3 hour meeting held quarterly or as needed until Notice of Final System Acceptance.

Any cost associated with effectuating partnering will be considered included in the Contract Price. It is the intent of the parties that the Dispute resolution provisions contained in this Section 19 shall apply only in the event that the normal Owner-Contractor issue resolution efforts through partnering are not successful. The Dispute resolution provisions set forth in Section 19.2 shall apply to all Disputes arising out of the Work that are not resolved by the parties through the partnering process, except as expressly provided to the contrary in the Contract Documents.

### **19.2 Dispute Resolution; General Provisions**

All Disputes between Contractor and Owner (or between Contractor's Subcontractors and Owner) that have not been resolved by the parties through the partnering process shall be resolved as provided by this Section.

#### **19.2.1 Disputes; Disputes Governed by this Section; Priorities**

A "Dispute" is any written request for relief in any form arising out of or relating to the Contract Documents or the Project, including but not limited to all contract claims, statutory claims, equitable claims, claims for extension of time, and disagreements resulting from a change, a delay, a Change Order, any other written orders, or oral orders from Owner, including any direction, instruction, interpretation, or determination by Owner. When a Dispute occurs, Contractor shall pursue resolution through the process set forth in this Section.

Hereafter, all references to Disputes brought by Contractor refer also to Disputes brought by Contractor on behalf of any of its Subcontractors, provided that the additional requirements of Section 19.2.2 are met.

#### **19.2.2 Overview of Process**

The Dispute resolution process shall involve the following steps:

1. When a Dispute arises, Contractor must notify Owner in writing. This written notification must specify all claims composing the Dispute and must include supporting documentation detailing the alleged matters at issue.

2. Contractor also shall submit a sworn certification in a form acceptable to Owner, executed by an authorized representative with authority to bind Contractor and with direct knowledge of the Dispute, certifying that:
  - i. the claim is made in good faith and in accordance with the terms of the Contract Documents;
  - ii. the amount claimed accurately reflects the appropriate adjustments in the Contract Price and time, and includes all delay claims and direct and indirect costs sought by Contractor;
  - iii. the supporting cost and pricing data are accurate, current and complete;
  - iv. the factual basis for the claim is not falsely represented; and
  - v. except as expressly noted and justified by citation to legal authority, the amount claimed includes no attorneys' fees, interest or other generally non-compensable costs. Contractor's relief is limited to the actual damages incurred, not punitive or consequential damages.
3. Contractor may request a meeting with Owner to discuss the claims at issue after the written notification is made.
4. Owner will review the materials submitted by Contractor and provide a written response to Contractor within thirty (30) days of Owner's receipt of the Notice of Dispute.
5. Upon conclusion of the process described in this section, if the Dispute remains unresolved, the parties may pursue remedies in law and/or equity.

### **19.2.3 Continuation of Work**

At all times during this Dispute resolution process or any subsequent administrative or court proceeding, and at all times during the pendency of any Dispute with any other project contractor, Contractor and all Subcontractors shall proceed with the Project Work diligently, without delay, in accordance with all provisions of the Contract Documents.

### **19.2.4 Records Related to Dispute**

Throughout the course of any Work that is the subject of any Dispute, Contractor shall keep complete records of the extra costs and time incurred related to the Dispute. Contractor shall permit Owner access to these and all other records needed for evaluating the disputed issue(s) as determined by Owner. These records shall be retained for a period of not less than six (6) years from the date of resolution of the Dispute.

## **20 ACCEPTANCE OF PROJECT**

The System will be considered fully installed when operation of the System is to the satisfaction of Owner. After Software installation is complete, Contractor shall certify in writing to Owner that the Software is installed and ready for use on Owner's and the Users' respective operating Systems.

### **20.1 Project Completion**

As a pre-requisite to Project Completion, Contractor shall provide written Notice to Owner when all of the following have occurred with respect to the Project:

1. Owner and Contractor have agreed upon a Punch List for Project Completion and Final System Acceptance, as appropriate.
2. Contractor has completed all Work (except for Punch List items, final cleanup and other items only included in the requirements for Final System Acceptance).
3. Contractor has ensured that the Work in connection with Project Completion has been performed in accordance with the requirements of the Contract Documents.
4. Contractor has ensured that the Project may be operated safely and securely.
5. Contractor has received all applicable Governmental Approvals required for the Project.
6. Contractor has furnished to Owner certifications from Contractor's Design Manager, in form and substance satisfactory to Owner, certifying that the Design Documents meet the requirements of the Contract Documents.
7. Contractor has furnished to Owner certifications from Contractor's Project Manager, in form and substance satisfactory to Owner, certifying that the System meets the requirements of the Contract Documents.
8. Contractor has furnished to Owner certifications from Contractor's Project Manager, in form and substance satisfactory to Owner, certifying that there are no outstanding Nonconforming Work or Punch List items, identified by Contractor or Owner, as prerequisites to Project Completion.
9. Contractor has submitted its Final Invoice.

### **20.2 Notice of Project Completion**

Upon receipt of Contractor's Notice under Section 20.1, Owner will verify that:

1. All Nonconforming Work identified as prerequisites to completion of the Project has been corrected.
2. All Punch List items identified as prerequisites to completion of the Project have been completed.
3. All other requirements identified as prerequisites to completion of the Project have been met.

If any Work does not meet the requirements of the Contract Documents or Work has not been completed, Owner will promptly advise Contractor as to Nonconforming Work or incomplete



Work necessary to be corrected as a condition to Project Completion. Upon correction of the Nonconforming Work (excluding Punch List items identified for Final System Acceptance), Contractor shall provide written notification to Owner and Owner will verify that all prerequisites to Project Completion have been met and will issue a Notice of Project Completion.

### **20.3 Affidavit of Final Completion**

Contractor shall provide to Owner an executed sworn Affidavit of Final Completion in accordance with this Section 20.3 when all of the following have occurred:

1. Owner has received all Design Documents, test data, and other deliverables required under the Contract Documents for the Project.
2. All Software Products and special tools, Equipment, furnishings, and supplies purchased by and/or used by Contractor, as provided in the Contract Documents, have been delivered to Owner free and clear of Liens.
3. All of Contractor's and Subcontractors' personnel, supplies, Equipment, waste materials, rubbish, and temporary facilities have been removed from the PSAP Sites, Contractor has restored and repaired all damage or injury arising from such removal to the satisfaction of Owner and the Sites are in good working order and condition.
4. Contractor has furnished to Owner certifications from Contractor's Project Manager, in form and substance satisfactory to Owner, certifying that there are no outstanding Nonconforming Work or Punch List items.
5. Contractor has delivered to Owner a Notice of completion for the Project in recordable form and meeting all statutory requirements.
6. All of Contractor's other obligations under the Contract Documents have been satisfied in full or waived in writing by Owner.

The Affidavit of Final Completion shall include the following statement:

*To the best of Contractor's knowledge and belief, the Work under the Contract has been completed in strict accordance with the Contract Documents, no lawful debts for labor or materials are outstanding and no federal excise tax has been included in the Contract Price; all requests for funds for undisputed work under the Contract, including changes in the Work, and under all billings of whatsoever nature are accurate, complete and final and no additional compensation over and above the final payment shall be requested or is due under the Contract or under any adjustment issued thereunder for said undisputed work; there are no outstanding claims, Liens or stop notices relating to the Project; and upon receipt of final payment, Contractor and Subcontractors acknowledge that Owner and any and all employees of Owner and their authorized representatives shall thereby be released, discharged and acquitted from any and all claims or liability for additional sums on account of undisputed work performed under the Contract.*

If Contractor is unable to provide the affidavit in the above form, the affidavit shall certify that all such outstanding matters are set forth in an attached list which shall describe the outstanding matters in such detail as may be requested by Owner. The affidavit shall include a representation of Contractor that it is diligently and in good faith contesting all such matters

by appropriate legal proceedings and shall provide a status report regarding the same including an estimate of the maximum payable with respect to each such matter.

**20.4 Notice of Final System Acceptance**

Upon Owner's receipt of the Affidavit of Final Completion, Owner will verify that:

1. All Nonconforming Work has been corrected.
2. All Punch List items have been completed.
3. All other requirements identified as prerequisites to Final System Acceptance have been met.

If any Work does not meet the requirements of the Contract Documents or Work has not been completed, Owner will advise Contractor in writing as to Nonconforming Work or incomplete Work necessary to be corrected as a condition to Final System Acceptance. Upon correction of the Nonconforming Work (including incomplete Work), Contractor shall provide written notification to Owner and Owner will verify that all prerequisites to Final System Acceptance have been met and will issue a Notice of Final System Acceptance.

**20.5 Overpayments; No Relief from Continuing Obligations**

Final System Acceptance shall not prevent Owner from correcting any measurement, estimate or certificate made before or after completion of the Work, or from recovering from Contractor, the Surety(ies) or both, the amount of any overpayment sustained due to failure of Contractor to fulfill the obligations under the Contract. A waiver on the part of Owner of any breach by Contractor shall not be held to be a waiver of any other or subsequent breach. Final System Acceptance shall not relieve Contractor from any of its continuing obligations hereunder, or constitute any assumption of liability by Owner.

**20.6 Assignment of Causes of Action**

Contractor hereby offers and agrees to assign to Owner all rights, title and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Section 15), arising from purchases of goods, services or materials pursuant to the Contract or any Subcontract. This assignment shall be made and become effective at the time Owner tenders final payment to Contractor, without further acknowledgment by the parties.

## 21 WARRANTIES

### 21.1 Warranties by Contractor

#### 21.1.1 Project Warranties

Contractor warrants that:

1. All design Work furnished pursuant to the Contract Documents shall conform to all professional principles generally accepted as standards of the industry in the State of Missouri.
2. All Work furnished pursuant to the Contract Documents shall be performed in a workmanlike manner and shall conform to the standards of care and diligence normally practiced in the industry.
3. The Software Products, Materials and Equipment furnished under the Contract Documents shall be of good quality and, when installed, shall be new.
4. The Work shall be in general compliance with the requirements of the Contract Documents.
5. The Specifications and/or drawings selected or prepared for use during installation are appropriate for their intended use.

#### 21.1.2 Project Warranty Term

A. General Warranty. Except as otherwise set forth in the Services Agreement (**Exhibit C**) the Warranty term for each element of the System shall commence upon Acceptance thereof by Owner or acceptance thereof by the appropriate Person who will own such element. Subject to extension under Section 21.2, the Warranties regarding all elements of the System shall remain in effect until one (1) year after Final System Acceptance, whichever is applicable and comes first in time. If Owner determines that any of the Work has not met the standards set forth in this Section 21.1 at any time within the Warranty period, then Contractor shall correct such Work as specified below within the one year Warranty term.

B. Extended Warranty. Manufacturer's certificates of warranty shall be provided for all major System components. Warranty shall be obtained for at least one (1) year. Where a longer period is offered at no additional cost or called for in the specific specifications, the longer period shall govern.

#### 21.1.3 Software Warranties

In addition to the general Project Warranty provided herein, Contractor further agrees to the warranties set forth in the Services Agreement (**Exhibit C**).

#### 21.1.4 Corrective Work

Within seven (7) days of receipt by Contractor of Notice from Owner specifying a failure of any of the Work to satisfy Contractor's Warranties, or of any Subcontractor representation, Warranty, guarantee, or obligation which Contractor is responsible to enforce, Contractor and Owner shall mutually agree when and how Contractor shall remedy such violation; provided, however, that in case of an emergency as indicated by Owner in its Notice requiring immediate curative action, Contractor and Owner shall agree on a remedy immediately upon notice by Owner of such emergency. If Contractor does not use its best efforts to proceed to

effectuate such remedy within the agreed time, or if Contractor and Owner fail to reach such an agreement within such 7-Day period (or immediately, in the case of emergency conditions), then Owner, after notice to Contractor, shall have the right to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by Contractor. Contractor shall reimburse Owner for such costs within thirty (30) days after Contractor's receipt of invoice therefor. Owner may agree to accept Nonconforming Work in accordance with Section 5.7.2.

Owner and Contractor shall conduct a walkthrough of the PSAP Sites prior to expiration of the Warranty period and shall produce a Punch List of those items requiring Warranty Work.

**21.1.5 Contractor's Costs of Correction of Work**

All costs of correcting such rejected Work, including additional testing and inspections, shall be deemed included in the Contract Price. Contractor shall be responsible for obtaining any required Governmental Approvals or other consents from any other Person in connection with the Warranty Work.

**21.2 Warranty of Corrected Work**

The Warranties shall apply to all Work redone, repaired, corrected or replaced pursuant to the terms of the Contract. The Warranties as to each redone, repaired, corrected or replaced element of the Work shall extend beyond the original Warranty period if necessary to provide at least a 1-year Warranty period following acceptance thereof by Owner or acceptance thereof by the appropriate Person who will own such element.

**21.3 Subcontractor Warranties**

**21.3.1 Assignment**

Without in any way derogating Contractor's own representations and warranties (including the Warranties) and other obligations with respect to all of the Work, Contractor shall obtain from all Subcontractors and cause to be extended to Owner, appropriate representations, warranties, guarantees and obligations with respect to the design, Materials, workmanship, Equipment, tools and supplies furnished by such Subcontractors, including all such representations, warranties, guarantees, and obligations required to be furnished by Subcontractors pursuant to the Contract Documents. All representations, warranties, guarantees, and obligations of Subcontractors shall:

1. be written so as to survive all Owner and Contractor inspections, tests, and approvals; and
2. run directly to and be enforceable by Contractor and/or Owner and their respective successors and assigns.

Contractor hereby assigns to Owner all of Contractor's rights and interest in all extended warranties for periods exceeding the applicable Warranty period which are received by Contractor from any of its Subcontractors.

**21.3.2 Enforcement**

Upon receipt from Owner of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee, or obligation, Contractor shall enforce or

perform any such representation, warranty, guarantee, or obligation, in addition to Contractor's other obligations hereunder. Owner's rights under this Section 21.3.2 shall commence at the time such representation, warranty, guarantee, or obligation is furnished, and shall continue until the expiration of Contractor's relevant Warranty (including extensions thereof under Section 21.2). Until such expiration, Contractor shall be responsible for the cost of any Equipment, Material, labor (including re-engineering) or shipping, and Contractor shall be required to replace or repair defective Equipment, Material or workmanship furnished by any Subcontractor.

**21.4 No Limitation of Liability**

Except as limited in Section 21.1.1, the foregoing Warranties are in addition to all rights and remedies available under the Contract Documents or applicable law, and shall not limit Contractor's liability or responsibility imposed by the Contract Documents or applicable law with respect to the Work, including liability for design defects, latent defects, strict liability, negligence or fraud; provided, however, that, upon expiration of the Warranties, Contractor shall have no further liability to Owner hereunder for patent defects.

**21.5 Warranty Beneficiaries**

In addition to benefiting Owner and its successors and assigns, the Warranties and Subcontractor warranties provided under this Section 21 shall inure to the benefit of, and shall be directly enforceable by, any Users and Governmental Persons with respect to those portions of the Work owned or controlled by each such entity or Person.

**21.6 Remedies for Breach of Warranty**

In addition to Owner's other rights and remedies hereunder, at law or in equity, Contractor shall be liable for actual damages resulting from its failure to provide corrective Work in accordance with Section 21.1.4 and any breach of an express warranty.

**21.7 Disputes**

Any disagreement between Owner and Contractor relating to this Section 21 shall be subject to the Dispute resolution provisions contained in Section 19, provided that Contractor shall proceed as directed by Owner pending resolution of the Dispute.

## **22 DOCUMENTS AND RECORDS**

### **22.1 Subcontractor Pricing Documents**

Contractor shall require each Subcontractor to submit to Contractor a copy of all documentary information used in determining its Subcontract price, immediately prior to executing the Subcontract or Change Orders or amendments thereto, which shall be accessible by Contractor, Owner, and other dispute resolvers, on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor stating that it has provided all the documentary information used in establishing its Subcontract price. Each Subcontract that is not subject to the foregoing requirement shall include a provision that requires the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to Contractor and/or Owner in connection with any disputed change order made by such Subcontractor.

### **22.2 Project Records**

#### **22.2.1 Maintenance of Records**

Contractor shall maintain at Contractor's Project Manager's office in the State a complete set of all books, records and documents prepared or employed by Contractor with respect to the Project.

#### **22.2.2 Audit and Inspection Rights**

Contractor shall grant to Owner and their respective authorized representatives, such audit and inspection rights and allow such Persons such access to and the right to copy such books and records (including all tax returns and supporting documentation filed with any Governmental Persons) as such Persons may reasonably request from time to time in connection with the issuance of Change Orders, the resolution of Disputes, and such other matters as such Persons reasonably deem necessary for purposes of complying or verifying compliance with the Contract and Legal Requirements, including responding with requests pursuant to the Missouri Open Records Act.

#### **22.2.3 Change Order Pricing Data**

For cost and pricing data submitted in connection with pricing Change Orders, unless such pricing is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by law or regulation, such Persons and their representatives have the right to examine all books, records, documents, and other data Contractor related to the negotiation of or performance of Work under such Change Orders for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

#### **22.2.4 Claims Audits**

All Claims filed against Owner shall be subject to audit at any time following the filing of the Claim. The audit may be performed by employees of Owner or by an auditor under contract with Owner. No Notice is required before commencing any audit before sixty (60) days after Final System Acceptance. Thereafter, Owner shall provide twenty (20) days Notice to

Contractor, any Subcontractors or their respective agents before commencing an audit. Contractor, Subcontractors or their agents shall provide adequate facilities, acceptable to Owner, for the audit during normal business hours. Contractor, Subcontractors, and their agents shall cooperate with the auditors. Failure of Contractor, Subcontractors, or their agents to maintain and retain sufficient records to allow the auditors to verify all or a portion of the Claim or to permit the auditors access to the books and records of Contractor, Subcontractors, or their agents shall constitute a waiver of the Claim and shall bar any recovery thereunder.

### **22.3 Retention of Records**

Contractor shall maintain all records and documents relating to the Contract (including copies of all original documents delivered to Owner) at Contractor's Project Manager's office in the State until seven (7) years after the earlier to occur of:

1. the date Final System Acceptance is achieved; or
2. the termination date.

If Approved by Owner, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents. Contractor shall notify Owner where such records and documents are kept.

Notwithstanding the foregoing, all records which relate to Claims being processed or actions brought under the Dispute resolution provisions hereof shall be retained and made available until such actions and Claims have been finally resolved. Records to be retained include all books and other evidence bearing on Contractor's costs and expenses under the Contract Documents. Contractor shall make these records and documents available for audit and inspection to Owner, at Contractor's office, at all reasonable times, without charge, and shall allow such Persons to make copies of such documents (at no expense to Contractor).

## **23 SOFTWARE**

Notwithstanding all other terms and conditions stated herein, the parties specifically agree to the terms and conditions set forth in **Exhibit C** (the Services Agreement), which respect to the System software products and related interfaces and user manuals (collectively, the “Software Products”).

## **24 MISCELLANEOUS PROVISIONS**

### **24.1 Amendments**

The Contract may be amended only by a written instrument duly executed by the parties or their respective successors or assigns.

### **24.2 Waiver**

#### **24.2.1 No Waiver of Subsequent Rights**

Either party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of the Contract Documents at any time shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both parties, such interpretation and implementation thereof shall not be binding in the event of any future Disputes. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

#### **24.2.2 Custom Does Not Constitute Waiver**

No act, delay, or omission done, suffered or permitted by one party or its agents shall be deemed to waive, exhaust, or impair any right, remedy, or power of such party under any Contract Document, or to relieve the other party from the full performance of its obligations under the Contract Documents. No custom or practice between the parties in the administration of the terms of the Contract Documents shall be construed to waive or lessen the right of a party to insist upon performance by the other party in strict compliance with the terms of the Contract Documents.

#### **24.2.3 Waivers Shall Be In Writing**

No waiver of any term, covenant or condition of the Contract Documents shall be valid unless in writing and signed by the party providing the waiver.

### **24.3 Independent Contractor**

Contractor is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with Owner other than that of Project owner and independent contractor. In no event shall the relationship between Owner and Contractor be construed as creating any relationship whatsoever between Owner and any of



Contractor's employees. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner. Except as otherwise specified in the Contract Documents, Contractor has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other Persons that Contractor or any Subcontractor hires or engages to perform or assist in performing the Work.

#### **24.4 Successors and Assigns**

The Contract Documents shall be binding upon and inure to the benefit of Owner and Contractor and their permitted successors, assigns and legal representatives.

##### **24.4.1 Assignment by Owner**

Owner may assign all or part of its right, title and interest in and to the Contract, including rights with respect to the Surety bonds required hereunder and any other performance security provided, to any Person with the prior written approval of Contractor.

##### **24.4.2 Assignment by Contractor**

Contractor may assign its rights to receive payment under the Contract Documents and may Subcontract Work in compliance with the requirements of the Contract Documents. Contractor shall not otherwise sublet, transfer, assign or dispose of any portion of the Contract, or delegate any of its duties hereunder, except with Owner's prior written Approval. Contractor's assignment or delegation of any of its Work under the Contract Documents shall be ineffective to relieve Contractor of its responsibility for the Work assigned or delegated, unless Owner, in its sole discretion, has Approved such relief from responsibility.

#### **24.5 Designation of and Cooperation with Representatives**

##### **24.5.1 Designation of Representatives**

Concurrently with execution hereof, Owner and Contractor shall each designate an individual or individuals who shall be authorized to make decisions and bind the parties on matters relating to the Contract Documents. Such designations may be changed by a subsequent writing delivered to the other party in accordance with Section 24.10. The parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the Project and negotiate on behalf of each of the parties but who do not have authority to bind Owner or Contractor.

##### **24.5.2 Cooperation**

Contractor shall cooperate with Owner and all representatives of Owner designated as described above.

#### **24.6 Gratuities and Conflicts of Interest**

Neither Contractor nor any of its employees, agents and representatives shall offer or give to an officer, official, board member, committee member, representative, consultant or employee of Owner. Contractor represents and warrants that it has not previously offered or given any gifts, entertainment, payments, loans, or gratuities in violation of such prohibitions.

**24.7 Survival**

The provisions in the Contract Documents relating to confidentiality, disclaimers of warranty, indemnification, non-solicitation, venue and choice of law shall survive termination.

**24.8 Limitation on Third-Party Beneficiaries**

It is not intended by any of the provisions of the Contract Documents to create any third-party beneficiary hereunder, or to authorize anyone not a party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions) identify third parties and state that they are entitled to benefits hereunder. The duties, obligations, and responsibilities of the parties to the Contract Documents with respect to such third parties shall remain as imposed by law. The Contract Documents shall not be construed to create a contractual relationship of any kind between Owner and a Subcontractor or any other Person except Contractor.

**24.9 No Personal Liability**

Owner's authorized representatives are acting solely as agents and representatives of Owner when carrying out the provisions of or exercising the power or authority granted to them under the Contract Documents. They shall not be liable either personally or as employees of Owner for actions in their ordinary course of employment.

**24.10 Notices and Communications**

**24.10.1 Delivery of Notices**

Notices under the Contract Documents shall be in writing and delivered: (1) personally; (2) by certified mail, return receipt requested; (3) by a recognized overnight mail or courier service, delivery receipt requested; or (4) by tele-facsimile communication followed by a hard copy or with receipt confirmed by telephone, to the following address (or to such other address as may from time to time be specified in writing):

All correspondence with Contractor shall be sent to Contractor's Project Manager or as otherwise directed by such Project Manager. The address for such communications shall be:

Name  
Title  
Company  
Address  
City, MO ZIP

Telephone:  
Fax:  
E-mail: name@company.com

All communications to Owner shall be marked with Owner's project identification number and shall be delivered to Owner's Project Manager, with copies to such additional Persons as may be designated by Owner's Project Manager and as follows:

Ms. Jennifer L. George  
Director of Policy Research & Special Associate County Counselor  
Office of St. Charles County Executive  
100 North Third Street, Suite 318  
St. Charles, MO 63301  
Telephone: (636) 949-7520  
Fax: (636) 949-7521  
E-mail: [jgeorge@sccmo.org](mailto:jgeorge@sccmo.org)

With a copy to :  
Mr. Dwayne Kinley  
Emergency Communications Manager  
201 North Second Street, Suite 327  
St. Charles, MO 63301  
Telephone: (636) 949-1837  
E-mail: [dkinley@sccmo.org](mailto:dkinley@sccmo.org)

and

Ms. Toby Dible  
Associate County Counselor  
Office of the St. Charles County Counselor  
100 North Third Street, Suite 216  
St. Charles, MO 63301  
Telephone : (636) 949-7540  
Fax: (636) 949-7541  
E-mail: [tdible@sccmo.org](mailto:tdible@sccmo.org)

#### **24.10.2 Receipt of Notices**

Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, Notices sent by fax after 4:00 p.m. Central Standard Time and all other Notices received after 5:00 p.m. Central Standard (as applicable) shall be deemed received on the first Business Day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax shall have been received before 4:00 p.m.).

#### **24.10.3 Copies of Correspondence to Owner**

Contractor shall copy Owner on all written correspondence pertaining to the Contract between Contractor and any Person other than correspondence between Contractor and its Subcontractors, consultants and attorneys.

#### **24.11 Further Assurances**

Contractor shall promptly execute and deliver to Owner all such instruments and other

documents and assurances as are reasonably requested by Owner to further evidence the obligations of Contractor hereunder, including assurances regarding assignments of Subcontractors contained herein.

**24.12 Severability**

If any clause, provision, Section or part of the Contract is ruled invalid under Section 19 or otherwise by a court of competent jurisdiction, then the parties shall:

1. promptly meet and negotiate a substitute for such clause, provision, Section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the Contract Price to account for any change in the Work resulting from such invalidated portion; and
2. if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations.

The invalidity or unenforceability of any such clause, provision, Section or part shall not affect the validity or enforceability of the balance of the Contract, which shall be construed and enforced as if the Contract did not contain such invalid or unenforceable clause, provision, Section or part.

**24.13 Headings**

The captions of the Sections of the Contract Documents are for convenience only and shall not be deemed part of the Contract or considered in construing the Contract.

**24.14 Governing Law**

The Contract Documents shall be governed by and construed in accordance with the law of the State of Missouri. Venue for any legal action in connection with the Contract shall lie in the Circuit Court of St. Charles County, Missouri.

**24.15 Entire Agreement**

The Contract Documents contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties with respect to its subject matter.

**24.16 Counterparts**

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**24.17 Force Majeure**

Any delay or nonperformance of any provision of this Contract (other than for the payment of amounts due hereunder) caused by conditions beyond the reasonable control of the performing party shall not constitute a breach of this Contract, and the time for performance of such provision, if any, shall be deemed to be extended for a period equal to the duration of the conditions preventing performance.

**24.18 Compliance with the Law**

This Contract is entered into subject to compliance by Contractor with all provisions of the Constitution and laws of the State of Missouri and the Charter and ordinances of Owner, as the same shall apply hereto.

**24.19 Confidentiality**

Both parties recognize that their respective employees and agents, in the course of performance of this Contract, may be exposed to confidential information and that disclosure of such information could violate rights to private individuals and entities. Each party agrees that it will not disclose any confidential information of the other party and further agrees to take appropriate action to prevent such disclosure by its employees or agents. The confidentiality covenants contained herein shall survive the termination or cancellation of this Contract for a period of two (2) years. This obligation of confidentiality shall not apply to information that:

1. At the time of the disclosure is in the public domain;
2. After disclosure, becomes part of the public domain by publication or otherwise, except by breach of this Contract by a party;
3. A party can establish by reasonable proof was in that party's possession at the time of disclosure;
4. A party receives from a third party who has a right to disclose it to that party; or
5. Is subject to Sunshine Law requests, only to the extent disclosure is based on the good faith written opinion of the receiving party's legal counsel that disclosure is required by law: provided, however, that that receiving party shall give prompt notice of the service of process or other documentation that underlies such requirement and use its best efforts to assist the disclosing party if the disclosing party wishes to obtain a protective order or otherwise protect the confidentiality of such confidential information. The disclosing party reserves the right to obtain protective order or otherwise protect the confidentiality of its confidential information.

The section shall complement and support, but is not intended in any way to limit, the Confidentiality provisions set forth in the Services Agreement (**Exhibit C**).

**24.20 Non-appropriation**

If County Council should not appropriate or otherwise make available funds sufficient to

complete the Project, Owner may unilaterally terminate this Contract only upon thirty (30) days written Notice to Contractor. Upon termination, Owner shall remit payment as provided in Book 1, Article 15.

**24.21 Most Favored Nation**

If Contractor, at any time up to and including the fifth anniversary of the date of Final System Acceptance, enters into or performs a contract whereby Contractor furnishes any product, service, component, or option to any Person at a lower per Unit Price than Contractor furnishes to Owner or any User under this Contract, or on any terms that are materially more favorable to such Person than those set forth in this Contract, such lower per Unit Price and/or more favorable term shall automatically be incorporated into this Contract for future purchases. Contractor has an affirmative duty to inform Owner of circumstances triggering this clause. This clause shall be effective whether Contractor furnishes the product, service, component, or option to Owner or any User or such other Person directly. This clause shall be effective whether or not the product, service, component, or option has been produced or otherwise manufactured, delivered, invoiced, or paid for. In the event the product, service, component, or option has already been paid for by Owner or any User, Owner and any User, as the case may be, shall be entitled to a set off against any future payments to Contractor or to require Contractor reimburse Owner and/or the User for the savings.

**22.22 Survival**

All duties and responsibilities of any party to which, either expressly or by their nature, extend into the future, shall extend beyond and survive the termination of this Contract.

**22.23 Advertising**

No mention of Owner shall be made in any advertising or article in any publication relating to the project without the express written approval of Owner.

**22.24 Optional Items**

Contractor will hold the rates for optional items in place for eighteen (18) months from the Effective Date.

**Next Generation 9-1-1 Cloud System  
St. Charles County, Missouri  
Sample Contract  
May 9, 2014**

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IN WITNESS WHEREOF, the parties have executed the Contract as of the date and year first set forth above.

CONTRACTOR

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

\_\_\_\_\_  
Typed or Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

OWNER

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

\_\_\_\_\_  
Typed or Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

ATTEST:

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

\_\_\_\_\_  
Title

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

\_\_\_\_\_  
Director of Administration  
Title

APPROVED

By: \_\_\_\_\_  
Superintendent of Police

By: \_\_\_\_\_  
Emergency Communications Manager

APPROVED AS TO LEGAL FORM

By: \_\_\_\_\_  
County Counselor

The County Accounting Officer hereby certifies that an unencumbered balance, sufficient to pay the total contract amount as above stated, remains in the appropriation account against which such obligation is to be charged.

By: \_\_\_\_\_  
Accounting Officer

## EXHIBIT A: DEFINITIONS

<b>Term/Acronym</b>	<b>Meaning</b>
Accept or Acceptance	Formal conditional determination in writing by Owner that a particular matter or item appears to meet the requirements of the Contract Documents.
Acceptance Date	The date the System is Accepted.
Acceptance Tests	Those tests described in the Statement of Work.
Activity or activity	Parts of the Work including finished products or functional processes required as subcomponents of the Work Breakdown Structure as defined by Contractor.
Addenda	A written amendment to Request for Proposal No. 14-089 issued by Owner after its release and before Award.
Affidavit of Final Completion	The meaning set forth in Book 1, Section 20.3.
Agreement or Contract	Depending upon the context, either: (i) the Contract (Book 1), or (ii) collectively, the Contract Documents, which establish the rights and obligations of Owner and Contractor.
Applicable Laws	See Legal Requirements.
Applicable Standards	The standards set forth in Book 2.
Application for Final Payment	The application described in Book 1, Section 11.5.1.
Approve or Approval	Formal conditional determination in writing Owner Project Manager that a particular matter or item is good or satisfactory for the Project. Such determination may be based on requirements beyond those set forth in the Contract Documents and may reflect the preferences of Owner.
ATP	The Acceptance Testing or Acceptance Test Plan described in the RFP and Statement of Work.
Award	The Acceptance of the Proposal by Owner (with the understanding that the order of priority of the Contract Documents shall be as set forth in Book 1, Section 1.3, and that Owner shall have the right to require compliance with the Contract Document requirements, even though it may necessitate performance of Work by Contractor not contemplated in the Proposal Documents).
Bid Bond	A bond as described in Book 1, Section 8.2.
Book 1	The Contract Document designated as Book 1 (the Contract).
Book 2	The Contract Document designated as Book 2 (the Proposal).



Business Day(s)	A day that Owner is open for business, excluding holidays, Saturdays and Sundays.
Calendar Day(s)	Each and every day shown on the calendar, including Saturdays and Sundays, beginning and ending at midnight.
Change Order	The meaning set forth in Book 1, Section 13.
Claim	A separate demand by Contractor for: (i) a time extension which is disputed by Owner; or (ii) payment of money or damages arising from work done by or on behalf of Contractor in connection with the Contract which is disputed by Owner. A claim will cease to be a Claim upon resolution thereof, including resolution by delivery of a Change Order or Contract amendment signed by all parties.
Completion Deadline	Depending upon the context, either: (i) Project Completion Deadline, or (ii) Finance Acceptance Deadline.
Confidential Information	The meaning set forth in Book 1, Section 24.19 and Exhibit B.
Contract	Depending upon the context, either: (i) the Contract (Book 1), or (ii) collectively, the Contract Documents, which establish the rights and obligations of Owner and Contractor.
Contract Deadlines	The meaning set forth in Book 1, Section 4.3.
Contract Documents	The meaning set forth in Book 1, Section 1.2.
Contract Price	The meaning set forth in Book 1, Section 11.1.
Contractor	The entity inserted in the first page of Book 1.
Contractor Project Manager	The person designated by Contractor to supervise the Project Persons performing Work and to receive delivery of notices to the Contractor pursuant to Book 1, Section 2.2.
Contractor-Related Entity(ies)	Contractor, Major Participants, Subcontractors, their employees, officers, and agents and all other Persons for whom Contractor may be legally or contractually liable.
Contractor's Specifications	The specifications describing the Work that are developed by Contractor.
Critical Path	The precedence of activities on each applicable Project Schedule.
Day(s)	The meaning set forth in Book 1, Section 1.7.
Design Documents	All drawings (including plans, sections, details and diagrams), specifications, reports, calculations and records, at any stage of development or revision

	necessary for design of the Project in accordance with the Contract Documents.
Detailed Design Review	The intellectual process of finalizing engineering, operational, and any other requirements necessary prior to System Implementation.
Directive Letter	The letter described in Book 1, Section 13.1.2.
Dispute	The meaning set forth in Book 1, Section 19.2.1.
Effective Date	The date of execution of the Contract by Owner.
Engineer	“Contractor’s Engineer.” Contractor acknowledges and agrees that Owner will be responsible for certain oversight and other matters with respect to the Project, and that as a result certain rights in favor of the Engineer may be exercised by and inure to the benefit of Owner rather than Contractor’s Engineer. In the event any question arises regarding whether any such rights are applicable to Owner or how to apply such rights, Owner’s interpretation regarding such matter shall control.
Engineering Services	All Work relating to the design, including preparation and interpretation of engineering plans and specifications, development of design solutions for conformance with the Contract Documents, Applicable Laws and other design-related decision-making, and any other Activities, collectively, which are required to be practice by an engineer in accordance with the laws of the State of Missouri.
Equipment	All equipment, machinery, tools, and apparatus, together with supplies for upkeep and maintenance, necessary for the proper construction, installation, testing and acceptable completion of the Work.
Error	An omission, inconsistency, inaccuracy, or deficiency.
Event of Default	A default as described in Book 1, Section 16, following Notice and opportunity to cure to the extent permitted therein and issuance by Owner of Notice that an Event of Default has occurred.
Final System Acceptance and Final System Acceptance Deadline	Acceptance of the Project as described in Book 1, Section 20.4. The Final System Acceptance Deadline is no later than 120 days after Project Completion.
Governmental Approval(s)	Any approval, authorization, certification, consent, decision, exemption, filing, lease, license, permit, agreement, concession, grant, franchise, registration or ruling required by or with any Governmental Person in order to design and complete the Project.
Governmental Person(s)	Any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity. The term includes the State of Missouri and agencies and subdivisions thereof, other

	than the Department of Transportation.
Holiday(s)	<p>New Year's Day (January 1)  Martin Luther King Jr. Day (Third Monday in January)  Presidents' Day (Third Monday in February)  Memorial Day (Last Monday in May)  Independence Day (July 4)  Labor Day (First Monday in September)  Veterans' Day (November 11)  Thanksgiving Day (Fourth Thursday in November)  Day after Thanksgiving Day (Fourth Friday in November)  Christmas Eve (December 24)  Christmas (December 25)</p> <p>When any of the above holidays falls on a Sunday, the holiday will be observed the following Monday; when any of the above holidays falls on a Saturday, the holiday will be observed on the immediately preceding Friday.</p>
Include, Including, Included or Includes	All references in the Contract Documents to "include," "including," "included" or "includes" shall mean "including, but not limited to."
Incremental Costs	Those costs, if any, which Contractor incurs as a result of a particular circumstance, which Contractor would not have incurred but for the circumstance. In determining such costs, one would determine the total cost that Contractor would have incurred had the circumstance not occurred, and subtract such amount from the costs actually incurred; the difference being the "increment."
Indemnified Parties	The meaning set forth in Book 1, Section 18.1.1.
Key Personnel	The meaning set forth in Book 1, Section 7.7.
Legal Requirements	All applicable federal, state and local laws, codes, ordinances, rules, regulations, judgments, decrees, directives, guidelines, policy requirements, orders and decrees of any Governmental Person having jurisdiction over the Project or Site, any Work. The term "Legal Requirements" does not include Governmental Approvals or federal income tax laws.
Lien	Any pledge, lien, security interest, mortgage, deed of trust, or other charge or encumbrance of any kind, or any other type of preferential arrangement (including any agreement to give any of the foregoing, any conditional sale or other title retention agreement, any lease in the nature of a security instrument, and the filing of or agreement to file any financing statement or other instrument intended to perfect a security interest).
Liquidated Damages	The damages described in Book 1, Section 17.1.
Major Participant	<p>Any of the following entities:</p> <p>(i) All general partners or joint venture members of the Contractor; all</p>

	<p>individuals, Persons, partnerships, limited liability partnerships, corporations, limited liability companies, business associations, or other legal entities, however organized, directly or indirectly holding a fifteen percent (15%) or greater interest in the Contractor;</p> <p>(ii) the lead engineering/design firm; and/or</p> <p>(iii) each Subcontractor that will perform Work valued at ten percent (10%) or more of the Work.</p>
Materials	All components required for use in the construction of the Project.
Nonconforming Work	Work performed that does not meet the requirements of the Contract Documents.
Notice or notice	The meaning set forth in Book 1, Section 24.10.
Notice of Final System Acceptance	The notice delivered to Contractor under Book 1, Section 20.4, stating that the final Owner acceptance of the Project has occurred.
Notice of Termination (or Partial Termination)	A notice issued by Owner to terminate the Contract and the performance of Work by Contractor, either in whole or in part, pursuant to Book 1, Section 15.
Notice of Termination Due to Suspension	A notice issued by Contractor pursuant to Book 1, Section 15.15.
Open-Source Software	Software that has its underlying source code freely available to evaluate, copy, and modify (also known as “freeware” or “shareware”).
Owner	St. Charles County, Missouri.
Owner Project Manager	The person designated by Owner to direct the Project and to receive delivery of notices to Owner per Book 1, Section 24.10.
Owner-Directed Changes	Any changes in the Work (including changes in the standards applicable to the Work), which Owner has directed Contractor to perform as described in Book 1, Section 13.
Performance Bond	A bond as described in Book 1, Section 8.1.
Person	Any individual, corporation, company, voluntary association, partnership, trust, unincorporated organization, or Governmental Person, including Owner.
Project	The Next Generation 9-1-1 Cloud System Project as described by the Contract Documents.
Project Completion	As defined in Book 1, Section 20.1 and 20.2.
Project Completion Deadline	Achievement of all Work necessary to meet the Project Completion Deadline as set forth in Book 1, Section 4.3.1.

Project Definition	Project scope of work as initially defined by the RFP and ultimately defined by the accepted Proposal Documents.
Project Manager	See Contractor Project Manager and Owner Project Manager.
Project Schedule	The meaning set forth in Book 1, Section 4.4.
Proposal or Proposal Documents	Those documents constituting Contractor's proposal in response to the RFP, including any best and final offers or supplements to proposals as may have been requested by Owner (Book 2).
Proposal Due Date	The due date for submission of responses to the RFP as set forth in Section 2.2 thereof.
PSAP(s)	Public Safety Answering Points.
Punch List	The list of Work items with respect to the Project that remain to be completed.
Request for Change Order (RCO)	A Contractor-initiated request for a change order pursuant to Book 1, Section 13.
Request for Change Proposal (RCP)	A proposal issued by Owner under Book 1, Section 13.
RFP or Request for Proposal	Request for Proposal No. 14-089 released by Owner, including all addenda thereto.
Shall	When used in the Contract Documents, "shall" indicates a mandatory duty on the part of Contractor.
Site	The locations upon or within which the Project is to be installed as well as other areas in the vicinity used by Contractor to complete the Work.
Software or Software Products	Software in object code format that is furnished with the System or listed on the Equipment List and as further described in Book 1, Section 23.
Specifications	The functionality and performance requirements that are described in the Contract Documents.
Stakeholder	A Person, group or entity whose interests may be impacted similarly (whether real or perceived) by the Project.
Standards of the Industry	Practices, procedures, methods and standards that: (i) are consistent with current industry practices established for, or employed by, leading participants in the software design, installation, implementation and maintenance industry; (ii) comply with all applicable laws and industry underwriters' standards; (iii) promote reliability, efficiency, security. Standards of the Industry include, without limitation, taking reasonable steps to ensure that sufficient personnel are employed and available to perform the Work and that such personnel are adequately skilled, experienced, and trained to design, install, operate, and

	maintain the Work properly and efficiently, and that appropriate coordination, monitoring and testing is performed to ensure that all elements of the Work are designed, installed and maintained so as to function as required by the Contract Documents.
State	The State of Missouri.
Statement of Work	The description of the Work to be performed by the parties, including services that will be provided by Contractor and its subcontractor(s) to install, optimize, implement and test the System and any of its component hardware, Software and other Equipment or Materials.
Subcontract	Any subcontract to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work between Contractor and a Subcontractor, or between Subcontractor and its lower tier Subcontractor, at any tier.
Subcontractor	Any Person with whom Contractor has entered into any Subcontract and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.
Supplier	Any Person other than employees of Contractor, not performing Work at the Site, that supplies machinery, equipment, materials or systems to Contractor or any Subcontractor in connection with the performance of the Work.  Persons who merely transport, pick up, deliver, or carry materials, personnel, parts, or equipment or any other items or Persons to or from the Site shall not be deemed to be performing Work at the Site.
Surety	A corporate body duly authorized to do business in the State of Missouri, and which has issued one or more of the Contract and Bid Bonds.
System	The next generation 9-1-1 cloud system composed of the Equipment and Software to be furnished by Contractor to as set forth in the Contract Documents.
System Implementation	The process of engineering, licensing, manufacturing, installing and testing of the System.
Technical Proposal	Contractor's formal written response to the technical requirements set forth in Book 2, Section 5.
Technical Criteria	The performance requirements set forth in Book 2, Section 5 which establish the minimum acceptable standards of quality, Materials and performance of the Work, and which shall be the basis for reviews and Final System Acceptance.
Test	The procedure and method of acquiring and recording physical data and comparing it to set standards and submitting a statement to such conditions or operations as will lead to its Acceptance or rejection (deficiency, defective condition, nonconformance, etc.) of the item.

Test-Based Acceptance	Acceptance based upon each test meeting the minimum Technical Criteria requirements.
Test Procedure	Methods that detail the practice of acquiring the Test data.
Turnkey Solution	The entire System and all tasks or services associated with the System shall be performed under the responsibility of Contractor or Contractor's subcontractor(s).
Unit Price	The meaning set forth in Book 1, Section 13.5.
Users	Governmental entities that will utilize the System to communicate within the geographical boundaries of St. Charles County.
Verification/Verify	The act of testing or inspecting, performed by qualified testing or inspecting personnel employed by Owner or its designated agent, to independently establish conformity of the System to the Contract Documents.
Warranty	Any warranty made by Contractor in Book 1, Section 21.
Warranty Period	The meaning set forth in Book 1, Section 21 or Exhibit C, as applicable.
Will	States a mandatory duty, depending upon the context, on the part of Engineer, Owner and/or Contractor.
Work	All duties and services to be furnished and provided by Contractor as required by the Contract Documents, including the administrative, design, engineering, quality control, quality assurance, relocation, procurement, legal, professional, manufacturing, supply, installation, construction, supervision, management, testing, verification, labor, Materials, equipment, documentation, and other efforts necessary or appropriate to achieve Final System Acceptance except for those efforts which the Contract Documents specify will be performed by Owner or other Persons. In certain cases, the term is also used to mean the products of the Work.

## **EXHIBIT B: PROJECT SCHEDULE**

[To be agreed upon by the parties and to include, at a minimum, the Completion Deadlines (for NTP 1 through NTP 5), and Final System Acceptance]

SAMPLE



## EXHIBIT C: SERVICES AGREEMENT

This Services Agreement, together with any appendices and attachments, is made and entered into by and between \_\_\_\_\_ (“Contractor”) and St. Charles County, Missouri, a charter county and political subdivision of the State of Missouri (“Owner”). This Agreement is effective as of \_\_\_\_\_ (“Effective Date”). In consideration of the mutual promises, the parties agree as follows:

### 1. Scope.

- A. This Services Agreement provides for the performance of services by Contractor for Owner and Users. All references to this Services Agreement include this document together with any and all appendices and attachments.
- B. The initial term of this Services Agreement begins on the Effective Date and, unless otherwise earlier terminated in accordance with the provisions herein, continues for a period of \_\_\_ year(s).
- C. All services provided by Contractor are for Owner’s and Users’ internal business operations and for the functionality of the System as a whole.

### 2. Ordering Procedure, Invoices & Payments.

- A. **Ordering Procedure.** Owner may engage Contractor to perform services pursuant to this Services Agreement by delivering to Contractor a written order on the form attached hereto as Appendix [redacted] (“Order Form”). [*Subject to successful negotiation, the vendor’s Order Form shall be attached and shall very clearly set forth, inter alia, the initial term and any renewal terms, payment terms, and deliverables.*]
- B. **Invoices.** Contractor shall invoice Owner in advance, which invoice shall describe with particularity the amount(s) due. Owner shall pay each invoice within thirty (30) Days of receipt of the invoice.
- C. **Penalty for Late Payments.** Interest shall accrue on any past due amount (not subject to a Dispute Notice) at a rate of one and a half percent (1.5%) of the past due amount.
- D. **Disputed Invoices.** Owner shall notify Contractor of any billing discrepancies or disputes about an invoice upon twenty (20) Days of receipt of the disputed invoice, specifying with particularity the basis of such dispute (“Dispute Notice”). Tender of a Dispute Notice does not relieve Owner of its obligation to pay any undisputed portion of any invoice. The parties shall negotiate in good faith to resolve any Dispute Notice. In no event shall Contractor have the right to suspend or terminate services unless and until a Dispute has been fully resolved in writing by the parties.

### 3. License Grant.

Upon the Effective Date and subject to all terms, conditions, limitations and exclusions contained herein, Contractor hereby grants to Owner and Users the right to use the services, during the applicable term, and only for Owner and Users’ internal business operations and for the functionality of the System as a whole.

### 4. Ownership.

- A. Contractor shall retain full ownership, rights, title and interest in and to the services, including documentation, and any intellectual property rights pertaining thereto.
- B. Owner and/or Users shall retain full ownership, rights, title and interest in and to any and all records, data and information that Owner and/or Users share with Contractor or input, manipulate, create and/or store with the Services (collectively, “Customer Data,” to include Owner and Users’ Confidential Information as set forth herein) including without limitation all intellectual property rights pertaining thereto. In addition to the rights and obligations set forth in the Transition Plan attached hereto as Appendix [redacted] and hereby incorporated by reference, upon request by Owner during a term or up to ninety (90) days after Termination, Contractor shall

make Customer Data accessible to Owner, by download, data transfer, or as otherwise agreed in writing by the parties, within thirty (30) Days and at no additional cost to Owner.

- C. Contractor shall not use aggregated or statistical data derived from the services provided to Owner and/or Users pursuant to this Services Agreement, except as agreed in writing by Owner in advance of such use.

## 5. Use Restrictions.

- A. Owner and Users shall only use the services for their own internal business operations and for the functionality of the System as a whole. Owner shall not sublicense, rent, lease, transfer, assign, distribute, time share, sell or resell, or otherwise make the services available to a third party (other than Users). Owner shall not modify, disassemble, peel components, decompile, reverse engineer or attempt to reverse engineer, derive source code or create derivative works from, adapt, translate, or merge the Services with other software, or permit or encourage any third party to do so. The preceding sentence does not apply, however, to open source software which is governed by the standard license of the copyright owner.
- B. Owner acknowledges and agrees that the services and related documentation are proprietary to Contractor and have been developed as trade secrets at Contractor's expense. Owner shall use best efforts to keep the services and documentation confidential and to prevent any misuse, unauthorized use or unauthorized disclosure by any party.
- C. Contractor shall only use the Customer Data and Owner and Users' Confidential Information to effectuate the purposes this Services Agreement, and shall only retain such information so long as necessary to do so and subject to section 14(B) below.

## 6. Confidentiality.

- A. **Confidential Information.** By virtue of this Services Agreement, either party may come into contact with the other party's or Users' non-public or proprietary information ("Confidential Information"). Confidential Information shall include, but is not limited to, any information or materials supplied to, obtained by, or observed by either party or Users and their respective employees, agents, consultants or subcontractors including proprietary software, source code, documents, financial information, documentation, data, specifications, customers, marketing strategies, business practices, user identification and passwords, account information, and personally identifiable information and/or other private data of Owner or Users' employees and citizens. Confidential Information may be in written, electronic, photographic or other tangible form, and it may be provided orally or visually. Confidential Information disclosed in a tangible or electronic form may be marked or otherwise identified as such, but in no event shall the absence of such a mark or identification in any way affect the parties' obligations hereunder, including without limitation their obligation to treat such information or data as confidential. Data created or stored vis-à-vis the services is considered Confidential Information.
- B. **Treatment of Confidential Information.** The parties shall treat all information or data of which they become aware as a result of this Services Agreement as confidential unless: (a) the information/data was rightfully known to the receiving party, without restriction on disclosure, prior to its engagement with the disclosing party; (b) the information/data is or has become generally available to the public, without the fault or negligence of the receiving party; (c) the receiving party rightfully received the information/data from a third party without a duty of confidentiality; (d) the receiving party independently developed the information/data without use of the disclosing party's confidential information; or (e) authorized, in writing, by the disclosing party. Confidential Information may include information of third parties, and the source of such information or data shall not affect its treatment hereunder.

**7. Non-Disclosure of Customer Data and Confidential Information.**

- A. Contractor shall only access and/or use Customer Data and Owner or Users' Confidential Information to the extent necessary to perform its contractual obligations hereunder. Contractor shall not sublicense, rent, lease, transfer, assign, distribute, time share, sell or resell, or otherwise make Customer Data available to any third party.
- B. Except as specifically permitted in this Services Agreement or as otherwise authorized in writing, neither party (including their respective employees and agents) shall, at any time, in any fashion, form or manner, whether directly, indirectly or by accident, divulge, disclose, communicate or use, any Confidential Information, or methods of accessing same, that is received, obtained, acquired or developed in association with this Services Agreement, whether prior to, during or subsequent to Contractor's engagement with Owner, unless necessary to effectuate the purposes of this Services Agreement. The parties' sole purpose for accessing and/or using Confidential Information shall be to perform their contractual obligations hereunder. This section 7(B) shall also apply to Contractor with respect to Customer Data.
- C. Contractor acknowledges and agrees that it, its employees and agents are bound by all applicable federal and state laws governing confidentiality and/or privacy of information including but in no way limited to individuals' personally identifiable information, e.g., protected health information (PHI) under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).
- D. The parties acknowledge and agree that this section 7 shall not apply to information that is subject to Sunshine Law requests, only to the extent disclosure is based on the good faith written opinion of the receiving party's legal counsel that disclosure is required by law; provided, however, that that the receiving party shall give prompt notice of the service of process or other documentation that underlies such requirement and use its best efforts to assist the disclosing party if the disclosing party wishes to obtain a protective order or otherwise protect the confidentiality of such Confidential Information. The disclosing party reserves the right to obtain a protective order or otherwise protect the confidentiality of its Confidential Information.

**8. Security.**

- A. Contractor shall ensure the security and integrity of Customer Data and Confidential Information. Contractor agrees to transmit such information only through the use of secure methods and agrees to use the same or a greater degree of care in safeguarding the information as it uses for its own data and confidential information (but no less than reasonable care).
- B. Contractor agrees to store any Customer Data and Owner and Users' Confidential Information in secure, locked containers. Where data is stored on a computer or other electronic media, Contractor must have an appropriate computer security policy that protects such information from unauthorized access and/or disclosure. The computer security policy must include provisions that address the physical security of computer resources; equipment security to protect equipment from theft and unauthorized use; software and data security; and access control. Any access to the information, wherever and however stored, must be limited to staff who have an official business need and who have read, understood and agreed to terms substantially similar to those stated in this Services Agreement. Contractor's computer security policy is attached hereto as Appendix [redacted] and hereby incorporated by reference. Contractor shall conduct regular testing of its security policy and shall submit to Owner annually a report detailing any security measures taken during the applicable year, including but not limited to the results of any such testing as well as any reported security breaches.

C. Contractor hereby certifies that its security practices conform to the following industry standards:

- Shared Assessments Program
- Common Assurance Maturity Model
- Cloud Security Alliance
- FedRAMP
- SSAE 16 SOC 2
- ISO 27001
- ISO 27002
- Other (please specify): \_\_\_\_\_

D. Owner may, in its sole discretion and at its cost, engage a third party to conduct a security assessment of Contractor's operations as they may pertain to the services to Owner and/or Users. Contractor agrees to cooperate with Owner and the third party chosen by Owner in the performance of such independent security assessment.

9. **Unauthorized Disclosure or Misuse.** Upon the discovery of any unauthorized disclosure or misuse of Customer Data or Confidential Information, the disclosing party shall immediately, but in any case within seven (7) Days, notify the other party of same, and shall act to prevent any further disclosure or misuse, including enforcing obligations of parties to whom it has disclosed Customer Data and/or Confidential Information. The disclosing party shall remediate the potential damage from the unauthorized disclosure or misuse and shall be liable for any such unauthorized disclosure or misuse.
10. **Disaster Recovery.** Contractor must have an appropriate disaster recovery plan and conduct regular testing of that plan. Such plan is attached hereto as Appendix [redacted] and hereby incorporated by reference. Contractor shall promptly notify Owner of any disaster which may involve Customer Data and/or Owner or Users' Confidential Information, shall act to mitigate any losses resulting from and shall be liable for same.
11. **System Performance & Uptime Guarantees.** [Upon successful negotiation of these terms, include here or attach document hereto as Appendix [redacted] and incorporate by reference.]
12. **Maintenance & Service Level Agreement ("SLA").** [Upon successful negotiation of the Maintenance and SLA terms, those documents shall be attached hereto as Appendix [redacted] and hereby incorporated by reference.]
13. **Suspension.** Subject to the Dispute resolution process set forth in the Contract (Book 1) to which this Services Agreement is an exhibit, in the event Owner has any past due amounts (not subject to a Dispute Notice) more than ninety (90) days past due, Contractor has the right to suspend services. Contractor shall immediately reinstate services upon Owner's payment in full of the past due amount(s) (excluding any amount(s) subject to a Dispute Notice).
14. **Termination.**
- A. **Right to Terminate.**
- i. Owner may terminate the Services Agreement for any reason upon sixty (60) days notice of cancellation to Contractor.
  - ii. Either party may terminate the Services Agreement: (a) upon sixty (60) days notice of non-renewal at the expiration of any term; or (b) upon the other party's breach of the terms set forth herein (including without limitation breach of the SLA, incorporated herein pursuant to section 11). Except as may otherwise be set forth in the SLA, the non-breaching party shall give the breaching party a detailed notice of the alleged breach and thirty (30) days opportunity to cure the breach, but one hundred and twenty (120) days for non-payment.

- iii. Contractor may terminate the Services Agreement at any time upon notice to Owner if Owner: (a) files or consents to the filing against it of any petition for relief, reorganization or liquidation under any bankruptcy or insolvency law of any jurisdiction, or has any such petition filed against it that is not dismissed within thirty (30) days thereafter; or (b) makes a general assignment for the benefit of its creditors, or consents to the appointment of a custodian, receiver, trustee or other officer with similar power over a substantial portion of its assets, or has any proceeding seeking such an appointment filed against it that is not dismissed within thirty (30) days thereafter. This section is subject to the Dispute resolution process set forth in the Contract (Book 1) to which this Services Agreement is an exhibit.

**B. Effect of Termination.** Upon termination of this Services Agreement:

- i. Contractor shall refund to Owner a pro-rata amount of any payments already made for services not yet performed as of the effective date of termination, and Owner shall be released from any future payment obligation on or after the effective date of termination.
  - ii. Contractor shall return all Customer Data and Owner and Users' Confidential Information, in any form and regardless of the source of such information, in accordance with the Transition Plan incorporated herein pursuant to **section 4.B**. *[such Transition Plan shall provide that Contractor will return all Customer Data and Owner and Users' Confidential Information within thirty (30) days of the effective date of termination, shall set forth the format in which the data shall be returned, and provide that, if the termination is due to Contractor's breach, Contractor shall use commercially reasonable efforts to assist Owner in securing the continuity of its operations and mitigate any loss or damages to Owner, including but not limited to providing assistance to Owner in transition to an alternative provider]*. In the alternative, with the written consent of Owner, Contractor may destroy all Customer Data and Owner's Confidential Information. "Destroy" includes the complete purging of all such information from all computers and back-up media storage. Upon request by Owner, Contractor shall provide a written certification of compliance with this section.
  - iii. Contractor's right to access and/or use Customer Data and Owner and Users' Confidential Information ceases upon the effective date of termination; however, its obligations under **sections 6, 7 and 8** shall survive in perpetuity.
15. **Notice.** Any notices made pursuant to this Services Agreement shall be made as set forth in the Contract (Book 1) to which this Services Agreement is an exhibit.
16. **Indemnification.** In addition to the indemnification provisions set forth in the Contract (Book 1) to which this Services Agreement is an exhibit, Contractor further agrees to:
- A. Defend and indemnify Owner against any claim by an unaffiliated third party of this Services Agreement that the services infringe upon that party's patent, copyright, trade secret or other intellectual property right and will pay Owner's reasonable attorneys' fees and the amount of any resulting adverse final judgment issued by a court of competent jurisdiction or of any settlement. If Owner's use of the services is enjoined as a result of any such claim, or in Contractor's opinion is likely to be enjoined or subject to such a claim, then, at its expense, Contractor may: (i) procure for Owner and Users the right to continue to use the services; or (ii) replace or modify the services with a functionally-equivalent or better service so that Owner and Users' use is not subject to a claim. If Contractor determines that it cannot accomplish either of the foregoing in a commercially reasonable manner, then, upon Contractor's request: (i) Owner and Users shall surrender, at Contractor's expense, use of the services; and (ii) Contractor shall promptly refund to Owner the price of the services less a reasonable allowance for use, provided that Contractor

shall use commercially reasonable efforts to assist Owner and Users in securing the continuity of their operations and mitigate any loss or damages to Owner and/or Users.

- B. Indemnify and hold harmless Owner from any and all claims, suits, causes of action, damages, and costs of any kind (including attorneys' fees) arising out of or in any way related to Contractor's unauthorized disclosure and/or misuse of Customer Data and/or Owner's Confidential Information.

17. **Warranty.** In addition to the warranties set forth in the Contract (Book 1) to which this Services Agreement is an exhibit, Contractor further agrees as follows.

- A. **Warranty of the Services.** If the services do not perform as warranted, Contractor will use reasonable efforts, consistent with industry standards, to cure the defect. Should Contractor be unable to cure the defect or provide a reasonable replacement service, Owner shall be entitled to a full refund of the fees paid for the defective services.
- B. **Warranty of Fitness for a Particular Purpose.** Owner has presented detailed technical specifications in the Contract Documents of the particular purpose for which the System is intended. Owner has provided detailed descriptions and criteria of how the System can be defined to accomplish this particular purpose. Owner has also defined the exact procedures and techniques to be employed in testing whether the System has achieved the defined performance of this particular purpose. Given this advanced preparation concerning, and documentation about Owner's particular purpose, Contractor, at the time this Services Agreement is in force has reason and opportunity to know (i) the particular purpose for which the System is required, and (ii) Owner is relying on Contractor's experience and knowledge of the System to provide that which is most suitable and appropriate. Therefore, Contractor warrants that the System is fit for the purpose for which it is intended as described in Contractor's Proposal in response to Owner's Request for Proposals.
- C. **Noninfringement Warranty.** Contractor warrants that the services do not infringe on any copyright, patent or other proprietary right(s) of any third party.
- D. **Exclusions.** These warranties do not apply to defects resulting from acts or events beyond Contractor's reasonable control (e.g., acts of God).
- E. **Remedies.** Contractor shall be liable for actual damages resulting from its breach of these warranties and any express warranty, in addition to Owner's other rights and remedies at law or in equity.

18. **Limitation of Liability.** Notwithstanding anything contained in the Contract Documents to the contrary, Contractor's liability to Owner shall not exceed one hundred percent (100%) of the Contract Price set forth in the Contract (Book 1) to which this Services Agreement is an exhibit, plus all fees due hereunder. Neither party shall be liable for any consequential, special, indirect, incidental, contingent or punitive damages, including loss of use and profit. The parties do not waive and expressly retain all rights and remedies to actual and direct damages as provided under State law.

19. **Ineffective Training.** Should an agent or employee of Contractor provide ineffective training services to Owner, as determined by Owner in its reasonable discretion, Contractor and Owner will determine in good faith a mutually agreeable, reasonable remedy for the ineffective services, in accordance with the Dispute resolution process set forth in the Contract (Book 1) to which this Software Agreement is an Exhibit.

20. **Financial Reports.** Contractor shall promptly provide to Owner copies of all financial statements and reports required filed pursuant to federal law.

21. **Export Control.** The parties acknowledge that the services, Customer Data and Confidential Information provided pursuant to this Services Agreement may be subject to the export laws and

regulations of the United States and/or other countries (collectively, "Export Laws"). The parties agree that they will not use, distribute, export, re-export, transfer or transmit the Software Products, Customer Data and/or Confidential Information (even in incorporated into other items) in violation of any applicable Export Laws.

22. **Miscellaneous.** This Services Agreement is subject to the terms and conditions contained in the Contract (Book 1) to which this Services Agreement is an exhibit as if fully set forth herein.

IN WITNESS WHEREOF, the parties have executed this Services Agreement as of the date and year first set forth below.

CONTRACTOR

OWNER

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

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

\_\_\_\_\_  
Typed or Printed Name

\_\_\_\_\_  
Typed or Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date