



SOUTHWEST COLORADO COUNCIL OF GOVERNMENTS

Special Meeting Agenda

Thursday, 27 September, 11:00 a.m.

La Plata County Administration Building

1101 East 2nd Avenue, Durango, CO

- I. Introductions

- II. Decision Items
 - a. Contract with Lightworks Fiber
 - b. Contract with Telamon, Inc.

- III. Adjournment

Vendor Contract Approval for USAC Funding

To: SWCCOG Board of Directors
From: Miriam Gillow-Wiles
Date: 27 September 2018

Comments: In 2017 the SWCCOG Board identified critical success factors for 2018, many of these critical success factors centered around middle mile broadband development. As a result the SWCCOG Staff have been pursuing funding for middle mile broadband development. While there is very little funding for the public sector for large broadband infrastructure builds, the recommendation from the 2016 Regional Broadband Plan was to utilize the USAC (Universal Service Administrative Company), which is a department of the FCC that handles the Educational Rate (e-Rate) and Healthcare Connect Fund (Rural Healthcare). After review, SWCCOG Staff and Consultants identified the Rural Healthcare rather than e-Rate as is widely utilized by the K-12 and Public Libraries in the region, but Rural Healthcare was only utilized by one entity for a reduction of cost, not broadband infrastructure.

Staff and consultants worked throughout the first half 2018 to comply with USAC's tedious rules. The USAC program is very much backwards of the grants the SWCCOG and Members apply for and receive, requiring a RFP process before applying for funding. Also different than most grants, there is no published (or adhered to) time frame for announcing funding. The basic steps required to apply for funding are as follows:

- 1) Certify that the agency(s) applying are eligible applicants
- 2) IF creating a consortium of providers (which allows for a greater amount of funding) have providers sign a Letter of Authorization (template provided by USAC) allowing the consortium to file documents and apply for funding on their behalf. This letter is uneditable per USAC.
- 3) Certify Consortium is eligible, and is not a healthcare or private agency.
- 4) Submit any and all documents pertaining to the RFP for review
- 5) Update with any USAC changes and resubmit. Repeat until accepted.
- 6) Post RFPs on USAC website (and any other location desired) for minimum of 28 days.
- 7) Review and select vendors. IF selecting vendors to build infrastructure, the cost must be justified based on the cost of internet connection – which means we had to request bid for both infrastructure and lit services (we used a 5 year horizon, as the lit services bid were a 5 year contract).
- 8) Send award letters, RFPs, RFP responses to USAC for review.
- 9) USAC reviews and asks questions on their own time frame
- 10) USAC requests for more information responses have an arbitrary time frame, assigned (one or two weeks) with an occasional extension.
- 11) Entity provides USAC with information
- 12) USAC may ask more questions – again with a time frame.
- 13) All documents submitted, USAC makes funding decisions sometime between December and March.

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The SWCCOG formed the Southwest Colorado Council of Governments Healthcare Consortium (SWCCOGHC), with the Dolores County Department of Public Health, San Miguel Department of Health and Environment, San Juan County Department of Health and Environment, and Southwest Health System (the hospital system based in Cortez). San Juan Basin Public Health chose to not participate in the consortium in 2018. The SWCCOGHC is technically a department of the SWCCOG, as it has no specific tax status and creating, yet another, non-profit was costly and unnecessary under the USAC rules. RFPs for both lit services and fiber optic builds were issued (if the entity is asking for infrastructure, a lit service RFP is also required) for the following builds:

- 1) Dove Creek to Cortez
- 2) Cortez to Durango
- 3) Durango to Telluride
- 4) Silverton to Durango

Dove Creek to Cortez had the following responses:

- Century Link Lit Services – 5 Year Contract
- Telamon Equipment (switches, routers, etc)
- Lightworks Fiber fiber optics build

Cortez to Durango had the following responses:

- Telamon Equipment (switches, routers, etc)
- Lightworks Fiber fiber optics build

Cortez to Telluride had the following responses:

- Century Link Lit Services – 5 Year Contract
- Telamon Equipment (switches, routers, etc)
- Lightworks Fiber fiber optics build

Silverton to Durango had the following responses:

- Century Link Lit Services – 5 Year Contract
- Telamon Equipment (switches, routers, etc)
- Lightworks Fiber fiber optics build

Staff and consultants evaluated the responses. In all but the Cortez to Telluride route, the fiber build was a more cost effective option (and in the case of Cortez to Durango – the only option) for the other builds. This made the discussion process easy with the Consortium Members; Cortez to Telluride was not feasible when comparing infrastructure to connectivity costs. As a result three of the four builds moved forward: Dove Creek – Cortez, Cortez – Durango, Silverton – Durango.

At the June 2018 Board Meeting, the Board selected two vendors RFPs for fiber and equipment with contract development to come later. The vendors provided SWCCOG staff with contract templates in August, and we had started the process of

Vendor Contract Approval for USAC Funding

reviewing when USAC made multiple requests for documentation. Among those requests were:

- Contracts for the three builds.
- Sustainability Plan for the infrastructure development
- Start dates (this is not necessarily an indication of funding)

Staff, NeoConnect (and their contractors), Ken Fellman, and SWCCOG lawyer David Lieberman were all engaged to modify the vendor contracts to fit the needs of the SWCCOG. We utilized previous broadband infrastructure contracts from other local governments as a guide as well these included the City of Fort Collins and Adams 12 School District. The result are two very robust contracts with protections for the SWCCOG balanced with the needs of the private companies. The non-executed contracts were provided to USAC, with the expectation of the discussion and approval at the Oct 25th Regular Board Meeting. However, USAC wants executed contracts by Sept 28th, with no extensions provided. Without approval the, SWCCOG will not receive funding.

Both contracts have been signed by the vendors at this time.

Lightworks Fiber, LLC.

- Contracts are only valid if funded
- If in the case that only specific builds are funded, then only those will be started and completed
- Design – Build contract, meaning they will design the infrastructure to fit the location as well as build the fiber.
- All fiber development will comply with CDOT standards (as it will be in the ROW), including environmental impacts and such
- SWCCOG has final say over any subcontractors of Lightworks
- Contractor shall: keep detailed financial records and allow the SWCCOG access, maintain build schedule and notify the SWCCOG upon any variations
- Will complete the build for the price included in the contract (Exhibit C):
 - o Dove Creek to Cortez: \$2,706,910
 - o Cortez to Durango: \$4,896,954
 - o Silverton to Durango: \$3,437,863 (this is the HWY550 section, as there is EagleNet fiber aerially from Cascade Village to Silverton)
- General local government indemnification language
- TABOR language
- Term of three years from start date (not signature as there may be 6 months difference)
- Significant amounts of language about operations, start dates, communications with SWCCOG

Telamon Technologies Corp.

- Contracts are only valid if funded

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- If in the case that only specific builds are funded, then only those will be started and completed
- Equipment only, not fiber or design. Equipment includes things such as routers, signal boosters, switches.
- SWCCOG has final say over any subcontractors
- Contractor shall: keep detailed financial records and allow the SWCCOG access, maintain build schedule and notify the SWCCOG upon any variations
- Will complete the build for the price included in the contract
 - o Dove Creek to Cortez - \$433,788
 - o Cortez to Durango - \$64,476
 - o Silverton to Durango - \$598,218
- No cost for shipping of equipment to SWCO
- General local government indemnification language
- TABOR language
- Term of three years from start date (not signature as there may be 6 months difference)

Legal Review: Contracts written with final review by Ken Fellman

Fiscal Impact: Very High – If not approved the SWCCOG will not receive USAC Funding this cycle.

Staff Recommendation: Approve the contracts with Telamon and Lightworks Fiber.

**Southwest Colorado Council of Governments Healthcare Consortium:
Dolores County Department of Public Health, San Juan County Department of
Health and Environment, and Southwest Health System**

DESIGN-BUILD AGREEMENT

This Agreement is made and entered into as of the date of the last signature below, by and between the Southwest Colorado Council of Governments and its Healthcare Consortium, a consortium of Colorado hospitals, behavioral health organizations, and health clinics organized as a division within the Southwest Colorado Council of Governments and certified by the Universal Service Administration Company (“USAC”) as a consortium under the Federal Communications Commission Healthcare Connect Fund (“SWCCOG”) and Lightworks Fiber, LLC (“Design-Builder”), individually “Party” and collectively “Parties,” for design-build Work in connection with the SWCCOG’s [Southwest Colorado Broadband Initiative – Phase 1] (“Project”).

ARTICLE 1. GENERAL PROVISIONS

- 1.1 Dolores County, Colorado and its Department of Public Health, San Juan County, Colorado and its Department of Public Health and the Southwest Health System, Inc. have authorized SWCCOG to enter into this Agreement on their behalf for the purpose of completing the Project as described herein, pursuant to amended Letters of Agency attached hereto as Addenda 1, 2 and 3.
- 1.2 Design-Builder has been awarded a contract based on its bid on the RFP. The RFP requires that the General Terms and Conditions, the Special Conditions, any Technical Specifications; and the Bidder's Proposal; and the Purchase Order are collectively an integral part of the contract between SWCCOG and Design-Builder. Accordingly, these documents shall collectively constitute a binding contract without further action by either Party. Notwithstanding the fact that some, but not all of the provisions in this Agreement are reproduced in whole or in part from the RFP and/or Design-Builder’s proposal, all relevant provisions of the RFP and Design-Builder’s proposal in response to the RFP are incorporated herein by reference.
- 1.3 The Parties agree to proceed in good faith and shall take all actions necessary to perform this Agreement in a cost effective and timely manner, to permit the Work to be designed and constructed for the Contract Price and by the Date of Substantial Completion established in the Notice to Proceed for Design. The Project is intended by the SWCCOG to be design and construction of fiber optic backbone and laterals. The SWCCOG’s Project Requirements are shown in Exhibit A, Project Requirements. The Project shall be delivered using the Design-Build method of project delivery. Design-Builder agrees to furnish the required skill, attention, and judgment in performing its obligations on the Project consistent with the applicable standard of care and to provide its best and most efficient business administration and superintendence in connection with the Work and to perform the Work in an expeditious and economical manner consistent with the best interests of the SWCCOG. Design-Builder agrees to procure and furnish the design and construction Work as set forth below:
 - 1.3.1 Design-Builder represents it is experienced in the Work required to design and construct the Project.
 - 1.3.2 Neither Design-Builder nor any of its agents or employees shall act on behalf of or in the name of the SWCCOG unless authorized in writing by the SWCCOG.
 - 1.3.3 The Parties shall perform their obligations with integrity, ensuring at a minimum that each: (a) avoids conflicts of interest and discloses promptly any conflicts of interest to the other Party, and

(b) warrants that it has not and shall not pay or receive any contingent fees or gratuities to or from the other Party, including its agents, officers, employees, Design Professional, Subcontractors, Subconsultants, and others for whom they may be liable, to obtain preferential treatment.

1.4 Engineering, surveying, and other design Work shall be procured from one or more independent design professionals retained by Design-Builder or shall be furnished by qualified employees of Design-Builder. The person or entity providing engineering and surveying Work shall be referred to as the “Design Professional.” If Design Professional is an independent design professional, the engineering and surveying Work shall be procured pursuant to a separate agreement between Design-Builder and Design Professional, which agreement shall be provided to the SWCCOG for its approval prior to any design Work being performed.

1.5 Design Professional for the Project is:

Lightworks Fiber

1.6 DEFINITIONS

1.6.1 “Additional Work” means services outside the current scope of the Agreement which may be requested by the SWCCOG, which services shall be negotiated separately and must be approved in writing by the SWCCOG and incorporated in an executed Change Order prior to performance.

1.6.2 “Agreement” means the Design-Build Agreement between the SWCCOG and Design-Builder, including Amendments, Change Orders, and Exhibits made part of the Agreement upon or after its execution.

1.6.3 “Amendment” is a written document signed by the SWCCOG and Design-Builder after execution of the Agreement, indicating changes in the terms and conditions of the Agreement.

1.6.4 “ANSI” is the American National Standards Institute.

1.6.5 “Application for Payment” is the application submitted by Design-Builder for payment for Work performed during a pay period.

1.6.6 “ASTM” is the American Society for Testing and Materials (ASTM).

1.6.7 “Business Day” means all Days, except Saturday, Sunday, and official SWCCOG observed holidays.

1.6.8 “Change Order” is a written order signed by the SWCCOG and Design-Builder after execution of the Agreement, indicating changes in the scope of the Work, Contract Price, or the Date of Substantial Completion, including substitutions proposed by Design-Builder and accepted by the SWCCOG.

1.6.9 “Certified Invoice” is an invoice from a supplier which has been endorsed by Design-Builder guaranteeing that the Material was purchased and received and establishing the value of the Material.

1.6.10 “Construction Change Directive” is a written order issued by the SWCCOG after execution of the Agreement and the SWCCOG’s issuance of the Notice to Proceed for Construction directing

- Design-Builder to commence with a change in the Work prior to the SWCCOG and Design-Builder reaching agreement on any resulting changes to the Contract Price and/or the Date of Substantial Completion.
- 1.6.11 “Construction Equipment” means all plant, machinery, tools and apparatus, including parts and supplies for operation and maintenance, which are necessary for the proper construction and acceptable completion of the Work.
- 1.6.12 “Contract Price” means the price to be paid by the SWCCOG to Design-Builder to compensate Design-Builder for its costs of performing the Work, including but not limited to, costs incurred for all labor, materials, equipment, Design Professional and/or Subconsultants fees, Subcontractors’ costs, Materials and Equipment Suppliers’ costs, permitting costs, other entities’ costs, insurance and bonding costs, Design-Builder’s recovery of its overhead expense, and its profit.
- 1.6.13 “Contract Time” is the number of Days commencing with the Date of Commencement given in the Notice to Proceed for Construction, including time extensions authorized by Change Order, needed to achieve Substantial Completion of the Work. Where a calendar date for Substantial Completion is specified, the Work shall be substantially completed on or before that date, as may be revised by Change Order.
- 1.6.14 “Date of Commencement” shall be set forth in the Notices to Proceed for Design and/or Construction to be issued to Design-Builder by the SWCCOG.
- 1.6.15 “Date of Final Settlement” is the date designated by the SWCCOG in accordance with C.R.S. § 38-26-107, as may be amended, for making Final Payment to Design-Builder.
- 1.6.16 “Date of Substantial Completion” is the date on which all the Work is required to be substantially completed; may also be called Substantial Completion Date.
- 1.6.17 “Day” means calendar day.
- 1.6.18 “Defective Work” is any Work not in conformance with the requirements of the Design-Build Documents.
- 1.6.19 “Design-Build Documents” consist of those documents identified in the Agreement.
- 1.6.20 “SWCCOG” is Southwest Colorado Council of Governments and its Healthcare Consortium.
- 1.6.21 “Drawings” are the graphic and pictorial portions of the Design-Build Documents, wherever located and whenever issued, showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules, diagrams, and notes, also sometimes referred to as plans. The Drawings may contain Specifications, and the Specifications may contain Drawings.
- 1.6.22 “EPA” is the United States Environmental Protection Agency.
- 1.6.23 “Final Acceptance” of the Work occurs on the date when Design-Builder’s obligations under the Agreement are complete, the SWCCOG has acknowledged that the Warranty Correction Period has expired and all outstanding items requiring correction have been repaired to the satisfaction of the SWCCOG, and there are no other outstanding warranty items to be corrected.

- 1.6.24 “Final Design Phase” is the phase of design where Drawings and Specifications are completed to the level necessary to obtain permits and Subcontractor bids and to perform the construction of the Work.
- 1.6.25 “Final Payment” is the payment of all outstanding balances due, including retainage, following completion of the Work and issuance of Initial Acceptance by the SWCCOG. Final Payment is payable on the Date of Final Settlement following advertisement of the Notice of Final Settlement and completion of the waiting period for submission of Verified Claims provided there are no pending claims.
- 1.6.26 “Hazardous Material” is any substance or material identified now or during the term of the Agreement as hazardous under any Laws or any other substance or material which may be considered hazardous or otherwise subject to statutory or regulatory requirements governing handling, disposal, transportation, or clean-up.
- 1.6.27 “Initial Acceptance” of the Work, or of a designated portion, occurs when the SWCCOG acknowledges that, to the best of its knowledge, all Work, including Punch List items, has been completed in accordance with the Design-Build Documents.
- 1.6.28 “Laws” mean federal, state, and local Laws, ordinances, codes, rules, and regulations applicable to the Work with which Design-Builder must comply that are in effect as of the date of the Agreement.
- 1.6.29 “Materials” and/or “Equipment” are all components, articles, appliances, devices, substances, supplies, and miscellaneous items specified or required for incorporation into the construction of the Work. Other materials and equipment not permanently incorporated into the finished Work are required to be furnished by Design-Builder, Subcontractors, Materials Suppliers and Equipment Suppliers for performance of the Work. Existing materials and equipment may be required to be modified by Design-Builder and Subcontractors in the performance of the Work.
- 1.6.30 “Material Supplier” and/or “Equipment Supplier” is a person or entity retained by Design-Builder to provide Material and/or Equipment for incorporation into the Work and to provide other Materials and/or equipment for performance of the Work.
- 1.6.31 “Milestone Date” is a principal event specified in the Design-Build Documents relating to an intermediate completion date or time prior to Substantial Completion of the entirety of the Work.
- 1.6.32 “NEC” is the National Electric Code. “NECA” is the National Electric Code of America.
- 1.6.33 “Notice of Award” is the notice issued by the SWCCOG that awards the Work to Design-Builder.
- 1.6.34 “Notice to Proceed for Design” is the notice issued by the SWCCOG to Design-Builder after the Agreement is fully signed which authorizes Design-Builder to proceed with the design phase Work, including pre-construction Work.
- 1.6.35 “Notice to Proceed for Construction” is the notice issued by the SWCCOG to Design-Builder, which authorizes Design-Builder to commence construction of the Work following the SWCCOG’s review and approval of the 100% Design complete documents For Permitting and For Construction.
- 1.6.36 “OSHA” is the Occupational Safety and Health Administration.

- 1.6.37 “Overhead” means (a) payroll costs and other compensation of employees in principal and branch offices not directly on the Project; (b) general and administrative expenses of principal and branch offices other than the Project field office, including charges for delinquent payments, and other general expenses not directly attributable to the Project; and (c) capital expenses, including interest on capital used for the Work.
- 1.6.38 “Pre-Design Phase” is the phase of design where site conditions are investigated, the SWCCOG’s goals and program requirements are defined in detail, studies are conducted, spatial relationships are developed, and code and zoning requirements are determined. May also be called Program and Conceptual Design.
- 1.6.39 “Preliminary Design Phase” is the phase of design where the Pre-Design Phase information is expanded upon to develop preliminary Drawings and outline Specifications. May also be called Design Development.
- 1.6.40 “Product Data” are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by Design-Builder to illustrate Materials or Equipment for some portion of the Work.
- 1.6.41 “Project” is the SWCCOG’s Southwest Colorado Broadband Initiative – Phase 1, for which Design-Builder is to perform the Work under this Agreement and may also include separate work to be undertaken by the SWCCOG with its own employees or separate contractors.
- 1.6.42 “Project Requirements” is the initial description of SWCCOG’s objectives in this Exhibit A that include the purpose of the Project, budget criteria, time criteria, performance requirements, space requirements and relationships, flexibility and expandability requirements, Materials and Equipment, and site requirements.
- 1.6.43 “Profit” means the profit earned by Design-Builder for the performance of the Work.
- 1.6.44 “Project Site” means the place where the Work is to be constructed.
- 1.6.45 “Property” is a general term denoting land, property, or interest therein, acquired for or devoted to the construction of an improvement.
- 1.6.46 “Punch List” is the list of Work items contained in the Certificate of Substantial Completion that Design-Builder is required to complete or correct prior to the SWCCOG granting Initial Acceptance.
- 1.6.47 “Quality Assurance Testing and Inspection” is the testing and/or inspection performed under separate contract and paid for separately by the SWCCOG to assist in evaluating whether Materials, Equipment, and/or workmanship complies with the quality requirements in the Design-Build Documents.
- 1.6.48 “Quality Control Program” is a defined program outlining the procedures Design-Builder will follow to implement Quality Control Testing and Inspection.
- 1.6.49 “Quality Control Testing and Inspection” is the testing and/or inspection that Design-Builder performs to assure that all Materials, Equipment and workmanship have met the minimum standards for quality as defined in the Design-Build Documents.

- 1.6.50 “Record Documents” are Drawings, Specifications, Change Orders, Amendments, or other Design-Build Documents maintained by Design-Builder during the course of construction to show differing conditions and changes made to the original Design-Build Documents. May also be referred to as As-Built Drawings and/or As-Built Specifications.
- 1.6.51 “Related Party” means a parent, subsidiary, affiliate or other entity having common ownership or management with Design-Builder; any entity in which any stockholder in, or management employee of, Design-Builder owns any interest in excess of ten percent (10%) in the aggregate; or any person or entity which has the right to control the business or affairs of Design-Builder. The term “Related Party” includes any member of the party’s immediate family, defined as spouse, parent, grandparent, child, grandchild, sibling, aunt, uncle, or cousin of any person identified above.
- 1.6.52 “RFP” means any or all of the three Requests for Proposal by Dolores County, Colorado, and its Department of Public Health [Exhibit D]; San Juan County, Colorado, and its Department of Public Health [Exhibit E]; Southwest Health System, Inc. [Exhibit F].
- 1.6.53 “Salvageable Material” is Material or Equipment that can be saved or salvaged for re-use.
- 1.6.54 “Samples” are physical examples which illustrate Materials, Equipment, or workmanship and establish standards by which the Work will be judged.
- 1.6.55 “Schedule” means Design-Builder’s schedule for the construction of the Work and is one of several related techniques for doing project scheduling. The Schedule is comprised of many individual tasks or activities based on a work breakdown structure where the start and finish dates of the various activities are indicated by a bar on a calendar. The start and/or finish dates may be dependent on the progress of one or more other activities. The Schedule shall show the nature of the interdependencies between the activities. The Schedule may also show the resources needed for each task or activity.
- 1.6.56 “Shop Drawings” are drawings, diagrams, schedules and other data specially prepared for the Work by Design-Builder or a Subcontractor, Sub-subcontractor, manufacturer, supplier, or distributor to illustrate some portion of the Work.
- 1.6.57 “Special Conditions” are conditions which may supplement and/or differ from and supersede the terms and conditions of the Agreement and the General Conditions and which may have been negotiated specifically for this Project.
- 1.6.58 “Specifications” are that portion of the Design-Build Documents consisting of the written requirements for Materials, Equipment, construction, systems, standards, and workmanship for the Work, and performance of related Work. Organization of the Specifications into divisions, sections, and articles shall not control Design-Builder in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade. The Drawings may contain Specifications, and the Specifications may contain Drawings.
- 1.6.59 “Stop Work Order” is an order issued by the SWCCOG to Design-Builder to suspend Work under the Agreement; provided, however, that Work necessary to assure the safety and protection of persons and property shall continue to be the responsibility of Design-Builder unless otherwise directed by the SWCCOG.
- 1.6.60 “Subconsultant” is a person or entity retained by Design Professional or Design-Builder as a

consultant to provide required professional services such as architectural, engineering, and/or surveying Work. The term Subconsultant does not include any separate contractors, subcontractors, vendors or suppliers employed by the SWCCOG.

- 1.6.61 “Subcontractor” is a person or entity retained by Design-Builder as an independent contractor to provide labor, Materials, Equipment, and/or services necessary to complete a specific portion of the Work. The term Subcontractor does not include Design Professional, Subconsultants, or any separate contractor employed by the SWCCOG.
- 1.6.62 “Substantial Completion” is when the Work is sufficiently completed so it may be utilized by the SWCCOG for the purposes for which it was intended, in accordance with applicable life, health, and safety codes, but excluding minor Work to be completed or corrected as Punch List Work.
- 1.6.63 “Unit Prices” are prices which may be established either in the initial Proposal or subsequently negotiated and agreed upon and incorporated into the Design-Build Documents by Change Order or Amendment, or both, for discrete elements of Work intended to be compensated by multiplying a measurable quantity of Work performed by the Unit Price.
- 1.6.64 “Universal Service Administrative Company” or “USAC” is a not-for-profit corporation designated by the Federal Communications Commission to administer the \$10 billion Universal Service Fund, including the Healthcare Connect Fund, which is providing the funding for the Project.
- 1.6.65 “Warranty Correction Period” means the period from Initial Acceptance to Final Acceptance during which Design-Builder is responsible for correcting defects or non-conforming Work and to keep the Work in good repair. May also be referred to as Warranty Period.
- 1.6.66 “Work” is the design phase services, including pre-construction services, construction phase services, any Additional Work that may be requested by the SWCCOG, Warranty Correction Period services, and other services which are necessary to complete Design-Builder’s obligations and complete the Project in accordance with and reasonably inferable from the Design-Build Documents. The Work, whether completed or partially completed, includes all labor, Materials, Equipment, and services provided or to be provided by Design-Builder.

ARTICLE 2. DESIGN-BUILD DOCUMENTS

2.1 ORDER OF PRECEDENCE

- 2.1.1 In case of any inconsistency, conflict or ambiguity among the Design-Build Documents, the documents shall take precedence in the following order:
- 2.1.1.1 Amendments to this Agreement;
 - 2.1.1.2 Change Orders;
 - 2.1.1.3 Design-Build Agreement, including Exhibits to the Agreement;
 - 2.1.1.4 Performance Bond;
 - 2.1.1.5 Labor and Material Payment Bond;
 - 2.1.1.6 Construction Drawings;
 - 2.1.1.7 Construction Specifications;
 - 2.1.1.8 Notice to Proceed for Design;
 - 2.1.1.9 Notice to Proceed for Construction;

- 2.1.1.10 SWCCOG's School Connectivity Project RFP, including General Terms and Conditions and Special Conditions, Bid Proposal Form, Statement of Work, Project Proposal Pricing Form, and Exhibits
- 2.1.2 Except as otherwise provided, among categories of documents having the same order of precedence, the term or provision that includes the latest date shall control. Information identified or required in one document and not identified or required in another shall not be considered a conflict or inconsistency.
- 2.1.3 If a conflict or ambiguity exists within the Design-Build Documents, Design-Builder shall resolve such ambiguity to include the highest quality and largest quantity.

ARTICLE 3. DESIGN-BUILDER'S ROLE AND RESPONSIBILITIES

3.1 GENERAL

- 3.1.1 Design-Builder shall be responsible for procuring or furnishing the design and for the construction of the Work consistent with the SWCCOG's Project Requirements, Exhibit A. A matrix, summarizing responsibilities of the SWCCOG and the Design-Builder has been attached as Exhibit B. However, Exhibit B is not intended to be all inclusive of the Parties responsibilities and is provided as a guide to clarify potential "gray areas" of scope between the SWCCOG and the Design-Builder.
- 3.1.2 Design-Builder, Design Professional, and Subconsultants shall perform all design Work with the professional skill and care customarily provided by design professionals practicing in the same or similar locality under the same or similar circumstances and shall perform their Work as expeditiously as is consistent with such professional skill and care and the orderly progress of the Work.
- 3.1.3 If Design-Builder desires to replace its Representative, any of its key personnel, Design Professional, Subconsultants, or Subcontractors, it shall notify the SWCCOG in writing of the changes it desires to make along with resumes of such proposed new personnel. The SWCCOG shall respond to Design-Builder's written notice regarding desired replacement within fifteen (15) Days after the SWCCOG receives the notice and resumes. If the SWCCOG does not respond within that time, the proposed personnel will be deemed to be approved by the SWCCOG.
- 3.1.4 If, during the term of this Agreement, the SWCCOG determines that the performance of approved key personnel, Design Professional, Subconsultants, or Subcontractors is not acceptable, it will notify Design-Builder and provide Design-Builder with the time that the SWCCOG considers reasonable to correct such performance. Thereafter, the SWCCOG may require Design-Builder to reassign such key personnel, Design Professional, Subconsultants or Subcontractors. If the SWCCOG notifies Design-Builder that certain of its key personnel, Design Professional, Subconsultants, or Subcontractors must be reassigned, Design-Builder shall use its best efforts to obtain adequate substitute personnel within ten (10) Days from the date of the notice.
- 3.1.5 Design-Builder may subcontract with Subconsultants and Subcontractors, and the SWCCOG shall have the right to object to any Subconsultant or Subcontractor selected by Design-Builder. The SWCCOG's failure to object to any Subconsultant or Subcontractor shall not relieve Design-Builder of any of its obligations under this Agreement. Agreements with Subconsultants and Subcontractors must contain a valid and binding provision whereby the Subconsultant and

Subcontractor waive any and all rights to make a claim against the SWCCOG (other than a Verified Claim against the contract funds) arising out of the performance of the Work.

- 3.1.6 Design-Builder shall cause appropriate provisions to be inserted in all subcontracts binding Subcontractors to the Design-Builder as Design-Builder is bound to the SWCCOG.
- 3.1.7 Nothing contained in the Design-Build Documents shall create any contractual relationship between any Design Professional, Subconsultant, or Subcontractor and the SWCCOG.
- 3.1.8 Because Design-Builder's represented qualifications are a material consideration to the SWCCOG in entering into the Agreement, the SWCCOG shall have the right to reject any proposed personnel, Design Professional, Subconsultant, or Subcontractor deemed unqualified or unsuitable for any reason to perform the Work, and the SWCCOG shall have the right to limit the number of Subconsultants or Subcontractors.
- 3.1.9 Design-Builder shall not retain any Design Professional, Subconsultant, or Subcontractor to perform Work under this Agreement if Design-Builder is aware, after a reasonable written inquiry has been made, that it is connected with the sale or promotion of Equipment or Material which is or may be used on the Project or any other conflict of interest which exists. In certain circumstances the SWCCOG may permit a waiver in writing provided Design-Builder has fully disclosed any potential conflict of interest.
- 3.1.10 It is understood and agreed by and between the Parties that the status of Design-Builder shall be that of an independent contractor and a person retained on a contractual basis to perform professional and construction Work for a limited period and it is not intended, nor shall it be construed, that Design-Builder is an employee or officer of the SWCCOG.
- 3.1.11 The Parties acknowledge that Design-Builder is not entitled to unemployment insurance benefits unless unemployment compensation coverage is provided by Design-Builder or some other entity besides the SWCCOG, that Design-Builder is not entitled to Workers' Compensation benefits from the SWCCOG, and that Design-Builder is obligated to pay federal and state income tax on any monies earned pursuant to this Agreement. The Parties further acknowledge the provisions of this section are consistent with Design-Builder's insurance obligations, as set forth in this Agreement.
- 3.1.12 Design-Builder shall provide and pay for all labor, Materials, Equipment, tools, Construction Equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent, and whether incorporated or to be incorporated in the Work.
- 3.1.13 Design-Builder shall enforce strict discipline and good order among Design-Builder's employees and all other persons carrying out the Work. Design-Builder shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them. Design-Builder, as of the date of this Agreement, shall not knowingly employ or contract with an illegal alien who will perform Work under this Agreement.
- 3.1.14 Design-Builder shall provide a structure and process that assures that the SWCCOG is kept current with the intended scope, budget, schedule, and quality commitments throughout the evolution of the design and construction. It is Design-Builder's responsibility to inform the SWCCOG in a timely manner when challenges arise so that the SWCCOG can make timely informed decisions throughout the design and construction process.

- 3.1.15 Design-Builder shall coordinate with the SWCCOG all required inspections sufficiently in advance to allow the SWCCOG to attend.
- 3.1.16 Design-Builder shall keep such detailed accounts as are necessary for proper financial management of the Work. Design-Builder shall maintain a complete set of all books and records prepared or used by Design-Builder in connection with the Project. Design-Builder's records shall be current, complete and accurate and maintained in accordance with Generally Accepted Accounting Principles (GAAP). The SWCCOG shall be afforded reasonable access during normal business hours to all Design-Builder's records, books, correspondence, instructions, Drawings, Specifications, receipts, vouchers, memoranda and similar data relating to this Agreement. Design-Builder shall preserve all such records for a period of three (3) years after the date of Final Acceptance.
- 3.1.17 Design-Builder shall, after execution of this Agreement, undertake such testing, inspections, and investigations necessary to perform its obligations under the Design-Build Documents, including, but not limited to, additional geotechnical evaluations and Hazardous Materials studies. All reports and analyses generated by Design-Builder's testing, inspections and investigations, including, but not limited to, additional testing shall be furnished to the SWCCOG promptly.
- 3.1.18 Design-Builder shall issue "Supplemental Instructions" to the SWCCOG when an ambiguous condition requiring clarification is discovered in the Drawings, Specifications or other Design-Build Documents for which it is responsible, but which does not impact the Contract Price or Date of Substantial Completion. Design-Builder shall issue documents providing clarification and/or correcting errors or omissions in the Design-Build Documents, and no increase in the Contract Price amount shall be allowed for this effort.

3.2 DESIGN-BUILDER'S REPRESENTATIVE, KEY PERSONNEL, SUBCONTRACTORS

- 3.2.1 Design-Builder's Key Personnel and Subcontractors shall be assigned by Design-Builder to perform the Work under this Agreement. Design-Builder shall submit to the SWCCOG a list of any additional Key Personnel or Subcontractors who will perform Work under this Agreement within thirty (30) Days after this Agreement has been executed, together with complete resumes and other information describing their ability to perform the tasks assigned. Such additional personnel must be approved in writing by the SWCCOG before they are permanently assigned. It is the intent of the Parties that all Key Personnel and Subcontractors perform their specialty for all such Work required by this Agreement and be retained for the term of this Agreement to the extent practicable and to the extent that such Work maximizes the quality of Work performed under this Agreement.

3.3 DESIGN PHASE

- 3.3.1 The design phase, which shall also include pre-construction Work, shall commence on the date set forth in the Notice to Proceed for Design in accordance with the SWCCOG's Project Requirements, Exhibit A.
- 3.3.2 Design-Builder shall follow the specific design phase requirements in the SWCCOG's Project Requirements, Exhibit A, to achieve the goals of the SWCCOG for the Project.

3.4 COMPLIANCE WITH PATENT, TRADEMARK AND COPYRIGHT LAWS

- 3.4.1 Design-Builder warrants that all Work performed under this Agreement shall comply with all applicable patent, trademark, and copyright laws, rules, regulations, and codes of the United States.

Design-Builder shall not utilize any protected patent, trademark or copyright in performance of the Work unless Design-Builder has obtained proper permission, releases and other necessary documents. If Design-Builder specifies any Material, Equipment, process, or procedure, which is protected, Design-Builder shall disclose such patents, trademarks and copyrights to the SWCCOG in writing.

3.4.2 To the fullest extent permitted by law, Design-Builder agrees to release, indemnify, defend, and hold harmless the SWCCOG, its officers, agents and employees from any and all claims, damages, suits, costs, expenses, liabilities, actions, or proceedings of any kind or nature whatsoever, including attorneys' fees and costs, of or by anyone whomsoever, in any way resulting from, or arising out of, directly or indirectly, the performance of Work under this Agreement which infringes upon any patent, trademark, or copyright protected by law.

3.4.3 Design-Builder shall pay all royalties and license fees which may be due on the inclusion of any patented or copyrighted Materials, methods or systems selected by Design-Builder and incorporated in the Work.

3.5 EARLY WORK PACKAGES

3.5.1 The Parties anticipate that there may be some phases of the Project that are ready for construction before other phases are ready. Design-Builder shall recommend such phases or elements Project ("Early Work Package") to the SWCCOG as appropriate and if the SWCCOG agrees, the SWCCOG shall issue a Notice to Proceed for Construction of the Early Work Package. The SWCCOG may, in its sole discretion, authorize an Early Work Package pursuant to this section but shall have no obligation to authorize any Early Work Package. Prior to any such authorization, Design-Builder shall provide the SWCCOG with an Early Work Package submittal.

3.6 CONTRACT PRICE PROPOSAL

3.6.1 Design-Builder shall complete the Work for the Contract Price included in Exhibit C in this Agreement.

3.6.2 The Contract Price, including authorized adjustments, is the maximum amount payable by the SWCCOG to Design-Builder for performance of the Work under the Design-Build Documents. The Contract Price is subject to modification only as provided herein. Design-Builder agrees that it will be responsible for paying all costs of completing the Work even if they exceed the total Contract Price, as may be adjusted in accordance with this Agreement.

3.6.3 Design-Builder represents and warrants that it has, as of the date of the Contract Price Proposal, ascertained the nature and location of the Work, the character and accessibility of the Project Site, the existence of obstacles to construction which are ascertainable or visible upon a thorough investigation of the Project Site, the availability of facilities and utilities, the location and character of existing or adjacent work or structures, the surface conditions, environmental conditions, and any other general and local conditions (including labor) which might affect its performance of the Work or the cost thereof.

3.6.4 Upon acceptance by the SWCCOG of the Contract Price Proposal, the SWCCOG shall issue Notice of Award of the Agreement to the Design-Builder.

3.7 CONSTRUCTION PHASE WORK

- 3.7.1 The construction phase shall commence upon the issuance by the SWCCOG of a written Notice to Proceed for Construction, following acceptance of the 100% design complete Drawings and Specifications.
- 3.7.2 To complete the Work, Design-Builder shall provide all necessary permits, construction supervision, inspections, Construction Equipment, labor, Materials, Equipment, tools and subcontracted items.
- 3.7.3 Design-Builder shall conduct construction progress meetings if requested by the SWCCOG at a date, time and location to be agreed upon with the SWCCOG in accordance with the SWCCOG's Project Requirements, Exhibit A.
- 3.7.4 Design-Builder shall prepare a Daily Site Report in accordance with the SWCCOG's Project Requirements, Exhibit A.
- 3.7.5 Design-Builder shall supervise and direct the Work using Design-Builder's best skill and attention. Design-Builder shall be solely responsible for and have control over construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Design-Build Documents, unless the Design-Build Documents give other specific instructions concerning these matters.
- 3.7.6 Work that has not been given Initial Acceptance by the SWCCOG remains in the sole control of Design-Builder until the entirety of the Work is complete. Because the SWCCOG cannot control how Design-Builder performs the Work, the responsibility for safety and proper use shall be solely Design-Builder's. Until the entirety of the Work is completed, Design-Builder may perform Work that changes or modifies Work previously done, and even though at any given time, a portion of Work might be well done and acceptable in quality, the responsibility for keeping it in that condition until all the Work is complete, is the sole responsibility of Design-Builder. For this reason, the SWCCOG will not accept any portion of the Work until the entirety of the Work is complete and control of the Work is withdrawn from Design-Builder by Initial Acceptance by the SWCCOG.
- 3.7.7 Design-Builder shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project Site at all times during the performance of the Work. Such superintendent shall be able to read, write, and speak English fluently. The superintendent shall represent Design-Builder, and communications given to the superintendent shall be as binding as if given to Design-Builder. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request.
- 3.7.8 Design-Builder shall be responsible to the SWCCOG for acts and omissions of its employees, Design Professional, Subconsultants, Subcontractors and their agents and employees, and all other persons performing portions of the Work for Design-Builder. Design-Builder shall enforce strict discipline and good order among its employees, Design Professional, Subconsultants, Subcontractors, and all other persons performing the Work. Design-Builder shall not permit employment of unfit persons or persons not skilled in tasks assigned to them. Design-Builder, as of the date of this Agreement, shall not knowingly employ or contract with an illegal alien who will perform Work under this Agreement.
- 3.7.9 Design-Builder shall be responsible for inspection of portions of Work already performed under this Agreement to determine that such portions are in proper condition to receive subsequent Work.
- 3.7.10 Design-Builder shall give all notices and comply with all Laws at its own cost. Design-Builder

- shall be liable to the SWCCOG for losses, costs and expenses attributable to any acts or omissions by Design-Builder, Design Professional, Subconsultants, Subcontractors, and their agents and employees resulting from the failure to comply with Laws, including, fines, penalties, and corrective measures.
- 3.7.11 Design-Builder shall maintain Record Documents as required by the SWCCOG's Project Requirements, Exhibit A.
- 3.7.12 Design-Builder shall develop and maintain a Schedule as required by the SWCCOG's Project Requirements, Exhibit A.
- 3.7.12.1 Review and acceptance of the Schedule by the SWCCOG shall be a condition precedent to the making of any progress payments to Design-Builder. Acceptance of Design-Builder's Schedule by the SWCCOG, however, shall not relieve Design-Builder of its sole responsibility for the accuracy or feasibility of the Schedule, or of Design-Builder's sole responsibility to complete the Work in accordance with the Design-Build Documents, nor does such acceptance by the SWCCOG warrant, acknowledge, or admit the reasonableness of durations, sequence or logic of the Schedule.
- 3.7.12.2 If at any time Design-Builder's progress is determined by the SWCCOG to be inadequate to meet Milestone Dates or achieve Substantial Completion in accordance with the Design-Build Documents, the SWCCOG may notify Design-Builder. Upon receipt of such notice, Design-Builder shall immediately revise the Schedule indicating the steps necessary to improve the progress of the Work so that it will meet the Milestone Dates and the Substantial Completion Date and otherwise comply with the Design-Build Documents.
- 3.7.12.3 If within a reasonable period of time after notice is given as outlined above, the SWCCOG determines that Design-Builder has not sufficiently improved progress or is not complying with the Schedule, the SWCCOG may require Design-Builder to increase Design-Builder's work force, work additional hours per Day or Days per week, increase the number of shifts per Day, and/or increase the amount of Construction Equipment until such time as the Work is in compliance with the Schedule. Neither such notice by the SWCCOG nor the SWCCOG's failure to issue such notice shall relieve Design-Builder of its obligation to achieve the quality of Work and rate of progress required by the Design-Build Documents. Design-Builder shall not be entitled to an increase in the Contract Price for acceleration or other costs it may incur to remedy delays within its control.
- 3.7.13 Design-Builder shall prepare and submit Shop Drawings, Product Data and Samples as required by the SWCCOG's Project Requirements, Exhibit A.
- 3.7.13.1 The Work shall be in accordance with approved submittals except that Design-Builder shall not be relieved of its responsibility to perform the Work consistent with the requirements of the Design-Build Documents even if an approved submittal differs from Design-Build Document requirements. The Work may deviate from the Design-Build Documents only if Design-Builder has notified the SWCCOG in writing of a deviation at the time of the submittal and a Change Order is executed authorizing the deviation.

- 3.7.13.2 Design-Builder shall perform no portion of the Work requiring submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittals have been approved by the SWCCOG. Such Work shall be in accordance with approved submittals.
- 3.7.13.3 The SWCCOG's review and approval shall not extend to means, methods, techniques, sequences, or procedures of the construction of the Work or to safety precautions or programs incident thereto. The SWCCOG's review and approval of submittals shall be only for general conformance with the design concept, as otherwise provided, and shall not be construed as:
 - 3.7.13.3.1 Permitting any departure from the Design-Build Documents;
 - 3.7.13.3.2 Relieving Design-Builder of the responsibility for any error in details, dimensions, or otherwise that may exist in such submittals;
 - 3.7.13.3.3 Constituting a blanket approval of dimensions, quantities, or details of the Material or Equipment shown, or maintenance requirements. Detailed parts Drawings shall show location, name and catalog numbers of parts; or
 - 3.7.13.3.4 Approving departures from additional details or instructions previously furnished by the SWCCOG. Such check or approval shall not relieve Design-Builder of its responsibility of meeting all the requirements of the Design-Build Documents.

3.8 DESIGN-BUILDER'S RESPONSIBILITY FOR DESIGN PROFESSIONAL AND SUBCONSULTANTS

- 3.8.1 Design-Builder shall cause Design Professional and Subconsultants to:
 - 3.8.1.1 Attend pre-construction conference and shall provide assistance to Design-Builder in responding to inquiries by Subcontractors, Material suppliers, Equipment suppliers, and the SWCCOG.
 - 3.8.1.2 Assist with the preparation of Amendments or Change Orders.
 - 3.8.1.3 Assist Design-Builder and/or the SWCCOG in the review of qualification of bidders.
 - 3.8.1.4 Provide periodic field observation as agreed with the SWCCOG, but not less than at beginning, midpoint, and near the end of each sub-trade's operations, to assure themselves, Design-Builder, and the SWCCOG that the Work is proceeding in accordance with the intent of the Design-Build Documents. Design Professional and Subconsultants shall submit a written report to the SWCCOG and Design-Builder for all field observations performed. Notwithstanding the foregoing, if required by any permitting agency or the SWCCOG, Design Professional and Subconsultants shall be required to inspect structural work including, but not limited to, any foundations, steel structures, and masonry structures, and provide a letter to the permitting agency and the SWCCOG certifying that the Work was constructed substantially in accordance with the design intent.
 - 3.8.1.5 Attend design and construction meetings with Design-Builder and the SWCCOG if

required to facilitate communications and resolve issues.

- 3.8.1.6 Promptly respond to Requests for Information issued by the SWCCOG, Design-Builder, Subcontractors, testing agencies, commissioning agent, building department, or other entities so as not to delay construction. The SWCCOG intends to contract for services with a third party or parties to provide the SWCCOG's Quality Assurance observation, testing and inspection services during construction. Design Professional and Subconsultants shall promptly respond to inquiries by any third party which may arise during the course of this Work.
- 3.8.1.7 Periodically update the electronic Drawings and Specifications to reflect as-built information throughout the construction phase, at a minimum at the completion of each trades work, to keep the electronic Drawings and Specifications current. The as-built information shall be confirmed by Design-Builder in consultation with the SWCCOG's Representative before the revisions are finalized.
- 3.8.1.8 Provide Change Order consultation as it relates to Change Order requests, including, but not limited to, review of Change Order requests for impacts on quality, constructability, aesthetics and functionality. Change Order consultation may also be necessary for discretionary changes requested by the SWCCOG; however, such consultation is not included in the Contract Price. Compensation for the SWCCOG's discretionary Change Order consultation shall be made on a time and expense basis at the billable hourly rates for applicable personnel, and such compensation shall be included in the Agreement by Change Order.
- 3.8.1.9 If requested by the SWCCOG, prepare an as-built survey and incorporate it into the Record Documents.
- 3.8.2 Design-Builder shall cause the requirements in Section 3.8.1 to be included in all subcontracts with Design Professional and Subconsultants.

3.9 SAFETY AND PROTECTION OF PERSONS AND PROPERTY

- 3.9.1 Design-Builder shall have sole responsibility for safety precautions and safety programs and compliance with Laws in the performance of the Work in accordance with the SWCCOG's Project Requirements, Exhibit A; provided that such obligation does not relieve Subcontractors of their responsibility for the safety of persons or property in the performance of their Work or for compliance with Laws.
- 3.9.2 Design-Builder shall seek to avoid injury, loss or damage to persons or property by taking reasonable steps to protect:
 - 3.9.2.1 Its employees and all other persons at the Project Site;
 - 3.9.2.2 Materials, supplies and Equipment stored at the Project Site; and
 - 3.9.2.3 The Project and all property and structures located at the Project Site and adjacent to work areas.
- 3.9.3 Design-Builder shall at all times:

- 3.9.3.1 Safely guard the SWCCOG's property and abutting or adjacent property from injury, loss, or damage;
 - 3.9.3.2 Protect by false work, braces, shoring or other effective means all buildings, foundations, walls, fences, and other property along its line of Work, or affected directly by its Work including, but not limited to, the SWCCOG's property, against damage;
 - 3.9.3.3 Provide, erect, and maintain suitable barriers around all excavations or obstructions to prevent accidents; and provide, place, and maintain during the night sufficient lights, signals, and signs for this purpose on or near the Work;
 - 3.9.3.4 Cover or otherwise protect stockpiles of Materials to avoid damage to the Materials and damage to any property from such Materials;
 - 3.9.3.5 Protect all Work affected by weather unsuitable for the proper execution of the Work in a first-class manner from weather-related damage; and
 - 3.9.3.6 Repair, replace, or make good any such damage, loss or injury, unless caused directly by the SWCCOG.
- 3.9.4 Design-Builder shall designate an individual at the Project Site in its employ who shall act as Design-Builder's designated safety representative with the duty to prevent accidents. Unless otherwise identified by Design-Builder in writing to the SWCCOG, the designated safety representative shall be Design-Builder's superintendent.
- 3.9.5 Damage or loss not insured under property insurance that arises from the performance of the Work, to the extent of the negligence attributed to acts or omissions of Design-Builder, Subcontractors, Sub-subcontractors, Material suppliers, Equipment suppliers, or anyone for whose acts Design-Builder may be liable, shall be promptly remedied by Design-Builder at its sole cost, and such costs shall not be reimbursable under this Agreement. Damage or loss attributable to the acts or omissions of the SWCCOG or others for whom it may be liable and not to Design-Builder shall be promptly remedied by the SWCCOG at its cost. Design-Builder shall contact any property the SWCCOGs verbally and in writing where access is needed across their property to the Project Site. Repair of any unanticipated damage to such property caused by Design-Builder shall be the responsibility of Design-Builder and shall not be compensated separately.
- 3.9.6 If the SWCCOG determines that any part of the Work or Project Site is unsafe, the SWCCOG, without assuming responsibility for Design-Builder's safety program, may require Design-Builder to stop the Work, or with or without notice to Design-Builder, take corrective measures satisfactory to the SWCCOG, or both. If Design-Builder does not promptly institute corrective measures, the SWCCOG may perform them. The cost of such corrective measures provided by the SWCCOG shall be borne by Design-Builder, and if not paid on presentation of the bills, such costs may be deducted from any amounts due or that become due Design-Builder. The performance of such corrective work by the SWCCOG shall not relieve Design-Builder of responsibility for any damage which may occur.
- 3.9.7 In any emergency affecting the safety of persons or property, Design-Builder shall take reasonable measures to prevent threatened damage, injury or loss. Any change in the Contract Price or the

Date of Substantial Completion on account of emergency Work shall be determined as provided for herein.

- 3.9.8 Whereas the State in which the Work is performed has passed legislation bearing on Occupational Safety and Health, such legislation and amendments thereto, together with rules and regulations issued pursuant thereto, in addition to rules and regulations promulgated by OSHA shall be complied with by Design-Builder. SWCCOG shall not be liable for occupational safety and health violations of any kind committed by Design-Builder or its employees, agents, assignees, or subcontractors.

3.10 WARRANTY OF MATERIALS AND EQUIPMENT

- 3.10.1 Design-Builder warrants that all Materials and Equipment furnished as part of the Work shall be new unless otherwise specified, of good quality, in conformance with the Design-Build Documents, and free from defective workmanship and Materials. In the absence of detailed Specifications, all Materials and Equipment shall conform to the latest standards of the ASTM. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. Design-Builder's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by Design-Builder, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage.
- 3.10.2 Design-Builder shall furnish satisfactory evidence as to the kind and quality of Materials and Equipment furnished and warranty documentation as required by the SWCCOG's Project Requirements, Exhibit A.
- 3.10.3 The Warranty Correction Period during which Defective Work must be corrected shall commence on the Date of Initial Acceptance.

3.11 CORRECTION OF WORK WITHIN WARRANTY CORRECTION PERIOD

- 3.11.1 If, prior to Final Acceptance or within one (1) year after the date of Initial Acceptance, or for such longer periods of time as may be set forth with respect to specific warranties required by the Design-Build Documents, any Defective Work is found, the SWCCOG shall promptly notify Design-Builder in writing. Unless the SWCCOG provides written acceptance of the Defective Work, Design-Builder shall promptly correct the Defective Work at its own cost and time and bear the expense of any services required for correction of any Defective Work.
- 3.11.2 With respect to any portion of Work corrected after Initial Acceptance, the Warranty Correction Period shall be extended for this portion of Work by the period of time elapsed between Initial Acceptance and the completion of the corrected Work.
- 3.11.3 If Design-Builder fails to commence correction of Defective Work within thirty (30) Days after receipt of written notice from the SWCCOG, the SWCCOG may correct the Defective Work in accordance with the SWCCOG's right to carry out the Work. In such case, an appropriate Change Order shall be issued deducting the cost of correcting the Defective Work from amounts then or thereafter due Design-Builder. If amounts then or thereafter due Design-Builder are not sufficient to cover such amounts, Design-Builder shall pay the difference to the SWCCOG upon demand.
- 3.11.4 Design-Builder's obligations and liability with respect to any Defective Work discovered after the Warranty Correction Period shall be determined by Laws. If after the Warranty Correction Period, but before the applicable limitation period has expired, the SWCCOG discovers any Defective

Work, the SWCCOG shall, unless the Defective Work requires emergency correction, promptly notify Design-Builder and allow Design-Builder an opportunity to correct the Defective Work at its cost. If Design-Builder elects to correct the Defective Work, it shall provide written notice of such intent within seven (7) Days of its receipt of notice from the SWCCOG and shall complete the correction of Defective Work within a mutually agreed time. If Design-Builder does not elect to correct the Defective Work, the SWCCOG may have the Defective Work corrected, and shall promptly provide Design-Builder with an accounting of the correction costs, which shall be paid by Design-Builder to the SWCCOG upon demand.

- 3.11.5 If Design-Builder's correction or removal of Defective Work causes damage to or destroys other completed or partially completed Work or other property, Design-Builder shall be solely responsible for promptly correcting the damage and for the cost of correcting the destroyed or damaged property.
- 3.11.6 The Warranty Correction Period for Defective Work does not constitute a limitation period with respect to the SWCCOG's right to enforce Design-Builder's other obligations under this Agreement or the Design-Build Documents.
- 3.11.7 Prior to Initial Acceptance, at the SWCCOG's option and with Design-Builder's concurrence, the SWCCOG may elect to accept Defective Work rather than require its removal or correction. In such case, the Contract Price shall be adjusted for any diminution in the value of the Project resulting from such Defective Work.

3.12 CONFIDENTIALITY

- 3.12.1 Unless compelled by law, a governmental agency or authority, an order of a court of competent jurisdiction, or a validly issued subpoena, Design-Builder shall treat as confidential and not disclose to third-persons, except Subcontractors, Material Suppliers, Equipment Suppliers, Design Professional, Subconsultants, and Sub-subcontractors as is necessary for the performance of the Work or use for its own benefit, any reports or other data provided by the SWCCOG or which Design-Builder may acquire in connection with the Work. All confidential information shall be returned to the SWCCOG at the end of the Project.
- 3.12.2 To the extent permissible under the Colorado Open Records Act (CORA), the SWCCOG will treat as confidential all Design-Builder's estimating methodology and proprietary cost data that may be disclosed to the SWCCOG in connection with the performance of this Agreement.
- 3.12.3 The SWCCOG and Design-Builder shall specify those items to be treated as confidential by the other Party and shall mark them "Confidential." Design-Builder shall hold the SWCCOG harmless from any claims arising from the release of confidential and proprietary information not clearly designated as such by Design-Builder or that is compelled to be released by Laws, a governmental agency or authority, an order of a court of competent jurisdiction, a validly issued subpoena, or an applicable open records request pursuant to CORA.
- 3.12.4 Any aerial photography supplied by the SWCCOG to Design-Builder shall not be used for any purpose other than the Project.
- 3.12.5 In the event a third party seeks disclosure of any Confidential Information from Design-Builder or the SWCCOG, that Party shall promptly notify the other Party to permit that Party's legal objection.
- 3.12.6 Design-Builder accepts and acknowledges that the SWCCOG is a government entity subject to the

provisions of CORA and will aid with the SWCCOG in its efforts to comply with the requirements of CORA as applicable.

3.13 COMPLIANCE WITH LAWS AND REGULATIONS

- 3.13.1 All Work performed under this Agreement shall comply with all applicable Laws, rules, regulations, and codes of the United States and the State of Colorado and with the charter, ordinances, and rules and regulations of the SWCCOG. Additionally, all Work performed under this Agreement shall comply with all applicable rules and regulations of the USAC Rural Healthcare Program. For the avoidance of doubt, it is Design-Builder's obligation to be familiar with all applicable Laws, including, without limitation, all applicable USAC rules and regulations.
- 3.13.2 Design-Builder shall provide the SWCCOG with copies of all notices required of Design-Builder by Laws.
- 3.13.3 Design-Builder shall by signature and attestation on this Agreement certify to the following:
- 3.13.3.1 Design-Builder shall complete a criminal background check on all employees who work under this Agreement and maintain records of such during the term of the Agreement. Design-Builder shall provide proof of background checks upon request by the SWCCOG, and otherwise ensure that any subcontractors and their employees are similarly restricted and subject to this background check requirement. Design-Builder will be responsible for following all federal, state, and local privacy and confidentiality requirements in performing background checks.
- 3.13.3.2 Design-Builder, as of the date of this Agreement, shall not knowingly employ or contract with an illegal alien who will perform Work under this Agreement;
- 3.13.3.3 Design-Builder shall participate in either the Employment Verification Program (E-Verify Program) created in Public Law 104-208, as amended and expanded in Public Law 108-156, as amended, and jointly administered by the United States Department of Homeland Security and the Social Security Administration, or its successor program, or the Department Program, which is the employment verification program established by the Colorado Department of Labor and Employment (the "Department") pursuant to C.R.S. §§ 8-17.5-102(5)(c) in order to confirm the employment eligibility of all employees who are newly hired for employment to perform work under the Agreement;
- 3.13.3.4 Design-Builder has confirmed the employment eligibility of all employees who are newly hired for employment to perform the Work under this Agreement through participation in either the E-Verify Program or the Department Program;
- 3.13.3.5 Design-Builder shall not enter into a subcontract with a Subcontractor that fails to certify to Design-Builder that the Subcontractor shall not knowingly employ or contract with an illegal alien to perform Work under this Agreement;
- 3.13.3.6 Design-Builder shall not use either the E-Verify Program or the Department Program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed; and
- 3.13.3.7 If Design-Builder obtains actual knowledge that a Subcontractor performing Work

under this Agreement employs or contracts with an illegal alien, Design-Builder shall:

- 3.13.3.7.1 Notify Subcontractor and the SWCCOG within three (3) Days that Design-Builder has actual knowledge that the Subcontractor is employing or contracting with an illegal alien; and
- 3.13.3.7.2 Terminate the subcontract with the Subcontractor if within three (3) Days of receiving the notice required pursuant to this section, the Subcontractor does not stop employing or contracting with the illegal alien; except that Design-Builder shall not terminate the subcontract with the Subcontractor if during such three (3) Days the Subcontractor provides information to establish that the Subcontractor has not knowingly employed or contracted with an illegal alien.
- 3.13.3.8 Design-Builder shall comply with any reasonable request by the Colorado Department of Labor and Employment made in the course of an investigation that the Department is undertaking pursuant to the authority established by C.R.S. § 8-17.5- 102(5).
- 3.13.3.9 Equal Opportunity. Design-Builder shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin. Design-Builder shall take affirmative action to ensure that applicants are employed, and the employees are treated during employment without regard to their race, religion, color, sex or national origin. 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; and selection for training, including apprenticeship. Design-Builder agrees to make available to employees and applicants for employment notices setting forth the policies of nondiscrimination by posting such notices in conspicuous places.
- 3.13.3.10 Equal Opportunity Employment. Design-Builder shall, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex or national origin.
- 3.13.3.11 USF Participation. Design-Builder shall agree to participate in the Rural Health Care Program and to cooperate fully and in all respects with SWCCOG, the Universal Service Administrative Company, and any agency or organization administering the Rural Health Care Program to ensure that SWCCOG receives all of the Rural Health Care funding for which it has applied and to which it is entitled in connection with Design-Builder's work under this Agreement.
- 3.13.3.12 If Design-Builder violates any provision of this certification, the SWCCOG may terminate this Agreement for cause. Notwithstanding any provision to the contrary, if this Agreement is so terminated, Design-Builder shall be liable for any actual and consequential damages suffered by the SWCCOG.

3.14 TAXES

- 3.14.1 Design-Builder shall pay all sales, consumer, use or other similar taxes required to be paid in accordance with Laws and regulations applicable to the Work. The SWCCOG is exempt from

Colorado State and local sales and use taxes on Materials and Equipment to be permanently incorporated into the Work. Such taxes shall not be included in the Contract Price.

- 3.14.2 Design-Builder shall apply to the Colorado Department of Revenue for an exemption certificate by execution of Colorado State Form DR-0172 and, when allowed by the local taxing jurisdiction, purchase the Materials and Equipment tax free. Some taxing jurisdictions may not exempt sales and use taxes on purchases for governmental projects. Design-Builder shall determine which jurisdiction taxes are waived for governmental projects. Design-Builder shall be liable for exempt taxes paid due to the failure to apply for exemption certificates or failure to use them. Some local jurisdictions will not waive their sales taxes on purchase of materials for incorporation into the SWCCOG's projects even when the contractor has a tax-exempt certificate. In the jurisdictions that will not waive the tax, the Design-Builder, Subcontractor, Material Supplier, or Equipment Supplier is required to pay it and adjustment in the Contract Price for payment of such taxes is not allowed.
- 3.14.3 Design-Builder shall furnish the SWCCOG, upon request, duplicate receipts or other satisfactory evidence showing or certifying to the proper payment of all required licenses and taxes. Design-Builder shall promptly pay, when due, all bills, debts, and obligations it incurs in the contract funds, or performing the Work and shall allow no lien, mortgage, judgment or execution to be filed against land, facilities or improvements owned by the SWCCOG.

3.15 ASSIGNMENTS

- 3.15.1 Design-Builder shall not assign the whole or any part of this Agreement or any monies due or to become due thereunder without the written consent of the SWCCOG and of the Surety on Design-Builder's bonds. A copy of the consent of the Surety, together with a copy of the assignment, shall be filed with the SWCCOG. If Design-Builder assigns all or any part of any monies due or to become due under the Design-Build Documents, the instrument of assignment shall contain a clause to the effect that it is agreed that the right of the assignee in and to any monies due or to become due to Design-Builder under the Design-Build Documents shall be subject to prior claims and liens of all persons, firms and corporations for services rendered, for the payment of all Materials and Equipment furnished, for payment of all Construction Equipment used or rented in the performance of the Work, and for the payment of any liens, claims, or amounts due federal, state or local governments or any of their special enterprises.

3.16 SUBSTANTIAL COMPLETION, INITIAL ACCEPTANCE, AND FINAL SETTLEMENT

- 3.16.1 When Design-Builder considers the Work to be substantially complete, Design-Builder shall make a written request to the SWCCOG for the issuance of a Certificate of Substantial Completion. The SWCCOG, upon receipt of the request, shall make an inspection of the Work and either issue a written Certificate of Substantial Completion together with a Punch List, or deny Design-Builder's request in writing and provide the reasons for such denial in accordance with the requirements in the SWCCOG's Project Requirements, Exhibit A. Issuance of a Certificate of Substantial Completion will stop the accrual of liquidated damages.
- 3.16.2 Upon completion of the Punch List Work, Design-Builder shall make written application to the SWCCOG for an inspection of the Work, and the SWCCOG will make such inspection. When the SWCCOG finds the Work acceptable and complete under the Design-Build Documents, the SWCCOG will grant Initial Acceptance. Initial Acceptance shall not release Design-Builder from any Warranty obligations. The Warranty Correction Period shall begin on the Date of Initial Acceptance. The SWCCOG shall issue Initial Acceptance in writing, which shall set out the

beginning and end dates for the Warranty Correction Period.

- 3.16.3 Upon issuance of Initial Acceptance, the SWCCOG shall, as required by C.R.S. § 38-26- 107, as may be amended, establish the Date of Final Settlement and post or advertise the Notice of Final Settlement. The Work shall be deemed completed satisfactorily and finally accepted by the SWCCOG as those terms are used in C.R.S. § 24-91-103(1)(a) upon Initial Acceptance by the SWCCOG.
- 3.16.4 Design-Builder shall be responsible for the maintenance, security, heat, utilities, damages to the Work and insurance until the date of Initial Acceptance. In addition, Design-Builder shall be responsible for the provision of maintenance, security, heat, utilities, damages to the Work and insurance for the affected portion of the Work during any period in which Design-Builder is called upon to perform corrective Work during the Warranty Correction Period.

3.17 PROJECT CLOSEOUT

- 3.17.1 When Design-Builder applies for Substantial Completion, Design Professional and Subconsultants, in consultation with the SWCCOG's Representative, shall perform a walk-through of the Project to review and add to Design-Builder's Punch List. Design Professional, Subconsultants, and the SWCCOG's Representative shall monitor Design-Builder's progress on the Punch List and recommend to the SWCCOG when all items are satisfactorily completed and Initial Acceptance may be granted.
- 3.17.2 In the case where Design-Builder has requested that the SWCCOG issue a Certificate of Substantial Completion but the SWCCOG has denied such request, Design-Builder shall complete the Work to address the SWCCOG's concerns and comply with the Design-Build Documents and shall again request in writing that the SWCCOG issue a written Certificate of Substantial Completion. The SWCCOG will handle any subsequent requests as outlined herein.
- 3.17.3 If the SWCCOG issues a Certificate of Substantial Completion, the Certificate shall list any items remaining to be completed as Punch List Work and shall set a date certain by which Design-Builder shall complete or correct the Punch List Work.
 - 3.17.3.1 If Design-Builder does not provide in writing within four (4) Days of the issuance of the Certificate of Substantial Completion good and sufficient reasons why the Punch List Work cannot be completed by the date established in the Certificate of Substantial Completion, the date shall be as established in the Certificate, and the Punch List Work shall be completed by that date.
 - 3.17.3.2 If Design-Builder does not complete the items on the Punch List by the date established in the Certificate of Substantial Completion, the SWCCOG, upon seven (7) Days' notice to Design-Builder, shall have the option to withhold from the Final Payment up to two (2) times the estimated value of the uncompleted Punch List Work, to complete any uncompleted Work or repair deficient Work with its own forces, to deduct the actual cost from any amounts due or that become due to Design-Builder, and/or to seek compensation from the Surety.
- 3.17.4 Design-Builder shall submit a final Application for Payment upon completion of the Punch List Work. Prior to receiving Final Payment, Design-Builder, if requested by the SWCCOG, shall file with the SWCCOG:

- 3.17.4.1 Receipts showing payment in full;
 - 3.17.4.2 A waiver or release of claims and/or liens from each Subcontractor, material men, supplier, manufacturer, and dealer for all labor, Material, and Equipment used or furnished by each on the Work; and
 - 3.17.4.3 A complete release of all claims and/or liens of Design-Builder which may have arisen under the Agreement.
- 3.17.5 In lieu thereof, the SWCCOG may request and Design-Builder shall file statements showing the balance due on all accounts. The manner in which settlement is made by the SWCCOG with Design-Builder shall not release Design-Builder or its Surety from its payment obligations.
- 3.17.6 The amount of Verified Claims that were properly filed with the SWCCOG and which remain unsettled as of the Date of Final Settlement shall be deducted from the Design-Builder's Final Payment. Any balance due to Design-Builder will be payable to Design-Builder at 5:00 p.m. on the Date of Final Settlement.
- 3.17.7 Portions of the Work that are completed may be used or occupied by the SWCCOG when:
- 3.17.7.1 The portion of the Work is designated in a Certificate of Substantial Completion for the specific portion of the Work considered substantially complete;
 - 3.17.7.2 Appropriate insurer(s) and/or Sureties consent to the SWCCOG's occupancy or use;
 - 3.17.7.3 Public authorities having jurisdiction over the Work authorize the SWCCOG's occupancy or use; and
 - 3.17.7.4 Such occupancy or use of portions of the Work shall constitute Substantial Completion for that portion of the Work only. Issuance of Substantial Completion for a portion of the Work will be solely for the SWCCOG's convenience. The SWCCOG shall not be obligated to issue Substantial Completion on any portion of the Project until the entirety of the Work is substantially complete.
 - 3.17.7.5 Neither the final certificate of payment nor any provision in the Design-Build Documents, nor partial or entire occupancy of the premises by the SWCCOG, shall constitute acceptance of Work not done in accordance with the Design-Build Documents or relieve Design-Builder of liability in respect to any expressed or implied warranties or responsibility for faulty Materials, Equipment, or workmanship. This Warranty will have no time limit except as prescribed by law.
- 3.17.8 At the conclusion of construction and as a condition precedent to the SWCCOG granting Initial Acceptance, Design-Builder shall prepare and submit to the SWCCOG:
- 3.17.8.1 Copies of all Project meeting minutes and review comments;
 - 3.17.8.2 Redlined field set of Record Drawings;
 - 3.17.8.3 Redlined field set of Record Specifications;

- 3.17.8.4 Data in electronic format that document how the various elements of the Work, including changes, were constructed or installed;
- 3.17.8.5 Written concurrence from Surety to release Final Payment to Design-Builder;
- 3.17.8.6 Training as required along with documentation of same; and
- 3.17.8.7 Operations and maintenance manuals.

ARTICLE 4. THE SWCCOG'S RESPONSIBILITIES

4.1 RESPONSIBILITIES

- 4.1.1 The SWCCOG's responsibilities under this Article shall be fulfilled in a timely manner. A matrix, summarizing responsibilities of the SWCCOG and the Design-Builder has been attached as Exhibit B. However, Exhibit B is not intended to be all inclusive of the Parties responsibilities and is provided as a guide to clarify potential "gray areas" of scope between the SWCCOG and the Design-Builder.
- 4.1.2 Pursuant to C.R.S. § 24-91-103.6, as may be amended, the amount of money appropriated by the SWCCOG for this Agreement at the time of execution of the Agreement is equal to or in excess of the original Contract Price. No contract modification as defined in C.R.S. section 24-101-301 (10), Change Order, other form of order or directive by the SWCCOG requiring additional compensable Work to be performed, which Work causes the aggregate amount payable under the Agreement to exceed the amount then appropriated for the Project, shall be issued unless Design-Builder is given written assurance by the SWCCOG that lawful appropriations to cover the cost of the additional Work have been made and that the appropriations are available prior to the performance of the additional Work or unless such Work is covered under a remedy-granting provision in the Agreement.
- 4.1.3 The SWCCOG makes no representation or warranty as to the accuracy of the SWCCOG-provided information. Design-Builder shall carefully study and compare all the SWCCOG-provided information with field conditions, as well as for the internal consistency of such information, and shall promptly report in writing to the SWCCOG any conflict, ambiguity, or discrepancy which Design-Builder may discover and shall obtain a written interpretation or clarification from the SWCCOG before proceeding with any work affected thereby.
- 4.1.4 If the SWCCOG becomes aware of any error, omission or failure to meet the requirements of the Design-Build Documents or any fault or defect in the Work, the SWCCOG shall give prompt written notice to Design-Builder. The failure of the SWCCOG to give such notice shall not relieve Design-Builder of its obligations to fulfill the requirements of the Design-Build Documents.
- 4.1.5 The SWCCOG shall have the right to inspect the Work in accordance with the SWCCOG's Project Requirements, Exhibit A.
- 4.1.6 If Design-Builder fails to correct Work which is not in accordance with the requirements of the Design-Build Documents or persistently fails to carry out Work in accordance with the Design-Build Documents, the SWCCOG, in writing, may order Design-Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the SWCCOG to stop the Work shall not give rise to a duty on the part of the SWCCOG to exercise this right for the

benefit of Design-Builder or any other person or entity.

- 4.1.7 If Design-Builder defaults or neglects to carry out the Work in accordance with the Design-Build Documents, and fails within seven (7) Days after receipt of written notice from the SWCCOG to commence and continue correction of such default or neglect with diligence and promptness, the SWCCOG may, without prejudice to any other remedy the SWCCOG may have, make good such deficiencies. In such case a Change Order shall be issued deducting from amounts then or thereafter due Design-Builder the cost to correct such deficiencies. If amounts then or thereafter due Design-Builder are not sufficient to cover such amount, Design-Builder shall pay the difference to the SWCCOG of such costs upon demand.
- 4.1.8 The SWCCOG shall have no contractual or third-party beneficiary obligations to any third parties, including Design Professional, Subcontractors, Subconsultants, Material Suppliers, Equipment Suppliers or Sub-subcontractors.
- 4.1.9 The SWCCOG shall provide insurance for the Project as required by the SWCCOG's Project Requirements, Exhibit A.

4.2 THE SWCCOG'S REPRESENTATIVE

- 4.2.1 The SWCCOG's Representative is Miriam Gillow-Wiles or her designee. The SWCCOG reserves the right to inform Design-Builder in writing of a different SWCCOG Representative at any time during the Project.
- 4.2.2 The SWCCOG's Representative shall be fully acquainted with the Project and shall furnish the information and services required of the SWCCOG in a timely manner. The SWCCOG's Representative, however, shall not have authority to sign Change Orders. If the SWCCOG changes its representative or the representative's authority as described above, the SWCCOG shall notify Design-Builder in writing. the SWCCOG's Representative will be on the Project Site to observe the Work and to keep the SWCCOG informed as to the progress of the Work and the manner in which the Work is being performed, to keep records, to act as liaison between Design-Builder and the SWCCOG, to call to the attention of Design-Builder any Defective Work or deviations from the Design-Build Documents and to reject Defective Work.
- 4.2.3 The SWCCOG's review and approval of interim design submissions, meeting minutes, Issued for Permit or Issued for Construction Drawings and/or Specifications or other documents are for mutually establishing a conformed set of Design-Build Documents compatible with the requirements of the Work. Neither the SWCCOG's review nor approval of any interim design submissions, meeting minutes, or other documents shall be deemed to transfer any design liability from Design-Builder to the SWCCOG. Because one of the SWCCOG's Representative's primary interests is to assure that the Work progresses expediently and in a good and workmanlike manner, he or she may offer suggestions on means and methods to Design-Builder, which Design-Builder may or may not accept, at its discretion. Such suggestions are never to be considered as anything but suggestions and involve no assumption of responsibility, financial or otherwise, by either the SWCCOG or the SWCCOG's Representative. In carrying out any of the provisions of the Design-Build Documents or in exercising any power or authority granted thereby, there shall be no liability upon the SWCCOG's Representative, either personally or as officials of the SWCCOG, it being understood that in such matters, they act as agents and representatives of the SWCCOG only.
- 4.2.4 Any assistance which the SWCCOG's Representative may give Design-Builder shall not be construed as the basis of any assumption of responsibility or liability in any manner, financial or

otherwise, by the SWCCOG's Representative or the SWCCOG. If any part of Design-Builder's Work depends upon the work of any other contractor for the proper execution or results, Design-Builder shall inspect and promptly report in writing to the SWCCOG any lack of progress or defects in the other contractor's work as fit and proper for the reception of Design-Builder's Work. No extensions to the Date of Substantial Completion will be granted if Design-Builder fails to inspect and report on unsuitable work.

- 4.2.5 The SWCCOG's Representative is not and does not purport to be a safety engineer and is not engaged in that capacity by the SWCCOG and shall have neither the authority nor the responsibility to enforce safety Laws, rules, regulations or procedures, nor shall he or she be responsible for the safety of persons on and about the Project Site.
- 4.2.6 The presence or absence of the SWCCOG's Representative's on the Project will be at the sole discretion of the SWCCOG, and such presence or absence of the SWCCOG's Representative will not relieve Design-Builder of its sole responsibility to obtain the results required by the Design-Build Documents.
- 4.2.7 The SWCCOG's Representative shall not be authorized to approve or accept any portion of the Work or to issue instructions contrary to the Design-Build Documents. Such approvals, acceptance, or instructions, if given, must be in writing and signed by the SWCCOG. The SWCCOG's Representative shall have authority to reject Defective Work; however, the failure of the SWCCOG's Representative to reject Defective Work or Work that deviates from the Design-Build Documents shall not constitute acceptance of such Work by the SWCCOG.
- 4.2.8 Nothing in this section shall in any way be construed to require or to place responsibility for the method, manner, scheduling, coordination, or supervision of the Work upon the SWCCOG's Representative or the SWCCOG. Such responsibility rests solely with Design-Builder.

4.3 THE SWCCOG'S RIGHT TO PERFORM WORK

- 4.3.1 The SWCCOG reserves the right to award separate contracts in connection with other portions of the Project, or other construction or operations on the Project Site, under terms and conditions substantially similar to this Agreement, including those terms and conditions related to insurance and waiver of subrogation. The SWCCOG shall notify Design-Builder promptly after execution of any separate contract. If Design-Builder claims that delay or additional cost is involved because of such action by the SWCCOG, Design-Builder may make a claim as provided herein.
- 4.3.2 The SWCCOG shall provide for coordination of the activities of the SWCCOG's own forces and of each separate contractor with the Work of Design-Builder, who shall cooperate with them. Design-Builder shall participate with other separate contractors and the SWCCOG and shall make revisions to the Schedule deemed necessary after a joint review and upon mutual agreement.

ARTICLE 5. OWNERSHIP OF WORK PRODUCT

- 5.1 The term "Work Product" is intended to include all designs, Drawings, plan, studies, surveys, models, sketches, maps, digital models, Specifications, calculations, reports, and documentation, whether in paper copy or electronic format, produced by or through Design-Builder that are furnished to the SWCCOG.
- 5.2 The SWCCOG shall own all rights, title and interest in the Work Product upon compensation being paid to Design-Builder for the production of such Work Product. The SWCCOG's Ownership rights include,

without restriction or limitation, the right of the SWCCOG, and anyone contracting with the SWCCOG, to incorporate any ideas or information from the Work Product into: (a) any other contract awarded in reference to the Project; or (b) any subsequent procurement by the SWCCOG on another project. In receiving all rights, title and interest in the Work Product, the SWCCOG is deemed to own all intellectual property rights, copyrights, patents, trade secrets, trademarks, and service marks in Work Product, and Design-Builder agrees that it shall, at the request of the SWCCOG, execute all papers and perform all other acts that may be necessary, if any, to ensure that the SWCCOG's rights, title and interest in the Work Product are protected. The rights conferred herein to the SWCCOG include, without limitation, the SWCCOG's ability to use the Work Product without the obligation to notify or seek permission from Design-Builder. Design-Builder may request a license to use such Work Product, which may be approved, approved with conditions or rejected in the sole discretion of the SWCCOG.

- 5.3 The SWCCOG's use of the Work Product on any other project shall be at the SWCCOG's sole risk, and Design-Builder neither warrants nor represents that the Work Product is suitable for use on another project without modification. The SWCCOG waives any rights to seek recovery from Design-Builder for any claims, damages, liabilities, losses, and expenses arising out of or resulting from the SWCCOG's use of the Work Product on another project.
- 5.4 The SWCCOG acknowledges and agrees that in the performance of the Work, Design-Builder may use its proprietary algorithms, software, hardware, databases and other background technology that Design-Builder developed or licensed from third parties prior to the Agreement Date ("Pre- Existing Technology"). Design-Builder shall retain all right, title and interest in such Pre-Existing Technology. Design-Builder hereby licenses such Pre-Existing Technology to the SWCCOG on a non-exclusive, cost free, irrevocable, and perpetual basis for use by the SWCCOG in connection with the Project. The SWCCOG shall not license, transfer or otherwise make available Pre-Existing Technology to any third party without the written consent of Design-Builder, which consent is hereby granted for purposes of completing, operating, maintaining or repairing the Project following the termination or completion of this Agreement. The SWCCOG's use of any such Pre-Existing Technology for purposes other than in connection with the Project shall be at its own risk and Design-Builder shall have no liability therefor.
- 5.5 In the event of the termination of this Agreement, the SWCCOG shall have the right to use, reproduce and make derivative works of the Work Product, for which payment has been made, to complete the Project.
- 5.6 After completion of the Project, the SWCCOG may reuse, reproduce or make derivative works from the Work Product for the purposes of maintaining, renovating, remodeling, expanding or demolishing the Project.
- 5.7 Design-Builder shall obtain from any Design Professionals and any Subconsultants the same rights that correspond to the rights given by Design-Builder to the SWCCOG in this Section, and Design-Builder shall provide evidence to the SWCCOG that such rights have been obtained.
- 5.8 Design-Builder acknowledges that the SWCCOG's ability to successfully complete the Project may be significantly impacted if the SWCCOG terminates the Design-Build Agreement, and Design Professional and/ or certain Subconsultants are not available to continue working on the Project. Accordingly, Design-Builder agrees that if the SWCCOG exercises its right to terminate the Agreement, the SWCCOG shall have the right, but not the obligation, to contract directly with any Design Professionals and/or Subconsultants for services related to the Project, and Design-Builder shall take such steps as are reasonably necessary to enable the SWCCOG to implement such relationship(s), including the right to assume any subcontracts entered into by Design-Builder with such parties.
- 5.9 If the SWCCOG has exercised its rights under Section 5.8 above, the SWCCOG and Design-Builder shall promptly meet and confer about the documents and other materials prepared by Design-Builder, Design

Professionals and Subconsultants and, if applicable, Subcontractors. Design-Builder shall furnish, or cause to be furnished, to the SWCCOG all documents and other materials, including but not limited to schedules, bid packages, cost estimates, and other documents, requested by the SWCCOG, which documents shall then be deemed Work Product.

ARTICLE 6. SUBCONTRACTORS

6.1 SUBCONTRACTORS

- 6.1.1 Work not self-performed by Design-Builder shall be performed by Subcontractors or Design Professionals under written agreements with Design-Builder.
- 6.1.2 Design-Builder shall develop a list of Subcontractors to be submitted to the SWCCOG for review and approval. .
- 6.1.3 The SWCCOG may require that proposed Subcontractors submit pre-qualifications and resumes of proposed key staff for the SWCCOG's review and approval.
- 6.1.4 Design-Builder shall not retain any Subcontractor to whom the SWCCOG has made reasonable objection, provided the SWCCOG agrees to compensate Design-Builder for any additional actual costs incurred by Design-Builder as a result of such objection. The SWCCOG may propose Subcontractors to be considered by Design-Builder. Design-Builder, however, shall not be required to retain any Subcontractor to whom Design-Builder has made reasonable objection.
- 6.1.5 Design-Builder shall be solely responsible for the supervision and management of Subcontractors in the performance of their Work.
- 6.1.6 Design-Builder agrees to bind every Subcontractor, Material Supplier, and Equipment Supplier (and require every Subcontractor to bind its Sub-subcontractors and Material Suppliers and Equipment Suppliers) to all the provisions of this Agreement and the Design-Build Documents as they apply to the Subcontractors' or Material and Equipment Suppliers' portions of the Work.

6.2 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

- 6.2.1 If this Agreement is terminated, each subcontract shall be assigned by Design-Builder to the SWCCOG, subject to the prior rights of the Surety, provided that:
 - 6.2.1.1 This Agreement is terminated by the SWCCOG pursuant to the requirements herein; and
 - 6.2.1.2 The SWCCOG accepts such assignment after termination by notifying the Subcontractor and Design-Builder in writing, and assumes all rights and obligations of Design-Builder pursuant to each subcontract agreement. Design-Builder shall cause all appropriate Subcontractor information, documentation and contracts to be provided to the SWCCOG in the event of an assignment.
- 6.2.2 In the event the SWCCOG accepts such assignment and the Work has been suspended for more than thirty (30) Days, if the SWCCOG deems it justified, Subcontractor's compensation shall be adjusted as a result of the suspension. Upon such assignment to the SWCCOG, the SWCCOG may further assign the subcontract to a successor design-builder or other entity.

ARTICLE 7. TIME

7.1 TIME

- 7.1.1 The Dates of Commencement of the Work (design and construction phases) shall be set forth in Notices to Proceed. The Work shall proceed in accordance with the Schedule prepared by Design-Builder under this Agreement.
- 7.1.2 Unless the Parties agree otherwise, the Date of Substantial Completion shall be established in the Notice to Proceed for Design, subject to adjustments in accordance with this Agreement.
- 7.1.3 Unless instructed by the SWCCOG in writing, Design-Builder shall not commence the Work before the effective date of the insurance required to be provided by Design-Builder.
- 7.1.4 Neither the Date of Substantial Completion nor the Contract Price shall be adjusted as a result of Design-Builder's failure to obtain the insurance required under this Agreement.
- 7.1.5 Design-Builder shall proceed expeditiously with adequate forces and shall achieve Initial Acceptance within the time set forth in the Schedule.

7.2 DELAYS AND EXTENSIONS OF TIME

- 7.2.1 Design-Builder expressly agrees that in undertaking to complete the Work on or before the Date of Substantial Completion, it has taken into consideration and made allowances in the Schedule for all normal delays and hindrances incidental to the Work, whether growing out of delays in securing Materials, Equipment, and/or labor, normal inclement weather, or otherwise.
- 7.2.2 If Design-Builder is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Design-Builder, Design-Builder may be entitled to an extension of the Date of Substantial Completion should the delay have an impact on the then current Schedule.
- 7.2.3 In addition, if Design-Builder incurs additional costs as a result of a delay that is beyond the control of Design-Builder, Design-Builder may be entitled to an adjustment in the Contract Price, as appropriate.
- 7.2.4 If delays to the Project are encountered for any reason, the Parties agree to take reasonable steps to mitigate the effect of such delays.
- 7.2.5 If adverse abnormal weather conditions are the basis for a request for an extension to the Date of Substantial Completion, such request shall be submitted in accordance with the requirements in the SWCCOG's Project Requirements, Exhibit A.

7.3 LIQUIDATED DAMAGES

- 7.3.1 The SWCCOG and Design-Builder agree that time is of the essence of this Agreement and that the SWCCOG will suffer financial loss if any intermediate Milestone Dates or if the entirety of the Work is not substantially completed by the agreed upon date(s). The SWCCOG and Design-Builder also recognize the difficulty in calculating the actual loss suffered by the SWCCOG if the Work is not completed on time. Accordingly, instead of requiring any such proof, the SWCCOG

and Design-Builder agree that as liquidated damages for delay, Design-Builder shall pay the SWCCOG a reasonable amount of daily liquidated damages as follows:

- 7.3.1.1 Design-Builder agrees that if the Date of Substantial Completion of any intermediate Milestone Dates or the entirety of the Work is not attained, Design-Builder shall pay the SWCCOG one thousand five hundred and no dollars (\$1,500.00) as liquidated damages and not as a penalty for each Day that achieving Substantial Completion extends beyond the Date(s) established in the Notice to Proceed for Design and/or the Notice to Proceed for Construction, or as may be subsequently revised by Amendment or Change Order. The total liquidated damages under this Agreement shall not exceed 10% of the Contract Price.
- 7.3.2 The liquidated damages provided for above shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages incurred by the SWCCOG which are caused by any delay in achieving the Date of Substantial Completion for construction.
- 7.3.3 The SWCCOG shall have the right to deduct liquidated damages from any monies due or that become due Design-Builder and to sue for and recover any additional compensation for damages for non-performance of this Agreement.
- 7.3.4 The assessment of liquidated damages for failure to complete the Work by the Date(s) of Substantial Completion shall not constitute a waiver of the SWCCOG's right to collect any additional damages which the SWCCOG may sustain by failure of Design-Builder to carry out the terms of this Agreement.
- 7.3.5 If liquidated damages for Milestone Dates are specified, all conditions for liquidated damages shall apply to each and every Milestone specified. All Milestone Dates represent independent damages the SWCCOG will suffer and therefore shall be viewed independently. All Milestone Dates shall be cumulative, increasing by the amount specified for each date Design-Builder does not achieve Substantial Completion for each specific Milestone Date. If Design-Builder fails to obtain Substantial Completion of the entire Work by the Date of Substantial Completion, the liquidated damages for Milestone Dates shall cease to accrue as of that date and liquidated damages for failure to complete the entire Work will commence.

ARTICLE 8. COMPENSATION

8.1 DESIGN PHASE COMPENSATION

- 8.1.1 The compensation due for all Work performed during the design phase, including pre-construction Work, shall be included in the Contract Price.

8.2 CONSTRUCTION PHASE COMPENSATION

- 8.2.1 The construction phase for the Project, or for the first portion of the Project in the event the construction of the Project is to proceed in phases with early construction packages, shall commence upon issuance of the Notice to Proceed for Construction. Reference herein to the "construction phase" shall refer to either a single construction phase or collectively to all construction if the Project is to proceed in phases, unless the context specifically requires otherwise.
- 8.2.2 In addition to the construction of the Project, the construction phase shall be construed to also

- include Design-Builder's quality control inspection and testing, Punch List Work, start up, commissioning, troubleshooting, training, provision of operations and maintenance manuals, provision of spare parts, close out of permits and any other Project closeout activities normally associated with Projects of this type.
- 8.2.3 The compensation due for all Work performed during the construction phase, including any additional design Work, shall be included in the Contract Price.
- 8.2.4 The portion of the Contract Price earned by Design Builder in any given pay period shall be determined by the completion of the items of Work listed in Exhibit C. The Design-Builder and the SWCCOG shall meet to mutually agree on the method of verification of quantity measurements and documentation to be prepared by and submitted by the Design-Builder in its Application for Payment. At the time quantity measurements are made by Design-Builder, the SWCCOG's Representative may be present to verify and agree to such measurements. If the SWCCOG's Representative disagrees with Design-Builder's measurements, the SWCCOG may, at its option, independently measure quantities and adjust the quantity in accordance with its measurements. Design-Builder shall fully cooperate with the SWCCOG in any such endeavor at no additional cost to the SWCCOG.

ARTICLE 9. RELATED PARTIES

- 9.1 If any of the design or construction costs in the Contract Price arise from a transaction between Design-Builder and a Related Party, Design-Builder shall notify the SWCCOG of the specific nature of the contemplated transaction, including the identity of the Related Party and the anticipated cost to be incurred, before any such transaction is consummated or cost incurred.
- 9.2 If the SWCCOG, after such notification, authorizes the proposed transaction, then the cost incurred shall be included as a cost to be reimbursed under the Contract Price, and Design-Builder may procure the Work, Materials, Equipment, goods or service from the Related Party. If the SWCCOG fails to authorize the transaction, Design-Builder shall procure the Work, Materials, Equipment, goods or service from some person or entity other than a Related Party in accordance with this Agreement.

ARTICLE 10. CHANGES IN THE WORK

10.1 CHANGES

- 10.1.1 Design-Builder may request or the SWCCOG may order changes in the Work within the general scope of Design-Build Documents consisting of additions, deletions, or other revisions.
- 10.1.2 A change in the Work shall constitute any change or amendment of Work, which is different from or in addition to the SWCCOG's Project Requirements or the terms and conditions of this Agreement, including all Exhibits. No such change, including any additional compensation, shall be effective or paid unless authorized by written Change Order or amendment executed by the SWCCOG. Except as expressly provided in this Agreement, no agent, employee or representative of the SWCCOG shall have the authority to enter into any changes or modifications, either directly or implied by a course of action, relating to the terms and scope of this Agreement.
- 10.1.3 If Design-Builder proceeds with changed Work without written authorization, Design-Builder shall be deemed to have waived any claim for additional time and/or compensation, including claims

based on theories of promissory estoppel, unjust enrichment, quantum meruit or implied contract.

- 10.1.4 Minor changes in the Work are those changes that do not involve an adjustment in the Contract Price and/or the Contract Time and do not materially and adversely affect the Work, including the design, quality, performance, and workmanship required by the Design-Build Documents. Design-Builder may make minor changes in the Work consistent with the intent of the Design-Build Documents, provided that Design-Builder shall promptly inform the SWCCOG, in writing, of any such changes and record such changes on the record documents maintained by Design-Builder. The SWCCOG may request minor changes in the Work that do not involve an adjustment in the Contract Price or Contract Time, and do not materially or adversely affect the Work. If Design-Builder disputes that such order involves a minor change, Design-Builder shall notify the SWCCOG in writing.

10.2 CHANGE ORDERS AND CONSTRUCTION CHANGE DIRECTIVES

- 10.2.1 All such changes in the Work shall be authorized by Change Order or Construction Change Directive prior to performance of the changed Work.
- 10.2.2 Each adjustment in the Contract Price resulting from a Change Order or Construction Change Directive shall clearly separate the amount attributable to compensation for changes in the design Work, the pre-construction Work, and the construction Work.
- 10.2.3 The SWCCOG and Design-Builder shall negotiate in good faith an appropriate adjustment to the Contract Price for added or deleted Work and the revised Date of Substantial Completion therefor.
- 10.2.4 Should the SWCCOG and Design-Builder fail to agree on the amount of the change in the Contract Price or on the revised Date of Substantial Completion, the SWCCOG may issue a Construction Change Directive.
- 10.2.5 Except as provided in Section 10.3.4, Design-Builder shall not be obligated to perform changes in the Work that impact the Contract Price or the Date of Substantial Completion until either a Construction Change Directive has been issued by the SWCCOG or a Change Order has been executed by the Parties.

10.3 DETERMINATION OF CHANGES IN THE CONTRACT PRICE OR THE DATE OF SUBSTANTIAL COMPLETION

- 10.3.1 An increase or decrease in the Contract Price resulting from a change in the Work shall be determined by preparation of an estimate of the cost of revised Work.
- 10.3.2 The estimate of the cost of the revised Work may be determined based on one or more of the following methods:
- 10.3.2.1 Unit Prices if set forth in this Agreement or as subsequently agreed by the Parties multiplied by the estimated quantity of units to be provided. Any such Unit Prices to be paid to Subcontractors or Sub-subcontractors shall include an allowance for their Overhead and Profit. No additional markups will be paid to Subcontractors or Sub-subcontractors for their Overhead and Profit under this compensation method.
- 10.3.2.2 Design-Builder may negotiate compensation for changed Work to be performed by its Subcontractors or their Sub-subcontractors based on unit prices. Any such unit price to be paid to Subcontractors or Sub-subcontractors shall include their Overhead and

Profit. No additional markups will be paid to Subcontractors or Sub-subcontractors for their Overhead and Profit under this compensation method. Such unit prices are subject to the SWCCOG's approval.

- 10.3.2.2.1 If the SWCCOG, at its sole discretion, rejects the negotiated Subcontractor unit prices, Design-Builder shall require the Subcontractor or its Sub-subcontractor to perform the changed Work on a time and materials basis with documentation of all expenditures for labor, Materials, Equipment, Construction Equipment, and general conditions costs for the changed Work.
- 10.3.2.2.2 The maximum markup paid to any individual Subcontractor or Sub-subcontractor for recovery of its Overhead and Profit on its time and materials costs is limited to ten percent (10%).
- 10.3.2.2.3 The cumulative maximum markup to be paid to a combination of a Subcontractor and its lower tier Sub- subcontractors, regardless of the number of sub-tiers, for recovery of their Overhead and Profit on their time and materials costs is limited to twenty percent (20%).
- 10.3.2.3 An itemized cost estimate with supporting documentation to permit evaluation by the SWCCOG, including a detailed cost estimate for all labor, Materials, Equipment, Construction Equipment, general conditions costs, allowance for overhead and profit, and other allowable costs.
- 10.3.2.4 Design-Builder shall compensate Design Professional and Subconsultants for design modifications related to changed Work based on their standard billable hourly rate schedule in effect at the time of the changed Work multiplied by the actual hours expended, plus approved Reimbursable Expenses. Design-Builder shall negotiate a maximum liability for the design modification Work for incorporation into the estimate of the cost of the revised Work.
- 10.3.3 The maximum allowable mark-up payable to Design-Builder for its administration of changed Work shall be limited to ten percent (10%) of the cost of the Work as determined as allowed herein.
- 10.3.4 Design-Builder may be allowed to extend the Date of Substantial Completion for delay beyond Design-Builder's control. Examples of causes beyond the control of Design-Builder include, but are not limited to:
 - 10.3.4.1 Acts or omissions of the SWCCOG;
 - 10.3.4.2 Changes in the Work or the resequencing of the Work ordered by the SWCCOG;
 - 10.3.4.3 Existing Hazardous Materials encountered by Design-Builder;
 - 10.3.4.4 Concealed or differing site conditions, as that term is described in Section 10.5 below;
 - 10.3.4.5 Delay authorized by the SWCCOG pending dispute resolution or suspension by the SWCCOG;

- 10.3.4.6 Unforeseeable transportation delays;
 - 10.3.4.7 Labor disputes not involving Design-Builder;
 - 10.3.4.8 Fire;
 - 10.3.4.9 Terrorism;
 - 10.3.4.10 Epidemic;
 - 10.3.4.11 Adverse governmental action;
 - 10.3.4.12 Unavoidable accidents or circumstances; and
 - 10.3.4.13 Adverse abnormal weather conditions not reasonably anticipated.
- 10.3.5 If adverse, abnormal weather conditions are the basis for a request for an extension of the Date of Substantial Completion, such request shall be supported by data substantiating that weather conditions during the period of time claimed to be impacted were unusually severe and could not have been reasonably anticipated by Design-Builder when preparing the Schedule.
- 10.3.5.1 To establish the existence of abnormal weather of unusual severity that could not have been reasonably anticipated, Design-Builder shall submit weather data documentation published by the National Climatic Data Center. Depending on the nature of the abnormal weather, the data may include daily rainfall or snowfall amounts, low and high daily temperatures, sustained wind speed, and/or gust velocities. Data shall be obtained from the weather station nearest to the Project Site. Data shall be analyzed on a monthly basis.
 - 10.3.5.2 The existence of abnormal weather is not sufficient in itself to justify an extension to the Date of Substantial Completion. To be eligible for a weather-related Contract Time extension, the data must show both that the weather was abnormal and that it adversely impacted the critical path of the Work. Abnormal weather and adverse impact is defined as:
 - 10.3.5.2.1 The applicable weather condition(s) experienced on the Project during a given month are deemed abnormal if they fall outside of the extreme range of the weather data observed over the prior ten (10) year period during that same month; and
 - 10.3.5.2.2 The applicable weather condition(s) experienced on the Project are deemed adverse only if:
 - 10.3.5.2.2.1 They occurred within the same timeframe as scheduled activities on the then-current critical path; and
 - 10.3.5.2.2.2 The activities could not be performed as scheduled because of the weather conditions.

10.3.5.3 Design-Builder must demonstrate that the weather was the proximate cause of the delay in the performance of the critical path activity or activities. Other events that would independently cause delay that are within Design-Builder's control, such as unavailability of labor, occurring contemporaneously with abnormal, adverse weather conditions shall negate the weather condition as the proximate cause of the delay since the activity could not have been performed even in the absence of the abnormal adverse weather.

10.3.6 If an increase or decrease in the Contract Price or the Date of Substantial Completion cannot be agreed to by the Parties as set forth above and the SWCCOG issues a Construction Change Directive, the change in the Contract Price shall ultimately be determined by the reasonable actual expenses incurred and savings realized in the performance of the changed Work. Design-Builder shall keep detailed records of all costs incurred, costs avoided, and impacts to the Date of Substantial Completion, which shall be made available to the SWCCOG upon request. The impact of a Construction Change Directive on the Date of Substantial Completion shall be the actual time impact determined by an analysis of the then current Schedule. A Change Order shall be prepared at the conclusion of performance of the changed Work to incorporate the actual costs and time impacts, which Change Order shall be executed by the Parties.

10.3.7 If Unit Prices are included in the Design-Build Documents or are subsequently agreed to by the Parties, but the quantity of such items as originally contemplated is so different in a proposed Construction Change Directive or Change Order that the original Unit Prices will cause substantial inequity to the SWCCOG or Design-Builder, such Unit Prices may be adjusted, as mutually agreed by the Parties.

10.3.8 If the SWCCOG and Design-Builder disagree as to whether Work required by the SWCCOG is within the scope of the Work defined under this Agreement and included in the Contract Price, Design-Builder shall furnish the SWCCOG an estimate of the cost to perform the disputed Work in accordance with the SWCCOG's interpretation. If the SWCCOG issues a written order for Design-Builder to proceed, Design-Builder shall immediately commence performance of the disputed Work. Design-Builder shall prepare its claim for an increase in the Contract Price or extension in the Date of Substantial Completion, or both, related to the disputed Work as required herein. In such event, both Parties reserve their rights as to whether the Work was within the scope of the Work and whether it was included in the Contract Price.

10.4 CLAIMS FOR INCREASE IN CONTRACT PRICE OR EXTENSION OF THE DATE OF SUBSTANTIAL COMPLETION

10.4.1 For any claim for an increase in the compensation for Work and/or the Date of Substantial Completion, Design-Builder shall give the SWCCOG written notice of the claim within twenty-one (21) Days after the occurrence giving rise to the claim. Failure to strictly comply with the time requirements herein shall be deemed a waiver of the claim by Design-Builder.

10.5 DIFFERING SITE CONDITIONS

10.5.1 The term "Differing Site Conditions" refers to:

10.5.1.1 Actual and significant subsurface or latent physical conditions at the Project Site that differ materially from those reasonably anticipated at the time of the Contract Price Proposal; or

- 10.5.1.2 Unknown significant physical conditions at the Project Site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in this type of Work.
- 10.5.2 The term “Differing Site Conditions” excludes: (a) conditions of which Design-Builder had actual or constructive knowledge as of the date of the Contract Price Proposal; (b) conditions that should have been discovered through a reasonable investigation in preparation of its Contract Price Proposal; and (c) conditions (excluding man-made conditions) that come into existence after the date of the Contract Price Proposal.
- 10.5.3 Upon discovering an alleged Differing Site Condition and before the condition is further disturbed, Design-Builder shall promptly, after taking appropriate measures to secure the Work: (a) stop work in and secure the affected area; and (b) notify the SWCCOG of the alleged Differing Site Condition. Design-Builder’s notice to the SWCCOG shall be issued by telephone or in person and followed within 24 hours by a written notice providing a brief description and supporting documentation of why Design-Builder considers the condition encountered to be a Differing Site Condition. Upon receipt of Design-Builder’s notice, the SWCCOG will investigate the Differing Site Conditions.
- 10.5.4 If Design-Builder establishes that the actual condition encountered: (a) meets the criteria of this Section, and (b) directly and materially impacts Design-Builder’s cost or time of performance of the Work, Design-Builder may request an appropriate Change Order.
- 10.5.5 No increase in the Contract Price or the Date of Substantial Completion shall be allowed for any alleged Differing Site Condition unless Design-Builder has given the notice required under this Section.

ARTICLE 11. PAYMENT

11.1 APPLICATION FOR PAYMENT

- 11.1.1 Applications for Payment shall be on forms provided by the SWCCOG. Applications for Payment shall be supported by complete back-up documentation and such data as the SWCCOG may require establishing the quantity of items completed and substantiating Design-Builder’s right to payment for each month during which payment is requested. Design-Builder shall, along with its monthly Application for Payment for Work completed, submit an estimate of the value of the Work which will be completed during the following month. All terms of payment shall be governed by the RFP. In the event of a conflict in between the payment terms in this Agreement and the RFP, the RFP controls.
- 11.1.2 Contemporaneously with the submission of an Application for Payment, Design-Builder shall furnish the SWCCOG a statement accounting for the disbursement of funds received under the previous Application for Payment.

11.2 PAYMENT FOR STORED MATERIALS

- 11.2.1 If payments are to be authorized on account of Materials and Equipment not incorporated in the Work, but delivered and suitably stored at the Project Site or at an off-site storage warehouse, which are necessary for the orderly performance of the Work, Design-Builder shall furnish with its Application for Payment bills of sale, bills of lading, certified invoices, or such other evidence as may be appropriate and satisfactory to the SWCCOG that establish:

11.2.2 Actual cost, including transportation to the Project Site, of such Materials and Equipment;

11.2.2.1 Titles in the SWCCOG's name upon payment; and

11.2.2.2 Appropriate insurance coverage to protect the SWCCOG's interest upon payment.

11.3 PROGRESS PAYMENTS

11.3.1 On the 25th Day, or a Day agreed to by the Parties, of each month after the Work has commenced, Design-Builder shall submit to the SWCCOG an itemized Application for Payment for Work completed during the prior pay period. By submitting an Application for Payment, Design-Builder certifies that to the best of Design-Builder's knowledge, information, and belief, the Work covered by the Application for Payment has been completed in accordance with the Design-Build Documents, that all amounts have been paid by Design-Builder to its Design Professional, Subconsultants, Subcontractors, Material suppliers, and Equipment suppliers for Work for which previous Applications for Payment were certified and issued, and for which payments were received from the SWCCOG, and that the current amount shown in the Application for Payment is properly due.

11.3.2 Payments are due and payable within thirty (30) Days after the date of acceptance and approval by the SWCCOG of an Application for Payment. On or before the 30th Day following acceptance and approval, the SWCCOG shall pay Design-Builder the undisputed amount for which Application for Payment is made, less amounts previously paid by the SWCCOG, and less retainage withheld pursuant to requirements herein, and less other amounts allowable to be withheld as defined herein.

11.3.3 If an Application for Payment is rejected, in whole or in part, the SWCCOG shall submit to Design-Builder in writing the reasons for its rejection. Design-Builder shall revise the Application for Payment and resubmit to the SWCCOG. If Design-Builder does not agree with the SWCCOG's reasons for rejection, Design-Builder shall inform the SWCCOG in writing within five (5) Days after receipt of the reasons for rejection from the SWCCOG. If the SWCCOG and Design-Builder cannot agree on a revised Application for Payment within fifteen (15) Days after the SWCCOG's initial rejection of an Application for Payment, the SWCCOG shall pay Design-Builder the amount payable for those items not rejected by the SWCCOG, less amounts previously paid by the SWCCOG, and less applicable retainage. Those items rejected by the SWCCOG shall be due and payable when the reasons for the rejection have been cured.

11.3.4 Payments due but still unpaid forty-five (45) Days following acceptance and approval by the SWCCOG of an Application for Payment, less any amount retained or withheld as allowed herein, shall bear interest at the rate and by the terms set forth in C.R.S. 24-30-202(24).

11.3.5 Design-Builder warrants that title to all Materials and Equipment covered by an Application for Payment, whether incorporated into the Work or not, shall pass to the SWCCOG upon receipt of payment, in whole or in part, by Design-Builder. Design-Builder further warrants that upon submittal of an Application for Payment for Work for which payment has been received from the SWCCOG, to the best of Design-Builder's knowledge, information, and belief, such Work shall be free and clear of all liens, claims, security interests, or encumbrances in favor of Design-Builder, Design Professional, Subconsultants, Subcontractors, Sub-subcontractors, Material suppliers, Equipment suppliers, or other persons or entities making a claim by reason of having provided labor, Materials, or Equipment relating to the Project; and that such Materials or Equipment furnished or installed comply with the requirements of the Design-Build Documents.

- 11.3.6 The passing of title to the SWCCOG shall not be construed as relieving Design-Builder of its sole responsibility for:
- 11.3.6.1 The care and protection of the Work, Materials, and Equipment for which payment has been made; and
 - 11.3.6.2 The restoration of any damaged or destroyed Work, Materials, or Equipment.
- 11.3.7 Such responsibility shall continue until all Work under this Agreement has been completed and accepted by the SWCCOG.
- 11.3.8 The SWCCOG's progress payment, occupancy, or use of the Project, whether in whole or in part, shall not be deemed acceptance of any Work not conforming to the requirements of the Design-Build Documents and shall not constitute a waiver of the SWCCOG's right to require Design-Builder to fulfill all the requirements of the Design-Build Documents.
- 11.3.9 Prior to substantial completion, progress payments will be made in an amount equal to the Work performed, less the aggregate of payments previously made, and less other amounts as the SWCCOG is entitled to withhold for the reasons set forth below:
- 11.3.9.1 Ninety-five percent (95%) of the Work completed (with the balance being retainage). the SWCCOG may determine that as long as the character and progress of the Work remain satisfactory to it, no additional retainage will be withheld;
 - 11.3.9.2 Ninety-five percent (95%) (with the balance being retainage) of Materials and Equipment not incorporated in the Work, but delivered, suitably stored and accompanied by documentation satisfactory to the SWCCOG;
 - 11.3.9.3 Defective Work not remedied – the SWCCOG may withhold up to two (2) times the estimated value of any Defective Work;
 - 11.3.9.4 Failure or refusal of Design-Builder to comply with an instruction of the SWCCOG within a reasonable time;
 - 11.3.9.5 Liquidated damages assessed against Design-Builder;
 - 11.3.9.6 Being in arrears for any amounts owed to the SWCCOG;
 - 11.3.9.7 Failure to supply a Schedule or to update and supply a current Schedule; or
 - 11.3.9.8 Verified Claims submitted to the SWCCOG.
- 11.3.10 The SWCCOG may adjust or reject an Application for Payment or nullify a previously approved Application for Payment, in whole or in part, as may be necessary to protect the SWCCOG from loss or damage based upon the following:
- 11.3.10.1 Design-Builder's failure to perform the Work as required by the Design-Build Documents;

- 11.3.10.2 Loss or damage arising out of or relating to the Work or this Agreement and caused by Design-Builder or others for whom Design-Builder is responsible, except as accepted by an insurer providing other property insurance covering the Project;
 - 11.3.10.3 Design-Builder's failure to properly pay Design Professional, Subcontractors, Subconsultant, Material suppliers, or Equipment suppliers for labor, Materials, Equipment, or supplies furnished in connection with the Work, provided that the SWCCOG is making payments to Design-Builder in accordance with the terms of this Agreement;
 - 11.3.10.4 Defective Work not timely corrected;
 - 11.3.10.5 Reasonable evidence of delay in performance of the Work such that the Work will not be completed by the Date of Substantial Completion or that the unpaid balance of the Contract Price is not sufficient to offset any damages that may be sustained by the SWCCOG as a result of delays caused by Design-Builder;
 - 11.3.10.6 Reasonable evidence demonstrating that the unpaid balance of the Contract Price is insufficient to complete the Work; or
 - 11.3.10.7 Uninsured third-party claims involving Design-Builder or reasonable evidence demonstrating that third-party claims are likely to be filed unless and until Design-Builder furnishes the SWCCOG with adequate security in the form of a surety bond, letter of credit or other collateral or commitment sufficient to discharge such claims.
- 11.3.11 The SWCCOG shall make the final determination of the amount, quality, acceptability, and fitness of the several kinds of Work, including Materials and Equipment, which are to be paid for under this Agreement and shall decide all questions which may arise in relation to such Work.

11.4 FINAL PAYMENT

- 11.4.1 The final amount due to Design-Builder, as may be adjusted for any outstanding claims or Verified Claims properly filed with the SWCCOG, upon Design-Builder achieving Initial Acceptance of the Work is payable at 5:00 p.m. on the Date of Final Settlement. All claims shall be settled before issuance of Final Payment, or monies sufficient to cover such claims may be withheld by the SWCCOG from Final Payment.
- 11.4.2 When the claims are retracted or settled, payment shall be made for amounts withheld. The right to withhold payment, however, shall not preclude the SWCCOG from its right to declare this Agreement in default for any of the reasons specified in the Design-Build Documents.
- 11.4.3 The acceptance of Final Payment by Design-Builder shall operate as a release of all claims by Design-Builder for all things done or furnished in connection with this Agreement and for every act or omission or neglect of the SWCCOG or others relating to, or arising out of this Agreement, except for claims previously made in writing by Design-Builder and rejected and/or remaining unsettled by the SWCCOG at the time of Final Payment.
- 11.4.4 No payment, final or otherwise, shall operate to release Design-Builder, its Surety or its insurers from any obligations under this Agreement or under the Performance Bond or Labor and Materials

Payment Bond including, but not necessarily limited to, any one or more of the following:

- 11.4.4.1 Obligations arising from or relating to latent defects;
 - 11.4.4.2 Faulty Work or Material or Equipment appearing after any payment;
 - 11.4.4.3 Failure of the Work to perform in accordance with the requirements of the Design-Build Documents;
 - 11.4.4.4 Unsettled claims of the SWCCOG;
 - 11.4.4.5 Claims for non-payment of laborers, mechanics, materialmen or suppliers, or for Equipment used or rented; or
 - 11.4.4.6 Claims under any maintenance requirements of the Design-Build Documents or any special guarantees or warranties provided for under the Design-Build Documents.
- 11.4.5 Final Payment shall not be due until Initial Acceptance is granted by the SWCCOG and Final Payment shall not be made until the Date of Final Settlement.
- 11.4.6 In making Final Payment, the SWCCOG waives all claims except for:
- 11.4.6.1 Outstanding Verified Claims;
 - 11.4.6.2 Work not in conformance with the Design-Build Documents;
 - 11.4.6.3 Terms of any special warranties required by the Design-Build Documents, and
 - 11.4.6.4 Outstanding claims by the SWCCOG or third parties for damages attributed to Design-Builder or any person or entity for which it is responsible.

ARTICLE 12. INDEMNIFICATION, INSURANCE, AND BONDS

12.1 DESIGN-BUILDER'S INDEMNIFICATION

- 12.1.1 Design-Builder agrees to indemnify, defend and hold harmless the SWCCOG, its officers, agents, and employees (collectively "Indemnitees"), from and against all liability, claims, judgments, suits, demands for damages to persons or property which arise out of, result from, or are in any manner connected with the Work to be performed under this Agreement, to the extent such injury, loss, or damage is caused by, or is claimed to be caused by, the negligent acts, errors or omissions of Design-Builder, any officer, employee, or agent of Design-Builder, any Subcontractor, Design-Professional, Subconsultant or anyone else employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.
- 12.1.2 Design-Builder shall defend any and all claims or suits which may be brought or threatened against the Indemnitees and shall pay on behalf of the Indemnitees any expenses incurred by reason of such claims including, but not limited to, court costs and reasonable attorneys' fees incurred in defending or investigating such claims. Such payments on behalf of the Indemnitees shall be in addition to any and all other legal remedies available to the SWCCOG and shall not be considered the

Indemnitees' exclusive remedy.

- 12.1.3 Design-Builder's duty to indemnify the Indemnitees shall arise at the time written notice of a claim is first provided to the SWCCOG regardless of whether the claimant has filed suit on the claim. Design-Builder's indemnification obligations shall include, but not be limited to, any claim made against the Indemnitees by: (a) Design-Builder's employees, Subcontractors, Sub-subcontractors, Material Suppliers, Equipment Suppliers, Design Professional, Subconsultants, or third parties who have been injured on property owned by the SWCCOG; or (b) any third parties claiming patent, copyright or trademark infringement.
- 12.1.4 Design-Builder's indemnification obligations shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for Design-Builder, any Subcontractor, Design Professional, Subconsultant, or anyone else employed directly or indirectly by any of them or anyone for whose acts any of them may be liable under workers' compensation acts, disability benefit acts, or other employee benefit acts.

12.2 THE SWCCOG'S INDEMNIFICATION

- 12.2.1 Pursuant to Article X of the Constitution of the State of Colorado and the Colorado Taxpayer's Bill of Rights (TABOR), the SWCCOG cannot and shall not indemnify Design-Builder, any officer, employee or agent of Design-Builder, Design Professional, any Subcontractor, or any Subconsultant.
- 12.2.2 NO WAIVER OF GOVERNMENTAL IMMUNITY. Nothing in this Agreement shall be construed to waive, limit, or otherwise modify any governmental immunity that may be available by law to the SWCCOG, its elected and appointed officials, employees, contractors, principals or agents, or any other person acting on behalf of the SWCCOG and, in particular, governmental immunity afforded or available pursuant to the Colorado Governmental Immunity Act, Title 24, Article 10, Part 1 of the Colorado Revised Statutes.

12.3 DESIGN-BUILDER'S INSURANCE

- 12.3.1 Before commencement of the Work and as a condition precedent to payment, Design-Builder shall procure and maintain in force the insurance coverages and minimum limits in accordance with the following:
- 12.3.1.1 Worker's Compensation Insurance with limits as provided by statutes prescribed by and for the State of Colorado.
- 12.3.1.2 Comprehensive General Liability, including Broad Form Property Damage, Completed Operations, Broad Form Contractual Liability, Independent Contractors and personal injury for limits not less than \$2,000,000 each occurrence and \$5,000,000 general aggregate for damages of bodily injury or death or damage to or destruction of property. Products/Completed Operations Aggregate for limits not less than \$2,000,000. The SWCCOG must be named as "Additional Named Insured".
- 12.3.1.3 Comprehensive Automobile Liability, including coverage for all owned motor vehicles and hired and non-owned motor vehicles for limits not less than \$1,000,000 each occurrence for bodily injury or damage to or destruction of property. The SWCCOG must be named as "Additional Named Insured".

- 12.3.1.4 Insurance Coverage Special Hazards, special hazards coverage such as, but not limited to, property damage as a result of explosion hazard, collapse hazard, or underground property damage hazard, commonly known as XCU, shall not be excluded from the herein above required liability policies.
- 12.3.1.5 Professional Liability insurance (including Errors and Omissions) with limits of not less than \$1,000,000 for each claim and \$2,000,000 aggregate. such coverage shall be continued for a period of not less than three (3) years after acceptance of the completed Project by the SWCCOG.
- 12.3.1.6 Excess or umbrella liability insurance with minimum limits of \$2,000,000 for each occurrence.
- 12.3.1.7 The insurance coverages enumerated above constitute the minimum requirements and said enumeration shall in no way diminish or limit the liability of Contractor or subcontractors under this Contract.
- 12.3.2 Design-Builder shall cause Design Professional, Subcontractors, and Subconsultants to procure and maintain insurance coverages to be agreed upon between the SWCCOG and Design-Builder.
- 12.3.3 All coverages shall be procured and maintained with forms and insurers acceptable to the SWCCOG. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by Design-Builder, Design Professional, Subcontractors, and Subconsultants pursuant to their obligations under this Agreement. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.
- 12.3.4 Design-Builder shall name the Southwest Colorado Council of Governments, its officers, principals, agents, and employees as additional insureds with respect to the required Commercial General Liability, Automobile Liability, and Excess liability coverages. A Certificate of Insurance shall be completed and forwarded, along with the Additional Insured Endorsements, to the SWCCOG by Design-Builder's insurance agent(s) as evidence that the policies providing the required coverages, conditions, and minimum limits are in full force and effect and shall be subject to review and approval by the SWCCOG prior to commencement of any Work under this Agreement. The initial completed Certificates of Insurance and Additional Insured Endorsements shall include the Project Number and Design-Builder's email address for future inquiries and updates. Initial Certificates of Insurance and Endorsements shall be sent to:
- Southwest Colorado Council of Governments
Miriam Gillow-Wiles
Executive Director
PO Box 963, Durango, CO 81302
Phone: 970-779-4592
Email: director@swccog.org
- 12.3.5 Subsequent Certificates of Insurance indicating renewal of coverage(s) shall be sent to the SWCCOG's Bond Contracts Administrator no later than thirty (30) Days prior to the expiration date, and shall indicate "Renewal COI" and the Project number in the email subject line.
- 12.3.6 Failure on the part of Design-Builder to procure or maintain policies providing the required coverages, conditions and minimum limits shall constitute a material breach of this Agreement

- upon which the SWCCOG may immediately terminate this Agreement for cause; or at the SWCCOG's discretion, the SWCCOG may procure, or renew any such policy, or any extended reporting period, and may pay any and all premiums in connection therewith, and all monies paid by the SWCCOG shall be repaid by Design-Builder to the SWCCOG upon demand, or the SWCCOG may offset the cost of such premiums against any amounts then or thereafter due to Design-Builder.
- 12.3.7 The SWCCOG reserves the right to request and receive a certified copy of any policy and any endorsement thereto. Design-Builder agrees to execute any and all documents necessary to allow the SWCCOG access to any and all required insurance policies and endorsements.
- 12.3.8 Every policy required herein shall be primary insurance and any insurance carried by the SWCCOG, its officers, or its employees shall be excess and not contributory insurance to that provided by Design-Builder. Design-Builder shall be solely responsible for any deductible amounts under the policies required above, and such deductible amounts shall not be considered an added cost justifying a Change Order.
- 12.3.9 Design-Builder shall not be relieved of any liability, claims, demands or other obligations assumed pursuant to this Agreement by reason of its failure to procure and maintain insurance in sufficient amounts, durations or types.
- 12.3.10 All policies shall include a provision or endorsement that the coverages afforded under the policies shall not be canceled or materially changed prior to their natural termination dates until at least thirty (30) Days' prior written notice has been sent to the SWCCOG. The Certificate(s) shall indicate the form used, if any, under which this provision is included.

12.4 THE SWCCOG'S INSURANCE

- 12.4.1 The SWCCOG may procure and maintain insurance against loss of use of the SWCCOG's property caused by fire or other casualty loss. The SWCCOG shall either self-insure or obtain and maintain its own liability insurance for protection against claims arising out of the performance of this Agreement, including without limitation, loss of use and claims, losses and expenses arising out of the SWCCOG's acts or omissions.

12.5 BONDS

- 12.5.1 A Performance Bond and Labor and Material Payment Bond shall be obtained by Design-Builder as a condition precedent to execution of the Agreement. Such bonds shall be issued by a surety admitted in the State of Colorado and shall be acceptable to the SWCCOG.
- 12.5.2 The Surety on such bonds shall be satisfactory to the SWCCOG, shall be a duly authorized surety company licensed to do business in the State of Colorado, shall appear in the latest Federal Register Circular 570 as published by the Department of the Treasury, unless otherwise approved by the SWCCOG, and shall have no less than a Best's A Rating. The Surety will in no way be financially associated with Design-Builder.
- 12.5.3 If at any time a Surety shall become insolvent, is declared bankrupt, loses its right to do business in the state in which the Work is to be performed, or is no longer listed in Department of the Treasury Circular 570, Design-Builder shall within ten (10) Days after notice from the SWCCOG, substitute acceptable bonds in such form and sum and signed by such other sureties satisfactory to the SWCCOG.

- 12.5.4 The Performance Bond shall be issued in the penal sum equal to one-hundred percent (100%) of the Contract Price. The Performance Bond shall cover the cost to complete the Work. The SWCCOG will accept bond forms furnished by a surety licensed to do business in the State of Colorado and the bond should state that it remains in effect for the duration of the contractual performance period.
- 12.5.5 The Labor and Material Payment Bond shall equal the penal sum of the Performance Bond. A copy of the Labor and Material Payment Bond shall be made available by the SWCCOG or Design-Builder to Design Professional, Subconsultants, Subcontractors, Material suppliers, and Equipment suppliers upon written request.
- 12.5.6 Design-Builder shall keep its Surety advised of changes in the scope of the Work potentially impacting the Contract Price or the Date of Substantial Completion, though Design-Builder shall require that its Surety waives any requirement to be notified of any alteration or extension of time, suspension or termination.

ARTICLE 13. SUSPENSION AND TERMINATION

13.1 SUSPENSION BY THE SWCCOG FOR CONVENIENCE

- 13.1.1 The SWCCOG may order Design-Builder in writing to suspend, delay or interrupt all or any part of the Work without cause for its sole convenience.
- 13.1.2 Adjustments caused by suspension, delay or interruption may be made as appropriate for increases in the Contract Price and/or the Date of Substantial Completion. No adjustment shall be made if Design-Builder is or otherwise would have been responsible for the suspension, delay or interruption of the Work.

13.2 TERMINATION BY THE SWCCOG FOR CAUSE

- 13.2.1 If Design-Builder fails to supply enough qualified workers, proper Materials or Equipment, maintain the Schedule, or fails to make prompt payment to its employees, Design Professional, Subconsultants, Subcontractors, Material suppliers, or Equipment suppliers, disregards Laws or orders of any public authority having jurisdiction, or otherwise is in material breach of a provision of this Agreement, Design-Builder may be deemed in default. If Design-Builder fails within seven (7) Days after receipt of written notice from the SWCCOG to commence and continue correction of such default, the SWCCOG shall give Design-Builder and the Surety a second written notice to correct the default within a three (3) Day period.
- 13.2.2 If Design-Builder fails to promptly commence and continue satisfactory correction of the default following receipt of such second notice, the SWCCOG without prejudice to any other rights or remedies may: (a) take possession of the Project Site; (b) complete the Work utilizing any reasonable means; (c) withhold payment due to Design-Builder; and (d) as the SWCCOG deems necessary, supply workers, Materials, Equipment, and other facilities for the satisfactory correction of the default, and charge Design-Builder the costs and expenses, including reasonable overhead, profit, and attorneys' fees.
- 13.2.3 In the event of an emergency affecting the safety of persons or property, the SWCCOG may immediately commence and continue correction of a default without first giving written notice to Design-Builder, but shall give prompt written notice to Design-Builder following commencement

of the corrective action.

- 13.2.4 If Design-Builder files a petition under the bankruptcy code, this Agreement shall terminate if Design-Builder or Design-Builder's trustee rejects this Agreement, or if there has been a default and Design-Builder is unable to give adequate assurance that Design-Builder will perform as required by this Agreement or otherwise is unable to comply with the requirements for assuming this Agreement under the applicable provisions of the bankruptcy code.
- 13.2.5 If the SWCCOG exercises its rights under this Agreement to terminate this Agreement, the SWCCOG shall provide an accounting of the costs incurred by the SWCCOG to Design-Builder and the Surety.
- 13.2.6 If the SWCCOG terminates this Agreement for default, and it is later determined that Design-Builder was not in default or that the default was excusable under the terms of the Agreement, the termination shall be deemed a termination for convenience, and the rights of the Parties shall be as set forth herein.

13.3 TERMINATION BY THE SWCCOG FOR CONVENIENCE, NOTICE, AND DESIGN-BUILDER'S CLAIM

- 13.3.1 The SWCCOG may terminate this Agreement for its own convenience. In such event, termination by the SWCCOG for convenience shall be initiated by a written notice to Design-Builder which will specify the effective date of the termination.
- 13.3.2 Design-Builder, after receiving the notice, shall cancel any outstanding commitments for procurement of Materials and Equipment. In addition, Design-Builder shall use reasonable efforts to cancel or divert any outstanding subcontracted commitments, unless otherwise requested by the SWCCOG. With respect to such canceled commitments Design-Builder shall:
 - 13.3.2.1 Settle all outstanding liabilities and all claims arising out of the canceled commitments. Such settlements shall be approved by the SWCCOG and shall be final; and
 - 13.3.2.2 Assign to the SWCCOG all of the rights, title, and interest of Design-Builder under the terminated orders and Subcontracts, as directed by the SWCCOG. The SWCCOG will then have the right to settle or pay any or all claims arising out of the termination of these commitments.
- 13.3.3 Design-Builder shall submit its termination claim to the SWCCOG within ninety (90) Days after the effective date of the notice. During the ninety (90) Day period, Design-Builder may make a written request to the SWCCOG for a time extension in preparing the claim. Any time extension must be approved by the SWCCOG. If Design-Builder fails to submit its termination claim within the time allowed, the SWCCOG may determine the amount due Design-Builder, if any, by reason of the termination, which determination shall be final. Failure of Design-Builder to submit a termination claim within the time allowed shall constitute a waiver of the claim.
- 13.3.4 Design-Builder and the SWCCOG may agree upon the whole or any part of the amount to be paid Design-Builder as a result of the termination. The amount may include actual cancellation charges incurred by Design-Builder. The amount may also include any actual loss upon outstanding commitments for subcontracts which Design-Builder is unable to cancel, provided Design-Builder has proven reasonable effort to divert the commitments to other activities. The amount agreed upon shall be set forth in a Change Order, and Design-Builder shall be paid that amount. Design-Builder

shall not be entitled to compensation for Work not performed.

13.3.5 Design-Builder shall transfer title and deliver to the SWCCOG such items which, if the Agreement had been completed, would have been furnished to the SWCCOG including:

13.3.5.1 Completed and partially completed Work; and

13.3.5.2 Materials or Equipment produced, acquired, or in the process of being produced that is terminated by the notice.

13.3.6 Other than the above, any termination inventory resulting from the termination may, with written approval of the SWCCOG, be sold or acquired by Design-Builder under the conditions prescribed by and at prices approved by the SWCCOG. The proceeds of any such disposition shall be applied to reduce any payments owed to Design-Builder, or shall be credited to the Contract Price, or paid in a manner as directed by the SWCCOG. Until final disposition, Design-Builder shall protect and preserve all Material and Equipment which is in its possession and in which the SWCCOG has or may have an interest.

13.3.7 Design-Builder agrees to make its cost records available to the SWCCOG to the extent they are necessary to determine the validity and amount of each item in the termination claim.

13.3.8 Termination of this Agreement, or a portion thereof, shall not relieve Design-Builder of contractual responsibilities for the Work completed, nor shall it relieve the Surety of its obligation for and concerning any claim arising out of Work performed.

13.4 THE SWCCOG'S RIGHT TO TERMINATE FOR CONVENIENCE PRIOR TO ISSUANCE OF NOTICE TO PROCEED FOR CONSTRUCTION

13.4.1 Prior issuance of Notice to Proceed for Construction, the SWCCOG may terminate this Agreement for its convenience for any reason. The SWCCOG's decision to terminate shall be made in its sole discretion and shall not be subject to review by any reviewing body, including any court of competent jurisdiction. The termination for convenience provisions of Section 13.3 are not applicable to the SWCCOG's termination under this Section.

13.4.2 In the event the SWCCOG terminates this Agreement under this Section, Design-Builder's sole and exclusive remedy shall be the payment of any monies due for design and pre- construction Work performed by Design-Builder.

13.4.3 The SWCCOG shall have the right, in its sole discretion, to determine whether to complete the Project and, if so, the delivery approach for the Project, including, but not limited to, the right to complete the Project under any delivery method of its choosing.

13.4.4 Design-Builder acknowledges that the SWCCOG's ability to successfully complete the Project may be impacted if the SWCCOG terminates the Agreement with the Design-Builder and consequently the Design Professional and certain Subconsultants are not available to continue working on the Project. Therefore, Design-Builder hereby agrees that if the SWCCOG exercises its rights under this Section, the SWCCOG shall have the right, but not the obligation, to contract directly with the Design Professional and/or certain Subconsultants for Work related to the Project, and Design-Builder shall take such steps as are reasonably necessary to enable the SWCCOG to implement such relationship(s), including the right to assume any subcontracts entered into by Design-Builder.

- 13.4.5 If the SWCCOG exercises its rights under this Section, the SWCCOG and Design-Builder shall promptly meet and confer about the disposition of documents and other materials prepared by Design-Builder, Design Professional, and Subconsultants as part of the design Work. Design-Builder shall furnish, or cause to be furnished, to the SWCCOG all documents and other materials, including, but not limited to, schedules, bid packages, cost estimates, and procurement documents, requested by the SWCCOG.
- 13.4.6 After issuance of the Notice to Proceed for Construction, the SWCCOG's rights to terminate this Agreement for convenience shall be governed by Section 13.3.

13.5 TERMINATION BY DESIGN-BUILDER

- 13.5.1 If the Work has been stopped other than by Design-Builder for a consecutive thirty (30) Day period, upon seven (7) Days' written notice to the SWCCOG, Design-Builder may terminate this Agreement for the following reasons:
- 13.5.1.1 Under court order or order of other governmental authorities having jurisdiction; or
- 13.5.1.2 As a result of the declaration of a national emergency or other governmental act during which, through no act or fault of Design-Builder, labor, Materials, or Equipment are not available.
- 13.5.1.3 If the SWCCOG has for thirty (30) Days failed to pay Design-Builder after payment is due, Design-Builder may give seven (7) Days written notice of its intent to terminate this Agreement. If Design-Builder does not receive payment within seven (7) Days after giving the written notice to the SWCCOG, then upon seven (7) Days additional written notice to the SWCCOG, Design-Builder may terminate this Agreement.
- 13.5.1.4 Upon termination by Design-Builder in accordance with this section, Design-Builder shall be entitled to recover from the SWCCOG payment for all Work completed or partially completed and for all proven cost or expense incurred in connection with the Work, plus actual demobilization costs. Design-Builder shall not be entitled to compensation for Work not performed.

ARTICLE 14. DISPUTE RESOLUTION

- 14.1 Unless otherwise agreed in writing, Design-Builder shall continue to perform the Work and maintain the Schedule during any dispute or dispute resolution proceedings. If Design-Builder continues to perform, the SWCCOG shall continue to make payments in accordance with this Agreement.
- 14.2 If either Party claims that attempts to resolve a dispute among the Parties' Representatives, has reached an impasse, the Representative for each Party shall refer the dispute to senior management of the respective Parties to endeavor to reach resolution through good faith direct discussions. Such senior management representatives shall possess the necessary authority to resolve such dispute. If the dispute remains unresolved after fifteen (15) Days from the date of first discussion among the senior management representatives, the Parties may attempt to resolve the dispute through mediation.
- 14.3 If the mediation is unsuccessful or the Parties cannot agree on how to mediate the dispute, the Parties may proceed to litigation.

- 14.3.1 Venue for any legal action concerning or arising out of this Agreement shall be the District Court, County of La Plata, State of Colorado or in the United States District Court for the District of Colorado.
- 14.3.2 Any action arising out of or relating to this Agreement or the Work asserted by Design-Builder against the SWCCOG shall be brought within two (2) years from when the action accrued pursuant to C.R.S. § 13-80-102(h), as may be amended.
- 14.3.3 This Agreement shall be governed by the Laws of the State of Colorado notwithstanding its choice of law principles.

ARTICLE 15. FORCE MAJEURE

- 15.1 A Force Majeure Event means a reasonably unforeseeable event or circumstance which is not caused by an act or omission of a Party, which results in any delay in, or total or partial failure of, performance of the affected Party (other than in the obligation to make payments) after the Party has exercised due diligence and taken every reasonable step, excluding expenditures of money, to remedy, avoid or limit the impact of the event.
- 15.2 Force Majeure Events include acts of God; unusually severe weather, earthquakes; regional or national strikes or lockouts, loss damage or delay to long lead items of equipment, acts of war or terrorism, government action or inaction, cyberattacks, and fire or explosions other than from items under the control of the affected Party.
- 15.3 The performance by a party reasonably claiming a Force Majeure Event shall be suspended and, in the event that such Party is required to start or complete an action during a specific period of time, such start date or period for completion shall be extended but for no longer duration than is required by the effects of the Force Majeure Event.

ARTICLE 16. QUALITY ASSURANCE AND QUALITY CONTROL

- 16.1 During construction, the Work shall be subject to the review, observation, inspection and testing by the SWCCOG under its Quality Assurance (“QA”) program and shall be required to be inspected and tested by Design-Builder under its Quality Control (“QC”) Program.
- 16.2 The fact that the SWCCOG has a representative on the Project Site performing QA inspections and tests or observing Design-Builder’s QC inspections and tests shall not be taken as acceptance of the Work or any part of it.
- 16.3 The SWCCOG’s QA program is for the SWCCOG’s benefit. The SWCCOG’s QA program is not a substitute for Design-Builder’s QC responsibilities or its QC Program of testing and inspection.
- 16.4 Design-Builder is solely responsible for performing and paying for all necessary QC inspections and tests, the cost of which shall be included in the Contract Price.
- 16.5 Any QC tests and re-tests may be witnessed by the SWCCOG or the SWCCOG’s Representative.

ARTICLE 17. MISCELLANEOUS

- 17.1 The Parties acknowledge and agree that the provisions contained in this Agreement, including all Exhibits, Addenda, the RFP and Design-Builder's response to the RFP constitute the entire agreement and that all prior representations made by any officer, principal, agent or employee of the respective Parties unless specifically included in this Agreement are null and void and of no effect. This Agreement represents the entire and integrated agreement between the Parties and supersedes all prior negotiations, representations or agreements, either written or oral. No alterations, amendments, changes, or modifications to this Agreement, except those which are expressly reserved to the SWCCOG, shall be valid unless they are contained in a written amendment executed by the Parties.
- 17.2 Design-Builder, its agents, employees, Subcontractors, Sub-subcontractors, Design Professional, and Subconsultants shall not discriminate on the basis of race, color, creed, national origin, ancestry, age, gender, religion, sexual orientation, or mental or physical disability in any policy or practice.
- 17.3 Design-Builder shall not include any reference to this Agreement or to the Work in any of its advertising or public relations materials without first obtaining the written approval of the SWCCOG. Any oral presentation or written materials related to the Work shall include only presentation materials, work product, designs, renderings and technical data which have been accepted by the SWCCOG. The SWCCOG shall be notified in advance of the date and time of any such presentations. Nothing, however, shall preclude the transmittal of any information to officials of the SWCCOG.
- 17.4 Design-Builder, its subsidiaries and affiliates, shall not bid upon or otherwise attempt to perform any other work associated with the Project, other than its designated self-performed construction Work, without prior written approval from the SWCCOG. Design-Builder shall require in its subcontracts with Subcontractors that they and their subsidiaries or affiliates shall not bid upon or otherwise attempt to perform any work associated with the Project other than the Work described in their written subcontracts with Design-Builder.
- 17.5 This Agreement is for the exclusive benefit of the Parties, and not for the benefit of any third party.
- 17.6 Design-Builder agrees not to assign, pledge, or transfer its duties and rights in this Agreement, in whole or in part, without first obtaining the written consent of the SWCCOG.
- 17.7 The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provisions.
- 17.8 No assent, expressed or implied, to any breach of any one or more of the terms and conditions of this Agreement shall be deemed to be or taken by the SWCCOG a waiver of any subsequent breach of any such terms and conditions.
- 17.9 At all times, the SWCCOG and any of its authorized representatives shall have access to all of Design-Builder's, Subcontractors', Subconsultants', and Design Professional's books, documents, papers, and any other records which relate to the Work, Monday through Friday during regular business hours. Design-Builder further agrees that such records shall contain information concerning the personnel who performed the Work, the specific tasks they performed, and the hours they worked. Design-Builder shall retain these records for three (3) years after Final Acceptance.
- 17.10 Prior to disposal of any Project documents, Design-Builder shall provide the SWCCOG with a ten (10) Day written notice that it has documents it intends to dispose of, during which time the SWCCOG may take physical possession of such documents.

- 17.11 Design-Builder agrees that it and its subsidiaries, affiliates, principals, employees, Design Professional, Subcontractors, and Subconsultants shall not engage in any transaction, activity, or conduct which would result in a conflict of interest. Design-Builder represents it has disclosed all current or potential conflicts of interest to the SWCCOG. A conflict of interest shall include transactions, activities or conduct that would affect the judgment, actions or Work of Design-Builder by placing Design-Builder's own interests, or the interest of any party with whom Design-Builder has a contractual arrangement, in conflict with those of the SWCCOG. The SWCCOG, in its sole discretion, shall determine the existence of a conflict of interest and may terminate this Agreement in the event such a conflict exists after it has given Design-Builder written notice which describes the conflict. Design-Builder shall have twenty (20) Days after the notice is received to eliminate or cure the conflict of interest in a manner acceptable to the SWCCOG.
- 17.12 The Parties expressly agree that this Agreement was jointly drafted and that each Party had the opportunity to negotiate its terms and to obtain the assistance of counsel prior to execution. Therefore, this Agreement shall not be construed in favor of or against either Party, but shall be construed in a neutral manner.
- 17.13 Appropriation. Nothing in this Agreement shall be deemed or construed as creating a multiple fiscal year obligation on the part of the SWCCOG within the meaning of Colorado Constitution Article X, Section 20, or any other constitutional or statutory provisions, and the SWCCOG's obligations hereunder are expressly conditional upon annual appropriation by the SWCCOG Board of Directors (the "Board"), in its sole discretion. Design-Builder understands and agrees that any decision of the Board to not appropriate funds for payment shall be without penalty or recourse to the Board and, further, shall not affect, impair, or invalidate any of the remaining terms or provisions of this Agreement.
- 17.14 Funding: Contract is contingent upon approved funding from the USAC Rural Healthcare Fund.
- 17.15 Any notice or communication between Design-Builder and the SWCCOG which may be required or which may be given under the terms of this Agreement shall be in writing, and shall be deemed to have been sufficiently given when hand delivered or sent pre-paid, first Class United States Mail, addressed as follows:

To the SWCCOG:

Southwest Colorado Council of Governments
 Miriam Gillow-Wiles, Executive Director
 PO Box 963, Durango, CO 81301
 director@swccog.org

To Design-Builder:

Lightworks Fiber
 Eric Neal
 PO Box 193, Hotchkiss, CO 81419
 eneal@lightworksfiber.com

ARTICLE 18. EXECUTION OF AGREEMENT

- 18.1 It is agreed by the Parties that this Agreement shall be executed in triplicate, one (1) original being retained by Design-Builder, one (1) original for the Surety, and one (1) original to be retained by the SWCCOG.
- 18.2 In executing this Agreement, Design-Builder represents that it has the necessary corporate approvals to execute this Agreement and to perform the Work described herein.

IN WITNESS OF THE PARTIES AGREEMENTS, the SWCCOG and the Design-Builder have executed this Agreement on the date(s) indicated below:

LIGHTWORKS FIBER, LLC

Signature

Name and Title

Address

City, State, Zip

Tax ID

Date

**SOUTHWEST COLORADO COUNCIL OF GOVERNMENTS
APPROVED BY:**

Chris LaMay, SWCCOG Board Chair

Date

**SOUTHWEST COLORADO COUNCIL OF GOVERNMENTS HEALTHCARE CONSORTIUM:
DOLORES COUNTY DEPARTMENT OF PUBLIC HEALTH, SAN JUAN COUNTY DEPARTMENT OF
HEALTH AND ENVIRONMENT, AND SOUTHWEST HEALTH SYSTEM**

MASTER SUPPLY AGREEMENT

This Master Supply Agreement, dated as of [DATE] (this "**Agreement**"), is entered into between Telamon Technologies Corp., an Indiana corporation ("**Telamon**"), and Southwest Colorado Council of Governments and its Healthcare Consortium ("SWCCOGHC"), a consortium of Colorado hospitals, behavioral health organizations, and health clinics organized as a division within the Southwest Colorado Council of Governments ("SWCCOG") and certified by the Universal Service Administration Company ("USAC") as a consortium under the Federal Communications Commission Healthcare Connect Fund ("HCF"), and together with Telamon, the "**Parties**", and each, a "**Party**".

RECITALS

WHEREAS, Telamon is in the business of procuring, selling, and distributing telecommunications equipment, and certain related services that may accompany the sale of the equipment;

Whereas Dolores County Department of Public Health has authorized SWCCOG to enter into this Agreement on its behalf for the purpose of purchasing telecommunications equipment

Whereas San Juan County Department of Health and Environment has authorized SWCCOG to enter into this Agreement on its behalf for the purpose of purchasing telecommunications equipment;

Whereas Southwest Health System, Inc. has authorized SWCCOG to enter into this Agreement on its behalf for the purpose of purchasing telecommunications equipment;

WHEREAS, SWCCOG desires to purchase from Telamon, and Telamon desires to sell to SWCCOG the Product.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**ARTICLE I
DEFINITIONS AND EXHIBIT LIST**

Capitalized terms have the meanings set forth or referred to in this **Article I**, or as otherwise defined in this Agreement.

"**Affiliate**" of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

"**Basic Purchase Order Terms**" means, collectively, any one or more of the following terms specified by SWCCOG in a Purchase Order pursuant to **Section 3.01**: (a) a list of the Product to be purchased; (b) the quantity of each of the Product ordered; (c) the requested delivery date; (d) the unit

Price for each of the Product to be purchased; (e) the billing address; and (f) the Delivery Location. For the avoidance of doubt, the term "Basic Purchase Order Terms" does not include any general terms or conditions of any Purchase Order.

"Defective" means not conforming to the warranties in **Section 12.01**.

"Defective Product" means Product shipped by Telamon to SWCCOG pursuant to this Agreement that are Defective.

"Delivery Location" means the street address specified in the applicable Purchase Order.

"Governmental Authority" means any federal, state, local or foreign government or political subdivision thereof, or any agency or instrumentality of such government or political subdivision, or any self-regulated organization or other non-governmental regulatory authority or quasi-governmental authority (to the extent that the rules, regulations or orders of such organization or authority have the force of Law), or any arbitrator, court or tribunal of competent jurisdiction.

"Individual Transaction" means any Purchase Order that has been accepted by Telamon pursuant to **Section 3.02**.

"Intellectual Property Rights" means all industrial and other intellectual property rights comprising or relating to: (i) Patents; (ii) Trademarks; (iii) internet domain names, whether or not Trademarks, registered by any authorized private registrar or Governmental Authority, web addresses, web pages, website and URLs; (iv) works of authorship, expressions, designs and design registrations, whether or not copyrightable, including copyrights and copyrightable works, software and firmware, data, data files, and databases and other specifications and documentation; (v) Trade Secrets; (vi) all industrial and other intellectual property rights, and all rights, interests and protections that are associated with, equivalent or similar to, or required for the exercise of, any of the foregoing, however arising, in each case whether registered or unregistered and including all registrations and applications for, and renewals or extensions of, such rights or forms of protection pursuant to the Laws of any jurisdiction throughout in any part of the world.

"Law" means any statute, law, ordinance, regulation, rule, code, constitution, treaty, common law, or other requirement or rule of law of any Governmental Authority.

"Nonconforming Product" means any Product received by SWCCOG from Telamon pursuant to a Purchase Order that: (i) does not conform to the part number listed in the applicable Purchase Order; (ii) does not significantly conform to the Specifications; or (iii) materially exceeds the quantity of Product ordered by SWCCOG pursuant to this Agreement or any Purchase Order. Where the context requires, Nonconforming Product are deemed to be Product for purposes of this Agreement.

"Patents" means all patents (including all reissues, divisionals, provisionals, continuations and continuations-in-part, re-examinations, renewals, substitutions and extensions thereof), patent applications, and other patent rights and any other Governmental Authority-issued indicia of invention ownership (including inventor's certificates, petty patents and patent utility models).

"Person" means any individual, partnership, corporation, trust, limited liability entity, unincorporated organization, association, Governmental Authority or any other entity.

"Product(s)" means the products, goods, and/or equipment set forth in Schedule 1.

"Purchase Order" means SWCCOG's purchase order issued to Telamon hereunder, including all terms and conditions attached to, or incorporated into, such purchase order.

"Representatives" means a Party's Affiliates, employees, officers, directors, partners, shareholders, agents, attorneys, third-party advisors, successors and permitted assigns.

"RFP" means any or all of the three Requests for Proposal by Dolores County, Colorado, and its Department of Public Health [Exhibit A]; San Juan County, Colorado, and its Department of Public Health [Exhibit B]; Southwest Health System, Inc. (SHS) [Exhibit C].

"SWCCOG" means the Southwest Colorado Council of Governments, an intergovernmental entity formed under the Laws of the State of Colorado, and its Healthcare Consortium, a division of SWCCOG and a consortium of Colorado hospitals, behavioral health organizations, and health clinics certified by the Universal Service Administration Company as a consortium under the Federal Communications Commission Healthcare Connect Fund (HCF).

"Telamon's Intellectual Property Rights" means all Intellectual Property Rights owned by or licensed to Telamon.

"Telamon's Trademarks" means all Trademarks owned or licensed by Telamon.

"Specifications" means the specifications for the Product attached hereto as Schedule 1.

"Trademarks" means all rights in and to US and foreign trademarks, service marks, trade dress, trade names, brand names, logos, trade dress, corporate names and domain names, and other similar designations of source, sponsorship, association or origin, together with the goodwill symbolized by any of the foregoing, in each case whether registered or unregistered and including all registrations and applications for, and renewals and extensions of, such rights and all similar or equivalent rights or forms of protection in any part of the world.

"Trade Secrets" means all inventions, discoveries, trade secrets, business and technical information and know-how, databases, data collections, patent disclosures and other confidential and proprietary information and all rights therein.

Exhibit A – Dolores County Department of Public Health RFP

Exhibit B – San Juan County Department of Health and Environment RFP

Exhibit C – Southwest Health System, Inc. RFP

Addenda:

Telamon RFP Response (combined response to Exhibits A-C)

Telamon SWCCOG RFP Network Solutions

Bill of Materials

Bill of Materials Scope of Work

Bill of Materials Terms and Conditions (not to supersede this agreement)

Agreement to Purchase and Sell Product

Section 1.01 Purchase and Sale. Subject to the terms and conditions of this Agreement, during the Term, Telamon shall, on a non-exclusive basis, sell to SWCCOG, and SWCCOG shall, on a non-exclusive basis, purchase from Telamon, the Product.

Section 1.02 No Annual Minimum Quantities. The Parties agree that (a) SWCCOG is not obligated to purchase any annual minimum quantities from Telamon under this Agreement; and (b) Telamon is not obligated to sell any annual minimum quantities to SWCCOG under this Agreement.

ARTICLE II

TERMS OF AGREEMENT INTEGRATE TELAMON'S PROPOSAL AND SWCCOG'S RFP AND PURCHASE ORDER

Section 3.01 Award of Contract. Telamon has been awarded a contract based on its bid on the RFP. The RFP requires that the General Terms and Conditions, the Special Conditions, any Technical Specifications; and the Bidder's Proposal; and the Purchase Order are collectively an integral part of the contract between SWCCOG and Telamon. Accordingly, these documents shall collectively constitute a binding contract without further action by either Party. Notwithstanding the fact that some, but not all of the provisions in this Agreement are reproduced in whole or in part from the RFP and/or Telamon's proposal, all relevant provisions of the RFP and Proposal are incorporated herein by reference.

Section 3.02 Protection of Vested Interests. In order to protect the vested interests of the taxpayers of SWCCOG, and to ensure the efficient utilization of their tax dollars, Telamon shall comply with all contractual obligations contained in the General Terms and Conditions, the Special Conditions, the Technical Specifications and the Bid Proposal Form. With respect to these obligations, SWCCOG will report any non-compliance issues to Telamon for corrective action. Continued non-compliance by the Telamon shall be SWCCOG's grounds for notification of default under Section 10.03 or termination.

ARTICLE III

ORDER PROCEDURE

Section 3.01 Purchase Orders. SWCCOG shall initiate all Purchase Orders in written form via e-mail or US mail, and cause all Purchase Orders to contain the Basic Purchase Order Terms. By placing a Purchase Order, SWCCOG makes an offer to purchase the Product pursuant to the terms and conditions of this Agreement, including the Basic Purchase Order Terms, and on no other terms. Except with respect to the Basic Purchase Order Terms, any variations made to the terms and conditions of this Agreement by SWCCOG in any Purchase Order are void and have no effect.

Section 3.02 Telamon's Right to Accept or Reject Purchase Order. Telamon has the right, in its sole discretion, to accept or reject any Purchase Order. Telamon may accept any Purchase Order by confirming the order (whether by written confirmation, invoice or otherwise) in writing, at least ten (10) days prior to the scheduled delivery date.

Section 3.03 Cancellation of Individual Transactions.

(a) Telamon may, without liability or penalty, cancel any Individual Transaction if SWCCOG is in violation of its payment obligations, but only after Telamon has provided written notice of a failure to

pay, and the payment violation has not been cured, pursuant to Section 10.03 , or if SWCCOG has materially breached or is in material breach of this Agreement.

(b) SWCCOG shall have no right to cancel or amend any Purchase Order submitted by it.

(c) Notwithstanding anything in this Section 4.03 to the contrary, it shall not be a default or violation giving right to cancel any Individual Transaction, if there is a good faith dispute over any matter leading to a failure to pay or other alleged material breach.

ARTICLE IV SHIPMENT AND DELIVERY

Section 4.01 Shipment. Unless expressly agreed to by the Parties in writing, Telamon shall select the method of shipment of, and the carrier for, the Product. Telamon may make partial shipments of Product to SWCCOG. Each shipment will constitute a separate sale, and SWCCOG shall pay for the units shipped whether such shipment is in whole or partial fulfillment of a Purchase Order.

Section 4.02 Delivery. Unless expressly agreed to by the Parties in any Individual Transaction, Telamon shall deliver the Product to the Delivery Location, using Telamon's (or manufacturer's, as the case may be) standard methods for packaging and shipping such Product. All prices are FOB Destination Freight prepaid and require inside delivery.

Section 4.03 Late Delivery. Any time quoted by Telamon for delivery is an estimate only. So long as Telamon has acted timely in response to a Purchase Order or other obligations arising out of this Agreement, Telamon shall not be liable for any loss or damage arising from any delay in filling any order, failure to deliver or delay in delivery. Regardless of fault, if a delay in a shipment or delivery will, in SWCCOG's reasonable discretion, cause damage to SWCCOG and/or its principals, it may notify Telamon in writing that it is cancelling a Purchase Order. Unless so notified of a cancellation, no delay in the shipment or delivery of any Product relieves SWCCOG of its obligations under this Agreement, including without limitation accepting delivery of any remaining installment(s) of Product.

Section 4.04 Packaging and Labeling. Telamon shall properly pack, mark and ship Product and provide SWCCOG with shipment documentation showing the Purchase Order number, Telamon's identification number for the subject Product, the quantity of pieces in shipment, the number of cartons or containers in shipment, Telamon's name, the bill of lading number and the country of origin. All containers used for storage and/or shipment of materials and products supplied to SWCCOG shall be new and suitable for the intended purpose.

Section 4.05 Inspection. The materials and products shall be delivered to SWCCOG in new and undamaged condition for inspection by SWCCOG representatives. If the product(s) is damaged or a number of items or components are missing during shipment, Telamon shall either replace the damaged items (if shipped by Telamon) or be responsible for filing, processing and collecting all damage claims (if shipped by a contractor of the shipper). Telamon shall ensure that SWCCOG is appropriately compensated for any missing or damaged items to the satisfaction of SWCCOG.

Section 5.06 Defective Product. In the event that any of the Products supplied to SWCCOG by Telamon are found to be defective or Nonconforming Product, SWCCOG reserves the right to return the Product to Telamon at no cost to SWCCOG; either as an exchange for suitable merchandise or for full credit.

ARTICLE V
TITLE AND RISK OF LOSS

. Title and risk of loss to all Product ordered under any Individual Transaction shall pass to SWCCOG upon inspection and acceptance by SWCCOG at its designated point of delivery. Delivery is FOB Destination freight prepaid.

ARTICLE VI
PRICE AND PAYMENT

Section 6.01 Price. SWCCOG shall purchase the Product from Telamon at the prices set forth in Schedule 1 ("**Prices**") and Telamon's bid proposal. In the event of a conflict, the bid proposal shall control.

Section 6.02 Taxes. All Prices are exclusive of excise and sales taxes, as SWCCOG is exempt from payment of such taxes. SWCCOG shall provide an exemption certificate upon Telamon's reasonable request.

Section 6.03 Payment Terms. . All terms of payment shall be governed by the RFP. In the event of a conflict in between the payment terms in this Agreement and the RFP, the RFP controls.

Section 6.04 Invoice Disputes. SWCCOG shall notify Telamon in writing of any dispute with any invoice within 15 days from the SWCCOG's receipt of such invoice. SWCCOG will be deemed to have accepted all invoices for which Telamon does not receive timely notification of disputes, and shall pay all undisputed amounts due under such invoices within the period set forth in **Section 6.03**. The Parties shall seek to resolve all such disputes expeditiously and in good faith.

Section 6.05 Late Payments. Except for invoiced payments that SWCCOG has disputed, SWCCOG shall pay interest on all late payments at the lesser of the rate of 1% per month or the highest rate permissible under applicable Law, calculated daily and compounded monthly. SWCCOG shall also reimburse Telamon for all reasonable costs incurred in collecting any late payments, including, without limitation, reasonable attorneys' fees. If any payment disputes are resolved in favor of SWCCOG, Telamon shall reimburse SWCCOG for all reasonable costs incurred in resolving the dispute, including, without limitation, reasonable attorney's fees.

Section 6.06 No Set-off Right. SWCCOG shall not, and acknowledges that it will have no right, under this Agreement, any Purchase Order, any other agreement, document or Law, to withhold, offset, recoup or debit any amounts owed (or to become due and owing) to Telamon or any of its Affiliates, whether under this Agreement or otherwise, against any other amount owed (or to become due and owing) to it by Telamon or Telamon's Affiliates, whether relating to Telamon's or its Affiliates' breach or non-performance of this Agreement, any Purchase Order, any other agreement between (a) SWCCOG or any of its Affiliates and (b) Telamon or any of its Affiliates, or otherwise.

ARTICLE VII
COMPLIANCE WITH LAWS

Section 7.01 General Compliance With Laws Covenant. Both parties shall at all times comply with all Laws applicable to this Agreement, their performance of obligations hereunder and use or sale of the Product. Without limiting the generality of the foregoing, each Party shall (a) at its own

expense, maintain all certifications, credentials, licenses and permits necessary to conduct its business relating to the sale, purchase or use of the Product and (b) not engage in any activity or transaction involving the Product, by way of shipment, use or otherwise, that violates any Law.

Section 7.02 Local, State and Federal Compliance Requirements. Without limiting the generality of section 8.01, Telamon shall be familiar and comply with all local, state, and federal directives, ordinances, rules, orders, and laws as applicable to, and affected by, this Agreement including but not limited to Equal Employment Opportunity Commission (EEOC), the Occupational Safety, Health Act (OSHA), Title I and Title II of the Americans with Disabilities Act (ADA) regulations, and all regulations and USAC policies applicable to the sale of the Product.

Section 7.03 Foreign Corrupt Practices Act Covenant. Without limiting the generality of **Section 7.01**, Each Party shall, and shall cause its Representatives to, comply with the Foreign Corrupt Practices Act, including maintaining and complying with all policies and procedures to ensure compliance with this Act.

Section 7.04 Equal Opportunity. Telamon shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin. Telamon shall take affirmative action to ensure that applicants are employed, and the employees are treated during employment without regard to their race, religion, color, sex or national origin. 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; and selection for training, including apprenticeship. Telamon agrees to make available to employees and applicants for employment notices setting forth the policies of nondiscrimination by posting such notices in conspicuous places.

Section 7.05 Equal Opportunity Employment. Telamon shall, in all solicitations or advertisements for employees placed by them or on their behalf, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex or national origin.

ARTICLE VIII USF PARTICIPATION. TELAMON SHALL AGREE TO PARTICIPATE IN THE RURAL HEALTH CARE PROGRAM AND TO COOPERATE FULLY AND IN ALL RESPECTS WITH SWCCOG, THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY, AND ANY AGENCY OR ORGANIZATION ADMINISTERING THE RURAL HEALTH CARE PROGRAM TO ENSURE THAT SWCCOG RECEIVES ALL OF THE RURAL HEALTH CARE FUNDING FOR WHICH IT HAS APPLIED AND TO WHICH IT IS ENTITLED IN CONNECTION WITH TELAMON'S PRODUCTS.

INTELLECTUAL PROPERTY RIGHTS

Section 8.01 Ownership. SWCCOG acknowledges and agrees that:

- (a) any and all Telamon's Intellectual Property Rights are the sole and exclusive property of Telamon or its licensors;
- (b) SWCCOG shall not acquire any ownership interest in any of Telamon's Intellectual Property Rights under this Agreement;
- (c) any goodwill derived from the use by SWCCOG of Telamon's Intellectual Property Rights inures to the benefit of Telamon or its licensors, as the case may be;
- (d) if SWCCOG acquires any Intellectual Property Rights, rights in or relating to any Product (including any rights in any Trademarks, derivative works or patent improvements relating thereto) by operation of Law, or otherwise, such rights are deemed and are hereby irrevocably assigned to Telamon or its licensors, as the case may be, without further action by either of the Parties; and

(e) SWCCOG shall use Telamon's Intellectual Property Rights solely for purposes of using the Product under this Agreement and only in accordance with this Agreement and the instructions of Telamon.

Section 8.02 Prohibited Acts. SWCCOG shall not:

- (a) take any action that interferes with any of Telamon's rights in or to Telamon's Intellectual Property Rights, including Telamon's ownership or exercise thereof;
- (b) challenge any right, title or interest of Telamon in or to Telamon's Intellectual Property Rights;
- (c) make any claim or take any action adverse to Telamon's ownership of Telamon's Intellectual Property Rights;
- (d) register or apply for registrations, anywhere in the world, for Telamon's Trademarks or any other Trademark that is similar to Telamon's Trademarks or that incorporates Telamon's Trademarks;
- (e) use any mark, anywhere that is confusingly similar to Telamon's Trademarks;
- (f) engage in any action that tends to disparage, dilute the value of, or reflect negatively on the Product or any Telamon's Trademarks;
- (g) misappropriate any of Telamon's Trademarks for use as a domain name without prior written consent from Telamon; or
- (h) alter, obscure or remove any Telamon's Trademarks, or Trademark or copyright notices or any other proprietary rights notices placed on the Product, marketing materials or other materials that Telamon may provide.

Section 8.03 Software Licenses. If the Product purchased by SWCCOG includes or contains software, the SWCCOG shall be required to sign the software licensor's software license agreement before such software is provided to SWCCOG. Such software license agreement shall govern the use of such software, and SWCCOG shall comply with such licenses; provided that no software shall be provided and no Product will require software if the terms of the software license conflict with any applicable USAC regulations or the terms of this Agreement

ARTICLE IX TERM; TERMINATION

Initial Term. The term of this Agreement commences on the Effective Date and continues for a period as stated in the applicable Letter of Agency, not to exceed three (3) years , unless and until earlier terminated as provided under this Agreement (the "**Term**").

Section 9.01 Renewal Term. Upon expiration of the Initial Term, this Agreement automatically renews for additional successive one year terms unless and until either Party provides written notice of nonrenewal at least 75 days prior to the end of the then-current term, or unless and until earlier terminated as provided under this Agreement (each a "**Renewal Term**" and together with the initial Term, the "**Term**").

Section 9.02 Right to Terminate.

(a) **Telamon's Right to Terminate.** Telamon may terminate this Agreement, subject to Section 9.03 upon written notice to SWCCOG, if SWCCOG: (i) fails to pay any amount when due under this Agreement; (ii) has not otherwise performed or complied with any of the terms of this Agreement, in

whole or in part; or (iii) becomes insolvent, files a petition for bankruptcy or commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors.

(b) **SWCCOG's Right To Terminate.** SWCCOG may, by written notice to Telamon, terminate this Agreement, subject to Section 9.03, if Telamon has not performed or complied with any of the terms of this Agreement. The date of termination shall be stated in the notice.

(c) **Termination Other Than For Cause.** SWCCOG may terminate this Agreement upon thirty (30) days written notice for reasons other than cause. This may include without limitation SWCCOG's inability to continue with the Agreement due to the elimination or reduction of funding.

Section 9.03 Notice and Opportunity to Cure. Prior to any termination of this Agreement by either Party, the non-defaulting Party shall provide thirty (30) days written notice to the other Party, describing in as much detail as necessary to identify the alleged default, of the nature of the default. The Party alleged to be in default shall have thirty (30) days from the date of the written notice to cure the default. If the default is of a nature that it cannot reasonably be cured within such time period, the defaulting Party shall, within such thirty (30) day period, provide a detailed plan to commence the cure, and shall reasonably proceed to cure the default as soon as possible. If the proposed cure will take longer than ninety (90) days from the date of the default notice, the non-defaulting Party shall, at its option, be permitted to terminate this Agreement upon ten (10) days written notice.

Section 9.04 Effect of Termination.

(a) Expiration or termination of the Term will not affect any rights or obligations of the Parties that:

- (i) come into effect upon or after expiration or termination of this Agreement; or
- (ii) otherwise survive the expiration or earlier termination of this Agreement pursuant to **Section 15.07** and were incurred by the Parties prior to such expiration or earlier termination.

(b) Any Notice of termination under this Agreement automatically operates as a cancellation of any deliveries of Product to SWCCOG that are scheduled to be made subsequent to the effective date of termination, whether or not any orders for such Product had been accepted by Telamon. With respect to any Product that are still in transit upon termination of this Agreement, Telamon may require, in its sole and absolute discretion, that all sales and deliveries of such Product be made on either a cash-only or certified check basis.

(c) **Re-Procurement Charges.** In the event that Telamon defaults this Agreement is terminated for cause due to non-performance, SWCCOG reserves the right to re-procure Product from the next lowest Bidder or from other sources during the remaining term of the terminated/defaulted Agreement. Under this arrangement, SWCCOG shall charge Telamon any difference between the Telamon's price and the price to be paid to the next lowest Bidder as well as any reasonable costs associated with the re-solicitation effort which resulted from such default or termination.

ARTICLE X RECORDS AND CONFIDENTIALITY

Section 10.01 The SWCCOG and its duly authorized representatives shall have access to any books, documents, papers, and records of Telamon and its subcontractors that are related to this Agreement for the purpose of making audit, examination, excerpts, and transcriptions. Telamon acknowledges and agrees that SWCCOG is subject to and bound by the Colorado Open Records Act, § 24-72-101 et seq. C.R.S. ("CORA"). Any documents Telamon prepares pursuant to this Agreement may be subject to production and/or reproduction pursuant to those statutes, irrespective of any copyrights held by Telamon. Notwithstanding the provisions of Section 11.02 below, Telamon hereby waives any claims of any kind whatsoever against SWCCOG for the SWCCOG's compliance or attempted compliance with the provisions of CORA.

Section 10.02 All non-public, confidential or proprietary information of Telamon, including, but not limited to, specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts or rebates, disclosed by Telamon to SWCCOG and conspicuously marked as "confidential" or "proprietary", in connection with this Agreement is confidential, solely for the use of performing this Agreement and may not be disclosed or copied unless authorized by Telamon in writing, unless required by law. Upon Telamon's written request and/or upon termination of this Agreement for any reason, SWCCOG shall promptly return all documents and other materials received from Telamon, or shall destroy all such documents and certify as such, provided however, that SWCCOG may retain any documents necessary to comply with USAC requirements or otherwise required by Law. Telamon shall be entitled to injunctive relief for any violation of this Section. This Section shall not apply to information that is: (a) in the public domain; (b) known to the SWCCOG at the time of disclosure; (c) rightfully obtained by the SWCCOG on a non-confidential basis from a third party; or (d) subject to the provisions of Section 11.01 above.

ARTICLE XI REPRESENTATIONS AND WARRANTIES

Section 11.01 SWCCOG's Representations and Warranties. SWCCOG represents and warrants to Telamon that:

- (a) it is a Colorado intergovernmental entity, duly organized, validly existing and in good standing in the State of Colorado;
- (b) it is duly qualified to do business and is in good standing in every jurisdiction in which such qualification is required;
- (c) it has the full right, power and authority to enter into this Agreement, to grant the rights and licenses granted under this Agreement and to perform its obligations under this Agreement;
- (d) the execution of this Agreement by its Representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action of SWCCOG;
- (e) when executed and delivered by each of Telamon and SWCCOG, this Agreement will constitute the legal, valid and binding obligation of SWCCOG, enforceable against SWCCOG in accordance with its terms;

- (f) it is in material compliance with all applicable Laws relating to this Agreement, the Product and the operation of its business; and
- (g) it is not insolvent and is paying all of its debts as they become due.

Section 11.02 Telamon's Representations and Warranties. Telamon represents and warrants to SWCCOG that:

- (a) it is an Indiana corporation duly organized, validly existing and in good standing in the jurisdiction of its incorporation;
- (b) it is duly qualified to do business and is in good standing in every jurisdiction in which such qualification is required;
- (c) it has the full right, power and authority to enter into this Agreement, to grant the rights and licenses granted under this Agreement and to perform its obligations under this Agreement;
- (d) the execution of this Agreement by its Representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action of Telamon;
- (e) when executed and delivered by each of Telamon and SWCCOG, this Agreement will constitute the legal, valid and binding obligation of Telamon, enforceable against Telamon in accordance with its terms;
- (f) it is in material compliance with all applicable Laws relating to this Agreement, the Product and the operation of its business;
- (g) it is not insolvent and is paying all of its debts as they become due; and
- (h) all financial information that it has provided to SWCCOG is true and accurate and fairly represents Telamon's financial condition.

ARTICLE XII PRODUCT WARRANTIES

Section 12.01 Conditions of Material and Packaging. All materials and products supplied by Telamon in conjunction with this bid shall be new (unless otherwise specified in the Special Conditions), warranted for their merchantability, fit for a particular purpose, free from defects, and consistent with industry standards.

Section 12.02 All materials and products supplied by Telamon in conjunction with this bid shall be warranted for their merchantability, fit for a particular purpose, free from defects, and consistent with industry standards.

Section 12.03 Warranty Limitations. The warranties under Section 13.02 do not apply where the Product has:

- (a) been subjected to abuse, misuse, neglect, negligence, accident, improper testing, improper installation, improper storage, improper handling, abnormal physical stress, abnormal environmental conditions or use contrary to any instructions issued by Telamon;

(b) been reconstructed, repaired or altered by Persons other than Telamon or its authorized Representative; or

(c) been used with any third-party product, hardware or product that has not been previously approved in writing by Telamon.

ARTICLE XIII INDEMNIFICATION

Section 13.01 Indemnification of SWCCOG . Telamon hereby assumes the entire responsibility and liability for any and all damages, loss or injury of any kind or nature whatever to persons, or property caused by or resulting from the execution of its obligations under this Agreement, and Telamon agrees that it shall protect, indemnify and hold harmless SWCCOG, its principals, officers, agents and employees from and against any and all claims, losses, damages, charges or expenses, whether direct or indirect and whether to persons or property, to which SWCCOG or any said parties may be put or subjected by reason of or resulting from any act, action, neglect, omission or default on the part of Telamon, any of its subcontractors, or any officers, agents, or employees of any or all of them.

Section 13.02 Suit against SWCCOG . In case any suits or other proceedings are brought against SWCCOG, its principals, officers, agents or employees at any time on account of, or by reason of, any act, action, neglect, omission, or default by Telamon or any of its subcontractors or any of Telamon's officers, agents, or employees as aforesaid, Telamon hereby agrees to assume the defense thereof and to defend the same at Telamon's own expense and to pay any and all costs, charges, attorneys' fees and other expenses and any and all judgments that may be incurred by or obtained against SWCCOG or any of its principals, officers, agents, or employees in such suits or other proceedings and in case any judgment or other lien by placed upon or obtained against the property of SWCCOG in or as a result of such suits or other proceedings, Telamon shall at once cause the same to be dissolved and discharged by giving bond or otherwise.

Section 13.03 Damage to Persons or Property. Telamon shall exercise due care and take all appropriate safety precautions necessary or advisable for the prevention of accidents and shall comply with all laws and regulations applicable to this Agreement to avoid damage, loss or injury of any kind or nature whatsoever to persons or property.

Section 13.04 Liability of SWCCOG. Telamon's indemnification obligation shall not be construed to extend to any injury, loss, or damage to the extent caused by the act, omission, or other fault of the SWCCOG.

ARTICLE XIV INSURANCE OBLIGATIONS

Insurance. Telamon. shall carry casualty insurance during the life of this Agreement in accordance with the following:

A. Worker's Compensation Insurance with limits as provided by statutes prescribed by and for the State of Colorado.

B. Comprehensive General Liability, including Broad Form Property Damage, Completed Operations, Broad Form Contractual Liability, Independent Contractors and personal injury for limits not less than \$1,000,000 each occurrence and \$2,000,000 general aggregate for damages of bodily injury or death or damage to or destruction of property. Products/Completed Operations Aggregate for limits not

less than \$1,000,000. Dolores County, Colorado, and its Department of Public Health; San Juan County, Colorado, and its Department of Public Health; and Southwest Health System, Inc., must be named as "Additional Named Insured".

C. Comprehensive Automobile Liability, including coverage for all owned motor vehicles and hired and non-owned motor vehicles for limits not less than \$1,000,000 each occurrence for bodily injury or damage to or destruction of property. Dolores County, Colorado, and its Department of Public Health; San Juan County, Colorado, and its Department of Public Health; and Southwest Health System, Inc. must be named as "Additional Named Insured".

D. Insurance Coverage Special Hazards, special hazards coverage such as, but not limited to, property damage as a result of explosion hazard, collapse hazard, or underground property damage hazard, commonly known as XCU, shall not be excluded from the herein above required liability policies.

E. Contractor's Certificate of Insurance. Contractor shall not commence work under this Agreement until it has submitted to SWCCOG and received approval from SWCCOG of certificates of insurance showing Contractor's compliance with the foregoing insurance requirements. Each such certificate shall contain a valid provision or endorsement that the policy may not be canceled, terminated, changed or modified in any manner that would affect the terms of this Agreement without first giving thirty (30) days' written notice to SWCCOG, which notification must be sent registered mail, return receipt requested, to SWCCOG.

F. Subcontractor's Certificate of Insurance. Contractor will be required to furnish evidence of Worker's Compensation and Comprehensive General Liability, Comprehensive Property Damage Liability, and Automobile Public Liability and Property Damage insurance coverage of subcontractors and their employees.

G. Professional Liability insurance (including Errors and Omissions) with limits of not less than \$1,000,000 for each claim and \$2,000,000 aggregate. Such coverage shall be continued for a period of not less than three (3) years after acceptance of the completed Project by SWCCOG.

H. Form following excess or umbrella liability insurance with minimum limits of \$2,000,000 for each occurrence.

The insurance coverages enumerated above constitute the minimum requirements and said enumeration shall in no way diminish or limit the liability of Telamon under this Agreement.

ARTICLE XV MISCELLANEOUS

Section 15.01 Contingent on USAC Funding. This Agreement is contingent upon Universal Service Administrative Company ("USAC") funding. The parties shall perform all reasonably necessary actions to obtain such funding. If funding from the USAC is not received, then this Agreement shall have no effect.

Section 15.02 Further Assurances. Upon Telamon's reasonable request, SWCCOG shall, at its sole cost and expense, execute and deliver all such further documents and instruments, and take all such further acts, necessary to give full effect to this Agreement

Section 15.03 . Annual Appropriation. Nothing in this Agreement shall be deemed or construed as creating a multiple fiscal year obligation on the part of the SWCCOG within the meaning of Colorado Constitution Article X, Section 20, or any other constitutional or statutory provisions, and the SWCCOG's obligations hereunder are expressly conditional upon annual appropriation by the SWCCOG Board of Directors (the "Board"), in its sole discretion. Telamon understands and agrees that any decision of the Board to not appropriate funds for payment shall be without penalty or recourse to the Board and, further, shall not affect, impair, or invalidate any of the remaining terms or provisions of this Agreement.

Section 15.04 Governmental Immunity Act. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the notices, requirements, immunities, rights, benefits, protections, limitations of liability, and other provisions of the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 et seq. and under any other applicable law.

Section 15.05 Omission From Specifications. The apparent silence and/or omission from any detailed description contained in the specifications of this Agreement, the RFP and Proposal, and any of its attachments and/or any subsequent addendum shall be regarded as meaning that only the best commercial practices are to prevail and that only materials and workmanship of first quality are to be used.

Section 15.06 Integration Clause. This Agreement together with the exhibits, RFP, and the purchase order issued in connection herewith constitutes the entire agreement between the parties. No other agreements, oral or written, pertaining to the work under the Contract exist between the parties. This Agreement can be modified only by an amendment in writing signed by both parties

Section 15.07 Survival. Subject to the limitations and other provisions of this Agreement: (a) the representations and warranties of the Parties contained herein shall survive the expiration or earlier termination of this Agreement; and (b) Articles 3, 9, 11, 12, 13, 14, and 16 of this Agreement, as well as any other provision that, in order to give proper effect to its intent, should survive such expiration or termination, shall survive the expiration or earlier termination of this Agreement.

Section 15.08 Notices. All notices, requests, consents, claims, demands, waivers and other communications under this Agreement (each, a "**Notice**") shall be in writing and delivered by personal delivery, by certified or registered mail, return receipt requested or by a recognized overnight delivery service. Any such notices shall be considered given upon receipt, as confirmed by the delivery confirmation record. All notices shall be sent to the respective address, as set forth below:

Buyer: Southwest Colorado Council of Governments Healthcare Consortium
PO Box 963
Durango, CO 81302
Attn: Miriam Gillow-Wiles, Executive Director
Ph: 970-779-4592
E-mail (courtesy copy): director@swccog.org

Telamon: Telamon Technologies Corp.
1000 East 116th Street
Carmel, Indiana 46032
Attn: General Counsel

Ph: 317-818-6888

E-Mail (courtesy copy): General.Counsel@telamon.com

Section 15.09 Interpretation. The Parties drafted this Agreement without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted. The exhibits, schedules, attachments and appendices referred to herein are an integral part of this Agreement to the same extent as if they were set forth verbatim herein.

Section 15.10 Headings. The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

Section 15.11 Severability. This Agreement will be enforced to the fullest extent permitted by applicable law. If any provision of this Agreement is held to be invalid or unenforceable to any extent, then the remainder of this Agreement will have full force and effect and such provision will be interpreted, construed or reformed to the extent reasonably required to render the same valid, enforceable and consistent with the original intent underlying such provision.

Section 15.12 Amendment and Modification. No amendment to or modification of this Agreement is effective unless it is in writing and signed by an authorized Representative of each Party. Terms and conditions may be added, modified, and deleted upon mutual agreement between agents of SWCCOG and the Telamon provided that such terms and conditions remain within the scope and original intent of the RFP. Said terms and conditions may include, but are not limited to, additions or deletions of service levels and/or commodities and increases or decreases in the time limits for an existing contract. Any and all modifications must be expressed in writing through a Contract Amendment and executed by authorized agents of SWCCOG and Telamon prior to the enactment of such modifications.

Section 15.13 Waiver. No waiver of any term, condition or obligation of this Agreement will be valid unless made in writing and signed by the Party to which such performance is due. No failure or delay by any Party at any time to enforce one or more of the terms, conditions or obligations of this Agreement will (a) constitute waiver of such term, condition or obligation, (b) preclude such Party from requiring performance by the other Party at any later time, or (c) be deemed to be a waiver of any other subsequent term, condition or obligation, whether of like or different nature.

Section 15.14 Assignment. Neither Party may not assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of the other Party. Any purported assignment or delegation in violation of this Section is null and void. No assignment or delegation relieves the assigning or delegating Party of any of its obligations under this Agreement.

Section 15.15 Successors and Assigns. This Agreement is binding on and inures to the benefit of the Parties to this Agreement and their respective permitted successors and permitted assigns.

Section 15.16 No Third-Party Beneficiaries. This Agreement benefits solely the Parties to this Agreement and their respective permitted successors and assigns and nothing in this Agreement, express or implied, confers on any other Person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

Section 15.17 Choice of Law/Venue. This Agreement, including all Individual Transaction documents and exhibits, schedules, attachments and appendices attached to this Agreement and thereto, and all matters arising out of or relating to this Agreement, are governed by, and construed in accordance

with, the Laws of the State of Colorado, without regard to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the Laws of any jurisdiction other than those of the State of Colorado. The parties agree that the United Nations Convention on Contracts for the International Sale of Product does not apply to this Agreement. All claims arising out of or relating to this Agreement will be litigated exclusively in the district courts of La Plata County, Colorado, or the United States District Court for the District of Colorado, and the Parties consent to personal jurisdiction in those courts.

Section 15.18 Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

Section 15.19 Force Majeure. Neither Party shall be liable or responsible to the other Party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement when and to the extent such failure or delay is caused by or results from acts beyond the affected Party's reasonable control, including, without limitation: (a) acts of God; (b) flood, fire, earthquake or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) Law; (e) actions, embargoes or blockades in effect on or after the date of this Agreement; (f) action by any Governmental Authority; (g) national or regional emergency; and (h) strikes, labor stoppages or slowdowns or other industrial disturbances (each a "**Force Majeure Event**"); provided, however, that the Party whose performance is delayed by any force majeure event shall commence all activities necessary to fulfill its obligations as soon as the force majeure event has ended.

Section 15.20 Relationship of Parties. Nothing in this Agreement creates any agency, joint venture, partnership or other form of joint enterprise, employment or fiduciary relationship between the Parties. Neither Party has any express or implied right or authority to assume or create any obligations on behalf of or in the name of the other Party or to bind the other Party to any contract, agreement or undertaking with any third party.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

TELAMON TECHNOLOGIES CORP.

By_____

Name:

Title:

Southwest Colorado Council of
Governments

By_____

Name:

Title: