

**CONSTRUCTION AGREEMENT**

**for**

**SPECIFIED PORTIONS**

**of the**

**HIGH-SPEED ECONOMICS FOR RURAL OPPORTUNITIES**

**by and between**

**MCNC**

**3021 Cornwallis Road**

**Durham, NC 27709**

and

**Contractor**

**Address**

**Address**

Date

**TABLE OF CONTENTS**

**Page**

[1.](#_2lwamvv) Project Summary 1

[2.](#_111kx3o) Definitions 2

[3.](#_3l18frh) The Work 3

[4.](#_206ipza) Conflicts 4

[5.](#_4k668n3) Design Vendor’s Obligations and Authority 5

[6.](#_2zbgiuw) Time for Performance 5

[7.](#_1egqt2p) Changes 6

[8.](#_3ygebqi) Payments 7

[9.](#_2dlolyb) Allowances 9

[10.](#_sqyw64) Subcontracts and Purchase Orders 9

[11.](#_3cqmetx) Insurance 9

[12.](#_1rvwp1q) Indemnity 9

[13.](#_4bvk7pj) Surety Bond 9

[14.](#_2r0uhxc) Independent Contractor 10

[15.](#_1664s55) Inspection and Audit 10

[16.](#_3q5sasy) Liens 10

[17.](#_25b2l0r) Title to Work 11

[18.](#_kgcv8k) Work in Progress 11

[19.](#_34g0dwd) Hazardous Substances 11

[20.](#_1jlao46) Compliance with Laws 12

[21.](#_43ky6rz) Personnel 12

[22.](#_2iq8gzs) Contractor’s Warranties 12

[23.](#_xvir7l) Defects 13

[24.](#_3hv69ve) Signage 13

[25.](#_1x0gk37) Confidentiality 13

[26.](#_4h042r0) Ownership of Contract Documents 14

[27.](#_2w5ecyt) Representatives 14

[28.](#_1baon6m) Assignment 14

[29.](#_3vac5uf) Nondiscrimination 14

[30.](#_2afmg28) Waiver 14

[31.](#_pkwqa1) Construction of Terms 14

[32.](#_39kk8xu) Captions 14

[33.](#_1opuj5n) Entire Agreement; Severability; Amendments 14

[34.](#_48pi1tg) Termination 14

[35.](#_2nusc19) Dispute Resolution 15

[36.](#_1302m92) Notices 16

[37.](#_3mzq4wv) Counterparts 16

[38.](#_2250f4o) Third Party Rights 16

[39.](#_haapch) Miscellaneous 17

[40.](#_319y80a) Other Terms and Conditions 17

**Exhibits**

A Contract Documents – Drawings, Specifications

and Addenda – Form

B Change Order – Form

C Time and Materials Billing Requirements

D Request for Payment – Form

E Final Waiver of Liens – Form

F Certificate of Final Completion – Form

G Partial Waiver of Liens – Form

H Mechanics Lien Subordination Agreement – Form

I Insurance

J Performance Bond – Form

K Labor and Material Payment Bond – Form

L Other Terms and Conditions – Form

M Allowances – Form

N Project Schedule and Liquidated Damages – Form

O Notice To Proceed – Form

P Unit Price Schedule – Form

Q Debarment Certificate – Form

R E-Verify Certification

**CONSTRUCTION AGREEMENT**

**AGREEMENT**

made as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**BY AND BETWEEN:** MCNC (“Owner”)

3021 Cornwallis Road

Durham, NC 27709

and

(“Contractor”)

# **Project Summary**

The following summary (the “Project Summary”) identifies the construction project, which is the subject of this Agreement, including certain financial terms and deadlines. All terms in this Project Summary are more fully defined or referenced in Article 2 of this Agreement.

**1.1** Project and Participants:

The “Project” is: Owner was awarded a Middle Mile Broadband Infrastructure grant for High-speed Economics for Rural Opportunities (“HERO”) by the US Department of Commerce’s National Telecommunications and Information Administration (NTIA). Funding for this program was enabled by the Bipartisan Infrastructure Act signed into federal law in December of 2021 . The Project is comprised of construction and splicing of approximately total of 209.08 segment miles of middle mile infrastructure in North Carolina between Winston-Salem to Salisbury for approximately 40.45 segment miles, Salisbury to Albemarle for approximately 32.90 segment miles, Sanford to Fayetteville for approximately 33.30 segment miles, and Fayetteville to Kenansville for approximately 35.03 segment miles and Kenansville to Jacksonville for approximately 67.40 segment miles. Through additional investments from MCNC, direct fiber connections to community colleges, libraries, schools, health and safety facilities and other community anchor institutions along the construction corridors in eleven (11) of the most rural, economically disadvantaged counties in North Carolina will also be built.

“Design Vendor” is: Colliers Engineering & Design, CT P.C.

101 Crawfords Corner Road, Suite 3400

Holmdel, NJ 07733

“Owner’s Representative” is: Jeremy A. Rollins Telephone Number: (919) 248-1837

“Contractor’s Representative” is:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Telephone Number: ( )

“Design Vendor’s Representative” is: Craig Zeidman Telephone Number: (877) 627-3772

**1.2** “Statement of Work” or “Notice to Proceed” or “Exhibit O”: Exhibit O to this Agreement is the form for the Statement of Work and Notice to Proceed (which may be referred to as an “Exhibit O” or a “Statement of Work” or a “Notice to Proceed”) to be issued, at the discretion of Owner, for each segment or other designated portion of fiber optic infrastructure project that Owner wishes to engage Contractor to build under the terms of this Agreement. It is contemplated that Owner, at its discretion, may issue multiple Statements of Work over time under this Agreement, with this Agreement serving as the “master contract” and each Statement of Work serving as a scope of work that is subject to this Agreement.

**1.3** “Contract Time”: The Contract Time is the time specified in any issued and outstanding Exhibit O for Contractor to complete the work referred to in that Exhibit O. In other words, the Contract Time shall be the Final Completion Date shown in each Exhibit O for the Work covered by that Exhibit O.

**1.4** “Contract Sum” as follows: The Contract Sum shall be the total agreed compensation payable to Contractor under any issued and outstanding Exhibit O for the work referred to in that Exhibit O. Owner may cancel any Exhibit O for projects under the HERO project if funds are not appropriated or not otherwise made available to support the Project’s commencement or continuation of performance.

The actual Contract Sum is unknown at the time of execution of the Agreement. The presumed Contract Sum is computed based upon a Contractor charge of

\_\_\_\_\_\_\_\_\_segment: \_\_\_\_\_\_ assumed miles \* \_\_\_\_ ft/mile \* $\_\_\_\_\_\_\_per foot = $ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Therefore, for purposes of setting the Contract Sum for initial contracting and for determining the amount of Bonds, the Contract Sum will be assumed to be $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. The parties acknowledge that the actual Contract Sum may be more or less than the Contract Sum computed for Bond purposes.

If the actual Contract Sum exceeds the Contract Sum computed for Bond purposes by ten percent (10%), the Contractor shall update the Bond amount monthly to reflect the increase in the Contract Sum and that any additional Bond Cost shall not be reimbursed by Owner but shall be presumed to be reflected in the agreed upon per foot charge.

**1.4** Bonds Required: Payment Bond and Performance Bond.

**1.5** The Contractor shall perform all of the Work required by the Contract Documents as generally described below and more fully described on Exhibit O.

# **Definitions**

For the purpose of this Construction Agreement (the “Agreement”), the following terms have the following meanings:

**2.1** “Contract Documents” means this Agreement (including all Exhibits), the drawings set out in Exhibit A (the “Drawings”), the specifications set out in Exhibit A (the “Specifications”), and all addenda set out in Exhibit A (“Addenda”), issued by Owner prior to execution of this Agreement and all changes issued by Owner in writing after execution of this Agreement. Changes include written amendments to this Agreement executed by both parties to the Agreement, Change Orders, and written orders from Owner directing minor changes not affecting the Contract Sum or requiring an extension of time to complete the Work.

**2.2** “Design Vendor” means the engineer, consultant or firm named in the Project Summary and shall mean the Design Vendor or its authorized representative. The person named as “Design Vendor’s Representative” in the Project Summary is designated as the Design Vendor’s authorized representative unless the Contractor is advised in writing by Owner that a different person has been designated.

**2.3** “Laws and Regulations” means the laws, statutes, ordinances, codes, executive orders, rule, regulations and any other legal requirements of any nature applicable to the Work or the Project.

**2.4** “Materials” means materials, supplies, apparatus, appliances, equipment, machinery, fixtures, tools, implements, and all other items and facilities furnished or delivered in connection with the Project.

**2.5** “Owner’s Representative” means the person designated as such in the Project Summary or such other person or persons as Owner may, from time to time, designate in writing.

**2.6** “Project” means the construction, in accordance with the Contract Documents, of the project described in the Project Summary at the Project Location.

**2.7** “Project Location” means the location where the Project is to be constructed. The Project Location is generally identified in the Project Summary, and in the Drawings.

**2.8** “Services” means labor, supervision, transportation, utilities, storage and all other services furnished or performed in connection with the Project.

**2.9** “Subcontractor” means those persons or entities having a contract with the Contractor or with any other person or entity having a contract with the Contractor to perform any work or supply any materials or equipment required for the Project.

**2.10** “Work” means the furnishing, installation and performance of Materials and Services as described in Article 3 of this Agreement.

**2.11** The following terms are defined, or are defined in context, elsewhere in this Agreement as follows:

**TERM** **PREAMBLE/ARTICLE/**

**SECTION/EXHIBIT**

AAA………………………………………...Section 35.2

Adverse Weather Conditions………………...Section 6.2

Agreement………………………………………Article 2

Allowances……………………………………...Article 9

Bonds………………………………………….Article 13

Change Order………………………………...Section 7.1

Change Order Request……………………….Section 7.2

Claims………………………………………Section 12.1

Contract Sum…………………………Sections 1.3 & 8.1

Contract Time………………………...Sections 1.2 & 6.1

Contractor……………………………...............Preamble

Contractor Responsible Parties………..............Article 12

Contractor’s Costs…………………………......Exhibit C

Contractor’s Estimate………………………...Section 7.2

Contractor’s Representative………...Sections 2.2 & 27.2

Date of Termination………………………...Section 34.1

Delay Notice………………………………....Section 6.1

Design Vendor’s Representative……………..Section 1.1

Dispute……………………………………...Section 35.2

Environmental Laws………………………..Section 19.4

Final Completion………………………….....Section 6.4

Final Payment……………………………......Section 8.6

Final Punch List……………………………...Section 6.4

Final Request………………………………...Section 8.6

Final Waiver of Liens………………………..Section 8.7

Hazardous Substance……………………….Section 19.4

High Use Area………………………………Section 19.6

Interim Completion Dates…………………....Section 6.5

Liquidated Damages…………………………Section 6.7

Notice to Proceed…………………………….Section 6.1

Owner…………………………………………..Preamble

Owner Indemnified Parties……………………Article 12

Progress Schedule……………………………Section 3.3

Project Summary………………………………..Article 1

Records……………………………………..Section 15.4

Recovery Act……………………………….Section 15.5

Request for Payment………………………....Section 8.2

Schedule of Values…………………………..Section 8.2

Substantial Completion………………………Section 6.4

Substantial Completion Date………………...Section 6.1

Time and Materials Billing…………………..Section 7.3

Unexpected Event……………………………Section 6.1

# **The Work**

**3.1** The Contractor shall construct the Project for Owner at the Project Location with supporting improvements, facilities and equipment as described in or reasonably inferable from the Contract Documents. The Contractor shall provide, furnish and install all Materials not specifically shown in the Contract Documents to be furnished by Owner, and all Services as and when required for, or in connection with, the construction, furnishing or equipping of, or for inclusion or incorporation in, the Project in accordance with the Contract Documents.

**3.2** The Contractor agrees that the Work shall be performed in a good and workmanlike manner, free from defects, and in compliance with Laws and Regulations. All Materials shall be new and approved by or acceptable to Owner, except as otherwise expressly provided for in the Contract Documents. Any materials used to construct the Project for Owner shall remain the property of Owner.   If under any circumstances, Contractor installs additional Materials not requested, furnished or approved by Owner, the installed Material becomes the property of Owner and Contractor shall have no claim against Owner with respect to any such Materials not requested, furnished or approved by Owner. The Contractor shall cause all Materials and other parts of the Work to be readily available as and when required or needed for or in connection with the construction, furnishing and equipping of the improvements. Owner will negotiate with a specific fiber and conduit manufacturer for the delivery and recycling of fiber and conduit optic cable needed for the construction of the Project.  The Contractor will maintain control and possession of all delivered reels and the empty fiber and conduit reels after installation until such reels are picked up by the fiber/conduit manufacturing company for recycling. Contractor shall be responsible for all associated fees for any reels not returned or returned in a non-recyclable condition. Owner is in the process of selecting an outside plant vendor. Materials secured by the outside plant vendor may be stored in warehouse(s) centrally located to the Project. Upon Owner’s written notice to Contractor, Contractor shall obtain the Materials required for the Project from the centrally located warehouse(s). Contractor shall keep such Materials insured during transportation to the Project site and while stored on the Project site. Contractor shall be responsible for the care, custody, and control of all Materials whether supplied by Contractor or Subcontractors and those Materials that Owner supplies to Contractor. Any loss or damage to such Materials shall be at Contractor's sole cost and expense and shall not be reimbursed by Owner. Contractor shall replace all lost or damaged Materials such that the Project and Owner's other contractors are not delayed or inconvenienced. If Contractor fails to timely replace lost or damaged Materials, Owner shall be entitled to replace such lost or damaged Materials and deduct the cost of same from amounts otherwise due to Contractor. If adequate amounts are not due Contractor to make Owner whole, Contractor shall reimburse such amounts to Owner within 48 hours of written request from Owner. All fiber construction and fiber splicing practices shall be in compliance with National Electrical Safety Code “NESC”), American National Standards Institute (“ANSI”), and railroad specifications.

**3.3** The Contractor shall provide a critical path schedule, or such other type of schedule as Owner may approve, and periodic updating thereof and other necessary schedules (all of which are collectively referred to as the “Progress Schedule”) in the interest of completing the Project in the most expeditious and economical manner. Within thirty (30) calendar days after execution of this Agreement, the Contractor shall prepare and submit for Owner’s approval the Progress Schedule for the Work. The Progress Schedule shall indicate the dates for the commencement and completion of the various stages of construction, including Milestone Work and corresponding Interim Completion Dates (per Exhibit N), and shall be revised as required by the conditions of the Work, subject to Owner’s approval. The Progress Schedule shall encompass all of the work of all trades necessary for the construction of the Project and shall be sufficiently complete and comprehensive to enable progress to be monitored on a weekly basis.

The parties acknowledge and agree that notwithstanding any theoretical delays or theoretical extensions of time for Substantial Completion, as may be shown on the Progress Schedule, any Interim Completion Dates and the Substantial Completion Date shall be governed by this Agreement and shall be extended only in accordance with the procedures set forth herein.

**3.4** The Contractor shall provide to Owner, by email or fax to Owner’s Representative, and such other person(s) as Owner may instruct, by 10:00 a.m. on the day following any activity on the Project, a daily written progress report for the purpose of informing Owner of daily activities on the Project. If the Contractor shall neglect, fail, or refuse to complete and submit to Owner a daily written progress report then, without further notice or demand by Owner, the Contractor agrees to pay to Owner the sum of Fifty Dollars ($50.00) per day for each day that a daily written progress report is late. This amount may be retained by Owner from other current Project payments due to Contractor, current periodic pay estimates or from retainage, but if the amount owing and/or retained is insufficient to fully pay Owner, the Contractor agrees to pay said insufficiency to Owner. This provision is in addition to other damages and remedies that are available to Owner due to Contractor’s failure to perform its obligations hereunder.

**3.5** The Contractor shall provide competent on-site supervision of all phases of the Work. The Contractor’s Representative shall be selected by the Contractor, but such selection is subject to the approval of Owner. Any change in the Contractor’s Representative must be approved by Owner in advance and in writing. Contractor’s Representative shall represent the Contractor and communications given to the Contractor’s Representative shall be as binding as if given to the Contractor.

**3.6** Owner makes no warranties, express or implied, that the Drawings, Specifications, and Addenda are free of errors or omissions. Rather, the Contractor shall carefully study and compare the Contract Documents with each other, with information furnished by the Owner, and shall carefully inspect and verify field conditions, and shall at once report to the Design Vendor and Owner all errors, inconsistencies or omissions discovered. The Contractor shall not be liable for damages resulting from errors, inconsistencies or omissions in the Contract Documents unless Contractor should have reasonably recognized the error, inconsistency or omission or knowingly failed to report it to the Design Vendor and Owner. If the Contractor performs any construction activity involving such an error, inconsistency or omission, the Contractor shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the costs for correction. The intent of the Contract Documents is to include all items necessary for the proper performance and completion of the Work. The Contract Documents are complementary, and what is required by any one shall be as binding as if required by all. Work not covered by the Contract Documents shall not be required unless it is reasonably inferable as being necessary to produce the intended results.

**3.7** If conditions are encountered at the Project Location which are (1) subsurface or otherwise concealed physical conditions which differ from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then written notice by the Contractor shall be given to Owner promptly before such conditions are disturbed. If the conditions differ from those indicated in the Contract Documents and were not known to the Contractor at the time this Agreement was executed, and cause an increase or decrease in the Contractor’s cost of, or time required for, performance of any part of the Work, then no adjustment shall be made in the Contract Sum but an equitable adjustment in the Contract Time will be made (based upon all relevant circumstances) by means of a written agreement signed by Owner.

**3.8** The Contractor shall prepare or cause to be prepared, as part of the Work, any shop drawings, samples, submittals and detail drawings not made a part of the Drawings, Specifications, and Addenda, which are required in the performance of the Contractor’s obligations under this Agreement. Although the Design Vendor will review any shop drawings, submittals, detail drawings, and samples, neither the Design Vendor nor Owner shall be responsible to the Contractor for any failure of the shop drawings, submittals, detail drawings or samples to comply with the Contract Documents or Laws and Regulations. The Contractor shall maintain copies of all shop drawings, submittals and detail drawings, and maintain all samples at the Project and shall afford Owner and the Design Vendor access to same at all times during regular working hours.

**3.9** The Contractor at its own expense shall maintain one record set of the Contract Documents in good order and marked currently to record all changes made during construction and an accurate location of all portions of the Work and shall prepare an accurate set of as-built drawings. All of these shall be delivered to the Design Vendor (for review and delivery to the Owner) upon Final Completion of the Work. The Contractor shall cooperate with Owner and the Design Vendor in the preparation of accurate asbuilt drawings.

**3.10** The Contractor shall deliver to Owner all equipment data, along with its recommended spare parts list, maintenance manuals, manufacturer’s warranties and operations manuals as may be required for Owner’s employees or agents to maintain and operate any equipment delivered as a part of the Work.

**3.11** Required certificates of inspection, testing or approval shall be obtained by the Contractor and promptly delivered by the Contractor to Owner. If Owner and the Design Vendor are to observe said inspections, tests or approvals required by the Contract Documents, they shall be notified in writing by the Contractor of the dates and times of said inspections, tests or approvals.

**3.12** Contractor acknowledges that Owner is a 501(c)(3) entity and exempt from most income, sales, consumer, use and similar taxes. The Contractor shall pay all sales, consumer, use and other similar taxes for the Work or portions thereof, which are legally required at any time during the Contractor’s performance of the Work. Owner does not have a North Carolina sales tax exemption certificate. Therefore, if sales tax is incurred on behalf of the Owner for the Project, Contractor shall itemize such sales tax charges in each Request for Payment as a separate line item. Owner will reimburse Contractor for such properly incurred and itemized sales tax and request reimbursement from the State of North Carolina.

**3.13** The Contractor shall pay all royalties and license fees which are legally required at any time during the Contractor’s performance of the Work. The Contractor shall defend all suits or claims for infringement of any patent rights and shall hold Owner harmless from any loss, liability or expense on account thereof, including attorneys’ fees, except that Owner shall be responsible for all such loss when a particular design, process or the product of a particular manufacturer or manufacturers is specified in the Contract Documents, but if the Contractor has reason to believe that the design, process or product specified is an infringement of a patent, the Contractor shall be responsible for such loss, liability or expense unless the Contractor promptly gives such information in writing to Owner and the Design Vendor prior to any use of the design, process or product.

**3.14** Contractor shall be responsible for all cutting, fitting or patching that may be required to complete the Work or to make its several parts fit together properly. Contractor shall not damage or endanger any portion of the Work or the work of any separate contractors by cutting, patching or otherwise altering any Work, or by excavation. Contractor shall not cut or otherwise alter the work of any separate contractor except with the written consent of Owner and of such separate contractor. Contractor will not perform any splicing of the Work or river bores without Owner’s prior written consent. Contractor shall not unreasonably withhold from Owner or any separate contractor Contractor’s consent to cutting or otherwise altering the Work.

**3.15** Contractor acknowledges that it is providing Services and Work that assist the Owner in carrying out its program to expand the optical footprint of rural North Carolina. Contractor further acknowledges that all substantive decisions and actions that impact the ability for Owner to carry out its program or the overall success of the program rest solely with the Owner. Contractor acknowledge that Owner has been awarded a grant by the U.S. Department of Commerce’s National Telecommunications (“NTIA”)

**3.16** Contractor represents and warrants that it is familiar with, and experienced in performing, work of the scope and complexity as the Work under this Agreement.

# **Conflicts**

**4.1** The Contract Documents shall be interpreted so as to eliminate inconsistencies or conflicts.

**4.2** In case of conflicts between the provisions of this Agreement, any ancillary documents executed contemporaneously herewith or prior hereto, or any other of the Contract Documents, the provisions of this Agreement (including all Exhibits) shall prevail.

**4.3** Anything shown on the Drawings and not mentioned in the Specifications or mentioned in the Specifications and not shown on the Drawings shall have the same effect as if shown or mentioned respectively in both.

**4.4** The organization of the Specifications into divisions and sections and the arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of the Work to be performed by any trade. The organization of the Specifications and the arrangement of the Drawings are for the convenience of the Contractor and are not intended to relieve the Contractor from its obligation to conduct a complete study of the Drawings, Specifications, and Addenda for the purpose of directing the various Subcontractors and suppliers as to their respective responsibilities.

# **Design Vendor’s Obligations and Authority**

**5.1** The Design Vendor shall provide assistance to Owner in the areas of on-site review of Work in progress, review of pay requests, review of shop drawings, submittals, samples and detail drawings submitted by the Contractor, assisting in the interpretation of the intent of the Contract Documents for the proper execution of the Work, and such other assistance as Owner may request.

**5.2** Owner shall have the absolute authority to reject Work that does not in its opinion conform to the Contract Documents.

**5.3** The Design Vendor shall have no authority to order or approve any deviation from the Contract Documents, whether or not such deviation affects the Contract Sum, any Interim Completion Date or the Substantial Completion Date. In the event any such deviation is sought, prior written approval from Owner’s Representative must be obtained.

**5.4** The Design Vendor originally identified by Owner shall serve as such until the Owner gives the Contractor written notice naming another party as the Design Vendor. Should any question arise as to authority of the Design Vendor or difficulty with respect to communication therewith, the Contractor shall notify Owner’s Representative.

# **Time for Performance**

**6.1** Within ten (10) calendar days from the delivery of notice from Owner to the Contractor to proceed with the work (“Notice to Proceed” - Exhibit O), the Contractor shall commence performance of the Work and shall thereafter diligently proceed with the performance thereof to completion and shall complete the performance of the entire Work within the number of calendar days shown in the Project Summary (said number of days being referred to as the “Contract Time”) following Contractor’s receipt of the Notice to Proceed. The Contractor shall attain Substantial Completion during the Contract Time. The “Substantial Completion Date” shall be the date when Contractor actually attains Substantial Completion.

If the Contractor is, or reasonably expects to be, delayed in the performance of the Work by any Unexpected Event (as defined below), Contractor shall give Owner written notice thereof (the “Delay Notice”), which Delay Notice shall include (i) an estimate of the length of the delay that the Contractor believes will result from the Unexpected Event, and (ii) Contractor’s determination of how the delay in question would affect the Progress Schedule. Owner shall review the Delay Notice and approve or disapprove the delay (which approval or disapproval shall not be unreasonably withheld or delayed). If the Contractor fails to provide Owner with a Delay Notice within ten (10) calendar days after the occurrence or expected occurrence of the Unexpected Event, Owner may approve or disapprove the delay in its sole discretion. For purposes of this Section, an “Unexpected Event” shall mean any event (other than Adverse Weather Conditions) that (i) is unexpected and could not reasonably have been foreseen by the Contractor; and (ii) is not directly or indirectly the result of any act or omission of the Contractor or its Subcontractors or any person for whom the Contractor is liable; and (iii) is unavoidable and beyond the reasonable control of the Contractor; and (iv) cannot be mitigated through the reasonable efforts of the Contractor, and (v) directly and unavoidably affects a critical path activity of the Contractor. In the case of a continuing delay that results from the same Unexpected Event, the Contractor shall only be required to provide an initial Delay Notice, to be followed up with a subsequent Delay Notice or Delay Notices to the extent the Unexpected Event causes a delay beyond that initially anticipated as estimated in the initial Delay Notice (such follow-up Delay Notice or Delay Notices to be delivered at or prior to the time at which the anticipated delay was expected to have ceased). If Owner approves a delay in writing and in accordance with this Section, then, to the extent directly, unavoidably and measurably affected, the Substantial Completion Date and Interim Completion Dates shall be extended for a period equal to the length of the approved delay.

**6.2** Delays Caused by Adverse Weather Conditions. The Contractor shall only be entitled to weather-related delays in the Substantial Completion Date and the Interim Completion Dates that are approved by Owner as provided in this Section. If the Contractor encounters Adverse Weather Conditions (as defined below), Owner may approve a day-for-day delay to the Substantial Completion Date and to Interim Completion Dates to the extent such dates are directly, unavoidably and measurably impacted by the Adverse Weather Conditions. For purposes of this Section, “Adverse Weather Conditions” shall mean in excess of one (1) inch of rain per day as determined by an official National Weather Service measuring station in the area where the Project is located; snow; ice; sleet; high winds, or low temperatures, which based on nationally accepted standards prevent the completion of critical path items of the Work; or muddy site conditions that: (i) affect scheduled working hours on scheduled Work days; and (ii) directly, unavoidably and measurably affect a critical path activity of the Contractor; and (iii) cannot be mitigated through the reasonable efforts of the Contractor. The Contractor shall provide a weekly written report to Owner that identifies any Adverse Weather Conditions encountered during the preceding week, together with an explanation of any delays that the Contractor believes were a direct result of such Adverse Weather Conditions. Owner shall review the report and approve or disapprove the delays (which approval or disapproval shall not be unreasonably withheld or delayed). If the Contractor fails to provide Owner with such weekly reports, Owner may approve or disapprove a delay in its sole discretion. If Owner approves a delay in accordance with this Section then, to the extent affected directly, unavoidably and measurably, the Substantial Completion Date and Interim Completion Dates shall be extended for a period equal to the length of the approved delay.

**6.3** Extension of time shall be the Contractor’s sole and exclusive remedy for any such delay, unless the delay shall have been caused by acts constituting intentional interference by Owner with the Contractor’s performance of the Work, and then, only to the extent that such acts continue after the Contractor has provided written notice to Owner of such interference. Owner’s exercise of any of its rights under Article 7, regardless of the extent or number of such changes, or Owner’s exercise of any of its remedies of suspension of the Work, or requirement of correction or replacement of any defective Work, or its strict adherence to the Contract Documents shall not under any circumstances be construed as intentional interference with the Contractor’s performance of the Work.

**6.4** “Substantial Completion” shall be defined to include all Work (exclusive of minor items of unfinished Work, which do not preclude beneficial use of the premises for its intended purpose) required to complete the Work set forth in the Contract Documents. The date of Substantial Completion shall be determined by Owner with the Design Vendor’s assistance. The Contractor shall have thirty (30) calendar days after the date of Substantial Completion within which to complete all remaining Work required by the Contract Documents (the completion of all such Work, including any Work unfinished at the date of Substantial Completion, and the fulfillment of all requirements of the Contract Documents being referred to herein as “Final Completion”). Prior to the Contractor requesting Owner and the Design Vendor to perform the Substantial Completion review, the Contractor shall inspect the Project and prepare a list of all deficient and unfinished Work. The list shall be provided to the Design Vendor for review. At Substantial Completion, a Final Punch List will be prepared and provided to the Contractor. The “Final Punch List” is a listing of all known remaining incomplete items of the Work, but is not to be considered by the Contractor as a waiver by Owner of the Contractor’s obligation to complete all the Work in complete compliance with Contract Documents, which requirement is not waived. In the event the remaining Work is not completed or the Contractor has not demonstrated to Owner that a “good faith” effort has been made to complete said remaining Work or Contractor’s efforts to complete said Work are not being diligently pursued within said thirty (30) calendar days, Liquidated Damages, as defined and explained in Section 6.7 herein, will be charged against the Contractor. Time is of the essence in the performance of the Work.

**6.5** In addition to Substantial Completion and Final Completion as defined in Section 6.4, the Contractor shall complete and make available to Owner certain portions of the Work no later than the dates indicated on the Progress Schedule (“Interim Completion Dates”). The Contractor acknowledges that such Interim Completion Dates are essential to Owner’s plans and therefore time is of the essence in meeting said Interim Completion Dates. If the Work is not on schedule for any reason within the control or responsibility of the Contractor, the Contractor shall, if necessary, increase its manpower or work such overtime as is required to bring the Work back within the Progress Schedule. Such additional efforts shall not be chargeable to Owner or the Project.

**6.6** Owner may direct the Contractor to expedite the Work by whatever means the Contractor may use, including, without limitation, increasing manpower or working overtime to bring the Work back within the Progress Schedule. If the expediting of Work is required due to reasons within the control or responsibility of the Contractor, then the additional costs incurred shall not be chargeable to the Owner or the Project.

**6.7** If the Contractor shall neglect, fail, or refuse to complete the Work by the Substantial Completion Date, or any portion of the Work by any Interim Completion Date, subject to any proper extension granted in writing by Owner, then the Contractor agrees to pay to Owner, or to cause the Contractor’s surety to pay to Owner, the amounts specified on Exhibit N, not as a penalty, but as liquidated damages for the damages that would be suffered by Owner as a result of delay for each and every calendar day that the Contractor shall have failed to complete any milestone activities by its Interim Completion Date or the Work by the Substantial Completion Date (“Liquidated Damages”). The amounts are fixed and agreed upon by and between the Contractor and Owner because of the difficulty of fixing and ascertaining the actual damages Owner would in such event sustain, and the amount is agreed to be the amount of damages that Owner would sustain. The amount may be retained by Owner from other current Project payments, current periodic pay estimates or from retainage, but if the amount owing and/or retained is insufficient to fully pay Owner said Liquidated Damages, the Contractor agrees to pay, or cause the Contractor’s surety to pay, said insufficiency to Owner. The provision for Liquidated Damages under this Section is applicable solely to Contractor’s neglect, failure or refusal to complete the Work by the Substantial Completion Date, or any portion of the Work by any Interim Completion Date, and is in addition to other damages and remedies that are available to Owner due to Contractor’s failure to perform its obligations hereunder.

# **Changes**

**7.1** From time to time, Owner may authorize changes in the Work; issue additional instructions; require additional Work; or direct the omission of Work previously ordered. Only those changes in the Work that are approved on a Change Order in the form of Exhibit B and executed by the parties identified thereon (“Change Order”), or such additional instructions, authorizations of such additional Work or directions regarding omissions of Work that are in a writing duly executed by Owner, shall be binding on Owner.

**7.2** Owner may order changes in the Work by initiating a change order request (“Change Order Request”) setting forth in detail the nature of the requested change. Upon receipt of a Change Order Request, the Contractor shall review with the Design Vendor prior to furnishing to Owner a statement setting forth in detail, with a suitable detailed breakdown by trades and work classifications, the Contractor’s estimate (the “Contractor’s Estimate”) of the changes in the Contract Sum attributable to the changes set forth in such Change Order Request and proposed adjustments, if any, to the Substantial Completion Date and to any Interim Completion Dates resulting from such Change Order Request. If the Contractor’s Estimate relating to the Change Order Request requires an adjustment to the Project Schedule previously approved by Owner, the Contractor’s Estimate shall include a proposed amendment to the Project Schedule indicating the proposed adjustments to the Interim Completion Dates and the Substantial Complete Date. If Owner approves such Contractor’s Estimate, a Change Order shall be processed by Owner and delivered by Owner to the Contractor for execution. Agreement on any Change Order shall constitute a final settlement on all items affected therein, including without limitation any adjustment in the Contract Sum, the Substantial Completion Date, or any Interim Completion Dates, subject to performance thereof and payment therefore pursuant to the terms of this Agreement and such Change Order. Work bid by unit price may be increased or decreased in quantity as directed by Owner. The basis for adjustment of the Contract Sum shall be (a) the unit prices bid and set forth in the Contract Documents if the Work covered by the Change Order was originally bid on a unit price basis and (b) by negotiated lump sum if the Work covered by the Change Order was not originally bid on a unit price basis.

**7.3** In the event Owner and the Contractor cannot agree on any adjustment in the Contract Sum, extensions to the Contract Time, or adjustment to any Interim Completion Date or the Substantial Completion Date, the Contractor shall nevertheless proceed to perform the Work required by Owner’s Change Order Request upon written notice from Owner to proceed with the Work required by said Change Order Request. The Contractor shall keep separate records of all costs and time required to perform the Work required by the Change Order Request and in accordance with the “Time and Materials Billing” requirements set forth on Exhibit C, and an equitable adjustment will be made upon agreement between the Contractor and Owner.

**7.4** It is understood and agreed that refinement and detailing may be accomplished from time to time with respect to the Drawings, Specifications, and Addenda set forth in Exhibit A. No adjustment in the Contract Sum or the Substantial Completion Date, or of any Interim Completion Dates, shall be made unless such refinement or detailing results in changes in the scope, quality, function and/or intent of the Drawings, Specifications, and Addenda not reasonably inferable or anticipatable by a contractor of the Contractor’s experience and expertise and unless the Contractor advises Owner in writing within seven (7) calendar days of the Contractor’s receipt of said refinements and details that an adjustment is required and unless such adjustments are accepted by Owner in writing.

# **Payments**

**8.1** In full consideration of the full and complete performance of the Work and all other obligations of the Contractor hereunder, Owner shall pay to the Contractor a sum of money equal to the “Contract Sum” which is that sum set forth in the Project Summary, subject to additions and deductions as provided in this Agreement.

**8.2** (a) On or before the twenty-fifth (25th) day of each month during the performance of the Work, or such other day of the month as Owner may direct, the Contractor, after completion of the Design Vendor’s quality control approval process, shall submit to Owner for its approval a request for payment (“Request for Payment”). Each Request for Payment shall indicate the percentage of completion of each portion of the Work as of the beginning of the period covered by the Request for Payment through the 25th of each month and clearly labeled with the segment for which payment is being requested. Requests for Payment must be by segment with no co-mingling of segments within a Request for Payment. The Request for Payment shall be in the form attached hereto as Exhibit D. Submission of reports, certificates, waivers of lien, and other documents required in this Agreement to be submitted is a condition precedent to Owner’s obligation to pay Contractor hereunder. Fifteen (15) days prior to the first Request for Payment, the Contractor shall prepare and submit to Owner for its approval a schedule of values allocating the entire Contract Sum among the various portions of the Work (the “Schedule of Values”). The Schedule of Values approved by Owner shall be used as a basis for reviewing the Contractor’s Request for Payment.

(b) Subject to the provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

With respect to unit cost Work, take the number of units properly performed during the month times the unit cost of each item, less retainage of ten percent (10%) and subtract amounts, if any, for which Owner has withheld funds pursuant to its rights under any portion of the Contract Documents.

With respect to non-unit cost Work, take that portion of the Contract Sum properly allocable to completed non-unit cost Work as determined by multiplying the percentage completion of each portion of the non-unit cost Work by the share of the total Contract Sum allocated to that portion of the non-unit cost Work in the Schedule of Values, less retainage of ten percent (10%) and subtract the aggregate of previous payments made by Owner and subtract amounts, if any, for which Owner has withheld funds pursuant to its rights under any portion of the Contract Documents.

The Contractor’s Costs shall be segregated and detailed in a manner satisfactory to Owner, with sufficient supporting documentation for Owner to evaluate the charges. The Request for Payment shall indicate the percentage of completion of each portion of the Work, and the total Work, as of the end of the period covered by the Request for Payment. The Schedule of Values shall be used as one basis for reviewing the Request for Payment. Inadequately supported charges are subject to disallowance; however, Owner will make payments of the balance of the Request for Payment when such amounts are approved within thirty (30) days of receipt. The Request for Payment may include the cost of Contractor provided Materials not incorporated in the Work, but delivered and suitably stored at the Project location or at some other location if approved by Owner.

**8.3** Owner and the Design Vendor shall review each such Request for Payment and may make such exceptions as the Design Vendor or Owner reasonably deem necessary or appropriate under the circumstances then existing. In no event shall Owner be required to make payment for items to which Owner or the Design Vendor reasonably takes exception.

**8.4** Owner shall make payment to the Contractor in the amount approved, subject to Section 8.2. The payment of any Request for Payment by Owner, including the Final Request, does not constitute approval or acceptance by Owner of any item of the Work in such Request for Payment, nor shall it be construed as a waiver of any of Owner’s rights hereunder or at law or in equity.

**8.5** The Contractor agrees that ten percent (10%) of the amount due for Work performed under a subcontract under each Request for Payment may be retained by Owner until Final Payment. If the Contractor has furnished Bonds in accordance with Section 13 and the Contractor is performing satisfactorily when fifty percent (50%) of the Work has been completed, Owner may, at its sole discretion, elect to reduce the amount retained. Contractor further agrees that ten percent (10%) of the amount due, by segment, for self-performed Work, under each Request for Payment may be retained by Owner until Final Payment. Owner may, but shall not be obligated to, request consent of the Contractor’s surety to such reduction. Notwithstanding the foregoing, Owner may make payments to the Contractor sufficient to allow the Contractor to make payment to a Subcontractor of the Subcontractor’s retainage in full when satisfactory evidence is provided to Owner that: (1) all of Subcontractor’s Work is complete; (2) all necessary waivers of lien have been provided; and (3) all of Subcontractor’s laborers, suppliers and subcontractors have been paid. However, the Contractor shall remain liable for Subcontractor’s Work and for any unpaid laborers, material suppliers or subcontractors of Subcontractor in the event it is later discovered that said Work is deficient or that any of said laborers, material suppliers or subcontractors did not receive payments due them on the Project.

**8.6** Thirty (30) days after Final Completion of the Work and acceptance thereof by Owner or as soon thereafter as possible, the Contractor shall submit a final request for payment (“Final Request”) which shall set forth all amounts due and remaining unpaid to the Contractor and upon approval thereof by Owner, Owner shall pay to the Contractor the amount due under such Final Request (“Final Payment”) within thirty (30) days of receipt.

**8.7** The Final Payment shall be made only after the Contractor’s delivery to Owner of complete releases of all liens or lien rights signed by all Subcontractors on the form of Final Waiver of Liens attached hereto as Exhibit E (the “Final Waiver of Liens”). The Contractor may, if any Subcontractor refuses to furnish a Final Waiver of Liens, furnish a bond satisfactory to Owner to defend and indemnify Owner and any other property owner, person or entity Owner may be required to indemnify against any lien or claim. In addition, and as a condition precedent to Owner’s obligations to make Final Payment, the Contractor shall execute and deliver to Owner a Certificate of Final Completion on the form attached hereto as Exhibit F and a Final Waiver of Liens of the Contractor on the form attached hereto as Exhibit E.

**8.8** Any provision hereof to the contrary notwithstanding, Owner shall not be obligated to make any payment to the Contractor if any one or more of the following conditions exists:

(1) The Contractor is in default of any of its obligations under any of the Contract Documents or is in default of any other obligation owed by Contractor to Owner under this Agreement or any other agreement or transaction between the Contractor and Owner in connection with the Project;

(2) Any part of such payment is attributable to Work, which is defective or not performed in accordance with the Drawings, Specifications, and Addenda;

(3) The Contractor has failed to make payments promptly to any Subcontractor or for material or labor used in the Work for which Owner has made payment to the Contractor; or

(4) If Owner, in its good faith judgment, determines that the portion of the Contract Sum then remaining unpaid will not be sufficient to complete the Work in accordance with the Contract Documents, whereupon no additional payments will be due the Contractor hereunder unless and until the Contractor, at its sole cost, performs a sufficient portion of the Work so that such portion of the Contract Sum then remaining unpaid is determined by Owner to be sufficient to so complete the Work.

**8.9** The Contractor shall use the sums advanced to it pursuant to this Article 8 solely for the purpose of performance of the Work and the construction, furnishing, and equipping of the Work in accordance with the Contract Documents and payment of bills incurred by the Contractor in performance of the Work. Included with the submission of each Request for Payment, beginning with the second Request for Payment, the Contractor shall furnish to Owner a Contractor’s Partial Waiver of Liens on the form attached hereto as Exhibit G and a certified statement accounting for the disbursement of funds received from Owner. Such statement shall itemize all disbursements to Subcontractors and vendors. The Contractor shall also provide a Subcontractor’s Partial Waiver of Liens from each Subcontractor or vendor on the form attached hereto as Exhibit G for an amount at least equal to the aggregate amount paid to each such party through the date of the preceding Request for Payment. As a condition to the receipt of Final Payment, all such parties shall submit a full and final waiver and release of mechanic’s lien rights for all sums due under their respective subcontract, purchase order or other agreement. However, no provision hereof shall be construed to require Owner to see to the proper disposition or application of the monies so advanced to the Contractor.

**8.10** The Contractor shall promptly pay all bills for labor and material performed and furnished by its Subcontractors in connection with the construction, furnishing and equipping of the Work and the performance of the Work. The Contractor shall not make any payment to any Subcontractor until such Subcontractor submits a Subcontractor’s Partial Waiver of Liens on the form attached hereto as Exhibit G for an amount equal to the aggregate amount paid to such party prior to, and including, the current payment.

**8.11** Concurrently with the Final Request for Payment, the Contractor shall furnish to Owner, if requested by Owner, final surveys showing the exact locations of all lines installed by Contractor. Such surveys shall be prepared by a licensed surveyor who shall certify that the Work is installed and erected entirely upon the Project location and within the authorized boundaries and does not overhang or encroach upon any unauthorized easement or right-of-way.

# **Allowances**

The amounts listed as Allowances in Exhibit M (the “Allowances”) are included in the Contract Sum. Allowances shall cover the cost to the Contractor of Materials delivered at the Project Location and all required taxes, less applicable trade discounts. The Contractor’s costs for loading and transporting Materials stored at Owner’s or Owner’s agent’s warehouse (pursuant to 3.2), unloading and handling at the Project Location, labor, overhead, profit and other expenses contemplated for the stated Allowance are not in the Allowance amount, but are included in the Contract Sum unless stated otherwise. From time to time after commencement of the performance of the Work, Owner shall cause the Drawings, Specifications, and Addenda for the Allowances, or for portions thereof, to be prepared and delivered to the Contractor. If actual costs for providing the Materials subject to an Allowance are less than the amounts shown in Exhibit M, then the Contract Sum shall be reduced by the amount of the Allowance not expended. If the actual costs for providing the Materials subject to an Allowance exceed the amounts set forth in Exhibit M, then the Contract Sum shall be increased to such extent. The Contractor shall not perform Work subject to an Allowance without Owner’s prior written approval, if the cost of performing Work subject to an Allowance will exceed the amounts set forth in Exhibit J.

# **Subcontracts and Purchase Orders**

**10.1** Within thirty (30) calendar days after execution of the Agreement, the Contractor shall prepare and submit for Owner’s approval the names of the persons or entities proposed by the Contractor to furnish Materials or services for each portion of the Work. The Contractor shall contract solely in its own name and behalf, and not in the name or behalf of Owner, with the selected subcontractor or supplier. The Contractor’s subcontract form shall be subject to approval of Owner and shall provide that the Subcontractor shall perform its portion of the Work in accordance with all applicable provisions of this Agreement and the other Contract Documents, that Subcontractor is bound to the Contractor to the same extent as the Contractor is bound to Owner, shall provide for termination of the Subcontract by the Contractor in the same manner and method as provided in Article 34 of this Agreement, and shall further provide that, in the event this Agreement is terminated for any reason, that the Subcontractor shall, at Owner’s option, perform its subcontract for Owner, or for a contractor designated by Owner, without additional or increased cost, provided the Subcontractor is paid in accordance with its subcontract. Nothing contained herein shall, however, create any obligation on Owner to assume any subcontract or make any payment to any Subcontractor unless Owner chooses to request Subcontractor to perform pursuant to this Section and nothing contained herein shall create any contractual relationship between Owner and any Subcontractor.

**10.2** The Contractor shall not contract with any Subcontractor to whom Owner has made reasonable objection. If Owner shall designate as the selected Subcontractor or supplier a bidder whose bid exceeds that of the bidder recommended by the Contractor, whose bid complies with the Drawings, Specifications, and Addenda, the Contract Sum shall be increased by the amount by which the bid of the designated Subcontractor exceeds the bid of the bidder recommended by the Contractor.

**10.3** All subcontracts shall, so far as practicable, contain unit prices and any other feasible formula for use in determination of the cost of changes in the Work.

**10.4** This Agreement is subject to subpart C of 2 CFR part 180, “OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement).” In addition, applicants/bidders for a lower tier covered transaction for a subaward, contract, or subcontract greater than $100,000 of Federal funds at any tier are subject to 15 CFR part 28, “New Restrictions on Lobbying.” Prior to the provision of any Materials or services or the performance of any Work, Contractor shall, for each Subcontractor, submit to Owner an executed Certificate Regarding Debarment, Suspension, and Other Responsibility Matters (“Debarment Certificate”) as set forth in Exhibit Q.

# **Insurance**

**11.1** The Contractor shall provide insurance of the type and on the terms and conditions as specified in Exhibit I. The cost of this insurance shall be included in the Contract Sum.

**11.2** Owner shall have the option to provide at its own expense and for the mutual benefit of Owner, the Contractor, all Subcontractors and Sub-subcontractors any or all of the insurance specified in Exhibit I. In the event that Owner shall provide said insurance, the premium cost should not be included in the Contract Sum.

# **Indemnity**

To the fullest extent permitted by law, the Contractor shall indemnify, defend with acceptable counsel, reimburse, and hold harmless Owner, Owner’s Representative, Design Vendor, Owner’s officers, directors, members, managers, agents and employees (collectively, the “Owner Indemnified Parties”) from and against any and all claims, demands, actions, causes of action, judgments, damages, losses, costs, expenses, and liabilities of every kind, including, without limitation, expenses of litigation, court costs, punitive damages and attorneys’ fees (collectively, “Claims”), which arise from the acts or omissions of Contractor regarding the Project, any Subcontractor or supplier of Contractor (regardless of tier), any agent or employee of Contractor, any agent or employee of any Subcontractor or suppliers of Contractor, or anyone else for whose acts and omissions Contractor is responsible (collectively, the “Contractor Responsible Parties”), but only to the extent caused by the negligence or other legal fault of Contractor of one of the Contractor Responsible Parties. In no event shall Contractor be required to indemnify, defend reimburse, or hold harmless Owner or the other Owner Indemnified Parties with respect to Claims, which arise from the negligence or other legal fault of the Owner or the Owner Indemnified Parties.

# **Surety Bond**

Unless waived in writing by Owner prior to execution of this Agreement, the Contractor shall obtain and thereafter at all times during the performance of the Work maintain a separate performance bond and labor and material payment bond (collectively referred to herein as the “Bonds”) each in an amount equal to one hundred percent (100%) of the Contract Sum and each in the form attached hereto as Exhibits J and K, respectively, or in other form satisfactory to Owner. The surety providing such Bonds must be licensed, authorized and admitted to do business in the State of North Carolina and must be an U.S. Treasury listed surety company acceptable to Owner. The cost of the premiums for such Bonds shall be included within the Contract Sum.

# **Independent Contractor**

In performing its obligations hereunder, the Contractor shall be deemed an independent contractor and not an agent or employee of Owner, or other relationship of any kind. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, safety precautions and programs, and for coordinating all portions of the Work under this Agreement, unless the Contract Documents give other specific instructions concerning these matters. Contractor’s employees, agents or representatives performing Work under this Agreement shall at all times be under Contractor’s direction and control. Contractor shall pay all wages, salaries, and other amounts due its employees, agents or representatives in connection with this Agreement and the Project and shall be responsible for all reports and obligations for its employees, agents or representatives, including, but not limited to, social security and income tax withholdings, unemployment compensation, worker’s compensation, and all equal employment opportunity requirements (e.g., reporting).

# **Inspection and Audit**

**15.1** The Contractor represents that it has inspected the location or locations of the Work and has satisfied itself as to the condition thereof and that the Contract Sum is just and reasonable compensation for all Work, including all foreseen or foreseeable risks, hazards, and difficulties in connection therewith.

**15.2** Owner, the Design Vendor, and the representatives of the foregoing parties at all times shall have access to the Work for inspection thereof, but shall not be obligated to conduct any such inspections, and for all other reasonable purposes. The Contractor shall provide proper and safe facilities for such access and inspection by Owner and Design Vendor. If any of the Work is required to be inspected or approved by any public authority, the Contractor shall cause such inspection or approval to be performed.

**15.3** No inspection performed or failed to be performed by Owner or the Design Vendor hereunder shall be a waiver of any of the Contractor’s obligations hereunder or be construed as an approval or acceptance by Owner of the Work or any part thereof.

**15.4** Owner shall have access to the Work and the right to audit at any time all of the Contractor’s files, correspondence, instructions, drawings, calculations, contracts, receipts, memoranda, daily journals, computer records, payroll information, bid documents, books, records, correspondence, payment records, vouchers and other materials (collectively, the “Records”) relating to the Work, and the Contractor and all Subcontractors shall preserve all such Records for a period of ten (10) years after the Final Payment. Owner’s audit rights shall be applicable to all Subcontractors. Contractor shall be responsible for insuring that Subcontractors maintain such Records and allow such access. The Contractor hereby grants to Owner the authority to enter its premises for the purpose of such inspection and audit.

**15.5** Contractor acknowledges that the funds for the Project are provided under the American Recovery and Reinvestment Act, Public Law No. 111-5, as implemented by 2 C.F.R. Part 176, Subpart B (the “Recovery Act”). As a recipient of Recovery Act funds, Owner is required to report bi-annually certain information, including job estimates. Contractor agrees to supply Owner with required information for both Contractor and all Subcontractors, including, but not limited to, total hours worked, titles of each job position, and a breakout of newly created job positions and retained job positions, on or prior to deadlines set by Owner. Additionally, Contractor shall supply Owner with Occupational Safety and Health Administration logs/reports for the Project. Owner currently anticipates that required information will need to be submitted to Owner by Contractor for each biannual reporting period, on or before the following submission dates:

| Bi-annual Reporting Deadlines | Contractor Submission Dates |
| --- | --- |
| Mar.31 | Apr. 5 |
| Sept. 30 | Oct. 5 |

If a specified Contractor Submission date falls on a weekend or holiday, Contractor shall submit the required information to Owner prior to the weekend or holiday. In addition to the reporting requirement above, Owner will require that Contractor provide daily crew location reports and weekly wage/labor reports.

# **Liens**

Contractor shall promptly pay amounts due and owing to its Subcontractors. If any lien is filed by a Subcontractor (or lower-tier subcontractor or supplier of a Subcontractor), Contractor agrees to cause such lien to be released and discharged within 15 calendar days, or to provide Owner with a bond, which shall be in form and substance satisfactory to Owner. In the event Contractor fails to comply with the requirements of this Article 16, Owner shall have the right, but not the obligation, to pay all sums necessary to obtain such release and to deduct all amounts that are paid from any monies otherwise due Contractor hereunder or to require Contractor to reimburse Owner. Contractor expressly subordinates to the holder of any lender or mortgage lien holder on the Work, Project or the property of Owner, any lien that Contractor may now or at any time hereafter have or obtain (whether arising out of or related to Contractor’s performance under this Agreement or otherwise). Contractor shall execute and deliver to Owner’s lender and Owner’s title insurance company, promptly upon the request of Owner, a Lien Subordination Agreement in the form of Exhibit H attached hereto or such similar form as may be required by such lender or title insurance company. Furthermore, each agreement with each Subcontractor must contain a provision to the same effect as the foregoing, whereby each such Subcontractor subordinates any and all lien rights such Subcontractor may now or at any time hereafter have or obtain against the Work or the Property or the property of Owner. Contractor hereby agrees to, upon Owner’s request from time to time, sign and deliver to Owner waivers of lien in form and substance acceptable to Owner covering all Work for which Contractor has received payment from Owner.

# **Title to Work**

Immediately upon delivery of material to the Project Location or the performance of any part of the Work, as between the Contractor and Owner, title thereto shall vest in Owner; provided, however, the vesting of such title shall not impose any obligations on Owner or relieve the Contractor from any of its obligations hereunder.

# **Work in Progress**

**18.1** The Contractor shall protect and prevent damage to all phases of the Work, and any existing facilities or improvements, including but not limited to the protection thereof from damages by the elements, theft, or vandalism.

**18.2** The Contractor acknowledges and agrees that a National Telecommunications and Information Administration approved Environmental Assessment was prepared for this Project; the design, routes, maps and drawings comply with the Environmental Assessment; the Contractor’s Work will comply with the Environmental Assessment; and Contractor has received a copy of the Environmental Assessment. Contractor’s omission of Environmental Assessment requirements shall not relieve Contractor’s responsibility for compliance.

**18.3** Owner reserves the right to perform work related to the Project with their own personnel and to award separate contracts in connection with other portions of the High-speed Economics for Rural Opportunities (“HERO”) Project. The Contractor shall cooperate and coordinate its Work with the work of Owner or said separate contractors. The Contractor shall afford Owner and any of such separate contractors reasonable access to the Project Location and the Work for storage of material and equipment and for the prosecution of their work and shall connect and coordinate its Work with theirs as is reasonably inferable from the Contract Documents.

# **Hazardous Substances**

**19.1** The Contractor agrees that it shall not transport to, use, generate, dispose of, or install at the Project Location any Hazardous Substances, except in accordance with applicable Environmental Laws. Further, in performing the Work, the Contractor shall not cause any release of Hazardous Substances into, or contamination of, the environment, including the soil, the atmosphere, any water course or ground water, except in accordance with applicable Environmental Laws. In the event the Contractor engages in any of the activities prohibited in this Section, to the fullest extent permitted by law, the Contractor hereby indemnifies and holds harmless Owner Indemnified Parties from and against any and all Claims arising out of, incidental to or resulting from the activities prohibited in this Section.

**19.2** In the event the Contractor encounters on the Project Location any Hazardous Substance, or what the Contractor reasonably believes to be a Hazardous Substance, and which is being introduced to the Work, or exists on the Project Location, in a manner in violation of any applicable Environmental Laws, the Contractor shall immediately stop Work in the area affected and report the condition to Owner and the Design Vendor in writing. The Work in the affected area shall not thereafter be resumed except by written authorization of Owner if in fact a Hazardous Substance has been encountered and has not been remediated and/or rendered harmless. In the event the Contractor fails to stop the Work upon encountering a Hazardous Substance at the Project Location, to the fullest extent permitted by law, the Contractor hereby indemnifies and holds harmless Owner Indemnified Parties from and against all Claims arising out of, incidental to, or resulting from the Contractor’s failure to stop the Work.

**19.3** The Contractor’s sole and exclusive remedy for any delay arising out of the encountering and/or rendering harmless of any Hazardous Substance at the Project Location shall be (i) an extension of the Contract Time plus (ii) payment to the Contractor of a reasonable sum to cover the Contractor’s direct field supervision costs that result from such delay. Owner and the Contractor may enter into an agreement for the Contractor to remediate and/or render harmless the Hazardous Substance, but the Contractor shall not remediate and/or render harmless the Hazardous Substance absent such agreement. Contractor shall not be required to resume Work in any area affected by the Hazardous Substance until such time as the Hazardous Substance has been remediated and/or rendered harmless.

**19.4** For purposes of this Agreement, the term “Hazardous Substance” shall mean and include, but shall not be limited to, any element, constituent, chemical, substance, compound, or mixture, which is defined in or included under or regulated by any local, State, or federal law, statute, ordinance, code, executive order, rule, regulation and any other legal requirements pertaining to environmental regulation, contamination, clean-up or disclosure (all such laws, rules and regulations being referred to collectively as “Environmental Laws”). It is the Contractor’s responsibility to comply with this Section based on the law in effect at the time its Work is performed and to comply with any amendments to those Environmental Laws for all Work performed after the effective date of any such amendments. Without limiting in any manner Contractor’s responsibilities under this Section, it is agreed that Contractor shall be responsible for the preparation and filing of a storm water pollution prevention plan to the extent such a plan is required under Environmental Laws.

**19.5** If Owner believes that Hazardous Substances may have been located, generated, manufactured, used or disposed of on or about the Project Location by the Contractor or any of its employees, agents, Subcontractors or invitees, Owner may have environmental studies of the Project Location conducted as it deems appropriate, and the Contractor shall be responsible for the cost of such studies to the extent it is determined that such Contractor, Subcontractor or invitees are responsible for the presence of such Hazardous Substances.

**19.6** Prior to any activity on the Project Location, Owner shall approve the plans for activities on any portion of the Project Location identified by Owner and Contractor as a High Use Area. A “High Use Area” includes any area of the Project Location used for equipment storage, batching plants, roads, parking lots and any other activity that could reasonably be expected to involve the placement or discharge of foreign materials on the Project Location. Upon the abandonment of any High Use Area, Contractor shall clean such abandoned area to the satisfaction of Owner (including such testing as Owner shall request). When Owner is satisfied with such cleanup, the Contractor shall replace the topsoil on the cleaned areas to a uniform depth of at least six inches upon request by Owner.

# **Compliance with Laws**

**20.1** The Contractor shall notify Owner in writing of all conflicts between the Contract Documents, Contractor’s operations and/or performance of the Work and any and Laws and Regulations, that come to the attention of the Contractor or should have come to the Contractor’s attention with the exercise of due care. If the Contractor performs any of the Work knowing, or when with the exercise of due care the Contractor should have known, it to be contrary to Laws and Regulations and fails to give Owner written notice thereof prior to Contractor’s performance, the Contractor shall bear all costs, liabilities, and expenses arising therefrom.

**20.2** Owner will obtain all North Carolina Department of Transportation (“NCDOT”), municipalities, railroad permits, easements, and individual rights-of-way.. The Contractor shall be responsible for obtaining all necessary construction permits, licenses, fees, building and other permits, and similar authorizations, from, and the payment of all associated fees to, governmental authorities required or necessary to perform its obligations hereunder, including the required railroad insurance and NCDOT bonds, and giving all notices required by governmental authorities.

**20.3** Without limiting Contractor’s other obligations set forth in this Agreement, Contractor is responsible for adopting its own safety program for maintaining work safety at the Project Location.

**20.4** Contractor agrees that Contractor shall comply with the requirements of the American Recovery and Reinvestment Act §1605, with all applicable Federal, state, and local Laws and Regulations, to the extent applicable, including but not limited to: the requirements of the Department of Commerce, National Telecommunications Information Administration Notice of Funding Opportunity (NOFO) No. NTIA-MMG-2-2022, Middle Mile Grant Program, dated May 13, 2022; the Infrastructure Investment and Jobs Act, 2021, Pub. L. No. 117-58, 135 Stat. 429 (Nov. 15, 2021) (IIJA) including the Build America, Buy America Act, Pub. L. No. 117-58, §§ 70901-52 (BABA)

**20.5** To the extent applicable, the Contractor shall comply with the requirements of Recovery Act §1605 for the Buy American requirement, as implemented by 2 CFR Part 176 Subpart B unless The U.S. Department of Commerce (DoC) waives the application of this provision.

Any subletting or subcontracting by vendor subjects such subcontractors to the same provisions. Contractor is hereby notified that it is required to purchase American-made equipment and products with funding provided under this Agreement.

# **Personnel**

**21.1** All personnel used or employed by the Contractor in the performance of the Work shall be qualified by training and experience to perform their assigned tasks and shall be legally eligible to work in the United States. At the request of Owner, the Contractor shall not use in the performance of the Work any personnel deemed by Owner to be incompetent, careless, unqualified to perform the Work assigned to such personnel, or otherwise unsatisfactory to Owner.

**21.2** The Contractor agrees that in the performance of the Work called for by this Agreement, it will employ only such labor, and engage Subcontractors that employ only such labor, as will not delay or interfere with the speedy and lawful progress of the Project, and as will be acceptable to and work in harmony with all other workmen employed on the Project Location. The Contractor agrees that it shall not employ any labor that will interfere with labor harmony at the Project Location or with the introduction and storage of materials and the execution of work by other contractors or by subcontractors.

**21.3** In the event of a strike or stoppage of Work resulting from a dispute involving or affecting the labor employed by the Contractor or any of its Subcontractors, Owner may, at its option and without demand, terminate this Agreement for default unless the Contractor shall remedy the strike or work stoppage or other disruption within three (3) business days after the dispute arises.

**21.4** Contractor shall furnish Owner, on request, resumes of Contractor’s key personnel involved in the day-to-day Work on the Project.

**21.5** Contractor agrees to pay all laborers and mechanics employed by Contractor on the Project not less than the prevailing wage determined under the “Davis-Bacon Act” (40 U.S.C. 276a-a5) for similar work in the civil subdivision for which the laborers and mechanics perform the Work and set forth in Exhibit R. In addition, to the extent applicable, Contractor shall pay all laborers and mechanics overtime compensation in accordance with the provisions of the “Contract Work Hours and Safety Standards Act” (40 U.S.C. 327-333). Contracts for amounts over $100,000 that are covered by the Davis-Bacon Act must include additional standard clauses (also appearing in 29 C.F.R. § 5.5) providing, among other things, that overtime for laborers and mechanics must be paid at a rate 1.5 times the basic rate of pay for time worked in excess of 40 hours per week. In addition, the DOL Davis-Bacon poster (WH–1321) must be prominently posted at the site of the work. Refer to: [www.dol.gov/whd/regs/compliance/posters/fedprojc.pdf](http://www.dol.gov/whd/regs/compliance/posters/fedprojc.pdf). Contractor also agrees to comply with all regulations issued pursuant to the above referenced Acts. Contractor agrees to require each Subcontractor to comply with provisions set out in this section 21 together with the above Acts and regulations issued pursuant to the above referenced Acts to the extent such Acts are applicable. Owner shall have the right to audit this information as set out in Section 15.4.

21.6 Pursuant to G.S. 143-48.5 and G.S. 143-133.3, Contractor and its subcontractors, will comply with the requirements of Article 2 of Chapter 64 of the NC General Statutes, including the requirement for each employer with more than 25 employees in North Carolina to verify the work authorization of its employees through the federal E-Verify system." E-Verify System Link: [www.uscis.gov](http://www.uscis.gov). Prior to performing any work, Contractor must complete Exhibit R or a form similar certifying the compliance with E-Verify.

21.7 Contractor understands and agrees that MCNC's Code of Ethics policy has a strictly enforced requirement that MCNC and its staff are prohibited from accepting any favors or gratuities from contractors, potential contractors, sub-agreement parties, or from anyone that could potentially be involved in any aspect of MCNC's business.

# **Contractor’s Warranties**

The Contractor represents and warrants:

**22.1** That it is financially solvent, able to pay its debts as they mature, and is possessed of sufficient working capital to perform this Agreement; that it is able to furnish the Materials; that it is experienced in and competent to perform the Work contemplated by this Agreement; and that it is qualified to do the Work herein and is authorized to do business in the State of North Carolina;

**22.2** That it holds a license, permit or other special license to perform the Work included in this Agreement, as required by Laws and Regulations, or employs or works under the general supervision of the holder of such license, permit or special license; and

**22.3** That the Work shall be constructed in a good and workmanlike manner, free from defects, and in strict compliance with the Contract Documents and all applicable Laws and Regulations

22.4 In addition, in accordance with The Iran Divestment Act of 2015, G.S. 147-86.55 *et seq*., by executing this Agreement, Contractor certifies that it (1) is not identified on the Final Divestment List of entities that the State Treasurer has determined engages in investment activities in Iran; (2) shall not utilize on any contract with the State agency any subcontractor that is identified on the Final Divestment List; and (3) that the person signing the Agreement is authorized by the Contractor to make this Certification.

# **Defects**

**23.1** The Contractor shall (i) replace any parts of the Work that fail to conform with the requirements of this Agreement and the Contract Documents that appear during progress of the Work on the Project; (ii) remedy any defects in the Work due to faulty materials or workmanship that appear within a period of one (1) year from the time of Final Completion of the Work hereunder or within such longer period of time as may be set forth in the Drawings, Specifications, and Addenda or other Contract Documents or as may be required by Laws and Regulations; and (iii) replace, repair or restore any parts of the Project or equipment or other items placed therein (whether by Owner or any other party) that are injured or damaged by any such parts of the Work that do not conform to the requirements of this Agreement or are due to defects in the Work. The provisions of this Article apply to Work performed by employees of the Contractor. The provisions of this Article shall not apply to corrective work attributable solely to the acts or omissions of any separate contractor or subcontractor of Owner. The Contractor’s responsibility to make repairs or redo Work under this Article is in addition to the Contractor’s responsibility to Owner for any other damages of any kind for which the Contractor would be legally responsible.

**23.2** If Owner and the Contractor deem it inexpedient to require the correction of Work damaged or not performed in accordance with the Contract Documents, an equitable deduction from the Contract Sum shall be made by agreement between the Contractor and Owner. Until such settlement, Owner may withhold such sums as Owner deems just and reasonable from monies, if any, due the Contractor. If no monies are held by Owner, reimbursement shall be made by the Contractor to Owner within thirty (30) calendar days of Owner’s written request.

**23.3** The Contractor’s express warranty herein shall be in addition to, and not in lieu of, any other warranties or remedies Owner may have under this Agreement, at law, or in equity for defective Work.

# **Signage**

**24.1** All construction signage, including, but not limited to, that appearing on construction vehicles and equipment located at the Project Location, shall be supplied by Owner. The Contractor will display signage and maintain it in good condition, throughout the construction period of this MMG grant. One or more signs for each job site will be provided. Signs must be satisfactory to MCNC and the NTIA and must identify the Project and indicate that the Project is federally funded. At each Project Location, Contractor must provide pictures of all signage to Owner documenting the date, time and Project Location. The Contractor recognizes that all signage may be disallowed, in Owner’s sole discretion, and that pre-existing signage or advertising on construction equipment, field offices, trailers, construction fences, etc. may be required to be replaced, masked or deleted, all at no cost or expense to Owner.

**24.2** Contractor acknowledges that Contractor is responsible for constructing, erecting, and maintaining in good condition throughout the construction period a sign(s) satisfactory to Owner and the National Telecommunications and Information Administration that identifies the Project and indicates that the Project is federally funded. Contractor also acknowledges that the National Telecommunications and Information Administration may require a permanent plaque or sign with the same or similar information and that projects funded by the Recovery Act must display signage that features the primary emblem of the Recovery Act throughout the construction phase and that the signage must be displayed in a prominent location as determined by Owner. The primary emblem must be displayed at a size at least six inches in diameter. Contractor shall make a reasonable effort to display satisfactory signage on all construction vehicles and equipment at the Project Location. However, if Contractor makes a reasonable effort and is unable to display signage on all construction vehicles and equipment, a minimum of two construction vehicles and equipment must display satisfactory signage. Contractor may be required to follow additional instruction regarding signage specifications by the agency awarding the funds.

**24.3** Contractor acknowledges that Contractor is responsible for properly posting all required Fair Labor Standards Act, Davis-Bacon Act, Whistleblower provisions (including notice of employees’ rights and remedies for whistleblower protections provided under section 1553 of the ARRA of 2009 Pub. L. 111-5) and any other federally required posters concerning labor and wages.

# **Confidentiality**

**25.1** The Contractor shall treat all information relating to the Project and all information supplied to the Contractor by Owner or the Design Vendor as confidential and proprietary information of Owner and shall not permit its release to unauthorized third parties or make any public announcement or publicity releases or use same in any promotional or professional materials without Owner’s written authorization. The Contractor shall also require Subcontractors and material suppliers to comply with this requirement.

**25.2** Contractor will not use any information concerning the Project or any information developed or discovered in connection with the performance of Contractor’s obligations under this Agreement to compete, directly or indirectly, with Owner. Contractor will not undertake any action which would allow Contractor or a third party to place cable, concurrently or subsequently, at the Project Location.

**25.3** Contractor warrants that Contractor is not employed or retained by any company or persons that could in any way result in a conflict of interest between Contractor’s duties to such company or persons and the duties owed to Owner. Should circumstances change such that Contractor breaches or thinks there is a possibility of a breach of the warranty contained in this Section, then Contractor shall immediately notify Owner and suspend further activities under this Agreement until Owner provides Contractor with written notice to resume Work. Owner is entitled to treat such an event as a material breach of this Agreement.

**25.4** The covenants and warranties contained in this Article shall survive the termination, expiration or satisfactory completion of this Agreement.

# **Ownership of Contract Documents**

All Drawings and Specifications prepared in connection with the Project are and shall remain the property of Owner and are not to be used by the Contractor on any other project and shall be relinquished to Owner at termination or Final Completion, provided, however, that at Final Completion, Contractor may maintain one record set of as-built drawings.

# **Representatives**

**27.1** Owner’s Representative shall be Owner’s representative on the Project unless and until Owner notifies the Contractor in writing that some other person shall be Owner’s Representative. Owner’s Representative is authorized to recommend approval of changes and increases or decreases in the Contract Sum, but Contract Documents changes shall be binding on Owner only if signed by an authorized employee or a corporate officer of Owner.

**27.2** The name of the party who is to be the “Contractor’s Representative” is shown in the Project Summary. Unless a corporate officer of the Contractor advises Owner, in advance and in writing, of any limitations on the authority of Contractor’s Representative, Contractor’s Representative shall have full authority to execute any and all instruments requiring the Contractor’s signature and to act on behalf of the Contractor with respect to all matters arising out of this Agreement.

# **Assignment**

The Contractor shall not assign this Agreement in whole or in part without the written consent of Owner; nor shall the Contractor assign any monies due or to become due to it hereunder, without the previous written consent of Owner. Owner may assign this Agreement in its sole discretion.

# **Nondiscrimination**

The Contractor agrees that it will not knowingly violate any applicable Laws and Regulations prohibiting discrimination concerning the solicitation for and employment in connection with the performance of its Work under this Agreement. Contractor shall expressly cite its nondiscriminatory employment practices. As applicable, Contractor will include these nondiscriminatory employment practice requirements in subcontracts and/or purchase orders. Further, pursuant to applicable Laws and Regulations. The Contractor shall comply with the Whistleblower Protection requirements of the American Recovery and Reinvestment Act (Recovery Act), Section 553 of the Division A, Title XV, Public Law 111-5 (for more information, see Office of Inspector General - U.S. Department of Labor - Whistleblowers Form (dol.gov).

29.1 Pursuant to 2 CFR § 200.321, Contractors must take all necessary affirmative steps (as described in 2 CFR § 200.321) to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible. Contractors are to identify the extent to which Small Businesses (SBs), Veteran-Owned Small Businesses (VOSBs), Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), HUBZone Small Businesses, Small Disadvantaged Businesses (SDBs) Woman-Owned Small Businesses (WOSBs), Historically Black Colleges/Universities or Minority Institutions (HBCU/MIs), Minority-Owned Businesses (MOBs), or Local (North Carolina) Businesses (LBs) would be utilized in the performance of this proposed contract. If Small Business, Minority and/or Local Businesses are utilized for the Work, Contractor agrees to provide the names of such entities used, description of Work performed, and total dollars paid for the Work provided by such entities.

29.2 The Contractor agrees that it will not knowingly violate any applicable Laws and Regulations prohibiting discrimination concerning the solicitation for and employment in connection with the performance of its Work under this Agreement. Contractor shall expressly cite its nondiscriminatory employment practices. As applicable, Contractor will include these nondiscriminatory employment practice requirements in subcontracts and/or purchase orders. Further, pursuant to applicable Laws and Regulations, Contractor agrees that it shall comply with the Whistleblower Protection requirements. If Small Business, Minority and/or Local Businesses are utilized for the Work, Contractor agrees to provide the names of such entities used, description of Work performed, and total dollars paid for the Work provided by such entities. Contractor shall comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), The Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), and Department of Commerce implementing regulations published at 15 C.F.R. Part 8b, The Age Discrimination Act of 1975, as amended (42 U.S.C. § 6101 et seq.), and Department of Commerce implementing regulations published at 15 C.F.R. Part 20, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq and any other applicable non-discrimination law(s), including, Parts II and III of Executive Order 11246, Equal Employment Opportunity (30 Fed. Reg. 12319), Executive Order 13166 and Executive Order 13798.

# **Waiver**

No consent or waiver, express or implied, by either party to this Agreement to or of any breach or default by the other in the performance of any obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other or future breach or default by such party hereunder. Failure on the part of any party hereto to complain of any act or failure to act of the other party or to declare the other party in default hereunder, irrespective of how long such failure continues, shall not constitute a waiver of the rights of such party hereunder. Inspection by, payment by, or tentative approval or acceptance by Owner, or the failure of Owner to perform any inspection hereunder shall not constitute a final acceptance of the Work or any part thereof and shall not release the Contractor from any of its obligations under this Agreement.

# **Construction of Terms**

Unless the context clearly intends to the contrary, words singular or plural in number shall be deemed to include the other and pronouns having a masculine or feminine gender shall be deemed to include the other. The term “person” shall be deemed to include an individual, corporation, unincorporated organization, partnership, trust, government and governmental agency or subdivision, as the context shall require.

# **Captions**

The captions used for the Articles in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of the intent of this Agreement or any Article hereof.

# **Entire Agreement; Severability; Amendments**

The Contract Documents constitute the entire agreement between the parties hereto with respect to the matters covered thereby. All prior negotiations, representations and agreements with respect thereto not incorporated in such Contract Documents are hereby canceled. This Agreement can be modified or amended only by a document duly executed on behalf of the parties hereto. In the event any provision of the Contract Documents shall be determined to be illegal, invalid or otherwise unenforceable, the remainder of this Agreement shall not be affected thereby and each remaining provision, term, covenant or condition of the Contract Documents shall be enforced to the fullest extent permitted by law.

# **Termination**

**34.1** Owner shall have the right at any time, on not less than two (2) business days’ notice to the Contractor, to terminate this Agreement without cause and/or for Owner’s convenience. Upon receipt by the Contractor of such notice of termination (the “Date of Termination”), the Contractor shall immediately discontinue the Work and remove its equipment and employees from the Project Location. In the event of termination under this Section, the Contractor shall have the right, as its sole and exclusive remedy, to recover from Owner payment for Work satisfactorily performed to the Date of Termination (less any payment made to the Contractor by Owner). In addition, without terminating this Agreement as a whole, Owner may, for convenience, terminate a portion of this Agreement (by reducing, in such manner as Owner deems appropriate, the scope of the Work to be performed by the Contractor), in which event such termination of a portion of this Agreement shall be treated as a reduction in the scope of the Work, to which as equitable reduction shall be made to Contract Sum.

**34.2** In addition to Owner’s right to terminate this Agreement for default under the terms of Section 21.2 and elsewhere in this Agreement, if the Contractor shall fail to commence the Work in accordance with the provisions of this Agreement; fail to perform the Work to completion thereof in a diligent, efficient, workmanlike, skillful and careful manner and in strict accordance with the provisions of the Contract Documents; fail to use an adequate quantity or quality of personnel, equipment, or Material to complete the Work within the Contract Time; fail to perform any of its obligations under the Contract Documents; be adjudged a bankrupt; make a general assignment for the benefit of its creditors; permit a receiver to be appointed on account of its insolvency; otherwise become insolvent; or fail to make prompt payments to its Subcontractors, Owner shall have the right, on forty-eight (48) hours’ written notice thereof to the Contractor, to terminate this Agreement.

In the event of termination under this Section, Owner shall notify the Contractor’s surety, and the Contractor’s surety shall take over and perform this Agreement. The Contractor’s surety shall continue to perform, on at least an interim basis, until such time as it makes other satisfactory arrangements for completion pursuant to its Bond obligations. If the Contractor’s surety does not commence performance with adequate quantity and quality of personnel, equipment, and material to maintain the Contract Time, within five (5) calendar days from the date of receipt of such notice of termination, Owner may, without further notice to the Contractor or its surety, take possession of and use, without any rental obligation to the Contractor or any third party, all or any part of the Contractor’s Materials and other property of every kind used by the Contractor in the performance of the Work and use such property in the completion of the Work, and complete the Work with its own forces or by engaging the services of other parties therefor. Any such act by Owner shall not be deemed a waiver of any other right or remedy of Owner under this Agreement, the Bonds or otherwise. If after exercising any such remedy the cost to Owner of the performance of the balance of the Work is in excess of that part of the Contract Sum, which has not previously been paid to the Contractor hereunder, the Contractor and the Contractor’s surety shall be liable for and shall reimburse Owner for such excess costs and all delay damages suffered by Owner as a result thereof, as well as any other damages of any kind for which the Contractor would be legally responsible. If after termination of this Agreement under this Section, it is determined that the Contractor was not in default or that sufficient cause to terminate under Section did not exist, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of Owner under Section 34.1, and that the Contractor agreed to Owner’s use of its materials and other property, in which case the Contractor shall be entitled to be paid a reasonable sum for Owner’s use of the Contractor’s Materials and/or other property of the Contractor.

**34.3** If Owner fails to perform any of its obligations hereunder, the Contractor shall have the right to give Owner written notice thereof, stating the nature of the default. If Owner does not cure such default within fourteen (14) calendar days after receipt of such notice, the Contractor shall have the right to cease Work under this Agreement by giving Owner written notice thereof at any time thereafter while such default remains uncured. In the event Owner disputes the Contractor’s claim of default in writing, the Contractor shall not be entitled to cease Work, but shall proceed diligently with performance of this Agreement pending resolution of the dispute. The Contractor shall have the right to terminate this Agreement upon seven (7) calendar days’ written notice if the Work is suspended for a period of ninety (90) consecutive days or more due to causes not the fault of the Contractor.

**34.4** Owner may, if the Contractor neglects to perform the Work properly or to perform any provision of the Contract Documents, or does, or omits to do, anything whereby safety or proper construction may be endangered, whereby the safety of the environment may be endangered, or whereby damage or injury may result to person or property, after forty-eight (48) hours’ written notice to the Contractor, without prejudice to any other remedy Owner may have, make good all Work, Materials, omissions or deficiencies, and may deduct the cost therefor (together with interest thereon from the time Owner expends the amount in question until Owner recovers said amount at the rate that is the lesser of (i) 18% per annum, or (ii) the maximum non-usurious rate of interest permitted under applicable law) from the amount included in the Contract Sum due or which may thereafter become due the Contractor, but no action taken by Owner hereunder shall affect any of the other rights or remedies of Owner granted by this Agreement or by law or relieve the Contractor or the Contractor’s surety from any consequences or liabilities arising from such acts or omissions.

**34.5** The rights and remedies of Owner under this Article 34 shall be non-exclusive, and shall be in addition to all the other remedies available to Owner at law or in equity.

# **Dispute Resolution**

**35.1** This Agreement shall be governed by the applicable laws of the State of North Carolina and the United States of America, notwithstanding any conflicts of law rules to the contrary. This Agreement has been entered into in Wake County, North Carolina, and it shall be performable for all purposes in Wake County, North Carolina. Any action or proceeding against either party under or in connection with this Agreement or any of the Contract Documents which is allowed notwithstanding the arbitration clause in Section 35.3 below (such as an action or proceeding to confirm or challenge an arbitration award) must be brought in any State or federal court in Wake County, North Carolina.

**35.2** Any demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of the Agreement, payment of money, extension of time or other relief with respect to the terms of the Agreement or any other disputes and matters between the Contractor and Owner arising out of or relating to the Agreement (“Dispute”) must be initiated by written notice. Contractor and Owner shall endeavor to resolve their Disputes by mediation which, unless Contractor and Owner mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association (“AAA”) currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the AAA. The request may be made concurrently with the filing of arbitration but, in such event, mediation shall proceed in advance of such arbitration, which shall be stayed pending mediation for a period of 30 calendar days from the date of filing, unless stayed for a longer period by agreement of the Contractor and Owner or court order. Contractor and Owner shall share the mediator’s fee and any filing fees equally. The mediation shall be held in Wake County, North Carolina, unless another location is mutually agreed upon in writing. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction.

**35.3** Unless the parties subsequently agree to different procedures with respect to a particular claim, dispute or controversy, any claim, dispute, or controversy which arises under or relates to this Agreement or the Work shall be resolved by binding arbitration administered by the AAA and conducted in accordance with the Construction Industry Arbitration Rules of the AAA then in effect, unless the parties agree to arbitrate the dispute under different rules and procedures. The hearing in any such proceeding shall take place in Wake County, North Carolina. Any arbitration proceeding hereunder may, at Owner’s sole option, be combined by consolidation, joinder, or otherwise, with any other arbitration proceeding to which Owner or Contractor is a party and which involves a common question of law or fact with the arbitration proceeding between Owner and Contractor. The prevailing party in any arbitration proceeding hereunder shall be entitled to recover from the other party all costs and expenses incurred by the prevailing party in relation to the arbitration proceeding, including reasonable attorneys’ fees, arbitration filing fees, arbitrator compensation, expert witness fees, court reporter expenses, and document reproduction charges. The prevailing party shall be determined by the arbitrator(s) based on the surrounding facts and circumstances and not based on whether one party received a monetary award in its favor. Contractor shall include a similar arbitration agreement in contracts with its Subcontractors.

**35.4** Pending resolution of any dispute arising under this Agreement, other than termination hereof, the Contractor may not cease Work and shall proceed diligently with performance of this Agreement and Owner shall continue to make payments that are not in dispute in accordance with the Contract Documents.

# **Notices**

All notices required or given pursuant to or in relation to this Agreement shall be in writing and delivered in person to the individual to whom it is addressed, or sent certified or registered mail, postage prepaid, return receipt requested, or by fax or similar method of electronic transmission (provided appropriate confirmation of transmission documentation is retained and that a copy of the written document is also sent via U.S. mail) as follows:

If to Owner:

Attn: Tommy Jacobson, VP, COO

MCNC

3021 E. Cornwallis Road

Durham, North Carolina 27709

P.O. Box 12889

Research Triangle Park, North Carolina 27709

Telephone: (919) 248-1178

E-mail: tjacobson@mcnc.org

With a copy to:

Attn: MCNC’s General Counsel

MCNC

E-mail: legal@mcnc.org

If to Contractor:

Attn:

Telephone:

Fax:

E-mail:

With a copy to:

Attn:

Telephone:

Fax:

E-mail:

If to Design Vendor:

Attn: Collier’s Engineering & Design

Attn: Craig Zeidman

101 Crawfords Corner Rd., Ste .3400

Holmdel, NJ 07733

Telephone: (877) 627-3772

E-mail: craig.zeidman@collierseng.com

or, such other address(ee)(es) as any party entitled to receive notice hereunder shall designate to the other party, in writing, in the manner provided herein for notices. Any notice to be given herein shall be deemed given three business days after the date of deposit thereof in the U.S. mail, by certified mail, return receipt requested, postage prepaid, addressed to the applicable individual(s) at the address(es) provided.

# **Counterparts**

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

# **Third Party Rights**

Except as expressly stated to the contrary, nothing contained in this Agreement shall create a contractual relationship with or duties, obligations or causes of action in favor of any third party against either Owner or Contractor.

# **Miscellaneous**

**39.1** When this Agreement requires a matter to be subject to the consent or approval of Owner such approval or consent of Owner must be in writing and may be granted or withheld in Owner’s sole and absolute discretion (unless expressly provided otherwise herein).

**39.2** This Agreement represents the entire and integrated agreement between the parties and shall supersede and be controlling over any previous agreement between the parties, whether written or oral.

**39.3** All rights and remedies of Owner under this Agreement shall be cumulative and none shall exclude any other rights or remedies allowed by law.

**39.4** Failure of Owner to declare any default immediately upon occurrence thereof, or delay in taking action in connection therewith, shall not waive such default, but Owner shall have the right to declare any such default at any time.

**39.5** All unperformed obligations of Contractor shall survive the termination of this Agreement.

**39.6** All Exhibits identified in this Agreement are attached hereto and incorporated herein for all purposes.

# **Other Terms and Conditions**

Other terms and conditions, if any, forming part of this Agreement are as set forth in Exhibit L.

**IN WITNESS WHEREOF**, this Agreement is hereby executed as of the date first above set forth above.

| **MCNC, a North Carolina non-profit corporation**  By:  Name:  Title: | **, a**  By:  Name:  Title: |
| --- | --- |
|  |  |

**CONTRACT DOCUMENTS – DRAWINGS, SPECIFICATIONS, AND ADDENDA - FORM**

PROJECT TITLE: - The High-speed Economics for Rural Opportunities **-**  Segment

CONTRACT NO.:

CONTRACT DATE:

The following are part of the Contract Documents:

A.1 The Drawings are as follows:

Drawings: To be furnished in electronic format within 10 calendar days of Owner’s issuance to Contractor of the Notice to Proceed for this segment with any Drawing updates to be furnished within 10 calendar days of Owner’s receipt from Design Vendor.

A.2 The Specifications are as follows:

| Segment | Start Date | Substantial Completion Date |
| --- | --- | --- |
|  | no later than |  |

Contractor will provide Services and Work in accordance with the terms of this Agreement, industry standards, the fiber cable and build requirements listed in the Request for Proposal, and the Drawings.

A.3 The Addenda, if any, are as follows:

\_\_\_\_\_\_ Check here if this is a priority build segment.

Any further Addenda will be supplied by Owner to Contractor as Owner determines necessary.

A.4 Cost for Segment \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

.

**EXHIBIT B**

**CHANGE ORDER – FORM**

TO: MCNC CHANGE ORDER NO.:

DATE:

PROJECT TITLE: The High-speed Economics for Rural Opportunities

CONTRACT DATE:

This will authorize the following changes:

This Change Order constitutes full, final, and complete compensation to the Contractor for all costs, expenses, overhead, profit, and any damages of every kind that the Contractor may incur in connection with the above-described changes in the Work, including any impact on the referenced Work or on any of the Work under the Agreement, any changes in the sequence of any Work, any delay to any Work, any disruption of any Work, any rescheduling of any Work, and any other affect on any of the Work under the Agreement. By the execution of this Change Order, the Contractor accepts the new Contract Sum and Contract Time shown below, and expressly waives any claims for any additional compensation, damages, or time extensions in connection with the above-described changes. Except as herein or heretofore expressly modified, all terms of the original Agreement shall remain in full force and effect and shall cover the performance of, and payment for, any Work authorized hereunder.

The original Contract Sum, as applicable, was………………………………………………………$

Net change by previously authorized Change Orders……………………………………………….. $

The Contract Sum prior to this Change Order was $

The Contract Sum will be (increased)(unchanged) by this Change Order on a

(Time & Material)(Lump Sum)(Unit Price) basis $

The new Contract Sum, including this Change Order, will be………………………………………..$

This Change Order will cause the Contract Time to be [ ] increased [ ] decreased [ ] unchanged by \_\_\_\_ calendar days.

ACCEPTED BY:

| .  By:  Title:  Date: | (Contractor)  By:  Title:  Date: | MCNC  By:  Title:  Date: |
| --- | --- | --- |

**EXHIBIT C**

**TIME AND MATERIALS BILLINGS REQUIREMENTS**

A. For changes to the Work performed pursuant to Section 7.3 of the Agreement, the Contractor shall maintain accurate and separate records relating to costs incurred or savings realized (“Contractor’s Costs”) until an audit can be performed by Owner to determine the Contractor’s Costs and to determine if any change in the Contract Time is justified.

B. All records must be supported by invoices, receipts, time records, or other documents that clearly identify and explain the charges, whether incurred by the Contractor or a Subcontractor. Inadequately supported charges are subject to disallowance.

C. All cash discounts, trade discounts, rebates, and refunds, and all returns from the sale of surplus materials and equipment shall be accounted for in determining Contractor’s Costs incurred in any change to the Work, and the Contractor shall endeavor to make provisions for the securing thereof.

D. The Contractor’s Costs shall be at rates not higher than the standard paid in the locality of the Work, except with prior written consent of Owner, and shall include the following items:

1. Hourly wages paid for labor in the direct employ of the Contractor in the performance of the change to the Work under applicable collective bargaining agreements, or under an hourly wage schedule agreed upon by Owner and the Contractor, and labor burden costs reflected for purpose of billing as a percentage of actual labor cost at the time the labor burden is billed and which costs are limited to actual FICA, State and federal unemployment taxes, group insurance, workers’ compensation insurance and union contract benefits. No overtime payments will be included in the Contractor’s Costs unless approved by Owner’s Representative prior to incurring same. Payroll labor charges shall list individual employee names, titles/classifications, actual hourly base rates, and labor burden. Although the Contractor will submit its billing for payroll labor burden on a preliminary percentage basis, prior to final agreement on the Change Order, the Contractor shall adjust its billing to reflect the lower of actual or effective payroll tax and insurance rates. Wages paid and wage reporting must also be in compliance with the Davis-Bacon Act, see Sections 21.5.

2. Salaries and approved fringe benefits of the Contractor’s supervisory or administrative personnel stationed at the field office, or with Owner’s prior written agreement at the Contractor’s home office, for the changes to the Work and employees engaged, at shops or on the road, in expediting the inspection, production, or transportation of the material or equipment for the changes to the Work. The number of employees in these classifications, and the rates of pay, shall be subject to the approval of Owner.

3. If approved in advance by Owner, reasonable relocation, transportation, traveling and lodging expenses of representatives of the Contractor incurred in the discharge of duties related to the changes to the Work.

4. The cost (including transportation, storage, operating, and normal maintenance cost) of all materials, equipment, temporary structures, and supplies purchased or rented for use on the changes to the Work. For qualified tools and equipment furnished by the Contractor from its own stock, such costs shall include a fair rental not to exceed seventy percent (70%) (unless otherwise approved by Owner in writing) of the rates published in “Compilation of Nationally Averaged Rental Rates,” most recent edition, by the Associated Equipment Distributors. Whether the qualified tools and/or equipment are supplied from the Contractor’s own stock or rented by the Contractor, the total rent paid for such tools and/or equipment shall not exceed seventy percent (70%) of the market value of such equipment at the time of its commitment to the changes to the Work.

If the total rent paid for any item of equipment rented from a vendor or from the Contractor’s own stock will exceed seventy percent (70%) of its fair market value, the item shall be purchased, or a bill of sale issued by the Contractor, and shall become the property of Owner. The Contractor shall be responsible for making an early determination of the likelihood that the seventy percent (70%) limit will be reached, and shall bear all rental costs in excess of seventy percent (70%) if a decision is made by the Contractor to rent or supply from his own stock rather than purchase such tools or equipment or issue a bill of sale.

Equipment rented or supplied by the Contractor must be initially rented or supplied in good working condition. Above-normal maintenance, capital improvements, and overhauls are not chargeable to Owner.

Daily, weekly, or monthly rental rates shall be billed when it results in cost savings to Owner.

Owner reserves the right to dispose of all such materials, equipment, temporary structures, tools, and supplies which have been purchased, when no longer required for the changes in the Work, and the Contractor’s Costs shall be credited for the proceeds therefrom or the reasonable value of any items with respect to which Owner takes title. Upon completion of the changes to the Work or the appropriate parts thereof, and subject to Owner’s prior approval and right to take title thereto, the Contractor shall sell to a third party or transfer to itself at the then fair market value thereof, said value determination being subject to Owner’s approval, all hoists, scaffolding, forms, tools, surplus material, equipment, and other items purchased for use in the changes to the Work with funds furnished therefor by Owner as part of the Contractor’s Costs. The amounts received from such sale (or the fair market value thereof in the case of transfer to the Contractor) shall be credited against the amounts due from Owner hereunder and against the Contractor’s Costs.

5. Amounts due under all Subcontracts made in accordance with the provisions of the Contract Documents and subject to the overhead and profit mark-up limitations set forth in the Agreement.

6. The cost of telephone, telegrams, postage, photographs, blueprints, office supplies, first aid supplies and related miscellaneous costs reasonably incurred in connection with the changes to the Work.

7. Increased premiums on bonds and insurance due to the changes to the Work, if any, that the Contractor is obligated to secure and maintain under the terms of the Contract Documents and such other insurance and bonds as may be required, subject to the approval of Owner.

8. The cost of obtaining and using all utility services required for the changes to the Work.

9. The cost of prompt removal of all of the Contractor’s debris. All subcontracts shall require Subcontractors to promptly remove all debris created by their activities, and the Contractor shall exercise its best efforts to enforce such requirements or to effect an appropriate back charge to those Subcontractors who fail to meet their requirements in this regard.

10. The cost and expenses actually sustained by the Contractor in connection with the changes to the Work, of protecting and repairing adjoining property, if required (Owner’s prior approval for repairs must be obtained except in emergencies), and of settlements for same made with the written consent of Owner, except to the extent that any such cost or expense is:

(a) reimbursable by insurance or otherwise,

(b) the responsibility of the Contractor under any indemnity provisions of the Agreement,

(c) due to the failure of any officer of the Contractor or of any of its representatives having supervision or direction of the changes to the Work to exercise good faith or the highest standard of care normally exercised in the conduct of the business of a contractor experienced in the performance of work of magnitude, complexity and type encompassed by the Contract Documents, in any of which events any such expenses shall not be included in the Contractor’s Costs.

11. Federal, State, municipal, sales, use and other taxes, applicable to the Project, all with respect to services performed or materials furnished for the changes to the Work, it being understood that none of the foregoing includes federal, State, or local income or franchise taxes.

12. All reasonable increased costs and expenditures necessary for the operation of the field office resulting from the changes to the Work, and including such progress photos as required by Owner; copies of all such photos to be dated, identified, and furnished directly to Owner.

13. The cost of secured off-site storage space or facilities made necessary due to the changes to the Work, which has been approved by Owner.

14. Any other expenses or charges incurred, with the prior written approval of Owner, in the performance of the changes of the Work.

E. The Contractor agrees to furnish and perform, without reimbursement, the following materials and services:

1. Furnishing information as to the cost and availability of materials and methods of construction which may be of value to the Design Vendor and Owner in determining the final design of the changes to the Work.

2. The services and related expenses, except as otherwise provided herein, of any officers or general office supervisory personnel of the Contractor and of personnel in the Contractor’s personnel, purchasing, legal, advertising, data processing, scheduling, labor relations, insurance, and tax departments and all other costs of doing business, services, and related expenses required to maintain and operate the Contractor’s general offices and any established branch offices, other than the additional field office expenses made necessary by the changes to the Work.

3. The services and related expenses of the Contractor’s purchasing, secretarial, estimating and accounting departments, and clerical staff at the Contractor’s general office or any established branch office.

4. The use, without interest, of capital employed for the changes to the Work.

5. Amounts required to be paid by the Contractor for federal, State, or local income or franchise taxes.

6. Costs due to any act or omission of the Contractor, any Subcontractor or supplier employed by the Contractor or anyone directly or indirectly employed by any of them, or for whose acts any of them may be liable, including but not limited to the correction of defective Work, disposal of materials and equipment wrongfully supplied, or making good any damage to property.

7. Entertainment and meal charges.

8. Travel charges unless approved in advance by Owner.

9. Costs for automobile mileage.

10. Bonuses, profit-sharing, or other charges.

**EXHIBIT D**

**REQUEST FOR PAYMENT – FORM**

PROJECT TITLE: CONTRACT NO.:

SEGMENT TITLE: CONTRACT DATE

1. ORIGINAL CONTRACT SUM……………………………………………………………$

2. TOTAL CHANGE ORDERS $

3. CONTRACT SUM TO DATE (Line 1 + 2) $

4. TOTAL COMPLETED & STORED TO DATE $

5. RETAINAGE:

a. % of Completed Work $

b. % of Stored Material $

Total Retainage $

6. TOTAL EARNED LESS RETAINAGE $

(Line 4 less Line 5 Total)

7. LESS PREVIOUS PAYMENTS $

8. CURRENT PAYMENT DUE $

9. BALANCE TO FINISH, PLUS RETAINAGE $

(Line 3 less Line 6)

The undersigned Contractor represents, warrants, and certifies that, to the best of the Contractor’s knowledge, information, and belief, the Work covered by this application has been completed in strict accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous payments were received from Owner and that current payment requested herein represents a just estimate of reimbursement to Contractor. The Contractor further represents, warrants, and certifies that there are no known mechanics’ liens or materialmen’s liens outstanding at the date of this application, that all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in this Request for Payment, that, except for such bills not paid but so included, there is no known basis for the filing of any mechanics’ or materialmen’s liens on the Work, and that effective waivers of liens have been obtained from all Subcontractors.

**EXHIBIT E**

**FINAL WAIVER OF LIENS – FORM**

THE STATE OF NORTH CAROLINA

THE COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The undersigned is a Contractor or Subcontractor who has furnished labor, material, services and/or equipment (the “Work”) in the construction of improvements upon real property owned by MCNC (“Owner”) for the fiber route constructed in the Counties of , North Carolina (the “Property”). The Property shall also include any other real property on which the Work is performed, which is affected by the Work, or which Contractor enters upon to perform the Work, regardless of whether or not that real property is owned by Owner. For instance, the Property shall additionally include, without limitation, all property over which Owner has obtained an easement, right-of-way, or similar interest in order to allow the Work to be performed.

The total of all charges, including any retainage, for and in connection with all such Work furnished by the undersigned has been paid in full to the undersigned. The undersigned acknowledges complete satisfaction of, and forever waives and releases, all claims of every kind against Owner or the Property or any funds or other property of Owner, including but not limited to all liens and claims of liens, which the undersigned may have as a result of or in connection with the performance or furnishing of such Work.

The undersigned has further represented and warranted and does hereby represent and warrant that (a) it has not assigned and will not assign any claims against Owner or any right to a lien against the Property or any funds or other property of Owner, (b) all persons and entities who have furnished labor, material, services, or equipment to the undersigned in connection with the Work have been paid all amounts to which they have or may become entitled, and (c) the undersigned’s contract for the Work is fully completed in accordance with the final Drawings and Specifications thereof.

To the fullest extent allowed by law, the undersigned hereby agrees unconditionally to indemnify Owner and hold Owner harmless against all liability, loss, cost or expense (including but not limited to reasonable attorney’s fees) now or hereafter incurred, paid or suffered by or asserted against Owner or the Property or any funds or other property of Owner because of any claim or action by the undersigned, or by any person or entity claiming by, through, or under the undersigned, with respect to the claims, liens or rights herein waived and released or arising out of any material breach of any representation herein made.

The person signing this document represents that he or she is duly authorized to do so on behalf of the undersigned Contractor or Subcontractor.

All of the provisions of this document shall bind the undersigned Contractor or Subcontractor and the undersigned’s heirs’ legal representatives, successors and assigns and shall insure to the benefit of Owner and Owner’s heirs, legal representatives, successors, assigns and sureties.

EXECUTED this day of , 20

By:

Title:

Date:

Sworn to and subscribed before me

this \_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20\_\_\_. [NOTARIAL SEAL/STAMP]

Notary Public

My Commission Expires:

**EXHIBIT F**

**CERTIFICATE OF FINAL COMPLETION – FORM**

TO: MCNC CONTRACT NO.:

PROJECT: CONTRACT DATE:

THE STATE OF NORTH CAROLINA §

§

THE COUNTY OF §

I am the of Contractor and I certify individually and on behalf of Contractor, that Contractor has paid all employees and Subcontractors in full for all labor, services, materials, and equipment supplied by them in connection with the above-described Contract No. and Project through and including the date of this certificate, except for such persons, if any, listed on the attached sheet in the amount indicated opposite their names, who shall be paid in full within ten days after the date hereof.

Contractor agrees that if any claim or lien is filed against (i) Owner, its assigns, its affiliates, directors, officers, agents, consultants, servants and employees, (ii) Owner’s lender(s), if any, or (iii) all other interests related to the Contract No. or Project, [(i) through (iii) are collectively referred to as the “Parties”] or any property owned by or any funds of any of the Parties described herein, Contractor will immediately pay and satisfy such claim or lien or furnish a sufficient bond for the release of such claim or lien. To the fullest extent allowed by law, Contractor further agrees to release, indemnify, defend, and hold harmless the Parties from any loss, cost, damage, liability, or expense, including, but not limited to, attorneys’ fees, which they may incur by reason of any such claim or lien.

I certify that Contractor has complied with all Laws and Regulations applicable to Contractor in connection with this Contract No. and Project.

Contractor:

By:

Title:

Date:

Sworn to and subscribed before me

this \_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

Notary Public

My Commission Expires:

[NOTARIAL SEAL/STAMP]

**EXHIBIT G**

**PARTIAL WAIVER OF LIENS – FORM**

THE STATE OF NORTH CAROLINA

THE COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

The undersigned is the Contractor or a Subcontractor who has furnished labor and/or material (“Work”) in the construction of improvements upon real property owned by MCNC (“Owner”) for the Segment \_\_\_\_\_ fiber route currently being constructed in the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ County, North Carolina (the “Property”). The Property shall also include any other real property on which the Work is performed, which is affected by the Work, or which Contractor enters upon to perform the Work, regardless of whether or not that real property is owned by Owner. For instance, the Property shall additionally include, without limitation, all property over which Owner has obtained an easement, right-of-way, or similar interest in order to allow the Work to be performed.

For Services/Work in connection with the Property, the undersigned:

⁫ Received $ through , , pursuant to Contractor’s invoice number(s)

⁫ is not owed any amounts, and no amounts have been retained.

Therefore, the undersigned:

1. Has been paid in full for all sums owed for Work concerning the Property;

2. Acknowledges complete satisfaction of, and forever waives and releases, all claims of every kind against Owner or the Property or any funds or other property of Owner, including but not limited to all liens and claims of liens, which the undersigned may have as a result of or in connection with the Work;

3. Has represented and warranted and does hereby represent and warrant that all persons or entities who have furnished labor and/or material to the undersigned in connection with the Work have been paid all amounts they are owed;

4. To the fullest extent allowed by law, agrees unconditionally to indemnify Owner and hold Owner harmless against all liability, loss, cost or expense (including but not limited to reasonable attorneys’ fees) now or hereafter incurred, paid or suffered by or asserted against Owner or Property because of any claim or action by the undersigned, or by any person or entity claiming by, through or under the undersigned, with respect to the claims, liens and rights herein waived and released or arising out of any material breach of any representation herein made.

In consideration of its funding of debt proceeds used to pay for Work furnished by the undersigned, the undersigned hereby agrees and acknowledges for the benefit of Owner’s lender(s), that all mechanic’s liens or rights to the same now or hereafter owned or held by the undersigned are and shall be subordinate and inferior to any lien held by Owner’s lender(s) on the Property.

The person signing this document represents that he or she is duly authorized to do so on behalf of the undersigned original Contractor or Subcontractor.

All of the provisions of this document shall bind the undersigned Contractor or Subcontractor and the undersigned’s heirs, legal representatives, successors and assigns and shall inure to the benefit of Owner and Owner’s legal representatives, successors, assigns and sureties.

EXECUTED this day of , 20 .

| Sworn to and subscribed before me  this \_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20\_\_\_.    Notary Public  My Commission Expires:  [NOTARIAL SEAL/ STAMP | By:  Title: |
| --- | --- |

**EXHIBIT H:**

**MECHANICS LIEN SUBORDINATION AGREEMENT – FORM**

THE STATE OF NORTH CAROLINA

**LIEN SUBORDINATION AGREEMENT**

THE COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

THIS LIEN SUBORDINATION AGREEMENT (the “Agreement”) is executed as of this \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Contractor”).

WHEREAS, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Owner”) owns that certain parcel of land described as follows:

(the “Property”), which Property is to be encumbered by the Deed of Trust to be recorded in the \_\_\_\_\_\_\_\_ County Registry (the “Deed of Trust”), from Owner to \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ as Trustee for the benefit of\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(hereinafter referred to as “Lender”), securing a loan in the original principal amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to be made by Lender to Owner.

***OR***

the “Property”), which Property is encumbered by the Deed of Trust recorded in Book \_\_\_\_\_ at page \_\_\_\_\_\_ of the \_\_\_\_\_\_\_\_ County Registry (the “Deed of Trust”), from Owner to \_\_\_\_\_\_\_\_ as Trustee for the benefit of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (hereinafter referred to as “Lender”), securing a loan in the original principal amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ made by Lender to Owner.

The Property shall also include any other real property on which the “Work” (as defined below) is performed, which is affected by the Work, or which Contractor enters upon to perform the Work, regardless of whether or not that real property is owned by Owner, and all easement or other rights of Owner in such other real property. For example, the Property shall additionally include, without limitation, all property over which Owner has obtained an easement, right-of-way, or similar interest in order to allow the Work to be performed, and all interest of Owner in such property.

WHEREAS, Contractor has furnished and will continue to furnish materials and/or labor (the “Work”) to the Property under a contract with Owner.

WHEREAS, the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Title Company”) has been requested to issue a title insurance policy insuring the interest of the Lender in the Property under the Deed of Trust, and the aforesaid policy must be without exception to possible unfiled mechanics’ and materialmen’s liens.

WHEREAS, Contractor acknowledges that Lender and Title Company will rely and are relying upon the statements herein made in paying out the proceeds of the loans to be secured by the Deed of Trust and issuing of title insurance.

WHEREAS, Contractor desires to subordinate any lien, claim or any other interest whatsoever which it might have in the Property and in any funds to be advanced secured by the Deed of Trust in order for disbursement of the aforesaid loans to be made and title insurance to issue insuring the aforesaid Deed of Trust as a valid first lien on the Property.

NOW, THEREFORE, in consideration of the sum of Ten Dollars ($10.00) and other good valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and in order to induce the making of one or more loans on the Property and the insuring of the title to the Property, Contractor certifies that (i)  Contractor has signed this Agreement in the correct legal capacity and has the authority to sign this Agreement; (ii) there are no outstanding actual or potential liens (filed or unfiled) for labor, services or materials for improvements on the Property by anyone claiming by, through, or under Contractor; and (iii)  Contractor has not received any notice of claim of lien upon funds or claim of lien on real property from any other person or entity.

In addition, Contractor certifies that, to the best of such Contractor’s knowledge and belief, (i) all parties known by Contractor to have dealt or contracted with Owner for improvements made within the 120 days immediately preceding the date of recordation of the Deed of Trust or who Contractor knows may be providing punch list or warranty work post-closing pursuant to labor, services or materials previously furnished are identified herein (though Contractor makes no representation regarding their waiver, subordination or payment unless claiming by through or under such Contractor) and (ii) such Contractor has no knowledge of any other type of claim outstanding by anyone claiming by, through, or under such Contractor which would entitle the holder thereof to claim a lien on or interest in the Property including retention of title agreements or security interests for any materials, appliances, fixtures or furnishings placed upon or installed on the Property.

Contractor hereby subordinates to the lien of the Deed of Trust Contractor’s right and that of anyone claiming by, through, or under such Contractor to file a lien for labor, services or materials on the Property. Contractor agrees that the Deed of Trust shall constitute a superior and paramount lien for all amounts which have been or may hereafter be advanced under the Deed of Trust including amounts advanced pursuant to any amendment, modification, extension or renewal thereof, and all of the liens, claims, and other rights and interests of the undersigned which it may have or hereafter acquire in and to the Property or the funds to be advanced secured by the Deed of Trust and those of anyone claiming by, through, or under Contractor are hereby subordinated to the lien of the Deed of Trust. Contractor further warrants that Contractor has not assigned and will not assign Contractor’s claim for payment or right to perfect a potential lien on the Property and that Contractor has the right to execute this subordination.

Contractor hereby agrees to indemnify and hold the said Lender and Title Company harmless from any and all loss, cost, damage and expense including without limitation reasonable attorneys’ fees which said Lender or Title Company may suffer or incur or become liable for under its policy directly or indirectly out of such improvements on the aforesaid Property or on account of any such mechanics’ or materialmen’s liens or claims, or in connection with enforcement of their rights under this Agreement.

EXECUTED this the \_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_\_

By:

Name:

Title:

Sworn to and subscribed before me

this \_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20\_\_\_ [NOTARIAL SEAL/STAMP]

Notary Public

My Commission Expires:

**EXHIBIT I**

**INSURANCE**

The Contractor shall purchase and maintain insurance of the following types of coverage and limits of liability as well as any permit insurance coverages as specifically required:

* Commercial General Liability (CGL) with limits of insurance of not less than $1,000,000 Each Occurrence and $5,000,000 Annual Aggregate.

1. If the CGL coverage contains a General Aggregate Limit, such General Aggregate shall apply separately to each Project.
2. CGL coverage shall be written on ISO Occurrence form CG 00 01 (10/93) or a substitute form providing equivalent coverage and shall cover liability arising from Premises, Operations, Independent Contractors, Products-Completed Operations, and Personal and Advertising Injury.
3. Owner and all other parties required of the Contractor, shall be included as additional insureds on the CGL, using ISO Additional Insured Endorsement CG 20 10 (11/85) or CG 20 10 (10/93) **AND** CG 20 37 or CG 20 33 **AND** CG 20 37 or an endorsement providing equivalent coverage to the Additional Insureds. This insurance for the Additional Insureds shall be as broad as the coverage provided for the named insured Contractor. It shall apply as Primary and Non-Contributing Insurance before any other insurance or self-insurance, including any deductible, maintained by, or provided to, the additional insured.
4. Contractor shall maintain CGL coverage for itself and all Additional Insureds for the duration of the Project and maintain Completed Operations coverage for itself and each additional insured for at least 3 years after completion of the Work.

* Automobile Liability

1. Business Auto Liability with limits of at least $1,000,000 each accident.
2. Business Auto coverage must include coverage for liability arising out of all owned, leased, hired and non-owned automobiles.
3. Owner and all other parties reasonably required of the Owner shall be included as Additional Insureds on the auto policy.

* Commercial Umbrella

1. Umbrella limits must be at least $5,000,000
2. Umbrella coverage must include as Additional Insureds all entities that are Additional Insureds on the CGL.

* Railroad Liability and/or Railroad Protective Insurance

a) In such limits as may be required by each railroad entity.

* Workers Compensation and Employers Liability

a) Employers Liability Insurance limits of at least $500,000 Each Accident, $500,000 each employee for Injury by Disease and $500,000 Aggregate for Injury by Disease

b) Where applicable, U.S. Longshore and Harborworkers Compensation Act Endorsement shall be attached to the policy.

c) Where applicable, the Maritime Coverage Endorsement shall be attached to the policy.

* Professional Liability Insurance

a) Professional Liability (E&O) with limits of at least $1,000,00 each incident.

b) Professional Liability coverage must include coverage for claims arising out of failure to deliver, financial losses, negligence or construction errors or oversight for services performed under this Agreement.

* Environmental/Pollution Liability Insurance

a) Environmental/Pollution Liability with limits of at least $1,000,000 per occurrence and $2,000,000 aggregate

b) Environmental/Pollution must cover claims arising out of the use or application of chemicals/herbicides as well as the negligent release of hazardous materials.

Waiver of Subrogation

Contractor waives all rights against Owner, Design Vendor and their agents, officers, directors and employees for recovery of damages to the extent these damages are covered by commercial general liability, commercial umbrella liability, business auto liability or workers compensation and employers liability insurance maintained per requirements stated above. Subcontractor’s Workers Compensation policy has WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS ENDORSEMENT with Contractor, Owner and Design Vendor.

Contractor shall furnish the Owner with a Certificates of Insurance evidencing that such insurance is provided and is in full force and effective before starting the Work and at any other time requested by the Owner. Attached to each Certificate of Insurance shall be a copy of the Additional Insured Endorsement that is part of the Subcontractor’s Commercial General Liability Policy. All of said certificates shall set forth on the face thereof contractual coverage as required herein. No amendment or cancellation of any of said policy shall be effective until after 30 days’ notice, in writing, to the Owner. The failure of the Contractor to supply certificates evidencing full compliance with the requirements of the provision shall not abrogate its duty to provide and maintain the required insurance, including the naming of the Owner as an Additional Insured.

**EXHIBIT J**

**PERFORMANCE BOND – FORM**

PROJECT TITLE:

CONTRACT DATE:

STATE OF NORTH CAROLINA

COUNTY OF

KNOW ALL MEN BY THESE PRESENTS: That \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a organized and existing under the laws of the State of \_\_\_\_\_\_\_\_\_\_\_, and fully authorized to transact business in the State of North Carolina, whose address is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, hereinafter called “Principal,” and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a organized and existing under the laws of the State of \_\_\_\_\_\_\_\_\_\_\_, and fully authorized to transact business in the State of North Carolina, as “Surety”, are held and firmly bound unto MCNC, hereinafter called “Owner”, in the penal sum of $\_\_\_\_\_\_\_\_\_ in lawful money of the United States, to be paid in \_\_\_\_\_\_\_ County, North Carolina, for the payment of which sum and the performance of such contract well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents. This Bond shall automatically be increased or decreased by the amount of any modification, which increases or decreases the Contract Sum.

The obligation to pay same is conditioned as follows:

WHEREAS, the Principal entered into a written Construction Agreement (“Agreement”) with Owner dated the \_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_ which Agreement is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein (including, but not limited to, all provisions in the Agreement with respect to obligations to correct *defective* Work, obligations in connection with defaults under the Agreement, indemnification obligations, obligations to provide reimbursement and repayment, and obligations to pay liquidated damages and all defined terms), for the Work described in the Agreement.

NOW, THEREFORE, if the Principal shall well, truly and faithfully perform and fulfill all of the undertakings, covenants, terms, conditions and agreements of said Agreement in accordance with the Contract Documents during the original term thereof and any extension thereof which may be granted by the Owner, notice of which extension being hereby waived by the Surety, and during the life of any guaranty or warranty required under said Agreement, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said Agreement that may hereafter be made, notice of which modifications to the Surety being hereby waived by the Surety, then this obligation shall be void; otherwise, it shall remain in full force and effect.

PROVIDED FURTHER, if Owner declares Principal in default under the Agreement and Owner formally terminates the Principal’s right to complete the Agreement by written notice to the Principal and the Surety, the Surety shall promptly and at the Surety’s sole expense either (a) arrange for the Principal, with the consent of Owner, to perform and complete the Agreement in accordance with the Contract Documents, including without limitation all modifications or subcontracts that may hereafter be made, notice of which modification or subcontracts to the Surety being hereby waived; or (b) undertake to perform the Agreement through its agents or through independent contractors. In any event, Surety’s obligations hereunder to perform and complete the Agreement shall remain in full force and effect. If the Surety does not proceed with reasonable promptness, the Surety shall be deemed to be in default on this Bond ten (10) days after delivery of written notice from Owner to the Surety demanding the Surety perform, and Owner shall be entitled to enforce any remedy available to Owner at Surety’s cost and expense, including, without limitation, reasonable legal fees.

PROVIDED FURTHER, that if any legal action be filed upon this Bond, exclusive venue shall lie in Wake County, State of North Carolina.

AND PROVIDED FURTHER, that the said Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Agreement or to the Work performed or to be performed, thereunder or the Drawings, Specifications, etc., accompanying the same shall in anywise affect its obligation on this Bond, and it does hereby waive (i) notice of any such change, extension of time, alteration or addition to the terms of the Agreement or to the Work or to the Drawings, Specifications, etc., and (ii) notice of any subcontracts, purchase orders, or other obligations related to the Agreement.

The undersigned and designated agent is hereby designated by the Surety herein as the Resident Agent in \_\_\_\_\_\_\_ County to whom any requisite notices may be delivered and on whom service of process may be had in matters arising out of such suretyship. All notices hereunder shall be deemed given and received (i) when deposited in a post office or other depository under the care or custody of the United States Postal Services, properly stamped and addressed as a registered or certified item, return receipt requested, or (ii) when delivered by express mail or parcel service or delivery service to the party’s address.

IN WITNESS WHEREOF, this instrument is executed, with MCNC to maintain the original version, this the \_\_\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

ATTEST: PRINCIPAL:

By:

Secretary President

ATTEST: SURETY:

By:

Secretary Attorney-in-Fact

The Resident Agent of the Surety in County, North Carolina, for delivery of notice and service of process is:

Name:

Street Address:

APPROVAL OF OWNER:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(NOTE: Date of Performance Bond must be date of Agreement. If Resident Agent is not a corporation, give a person’s name.)

**EXHIBIT K**

**LABOR AND MATERIAL PAYMENT BOND – FORM**

PROJECT TITLE:

CONTRACT DATE:

STATE OF NORTH CAROLINA

COUNTY OF

KNOW ALL MEN BY THESE PRESENTS: That \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a organized and existing under the laws of the State of \_\_\_\_\_\_\_\_\_\_\_, and fully authorized to transact business in the State of North Carolina, whose address is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, hereinafter called “Principal,” and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a organized and existing under the laws of the State of \_\_\_\_\_\_\_\_\_\_\_, and fully authorized to transact business in the State of North Carolina, as “Surety,” are held and firmly bound unto MCNC, hereinafter called “Owner”, in the penal sum of $\_\_\_\_\_\_\_\_\_ in lawful money of the United States, to be paid in \_\_\_\_\_\_\_ County, North Carolina, for the payment of which sum well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents. This Bond shall automatically be increased or decreased by the amount of any modification, which increases or decreases the Contract Sum.

The obligation to pay same is conditioned as follows:

WHEREAS, the Principal entered into a written Construction Agreement (“Agreement’) with Owner, dated the \_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_, 10\_\_, which Agreement is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein (including, but not limited to, all provisions in the Agreement with respect to obligations to correct *defective* Work, obligations in connection with defaults under the Agreement, indemnification obligations, obligations to provide reimbursement and repayment, obligations to pay liquidated damages, and all defined terms), for the Work described in the Agreement.

NOW, THEREFORE, if the Principal shall well, truly and faithfully perform its duties and make prompt payment to all persons, firms, subcontractors (regardless of tier)`, corporations and claimants supplying labor and/or material and specially fabricated materials in the prosecution of the Work provided for in said Agreement, notice of which modifications or subcontracts to the Surety is hereby expressly waived by the Surety, then this obligation shall be void; otherwise Surety is obligated to make prompt payment for all labor, subcontracts, materials, specially fabricated materials, and such obligation shall remain in full force and effect.

PROVIDED FURTHER, that if any legal action be filed upon this Bond, exclusive venue shall lie in Wake County, State of North Carolina.

PROVIDED FURTHER, that the said Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the Agreement or to the Work performed, or to be performed, thereunder, or the Drawings, Specifications, etc. accompanying the same, shall in anywise affect its obligation on this Bond, and it does hereby waive (i) notice of any such change, extension of time, alteration or addition to the terms of the Agreement or to the Work to be performed thereunder or to the Drawings, Specifications, etc. accompanying the same and (ii) notice of any subcontract, purchase order, or other obligation related to the Agreement.

The undersigned and designated agent is hereby designated by the Surety herein as the Resident Agent in \_\_\_\_\_\_\_ County to whom any requisite notices may be delivered and on whom service of process may be had in matters arising out of such suretyship. All notices hereunder shall be deemed given and received (i) when deposited in a post office or other depository under the care or custody of the United States Postal Service, properly stamped and addressed as a registered or certified item return receipt requested, or (ii) when delivered by express mail or parcel service or delivery service to the party’s address.

IN WITNESS WHEREOF, this instrument is executed, with MCNC to maintain the original version, this the \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_.

ATTEST: PRINCIPAL:

By:

Secretary President

ATTEST: SURETY:

By:

Attorney-in-Fact

The Resident Agent of the Surety in County, North Carolina, for delivery of notice and service of process is:

Name:

Street Address:

APPROVAL OF OWNER:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(NOTE: Date of Payment Bond must be date of Agreement. If Resident Agent is not a corporation, give a person’s name.)

**EXHIBIT L**

**OTHER TERMS AND CONDITIONS - FORM**

PROJECT TITLE: CONTRACT NO.:

CONTRACT DATE:

**EXHIBIT M**

**ALLOWANCES – FORM**

PROJECT TITLE:

CONTRACT DATE:

The Allowance items, if any, are as follows:

NO. QUANTITY DESCRIPTION ALLOWANCE

**EXHIBIT N**

**PROJECT SCHEDULE AND LIQUIDAT**E**D DAMAGES – FORM**

PROJECT TITLE: CONTRACT NO.:

CONTRACT DATE:

For the purpose of this Agreement, the Liquidated Damages shall be five hundred dollars ($500.00) per calendar day for each of the first fifteen calendar days that Contractor fails to complete the Work by the Substantial Completion Date set out in the Agreement. The Liquidated Damages shall be one thousand dollars ($1,000.00) per calendar day for each day after the fifteenth calendar day that Contractor fails to complete the Work by the Substantial Completion Date.

With respect to Interim Completion Dates, the following Liquidate Damages shall apply for each calendar day that the Contractor fails to complete the applicable Milestone Work by the respective Interim Completion Date.

| Milestone Work | Interim Completion Dates | Liquidated Damages |
| --- | --- | --- |
| Segment: | | |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
| Segment: | | |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |
|  |  |  |

Pursuant to this Agreement, Contractor is to provide to Owner and Design Vendor a Progress Schedule with the various stages for construction and the Milestone Work with the corresponding Interim Completion Dates. The Milestone Work and the corresponding Interim Completion Dates as supplied by Contractor and agreed to by Owner and Design Vendor will supplement this Exhibit N.

Note: With respect to Interim Completion Date Liquidate Damages, if no amount is listed above or if $0 is listed under the Liquidated Damages Applicable column, then it is intended that actual damages will be the measure of damages hereunder.

**EXHIBIT O**

**NOTICE TO PROCEED – FORM**

PROJECT TITLE: The High-speed Economics for Rural Opportunities CONTRACT DATED:

**STATEMENT OF WORK NO.:** \_\_\_pursuant to thatConstruction Agreement (the “Agreement”) between the parties dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

STATEMENT OF WORK DATE: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CONTRACTOR: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CONTRACTOR ADDRESS: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Contractor, you are hereby directed to execute promptly the following Work in connection with the above Project:

**I. DESCRIPTION OF WORK**

| **Project #/Ticket#** | **Site** | **Address** | **Cost** | **Comments** |
| --- | --- | --- | --- | --- |
| Ticket #  Project # |  |  | Construction:  Splicing: |  |
| **Total** |  |  |  |  |

**II. ADDITIONAL CONTRACT DOCUMENTS**

In addition to this Statement of Work, the following are hereby made a part of the Contract Documents:

A. The Drawings are: To be furnished by Contractor to Owner in electronic format. Design and drawings must be approved by Owner in writing in advance of Contractor beginning work and installation of materials.

B. The Specifications are: All drawings are to be provided in CAD, PDF, and shp files. All work must be performed to meet the permitting agencies requirements. Conduit/cable must be place at a minimum of 3 feet deep.

**III. CONTRACT TIME**

| HERO Project | Start Date | Interim Completion Date | Substantial Completion Date |
| --- | --- | --- | --- |
|  |  |  |  |

*\*If the Contractor is unable to meet the deadline specified, it is the Contractor’s responsibility to notify the Owner in writing of any delays in processing of the required permits.*

*\*\*Owner takes into consideration processing times for NCDOT and Railroad Permits. However, it is still the responsibility of the Contractor to notify Owner in writing if Contractor is unable to meet the specified completion dates as outlined above by the Owner.*

**IV. LIQUIDATED DAMAGES**

For the purpose of this Agreement, the Liquidated Damages shall be five hundred dollars ($500.00) per calendar day for each of the first fifteen calendar days that Contractor fails to complete each lateral, segment, or other portion of the Work by the applicable Final Completion Date set out above. The Liquidated Damages shall be one thousand dollars ($1,000.00) per calendar day for each day after the fifteenth calendar day that Contractor fails to complete the Work by the Final Completion Date.

**VI. CONTRACT SUM**

The Contract Sum which is payable by Owner to Contractor for proper completion of the Work in accordance with the Contract Documents is as follows:

A. If a fixed fee (i.e., a flat fee without any additions or add-ons for any reason) for the Work covered by this Statement of Work has been agreed to as stated in Section I.

-OR-

B. If unit pricing applies to this Work, fill in those unit prices here:

| **Type of Construction** | **Cost Per Foot** | **Estimated Footage (if applicable)** |
| --- | --- | --- |
| Directional Boring | $ |  |
| Trenching | $ |  |
| Plowing | $ |  |
| Rock Adder | $ |  |
| Fiber Jet Placement | $ |  |
| Composite Installation Rate for Turnkey Solution | $ |  |
| Aerial | $ |  |
| Any other unit pricing: |  |  |

Based on preliminary footage estimates, the value of this Statement of Work is $\_\_\_\_\_\_\_\_\_making the total contract sum as the date of this Statement of Work $\_\_\_\_\_\_\_\_\_\_

C. The Allowance items, if any, are as follows:

NO. QUANTITY DESCRIPTION ALLOWANCE

**VII. ACKNOWLEDGMENT AND AGREEMENT:**

| **MCNC, a North Carolina non-profit corporation**  By:  Name: \_\_\_  Title: \_\_\_\_\_\_\_\_\_\_\_\_\_ | **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**  By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| --- | --- |

**EXHIBIT P**

**UNIT PRICE SCHEDULE – FORM**

TO: MCNC CONTRACT NO.:

PROJECT: CONTRACT DATE:

UNIT PRICE SCHEDULE

ITEM UNIT PRICE

**EXHIBIT Q**

**CERTIFICATE REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS**

PROJECT TITLE: The High-speed Economics for Rural Opportunities

CONTRACT DATE:

STATE OF NORTH CAROLINA

COUNTY OF

KNOW ALL MEN BY THESE PRESENTS: That \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a organized and existing under the laws of the State of \_\_\_\_\_\_\_\_\_\_\_, and fully authorized to transact business in the State of North Carolina, whose address is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, hereinafter called “Contractor,” certifies that to the best of its knowledge, information and belief that it and its principals:

Are not presently debarred, suspended, proposed for disbarment, declared ineligible, or voluntarily excluded from transactions by any federal or state department or agency;

Have not within the three-years prior to this contract been convicted of or had a civil judgment rendered against it or its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state, or local (with commission of any of the offenses enumerated in the preceding paragraph of this certificate;

Have not within the three-years prior to this contract had one or more public transactions (federal, state, or local) terminated for cause or default;

That no Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. If any funds, other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, “Disclosure Form to Report Lobbying,” in accordance with its instructions.

Where the Contractor is unable to certify to any of the statements in this certificate, such Contractor shall attach an explanation.

EXECUTED this day of , 20 .

| By:  Title: | Sworn to and subscribed before me this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20\_\_\_.    Notary Public  My Commission Expires:  [*NOTARIAL SEAL/STAMP*] |
| --- | --- |

Exhibit R

**E-Verify Compliance - FORM**

PROJECT TITLE: The High-speed Economics for Rural Opportunities

CONTRACT DATE:

Name of Contractor: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Address of Contractor: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

MCNC has many county and municipal customers, and therefore we will need to be in compliance with the law as stated in Article 2 of Chapter 64 of the North Carolina General Statutes and the provisions of NCGS 153A-449. MCNC is in compliance with E-Verify requirements, and will require that all contractors are in compliance as well.

Contractor understands the E-Verify is the federal E-Verify program operated by the United States Department of Homeland Security and other federal agencies, or any successor or equivalent program used to verify the work authorization of newly hired employees in accordance with Article 2 of the Chapter 64 of the North Carolina General Statutes.

By my signature below, I certify that: ☐I am in compliance with E-Verify or ☐I employee less than 25 employees in North Carolina; that my subcontractors are in compliance with E-Verify unless they employ less than 25 employees in North Carolina; and that I will ensure compliance, where required, by any subsequently hired subcontractors, if any.

Contractor’s Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Print of Type Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_