

# DESIGN AND CONSTRUCTION AGREEMENT

This design and construction agreement (“Agreement”) is entered into between:

\_\_\_\_\_, a \_\_\_\_\_ Company, with the business address of \_\_\_\_\_, \_\_\_\_\_ (hereinafter referred to as “\_\_\_\_\_”),

and

\_\_\_\_\_ COUNTY, with the billing address of \_\_\_\_\_, \_\_\_\_\_ (“County”).

The effective date of this Agreement is the date this Agreement is signed by \_\_\_\_\_ and the County. \_\_\_\_\_ and the County may be referred to hereafter as the “Parties” or individually as “Party.”

## RECITALS

A. WHEREAS, on or about \_\_\_\_\_, 2024, the County requested proposals for a fiber broadband network (“RFP”) pursuant to Idaho Code 67-2806A, and \_\_\_\_\_ was selected to negotiate a contract with the County based on its response to the RFP, which RFP was dated \_\_\_\_\_, 2024 and the response from \_\_\_\_\_ was dated \_\_\_\_\_, 2024;

B. WHEREAS, \_\_\_\_\_ is an information technology and telecommunication service provider that desires to provide certain information technology, telecommunication services, and other required inputs for the design, engineering, construction and installation of fiber based telecommunications infrastructure for the County;

C. WHEREAS, the County desires to contract with \_\_\_\_\_ for \_\_\_\_\_ to provide services, materials, equipment and all other required inputs for the design, engineering, construction and installation of fiber optic based infrastructure;

D. WHEREAS, the Parties desire to enter into this Agreement to memorialize the understanding between the Parties regarding the terms and conditions upon which services, materials, equipment and all other inputs will be provided.

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants contained below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, do hereby agree as follows:

## AGREEMENT

1. **Recitals.** The Parties hereto agree that the Recitals set forth above are accurate and correct and the same are incorporated herein and made part hereof by this reference.

2. **The Services, Materials, and Equipment.** \_\_\_\_\_ shall furnish all labor, supervision, professional services, materials (except any materials specified in this document as Owner-furnished), supplies, equipment, material handling, warehousing, transportation, overhead, and any and all other items and shall perform any and all work required for the complete performance of the Work required herein within the allotted time, in strict accordance with the Statement of Work (“SOW”) attached to this Agreement as Exhibit “A” and by this reference made a part hereof, including all plans, specifications, drawings, standards, practices, policies, regulations, and all other provisions of the contract documents. (The furnishing of all inputs for the completion of the SOW by \_\_\_\_\_ is sometimes referred to herein as the “Work.”) The performance of the Work and the construction and installation of fiber optic infrastructure shall be upon the terms and conditions contained in this Agreement. The services, materials, equipment and other inputs that \_\_\_\_\_ will provide under this Agreement will be described herein and/or in the SOW.
3. **Contract Price.** The total original Contract Price to be paid to \_\_\_\_\_ by the County pursuant to and subject to the terms of payment set forth below shall be \$ \_\_\_\_\_. The Parties agree that \_\_\_\_\_ are hereinafter jointly and severally liable for the obligations of \_\_\_\_\_.
4. **Quality and Timeliness.**
- a. The Parties acknowledge that time is of the essence in connection with the Work to be provided by \_\_\_\_\_ under this Agreement.
  - b. \_\_\_\_\_ agrees to perform the Work for the benefit of the County and to be responsible for the quality and timeliness of the services. Specifically, all design, engineering, construction, installation of materials and equipment, services, and all other inputs to be provided by \_\_\_\_\_ under this Agreement will be complete, and the project will be operable and meet the requirements of this Agreement, the RFP, and all relevant local state and federal laws, rules, policies and regulations within three (3) years of the effective date of this Agreement. Initial availability of the system shall be rolled out and made operational by \_\_\_\_\_, 2024. \_\_\_\_\_ shall coordinate all work with the County.
  - c. \_\_\_\_\_ will provide to the County a fiber system providing a connect ready available service to each primary structure upon each lot within the area of service. \_\_\_\_\_ shall provide installed drops to the first 880 participating property owners free of charge to the owners. In the event that fewer drops are provided, then the contract price shall be reduced by \$290.00 for each unprovided drop.
  - d. \_\_\_\_\_ shall comply strictly with the National Electric Safety Code, local, municipal, state, federal and governmental laws, orders, codes and regulations applicable to \_\_\_\_\_’s operations in the performance

of the Work hereunder. \_\_\_\_\_ shall provide payment and construction bonds as provided by Idaho law and as required in this Agreement.

e. Construction equipment obtained or furnished by \_\_\_\_\_ which is to be used by \_\_\_\_\_ on the jobsite shall be in first-class operating condition, safe, fit for the uses for which intended, and suitable for the safe, legal and efficient performance of the Work. Such equipment shall be subject to inspection and approval from time to time by the County at its reasonable discretion. Any such equipment of \_\_\_\_\_ which is reasonably rejected by the County as not conforming with the foregoing shall be promptly removed by \_\_\_\_\_ and replaced with equipment acceptable to the County, without delaying the schedule for performance of the Work by \_\_\_\_\_. \_\_\_\_\_ shall save, indemnify and hold harmless the County from any claim related to County-owned equipment being used by \_\_\_\_\_ or its agents, employees or subcontractors.

f. \_\_\_\_\_ guarantees to the County that the Work shall strictly comply with the provisions of this Agreement and all requirements, specifications, guidelines, and drawings referred to in this Agreement or thereafter furnished, and that the Work shall be first-class in every particular and free from defects, errors, and omissions in construction and workmanship. \_\_\_\_\_ further guarantees that all materials, equipment and supplies furnished for the Work by \_\_\_\_\_, and its subcontractors or suppliers, shall be new, merchantable, of the most suitable grade, and fit for their intended purposes and shall comply in all respects with the specifications provided by the County. \_\_\_\_\_ shall be responsible for providing and installing all materials including but not limited to, fiber optic cable, conduit, pull boxes, terminations, termination cabinets, splices, pigtails, splice trays, connectors and associated accessories and equipment in a manner that does not cause unnecessary damage to existing property. In the event that damage is caused to other property by the Work, \_\_\_\_\_ shall promptly and fully repair or replace the damaged property at its expense.

g. Without limitation of any other rights or remedies of the County, if any defect, errors, or omissions in the Work in violation of the foregoing guarantees arises within the period set forth below, \_\_\_\_\_ shall upon receipt of written notice of such defect from the County promptly and within seven (7) business days furnish, at no cost to the County, labor, equipment and materials at the jobsite necessary to correct such defect and cause the Work to comply fully with the foregoing guarantees.

h. \_\_\_\_\_'s guarantees set forth above shall extend for twelve (12) months after the date of written acceptance of the Work by the County. Design and engineering, labor, equipment and/or materials furnished by \_\_\_\_\_ to correct defects shall be guaranteed by \_\_\_\_\_ in accordance with the guarantees set forth above for a period of twelve (12) months from the date of completion of the correction.

- i. In the event \_\_\_\_\_ shall have been notified of any defects in the Work in violation of \_\_\_\_\_'s foregoing guarantees and shall fail to promptly and adequately correct such defects, the County shall have the right to correct or to have such defects corrected for the account of \_\_\_\_\_, and \_\_\_\_\_ shall promptly pay the County the costs incurred in correcting such defects plus any damages suffered by the County, or alternatively the County may, at its discretion, deduct such costs and damages from any monies due \_\_\_\_\_.
- j. With respect to items of manufactured equipment specified by the County and purchased by \_\_\_\_\_ from others, \_\_\_\_\_ warrants that the equipment is as specified, and agrees to pass on and assign to the County the manufacturers' warranties.
- k. \_\_\_\_\_ shall inspect all materials, supplies and equipment which are to be incorporated in the Work. In addition, \_\_\_\_\_ shall conduct a continuous program of quality control throughout the execution of the Work.
- l. \_\_\_\_\_ shall, during the course of performance of the Work hereunder, make or cause to be made all tests required by this Agreement. \_\_\_\_\_ shall perform sufficient tests to determine that the project is operational as required by the industry standards, and shall submit to the County certification that the project, based upon the tests, is fully operational.
- m. The County shall have the right at all reasonable times to inspect the Work and all material, supplies and equipment for the Work. \_\_\_\_\_ shall provide or cause to be provided access and sufficient, safe and proper facilities for such inspections.
- n. The County's failure to inspect materials, equipment or the Work or to object to defects therein at the time the County inspects the same, shall not relieve \_\_\_\_\_ or any of its subcontractors and suppliers of their responsibilities for defective material, equipment or Work, nor be deemed to be a waiver of County's rights to subsequently reject defective Work.
- o. Rejection by the County of any or all parts of defective Work shall be final and binding. Such rejected Work shall be promptly corrected or replaced by \_\_\_\_\_ at \_\_\_\_\_'s expense. If \_\_\_\_\_ fails to commence and diligently continue correction or replacement of such rejected Work within seven (7) business days after receipt of written notice from the County to correct or replace the rejected work, the County may at its option remove and replace the rejected Work, and \_\_\_\_\_ shall promptly reimburse the County for the costs of such removal and replacement of defective and rejected Work, or alternatively, the County

may at its option deduct any such costs so incurred from any monies due \_\_\_\_\_.

- p. All Work performed by \_\_\_\_\_ shall be subject to coordination and inspection by County representatives, the representatives of permitting agencies, railroads and other right of way owners, and the city, county, or state inspectors. Work rejected by any such inspectors and representatives shall be corrected by \_\_\_\_\_ and its subcontractors at their sole cost, as expeditiously as possible, until it passes the inspection. \_\_\_\_\_ shall pay at its sole cost the expense of all permits, bonds, fees and financial guarantees required by all governmental entities, agencies and other third parties.
  
- q. In the event any significant portion of the SOW is to be subcontracted to a third party, \_\_\_\_\_ will be required to follow industry accepted guidelines in the management of, and awarding of the subcontract. If any subcontractors are utilized, names of proposed subcontractors will be presented to the County for evaluation. Subcontractors are not exempt from any of the requirements outlined within this Agreement. Where a portion of the Work is subcontracted, \_\_\_\_\_ remains fully responsible for proper and safe performance of the Work, and shall be responsible to the County for any and all acts and omissions of the subcontractor and its employees. Nothing contained in this Agreement shall create any contractual obligation or other liability on the County's part to \_\_\_\_\_'s subcontractors and suppliers. \_\_\_\_\_ and all subcontractors shall be properly and appropriately licensed under Idaho law to perform the portion of the Work for which they are responsible.
  
- r. \_\_\_\_\_ represents that it has carefully examined the drawings and specifications for the Work and has fully investigated and acquainted itself with all conditions relevant to the Work, and its surroundings. \_\_\_\_\_ assumes the risk of such conditions and, regardless of such conditions, the expense, and difficulty of performing the Work, will fully complete the Work by the stated deadline and for the stated Cost without further recourse to the County. Information on the site of the Work and local conditions at such site which may have been furnished by the County is not guaranteed by the County and is furnished only for the convenience of \_\_\_\_\_.

**5. Cooperation and Duties.**

- a. The County hereby agrees to provide timely responses to \_\_\_\_\_'s inquiries concerning the services and equipment. The County acknowledges that failure to provide timely responses to \_\_\_\_\_'s inquiries may result in delays in the provision of services and equipment. \_\_\_\_\_ will be authorized to assume responses by the County that would reasonably be calculated to conform with the requirements of guidelines as a result of the County's failure to timely communicate with \_\_\_\_\_.

- b. The County agrees to designate one or more County employees with the knowledge, authority, and capacity to act as a liaison responsible for ensuring that \_\_\_\_\_ promptly receives any assistance required of the County to perform its work under the Agreement. Specifically, because \_\_\_\_\_ anticipates that its employees will regularly and consistently work outside normal business hours in order to complete the project, the County will ensure that one or more County employees are available 24/7 to respond to \_\_\_\_\_ inquiries and requests, including but not limited to requests for access to County property in order to perform \_\_\_\_\_'s work. The Parties acknowledge that this level of cooperation on the part of the County is essential to enable \_\_\_\_\_ to perform its obligations in a timely manner.
- c. The County will cooperate in good faith for \_\_\_\_\_ to obtain any use permits required for fiber to be installed under this Agreement in locations agreed upon by \_\_\_\_\_ and the County.
- d. \_\_\_\_\_ and the County shall mutually agree to a joint inspection schedule, and both parties shall have the right to inspect the Work at all stages and at all times.
- e. \_\_\_\_\_ shall acquire easements, rights, conduit or other leases, fee interests and other rights as well as secure any and all other long-term and necessary permits, at the expense of \_\_\_\_\_, in the name of the County, necessary and requisite for constructing the County's fiber system.
- f. During the course of the Work, \_\_\_\_\_ shall procure any and all permits and licenses of a temporary nature, and all rights of access that are necessary for performance thereof (e.g., bridge, rail, and interstate highway crossings) and \_\_\_\_\_ shall observe and abide in all material respects with all applicable restrictions and all laws, regulations, ordinances, and other rules of any governmental authority having jurisdiction over the Work.
- g. \_\_\_\_\_ and the County may by written agreement make changes to the routes initially described in Exhibit A. \_\_\_\_\_ shall use its reasonable efforts to promptly proceed with the performance of the Work with respect thereto as so changed. The cost and time for performance shall be adjusted to compensate for increased or decreased costs of performance or time of performance resulting from such changes, additions, and omissions subject to the mutual agreement of the County and \_\_\_\_\_.
- h. At the completion of a sub-phase's construction, \_\_\_\_\_ shall provide the County the opportunity to perform a physical inspection. Upon acceptance, the County shall provide a Preliminary Acceptance Notice to \_\_\_\_\_ in a form acceptable to the County ("Preliminary Acceptance"). Said Preliminary Acceptance shall not relieve \_\_\_\_\_ of its guarantees under this Agreement and shall be

subject to a final acceptance following completion and operation of the entire system.

- i. \_\_\_\_\_ shall bear the risk of loss for all Work until Acceptance as provided in this Agreement. However, \_\_\_\_\_ shall not be responsible for any such loss solely due to the grossly negligent or intentional misconduct or omissions of the County.
- j. \_\_\_\_\_ shall save, indemnify and hold harmless the County for all negligent or intentional acts or omissions of \_\_\_\_\_ and its representatives, employees, staff, agents, subcontractors and other personnel.
- k. \_\_\_\_\_ shall take all actions and timely file all reports required to meet the requirements for the use of Capital Project Funds to be used to fund the Work.

**6. Payment.**

- a. The County shall pay \_\_\_\_\_ for the various sub-phases of the project as provided in the SOW. A payment for a completed sub-phase shall not be considered acceptance or approval of any Work or waiver of any defects therein.
- b. As each sub-phase of the work outlined in the SOW is completed, \_\_\_\_\_ will submit invoices to the County for progress payments for 90 % of completion of the sub-phase. \_\_\_\_\_ will list separately on each invoice the (i) equipment and materials installed by \_\_\_\_\_ and (ii) work/travel expenses at the completion of each sub-phase outlined in the SOW under each project. \_\_\_\_\_ will invoice the County upon the completion of each sub-phase. \_\_\_\_\_ will not invoice the County for any services or equipment not actually provided. \_\_\_\_\_ will not invoice the County the remaining 10% of each subphase until and unless the entire project (including all phases) is operational and has been closed, completed inspected, verified, and accepted in compliance with all standards and guidelines set forth herein, at which time a final invoice will be presented. The total of all payments for all invoices shall not be more than the Contract Price.
- c. Invoices will clearly correlate each element for which payment is requested to show particular work connected to a particular phase under the SOW. The final and/or retention invoice that includes all of the remaining costs of the project as set forth in the SOW shall be submitted for final payment after completion of the Work and final acceptance thereof by the County. This invoice shall contain a complete itemized listing of all previous invoices by number, date, gross amount, and the total amount of sums retained and due. It shall also contain, or be supported by, a written final acceptance of the Work acknowledging that project is operational and has been closed, completed and verified in compliance with this Agreement. Final payment shall be made within forty-five (45) days after receipt of a proper invoice and

supporting documentation satisfactory to the County. The final invoice documentation shall also include a break down of the final contract price by labor, materials, equipment.

- d. Payment is due on invoices for Allowed Costs, by phase completion, within thirty (30) calendar days of the invoice date. Any amounts not paid when due shall accrue interest at the rate of one percent (1%) per month (12% per annum) from the due date until paid by the County.
- e. \_\_\_\_\_ shall at all times promptly pay all proper invoices for services, materials, equipment and labor used or furnished by \_\_\_\_\_ in the performance of the Work under this Agreement and shall at its expense keep the right of way and the County's premises and all property belonging to the County and right of way owner, or to either of them, free and clear of any and all liens and rights of lien arising out of services, labor, equipment or materials furnished by \_\_\_\_\_ or its employees, materialmen or subcontractors in the performance of the Work. If \_\_\_\_\_ fails to release and discharge any such claim of lien against right of way owners' premises or the property of the County, or of either of them, arising out of performance of the Work within five (5) business days after receipt of written notice from the County to remove such claim of lien, the County may, at its option, discharge or release the claim of lien or otherwise deal with the lien claimant, and \_\_\_\_\_ shall promptly pay the County any and all costs and expenses of the County in so doing, including reasonable attorneys' fees incurred by the County, or alternatively the County may, at its choosing, deduct such costs and fees from the County's invoices.
- f. Good and clear title to all material and equipment furnished by \_\_\_\_\_ under this Agreement for the Work shall pass to the County upon incorporation into the Work. \_\_\_\_\_ shall ensure that vendors and suppliers from whom \_\_\_\_\_ obtains materials and equipment do not retain, encumber or reserve title to such items. \_\_\_\_\_ shall execute such other and additional documentation as the County may require in evidence of such transfer of title to the County.
- g. Notwithstanding the provisions of Clause (f) above, the care, custody and control of \_\_\_\_\_'s work incorporated into the Work shall remain with \_\_\_\_\_ until the Work has been accepted in writing by the County and shall thereupon pass to the County unless the County notifies \_\_\_\_\_ in writing that such care, custody, and control is assumed by the County at an earlier date. The taking of possession of the Work by the County shall not constitute the assumption of care, custody and control of the Work until such time as the Work has either been accepted in writing by the County or \_\_\_\_\_ has been notified as set forth herein.

7. **Change Orders.** Changes or alterations to the services or equipment requested by the County may obligate the County to pay additional costs to \_\_\_\_\_. Change



orders will be prepared by \_\_\_\_\_ and provided to the County and shall outline the changes to the services and/or equipment and the corresponding changes to the cost of such services and/or equipment. The County must agree to the changes set forth in the change order prior to \_\_\_\_\_ beginning any work under the change order. If \_\_\_\_\_ is unable to meet the County's required completion deadline due entirely to delays by the County or changes requested by the County, then, to the extent allowed by Idaho law, the County agrees to indemnify and defend \_\_\_\_\_ from any damage, liability, or harm suffered by the County with respect to \_\_\_\_\_'s inability to complete the services or provide the equipment prior to the County's required completion deadline.

8. **Insurance.** \_\_\_\_\_ shall, at its sole cost and expense, purchase, provide, maintain and keep in force for the entire term of this Agreement and thereafter as required, the insurance coverages identified below. Insurance coverage shall be maintained with insurance underwriters authorized and licensed to do business in the State of Idaho, and that are satisfactory to the County. The insurance shall be maintained with companies with a current A. M. Best Rating of A VIII or better.

At the time of execution of this Agreement, and annually thereafter, \_\_\_\_\_ shall furnish a Certificate of Insurance along with all associated and required policy endorsements showing that required insurance is current and in force. \_\_\_\_\_ shall furnish the County with certificates of insurance and an endorsement reflecting additional insured status. The certificates for each insurance policy shall be signed by a signature of a person authorized by the insurer to bind coverage on its behalf. The certificates for each insurance policy are to be on standard forms or such forms as are consistent with standard industry practices, and are to be received and approved by the County at the time of acceptance of this Agreement by \_\_\_\_\_ with existing insurance coverage to be maintained by \_\_\_\_\_ until \_\_\_\_\_ provides new certificates evidencing coverage. \_\_\_\_\_ hereby warrants that its insurance policies satisfy the requirements of this Agreement.

Required evidence of insurance shall be submitted for any renewal or replacement of a policy that already exists, at least ten (10) days prior to expiration or termination of the existing policy. \_\_\_\_\_ shall provide notice to the County of any changes to insurance or cancellation of any or all insurance at least thirty (30) calendar days in advance of such change or cancellation. If the insurance is cancelled or terminated or materially diminished so as to be out of compliance with the requirements of this Agreement, \_\_\_\_\_ shall provide a replacement policy so as to maintain continuous uninterrupted insurance coverage, in at least the amounts required. The insurance policies required under this Agreement shall be written on a claims made or claims occurrence basis as required by the County and shall be kept in place for at least one year beyond the date of expiration or termination of this Agreement.

The Certificates of Insurance must include the following reference: the County of \_\_\_\_\_ with the County's address. If, in the County's opinion, the minimum limits of the insurance coverage herein required become inadequate during the term of this

Agreement, \_\_\_\_\_ agrees that it will increase such minimum limits by reasonable amounts upon request of the County.

The amounts listed below are the minimum deemed necessary by the County to protect the County's interests in this matter. The County has made no recommendation to \_\_\_\_\_ as to the insurance necessary to protect \_\_\_\_\_'s interests and any decision by \_\_\_\_\_ to carry or not carry insurance amounts in excess of the above is solely that of \_\_\_\_\_. \_\_\_\_\_ shall be responsible for judgments, settlements, damages, costs, attorneys' fees and expenses that exceed limits of \_\_\_\_\_'s insurance coverage.

- a. Material Breach of Agreement. The continuous maintenance by \_\_\_\_\_ of all types of required insurance under this Agreement is mandatory. Failure of \_\_\_\_\_ to maintain such insurance is a material breach of this Agreement, and does not amend this Agreement, nor release \_\_\_\_\_ from any other obligations in this Agreement.
- b. Commercial General Liability Insurance. Commercial General Liability Insurance on a standard occurrence form, providing coverage for personal injury, bodily injury and death and property damage in amounts not less than \$2,000,000 per occurrence; \$2,000,000 General Aggregate; the General Aggregate shall apply separately to each occurrence. The required limits may be provided by a combination of Commercial General Liability Insurance and Excess or Commercial Umbrella Liability Insurance and shall include Commercial property insurance (cause of loss-special form) (formerly "all-risk") providing coverage for 100 % of the full replacement cost of the \_\_\_\_\_ Fiber Network ("BFN"). After construction of the BFN is completed and the BFN is accepted by the County, the County shall carry the property damage insurance. \_\_\_\_\_ may carry insurance under a blanket policy, provided that such policy provides equivalent coverage to a separate policy. The commercial general liability policy shall be endorsed to name the County of \_\_\_\_\_, the Board of County Commissioners and the County's officers, directors, employees, agents, and representatives as a PRIMARY ADDITIONAL INSURED.
- c. Commercial Automobile Liability Insurance. Commercial Automobile Liability Insurance with minimum combined single limits of at least two million dollars (\$2,000,000) each occurrence and two million dollars (\$2,000,000) aggregate with respect to each of \_\_\_\_\_'s owned, hired and non-owned vehicles, or any other vehicles assigned to or used in any activities authorized under or used in conjunction with this Agreement.
- d. Employer's Liability Insurance. Employer's Liability insurance with limits of at least one million dollars (\$1,000,000).
- e. Workers' Compensation Insurance. Workers' Compensation insurance shall be maintained during the life of this Agreement to comply with State law.

- f. Umbrella or Excess Liability Insurance. Umbrella or excess liability insurance in the amount of three million dollars (\$3,000,000).

Except for the property damage insurance of the County with respect to the BFN which shall be carried by the County, \_\_\_\_\_'s insurance shall be primary insurance and the County's insurance shall be excess and not contribute to it.

The policies shall also be endorsed to include a waiver of the insurer's right to subrogate against the County. Specifically, all insurance policies, except Workers Compensation, shall contain a waiver of transfer rights of recovery (subrogation) against the County, the County Boards, Commissioners, representatives, officers, officials, agents, and employees for any claims arising out of \_\_\_\_\_'s work or service.

\_\_\_\_\_ shall solely be responsible for deductibles and/or any self-insured retention.

9. **Governing Law.** This Agreement shall be governed by, and construed under, the laws of the State of Idaho.
10. **Mediation.** In the event of a dispute arising under this Agreement, the Parties shall first submit the dispute to mediation in \_\_\_\_\_ County, Idaho ("Mediation"). The Mediation proceedings may be initiated by either Party by sending written notice of the dispute and desire to mediate to the other Party. The mediator shall be an attorney licensed in the State of Idaho with at least five (5) years of mediation experience and is in good standing with the Idaho State Bar ("Mediator"). The Mediator shall be agreed upon in advance by the Parties and each Party hereby agrees to pay one half (1/2) of any and all costs and fees of the Mediator associated with the Mediation. The Parties agree to pay their own respective attorneys' fees with respect to the Mediation. The Mediation shall be held at a location in \_\_\_\_\_ County, Idaho that is mutually agreeable to the Parties within thirty (30) days of the date the other Party receives notice, as described above.
11. **Arbitration.** In the event that Mediation is unsuccessful in resolving any dispute between the Parties or in the event that the other Party fails to respond to the notice to mediate, the Parties may, by mutual agreement, submit to any remaining dispute to be settled by arbitration ("Arbitration") under the Commercial Rules of the American Arbitration Association ("AAA"). The Arbitration shall be completed by an AAA approved arbitrator and be held at a location in \_\_\_\_\_ County, Idaho that is mutually agreeable to the Parties. The Arbitration shall be held before a single arbitrator ("Arbitrator"), selected in accordance with the Commercial Rules of the AAA. The Arbitrator's award shall be final and shall be enforceable in any court of competent jurisdiction. The Arbitrator shall award the prevailing party its costs of the Arbitration including, but not limited to, the reasonable attorneys' fees, costs, and expenses of the prevailing Party. If a Party refuses to comply with the rendered award, and the other Party enters an application for judicial enforcement thereof, the refusing Party shall bear all of the costs and expenses incurred in connection with such application (including but not limited to, reasonable attorneys' fees, costs, and expenses of the complying Party). Nothing in this paragraph shall prevent either Party from

resorting to judicial process if injunctive or other equitable relief from a court is necessary to prevent serious and irreparable injury to a Party or to others.

12. **Attorneys' Fees.** In the event any action is instituted by a Party (including Arbitration as defined above) to enforce any of the terms and provisions contained in this Agreement, the prevailing Party in such action including pertaining to any appeal, shall be entitled to receive from the other Party reasonable attorneys' fees, costs, and expenses incurred in enforcing this Agreement.

13. **Termination.** The County may terminate this Agreement in the event that \_\_\_\_\_ fails to remedy a material breach of the Agreement within seven (7) business days after receipt of written notice of such breach from the County. In the event the County terminates this Agreement prior to the full completion, within thirty (30) business days of such termination, the County shall pay \_\_\_\_\_ for all the equipment and materials (but not for any labor, services or any other inputs) \_\_\_\_\_ has installed to the date of termination ("Termination Date"). The Termination Date shall be the date that is seven (7) days after \_\_\_\_\_ receives written notice from the County regarding a material breach of the Agreement that \_\_\_\_\_ fails to cure.

TERMINATION FOR NON-APPROPRIATION OF FUNDS: Notwithstanding any other provision of this Agreement, the County shall not be obligated by any provision of this Agreement during any of the County's future fiscal years unless and until the Board of County Commissioners appropriates funds for this Agreement in the County's Budget for each such future fiscal year. In the event that funds are not appropriated for this Agreement, then this Agreement shall terminate, without penalty, as of September 30 of the last fiscal year for which funds were appropriated. The County shall pay \_\_\_\_\_ for all allowed costs (but not for any labor, services or any other inputs \_\_\_\_\_ has installed up to the date of termination). The County shall notify \_\_\_\_\_ in writing of any such non-allocation of funds at the earliest possible date.

**Termination Due to Ineligibility of Funding.** The County may terminate this Agreement upon receiving any notice that the State of Idaho, any state or federal agency or department, any court, or the attorney general of the United States or of the State of Idaho, has determined that any Grant program or its provisions which were intended to fund this project are in violation of any law or of the requirements of the grant or program funding or if such funding is not made or is withdrawn by the Federal or State Government under the Capital Projects Funds. Upon termination under this paragraph, the County shall pay \_\_\_\_\_ only for the costs incurred by \_\_\_\_\_ before notice of termination is received by \_\_\_\_\_.

14. **Construction Bond.** \_\_\_\_\_ will obtain a construction bond in the amount of the total contract price covering faithful performance of the work required under this Agreement in a form acceptable to the County and shall deliver the fully executed bond to the County within five (7) business days of the execution of this Agreement.

- a. \_\_\_\_\_ shall provide a construction bond in the amount of two million two hundred thousand dollars (\$2,200,000) to ensure the faithful performance of its responsibilities under this Agreement including, by way of example and not limitation, its obligation to restore the County Rights-of-Way and other property. The construction bond shall be in a standard industry form. \_\_\_\_\_ shall pay all premiums or costs associated with maintaining the bond and shall keep the same in full force and effect at all times, until construction is completed to the satisfaction of the County.
- b. The bond shall not be cancelled or materially altered so as to be out of compliance with the requirements of this Section without forty-five (45) days written notice first being given to the County. If the bond is cancelled or materially altered so as to be out of compliance with the requirements of this Section within the term of this Agreement, or for one (1) year after the termination or expiration of this Agreement, \_\_\_\_\_ shall provide a replacement bond.
- c. After the giving of notice by the County to \_\_\_\_\_, and expiration of any applicable cure period, the bond may be drawn upon by the County for purposes that include, but are not limited to the following:
1. Failure of \_\_\_\_\_ to pay the County sums due under the terms of this Agreement;
  2. Reimbursement of costs borne by the County to correct Agreement violations not corrected by \_\_\_\_\_.
- d. The County shall give \_\_\_\_\_ written notice of any withdrawal under this subsection upon such withdrawal. Within ten (10) days following receipt of such notice, \_\_\_\_\_ shall restore the bond to the amount required under this Agreement. \_\_\_\_\_'s maintenance of the bond shall not be construed to excuse unfaithful performance by \_\_\_\_\_ or limit the liability of \_\_\_\_\_ to the amount of the bond or otherwise limit the County's recourse to any other remedy available at law or in equity.
- e. \_\_\_\_\_ agrees to maintain a continuous uninterrupted bond in the amounts required for the duration of this Agreement and as otherwise specified in this Agreement.
- f. \_\_\_\_\_ shall have the right to appeal to the Board of County Commissioners for reimbursement in the event \_\_\_\_\_ believes that the bond was drawn upon improperly. After a determination by the Board, \_\_\_\_\_ shall also have the right of judicial appeal if \_\_\_\_\_ believes the bond has not been properly drawn upon in accordance with this Agreement. Any funds the County erroneously or wrongfully withdraws from the bond shall be returned to \_\_\_\_\_ with interest, from the date of withdrawal at a rate equal to the prime rate of interest as

quoted in the Wall Street Journal on the date the County withdrew funds from the bond until the date the County returns the money to \_\_\_\_\_.

15. **Delays.** In the event of delay, the party delayed shall, at no cost to the other party, exercise due diligence to shorten the delay and shall keep the other party advised as to the continuance of the delay and steps taken to shorten or resolve the delay. Notwithstanding any other provision of this Agreement, \_\_\_\_\_ shall not be entitled to any compensation except compensation for the costs for completed phases of the Work.
16. **Time is of the Essence.** Time is of the essence with respect to all aspects of this Agreement and all of the Exhibits referred to herein.
17. **Further Assurances.** Each of the Parties hereto shall execute and deliver any and all additional papers, documents, and other assurances, and shall do any and all acts reasonably necessary in connection with the performance of its obligations hereunder to carry out the intent of the Parties.
18. **Modification or Amendments.** No amendment, change, or modification of this Agreement shall be valid unless made in writing and signed by both Parties.
19. **No Assignment Without Prior Written Consent.** The Parties hereto may not assign their respective rights or delegate their respective obligations hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed by either Party. In any event, this Agreement shall be binding upon and shall inure to the benefit of the successors and permitted assigns of the Parties. In the event of an assignment or transfer by \_\_\_\_\_, the County may require additions and modifications to this Agreement from the transferee or assignee in form and substance reasonably acceptable to the County
20. **Waiver.** Any waiver by either Party, whether express or implied, of any provision of this Agreement, any waiver of default, or any course of dealing hereunder, shall not affect such Party's right to thereafter enforce such provision or to exercise any right or remedy in the event of any other default or breach whether or not similar.
21. **Partial Invalidity.** Wherever possible, each provision in this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but in case any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions of this Agreement and this Agreement shall be construed and enforced as if such invalid, illegal, or unenforceable provision or provisions had never been contained herein, unless the deletion of such provision or provisions would result in such a material change as to cause completion of the transaction contemplated hereby to be unreasonable.
22. **Captions.** Captions are used herein for reference only and shall in no way be deemed to define, limit, explain, or modify any provision hereof.

23. **Construction.** All Parties to this Agreement and their counsel have reviewed and have had the opportunity to revise this Agreement.
24. **Successors and Assigns.** All of the terms and provisions contained herein shall inure to the benefit of and shall be binding upon the Parties hereto and their permitted respective successors and assigns.
25. **No Joint Venture.** It is not the intent of \_\_\_\_\_ or the County to, and said Parties do not by execution of this Agreement, become partners, equity participants, or joint venturers of each other.
26. **Notice.** If either Party is required or permitted to send the other Party any notice, such notice shall be in writing and sent to the other Party at its address listed below by certified mail, postage prepaid, return receipt requested or by email at the corresponding email address listed below. Notices sent by certified mail shall be considered received by the other Party on the date that is three (5) business days after such notice is deposited with the U.S. Postal Service. Notices sent via email shall be considered received by the other Party on the date that is one (1) business day after the emailed notice is sent to the other Party assuming proper communication protocols are followed. A courtesy phone call is suggested to accompany emails:

To \_\_\_\_\_:

\_\_\_\_\_  
 Attn: \_\_\_\_\_  
 \_\_\_\_\_

Email: \_\_\_\_\_

Phone: \_\_\_\_\_

To the County:

\_\_\_\_\_  
 Board of County Commissioners-\_\_\_\_\_

\_\_\_\_\_  
 Email: \_\_\_\_\_

Phone: \_\_\_\_\_

Any Party hereto may change its address for the purpose of receiving notices, demands, and other communications as herein provided by a written notice given in the manner aforesaid to the other Party hereto.

27. **Separate Counterparts.** This Agreement may be executed in one or more counterparts, each of which, when so executed, shall be deemed to be an original and which counterparts shall together constitute and be one and the same instrument.

28. **Copy with same Effect as Original.** A copy of this Agreement signed by the Parties, whether in electronic or hard copy form, shall have the same effect as an original.
29. **Authority of Signers.** The persons executing this Agreement on behalf of \_\_\_\_\_ and the County warrant his or her authority to do so and to bind \_\_\_\_\_ and the County, respectively.
30. **Entire Agreement.** This Agreement represents the entire agreement between \_\_\_\_\_ and the County with respect to the performance of the construction services to be provided by \_\_\_\_\_ to the County, and this Agreement supersedes any prior agreements, letters of intent, or understandings (whether written or oral) between the Parties with respect to construction services.

IN WITNESS WHEREOF, this Agreement is hereby executed as of the date indicated below:

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

**THE COUNTY:**

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

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

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

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