

## CONSTRUCTION SPECIFIC TERMS AND CONDITIONS

These Construction Specific Terms and Conditions apply to Qwest's purchase of construction Services from Supplier.

### 1. DEFINITIONS:

- 1.1 "Completion Date" means the date on the Order by which Supplier is obligated to complete the Project.
- 1.2 "Construction Documents" means all construction drawings, Project specifications, manuals and other construction documents applicable to the Project and any deliverables to be provided by Supplier to Qwest in connection with the Project. Construction Documents are considered Documentation under these Terms.
- 1.3 "CSI" means the Construction Specifications Institute.
- 1.4 "Contract Sum" means the total amount that Qwest agrees to pay for the Project pursuant to the Order.
- 1.5 "Consultant" means an architect or other third party engaged by Qwest to perform design services, prepare Construction Documents and/or assist in the administration of the Project. Section 11 of these Specific Terms and Conditions addresses the role of the Consultant in the Project, if one is designated by Qwest for the Project.
- 1.6 "Cost" means the total amount to be paid for Services that is based on a cost plus arrangement, as described below.
- 1.7 "Cost Plus Task Order" means an Order that is based on a cost plus pricing arrangement between Qwest and Supplier.
- 1.8 "Fee" means the Cost multiplied by the fee percentage set forth on the Order.
- 1.9 "Fixed Price" means the fixed sum set forth on the Order for the Project.
- 1.10 "Lump Sum Task Order" means an Order that is based on a fixed pricing arrangement between Qwest and Supplier.
- 1.11 "Not to Exceed Price" means the "not to exceed" amount set forth in the Order for the Project.
- 1.12 "Project" means the construction Services performed by or for Supplier in connection with the Order. If Services are referred to as "Work" on the Order, "Work" will mean the Project.
- 1.13 "Retainage" means an amount to be retained by Qwest from each payment for the Project until payment by Qwest of an Approved Invoice for the Project, which amount will be retained by Qwest for the due and punctual performance of Supplier's obligations for the Project.
- 1.14 "Site" means the location of the Project.

### 2. DESCRIPTION OF THE PROJECT:

The Order will describe: (i) the Services to be performed by Supplier in connection with the Project; (ii) the method by which Supplier will be compensated; (iii) the Fixed Price or Not to Exceed Price, as applicable; (iv) the Completion Date; (v) the Site; and (vi) the Construction Documents.

### 3. CHANGE ORDERS:

#### 3.1 Proposal of Changes.

Qwest, Consultant and Supplier may at any time during the Project propose additions, alterations, deductions or deviations to or from the Project or the Construction Documents by issuing a proposed Change Order. Unless otherwise specifically agreed to in writing by Qwest, nothing contained in this Section will be construed to authorize Supplier to perform any Service that will cost more than the Contract Sum.

### **3.2 Notification of Changes.**

Supplier will immediately deliver a written notice to Qwest and Consultant whenever it has reason to believe a change in the Project has occurred that will require a Change Order, which notice will clearly specify (a) Supplier's estimate of any necessary change in the Completion Date, (b) Supplier's estimate of any necessary change in the Contract Sum, (c) any other change that Supplier believes must be made, and (d) a detailed rationale as to why the changes are required including, if applicable, an itemization of labor, overhead, profit, materials, and costs of Subcontractors and any other information required to evaluate the Change Order. Additional information will be provided by Supplier upon the request of Qwest or Consultant.

## **4. COMPLETION DATE:**

### **4.1 Completion Date.**

Supplier will complete the Project no later than the Completion Date set forth in the Order. If Supplier fails to complete the Project by the Completion Date, Qwest may at its option immediately terminate the Order and complete all or any part of the Project itself (by using its own employees or by hiring another contractor) and bill Supplier for all related costs.

### **4.2 Sufficient Personnel / Notification and Correction of Non-Compliance with Completion Date.**

Supplier will furnish a sufficient quantity of materials, tools, equipment and qualified personnel to complete the Project by the Completion Date. Should the progress of the Project appear to Qwest or Consultant to be inadequate to ensure completion by the Completion Date, Supplier will, within 7 calendar days after notice from Qwest or Consultant, take appropriate steps to put the Project back on schedule. Should Supplier fail to institute appropriate measures, in Qwest's or Consultant's reasonable judgment, within such 7 calendar day period, or should the measures taken fail to put the Project back on schedule, Qwest may, but will not be required to, supplement Supplier's, materials, tools, equipment and/or forces with other, materials, tools, equipment and/or forces and bill Supplier for all related costs. Supplier will coordinate and work together with such forces, materials and/or equipment. Qwest's use of such supplemental, materials, tools, equipment and/or forces will not excuse Supplier from performing all of its obligations under the Order.

## **5. INVOICES AND PAYMENTS:**

In addition to the terms and conditions in the Section titled "Invoices and Payments" in the General Terms and Conditions, the following terms and conditions apply to the Project performed under these Specific Terms and Conditions:

### **5.1 Amounts to be paid for Project.**

Subject to Qwest's acceptance of the Project, Qwest will pay Supplier the Contract Sum, which amount will be either (i) the Cost, plus a Fee, but never greater than the Not to Exceed Price, or (ii) the Fixed Price. The Contract Sum may only be modified by a Change Order. The Contract Sum will be paid in accordance with the payment terms set forth below. The Contract Sum includes applicable sales, use and excise taxes and the cost of any permits, product licenses, other licenses and certificates required in connection with the Services.

### **5.2 Schedule of Values.**

Unless Qwest agrees in advance that it is not required, at the commencement of the Project, Supplier will submit to Qwest and Consultant a "Schedule of Values" in the form attached hereto as **Exhibit SV** (the "Schedule of Values"). The Schedule of Values will indicate the breakdown of the Contract Sum in accordance with the divisions of work specified by CSI. Unless Consultant or Qwest notifies Supplier within 10 calendar days after receipt by Qwest and Consultant of the Schedule of Values that the Schedule of Values is unacceptable, the Schedule of Values will be deemed approved. Upon receipt of notification of disapproval, Supplier, Qwest and Consultant will promptly work together to prepare a revised Schedule of Values acceptable to Consultant, Qwest and Supplier.

### **5.3 Progress Payments.**

Supplier may receive periodic payments of portions of the Contract Sum for the Project at intervals no more frequently than monthly.

### **5.4 Applications for Payment.**

In order to receive payments, Contractor must complete the Application for Payment process using a format approved by Qwest in advance, indicating the value of the Services completed by Supplier as of the date of the Application (and since submittal of the last Application), together with any reports, forms and supporting data (such as copies of invoices from Subcontractors, including material suppliers) reasonably required by Consultant or Qwest. Supplier shall not submit any Approved Invoices until after the Schedule of Values (if required) and Request for Receipt have been accepted by Qwest. Materials supplied by Supplier will be listed separately on the Application. Language included or inserted on an Application or on any other document submitted by Supplier with an Application that conflicts with the terms and conditions contained in the Order will not be binding and is null and void.

### **5.5 Taxes.**

Tax that Supplier has paid on materials included in the Service will be included on the Approved Invoice, if applicable, in the tax field, as part of the cost of the materials. Failure of Supplier to itemize all taxes on an Approved Invoice will prohibit Supplier from collecting the taxes from Qwest at a later date. Upon request by Qwest, Supplier will provide to Qwest an original and/or copy of a receipt for all materials.

### **5.6 Consultant's Review of Applications.**

If a Consultant is assigned by Qwest, Supplier will send the Request for Receipt to the Consultant for review and verification. Within 3 days after the Consultant receives each Request for Receipt (other than the Final Request for Receipt) the Consultant will respond in writing either: (1) verifying and confirming the Request for Receipt and the amount due to the Contractor; or (2) rejecting the Request for Receipt or portion thereof along with the reasons for the rejection. Such reasons could include, without limitation:

- (a) unsatisfactory performance or prosecution of the Service by Supplier or defective Service;
- (b) liens or claims filed or reasonable evidence indicating the possible filing of claims;
- (c) failure of Supplier to make payments promptly to any Subcontractor for labor, materials or equipment; or
- (d) incorrectness of the Application.

Following certification of the Request for Receipt by the Consultant, the Contractor will forward the Consultant's written confirmation of the Request for Receipt to Qwest for final approval. Once Qwest approves the Request for Receipt in writing, the Contractor may submit an Approved Invoice.

### **5.7 Retainage Amount.**

Unless Qwest notifies Supplier in writing that Retainage is required for the Project, there will not be any Retainage. If Qwest does notify Supplier that there will be Retainage for the Project, the Retainage will be the lesser of 10% or the highest amount allowable by law unless Qwest notifies Supplier of a different Retainage amount.

### **5.8 Correction of Services.**

If Consultant determines that all or part of the payment specified in any Request for Receipt should not be made, Supplier will immediately correct the problem, at its own expense, remedy any defects in the Services and pay for all damages resulting from the defects, including additional testing, inspections, compensation for services, and expenses of Qwest made necessary by the faulty Services. Supplier and Consultant will work together in good faith to prepare a revised Request for Receipt acceptable to Consultant. Upon resolution of the dispute Consultant will deliver a revised or supplemental certification to the Contractor to be attached to the Request for Receipt and forward to Qwest for receipting (approval).

## **5.9 Waiver of Claims.**

In no event will Supplier be compensated for more than the Contract Sum, as modified by any Change Order. Supplier will bring any claim for amounts Supplier claims are due and owing from Qwest within 1 year after issuance of the relevant Application. Any claim(s) not brought by Supplier within this 1 year period will be waived.

## **5.10 Payment Claims.**

Supplier warrants that no Payment Claims will be filed or maintained by it, its Subcontractors or any other third party against any Qwest equipment, real estate or other property, including property of third parties, on account of the Services. Qwest reserves the right, prior to making any payments or at any other time, to require Supplier and any Subcontractor to furnish a Lien Waiver.. Any failure by Supplier or its Subcontractor to submit a Lien Waiver requested by Qwest will be a material breach of the Order.

## **5.11 Final Application.**

Upon completion of the Project, Supplier will deliver to Consultant and Qwest a final Application for Payment (the "Final Application") and will notify Consultant and Qwest in writing that the Project is ready for final inspection. At such time, Supplier will deliver to Consultant and Qwest the following:

- (a) A Lien Waiver covering all Services included in the Project, including that of all Subcontractors (including suppliers of materials);
- (b) Printed or typewritten operating, servicing, maintenance and cleaning instructions for all Services included in the Project, including individual items of equipment and system operation and maintenance;
- (c) Records specified by Qwest or Consultant including record drawings, other drawings, red-lined prints and as-built drawings, if applicable, on paper and electronically in AutoCAD format;
- (d) A written description of the sequence of controls for all mechanical, electrical, plumbing and other systems;
- (e) An Application for the net remaining Retainage, as applicable;
- (f) Consent of the surety, if any, to final payment;
- (g) Training of Qwest's designated employees in the operation of mechanical, electrical, plumbing and other systems;
- (h) Each written warranty with respect to the Project and assignment thereof, certificates of inspections, and bonds for Qwest's and Consultant's review;
- (i) Written evidence that all performance tests required in connection with the Project have been successfully completed;
- (j) Certificate(s) of occupancy, if required; and
- (k) Certification by Supplier that the Project has been completed in accordance with the Order.

## **5.12 Process for Approval of Final Applications.**

Upon receipt of the last of the items set forth in the previous subsection, Consultant will inspect the Project. The process for payment of the Final Application will be the same as that set forth above for other Applications.

## **6. ADDITIONAL DUTIES OF SUPPLIER:**

### **6.1 Representatives.**

Supplier will supervise and direct the Services using Supplier's best skill and attention. To that end, Supplier will keep on the Site a competent superintendent (to be on the Site full time if so specified in the Construction Documents) that is capable of communication in English ("Supplier's Representative") and any necessary assistants, all of whom will be satisfactory to Qwest. Supplier will not replace Supplier's Representative without the prior written approval of Qwest. "Qwest's Representative" is Qwest's project

manager assigned to the Project as set forth in the Order for the Project or otherwise designated by Qwest from time to time. Qwest's Representative and Supplier's Representative will act in such capacity only for the individual Project. Qwest shall have the right, but not the duty, to enter upon any location where Services are being performed to conduct inspections of the Services at any time to ensure compliance with the Order.

## **6.2 Materials Provided.**

Materials provided by Supplier will be new and strictly of the type, manufacturer and quality specified by Qwest. Supplier will be responsible for the security of all materials received by Supplier, whether or not received from Qwest and whether located on the premises of Supplier, Qwest or otherwise. Supplier will be responsible for obtaining and providing to its employees and Subcontractors training on the proper use and installation of all materials, whether supplied by Supplier or Qwest.

## **6.3 Coordination.**

Supplier will coordinate the Services with Qwest's Representative and will work with Qwest's Representative to establish acceptable communication lines. Supplier shall promptly respond to all concerns, issues and questions raised by Qwest's Representative.

## **6.4 Acts or Omissions.**

Supplier will be responsible to Qwest for acts and omissions of Supplier's employees, its Subcontractors, their agents and employees and other persons performing portions of the Services on behalf of Supplier.

## **6.5 Inspection.**

Supplier will be responsible for inspection of portions of work already performed on the Site to determine that such portions are in proper condition to receive Services to be performed by Supplier.

## **6.6 Maintenance of the Site.**

Supplier will confine the Services to areas permitted by law, ordinances, permits and the Order and will not unreasonably encumber the Site with materials or equipment. Supplier will keep the Site and surrounding area free from accumulation of waste materials or rubbish and will remove all waste materials, rubbish and any combustibles on a daily basis. Upon completion of the Project, Supplier will remove all waste materials, rubbish, Supplier's tools, construction equipment, machinery and surplus materials from the Site. If Supplier fails to clean up the Site as required in this subsection, Qwest may do so or hire another contractor to do so and bill Supplier for the cost of the cleanup.

## **6.7 Access.**

Supplier will provide Qwest and Consultant access to the Project, in preparation and in progress, wherever located.

## **6.8 Compliance with Polices.**

Supplier will comply, and will cause its employees, agents and Subcontractors and their respective employees and agents to comply, with all Qwest or Consultant rules and regulations pertaining to the Site, and all amendments or supplements thereto, including without limitation rules regarding cellular telephone use. Supplier also will comply and will cause Supplier's employees, agents and Subcontractors and their respective employees and agents to comply with all health and safety directives issued by Qwest or Consultant while present at the Site, which will be made available to Supplier by Qwest, including the following sections of the Qwest Fire Life Safety Policy (QFLSP):

No smoking policy

QFLSP-D1 "Fire Protection During Construction"

QFLSP-E3 "Fire Stopping Requirements"

QFLSP-A6 "Fire Protection Impairment Program"

## **6.9 Methods and Procedures.**

When directed by Qwest or Consultant, Supplier will prepare, submit and have approved by Qwest and Consultant methods of procedure ("MOP") that will include detailed work processes, time frames, and responsibilities. Supplier will comply with any approved MOP and will cause its employees, agents and Subcontractors and their respective employees and agents to comply with the MOP.

## **6.10 Emergency Contacts.**

Supplier will maintain and provide to Qwest and Consultant in connection with the Project an emergency contact list with names and phone numbers for both business and non-business hours. In the event Qwest experiences an emergency situation impacting service or safety, Supplier will respond and will cause its employees, agents and Subcontractors and their respective employees and agents to respond in an expedited manner to assist Qwest in recovering from an emergency condition.

## **6.11 Quality Control Program.**

Supplier will have in place an effective quality control program as necessary to ensure that all Services are completed in compliance with the Order. Supplier is solely responsible for quality control. Supplier will submit its quality control program manual to Qwest and Consultant for review or information, if requested.

## **6.12 Bond or Security.**

At any time during the Project, Qwest may request and Supplier shall furnish a performance and/or payment bond or other financial instrument for the Project in an amount and on a form to be determined by Qwest. The bond shall be written by a surety company having at a minimum a "Best's" rating of A- VII and be listed on the Department of the Treasury's Listing of Approved Sureties.

## **6.13 Use of Information.**

No information or material provided to Supplier in connection with the Services may be used in connection with any other job or project, even if such job or project is for Qwest or its affiliates, without the prior written consent of Qwest's Representative.

## **7. USE OF SUBCONTRACTORS:**

### **7.1 Submission of Subcontractor List.**

Supplier will submit to Qwest and Consultant a list of proposed Subcontractors either as a part of bid documents for the Services or as a separate document prior to the execution by Supplier of any subcontractor agreement. Qwest or Consultant will have 10 calendar days after the later of (i) the awarding of the bid or (ii) receipt of Supplier's list of proposed Subcontractors to reject all or any proposed Subcontractors. Any proposed Subcontractor not rejected by Qwest or Consultant within such 10 day period will be deemed to have been accepted. Any acceptance or rejection of a proposed person or entity by Qwest or Consultant will not relieve Supplier of responsibility for the Services.

### **7.2 Contracts with Subcontractors.**

To the extent of the Services performed by a Subcontractor, all provisions of the Order that apply to the Services being performed by the Subcontractor will apply to the Subcontractor with the same force and effect as they apply to Supplier. Each subcontractor agreement will be in writing and will preserve and protect the rights of Qwest and Consultant under the Order so that the subcontracting of the Services to be performed by the Subcontractor will not prejudice such rights. Supplier will make available to each proposed Subcontractor, prior to entering into a subcontract, copies of the relevant portions of the Order (including, in every instance, a copy of the Construction Documents); provided, that Supplier is not required to provide to any Subcontractor the financial terms of the Order. Supplier will require in each subcontract that, to the extent of the Services to be performed by the Subcontractor, the Subcontractor agrees to be bound by and to comply with all terms and conditions contained in the Order that apply to the Services being performed by the Subcontractor (including, by specific reference, all change order, subcontractor, indemnification, confidential information, offset, compliance with laws, limitation of liability, dispute resolution, safety, hazardous materials, insurance, warranty, inspection and audit provisions contained in the Order) and that the Subcontractor assumes all obligations, liabilities and responsibilities

under the Order jointly and severally with Supplier with respect to the Subcontractor's Services. No subcontracting of any of the Services will release Supplier from any of its obligations contained in the Order.

## **8. ADDITIONAL WARRANTIES:**

In addition to the representations and warranties contained in the General Terms and Conditions, the following warranties apply to the Services:

### **8.1 Correction of Services.**

Supplier will promptly correct any Services identified as defective or incomplete pursuant to the Section of these Specific Terms and Conditions titled "Invoices and Payments" or any Services which fail to conform in any way to the requirements of the Order, whether observed before or after payment of the Final Application for the Project which includes the Services, and whether or not fabricated, installed or completed.

### **8.2 Minimum 12 Month Warranty.**

- (a)** In addition to any other express or implied obligations and assurances under the Order, Supplier hereby warrants for a period of 12 months (or longer, if so provided by law, and to the extent provided by law) from and after the later of (i) the date of payment by Qwest of the Final Application for the Project, or (ii) the date that the defect was reasonably discoverable, that all labor, workmanship, components, materials and other parts of the Services in or covered by the Project will be free from defects in material and workmanship under normal use and service and will conform in all respects with the Order.
- (b) Repair or Replacement.** Upon notice from Qwest, Supplier will immediately, at its own expense, repair, correct, or replace:
  - (i)** any defective materials supplied by Supplier or any Subcontractor; or
  - (ii)** any defects in the Services occurring during the warranty period whether observed before or after payment of the Final Application for the Services and whether or not the Services are already installed or completed.
- (c) Additional Warranty Period.** Any repaired or replacement materials will have a warranty period equal to the greater of: (i) 1 year from the date of incorporation in the Services, or (ii) the remainder of the original warranty period.
- (d) Payment of Costs to Remedy.** Supplier will pay all documented and reasonable costs (including attorneys' fees, additional testing and inspection, and Qwest's own costs or compensation paid to third parties) incurred by or on behalf of Qwest in identifying a defect in Services or materials found to be the responsibility of Supplier.
- (e) Non-Exclusive Remedy.** Establishment of the 12 month period in the subsection above relates only to the specific obligation of Supplier to correct the Services, and has no relationship to the time within which Qwest may seek to enforce Supplier's obligations under the Order.

### **8.3 Possession of Project.**

Upon payment of the Final Application for the Project, Qwest will take possession of the Project and will assume responsibility for security, maintenance, heat, utilities, damage to the Project and insurance. Until such time, unless otherwise specifically provided in the Order, Supplier will be responsible for all such obligations. Notwithstanding the foregoing, Qwest may elect in writing at any time during the Project to place a portion of the Services included in the Project into service as of a date specified in Qwest's written notice. In such case, the warranty period set forth in the preceding subsection with respect to that selected portion of the Services only will commence on the date that Qwest elects to place the portion of the Services into service as set forth in the written notice. The warranty period for all other portions of the Services included in the Project will remain unchanged and will continue to be governed by the preceding subsection. If Qwest elects to place a portion of the Services in a Project into service, Supplier will retain responsibility for security, maintenance, heat, utilities, damage and insurance with respect to the portion

of the Services that Qwest has elected to place into service unless Qwest agrees in writing to accept any or all of these responsibilities.

#### **8.4 Correction by Qwest.**

If Supplier fails to promptly correct nonconforming Services, Qwest may correct the Services itself or hire another contractor to do so and Qwest will be entitled to bill Supplier for the cost of correction, including all costs incurred by Qwest.

#### **9. ADDITIONAL INDEMNIFICATION OBLIGATIONS OF SUPPLIER:**

In addition to the indemnification provided in the Section titled "Indemnification" of the General Terms and Conditions, and subject to its procedures, Supplier will indemnify, defend and hold harmless Qwest (including its officers, directors, employees and agents) and its affiliates and customers from and against all suits, actions, fines, damages or claims of any character:

- (a) for any personal injuries or property damage received or sustained by any person or property arising in whole or in part from the acts or omissions of Supplier, its Subcontractors and/or their respective officers, employees, agents or affiliates in the performance of Services;
- (b) because of any actual or alleged act or omission of Supplier, its Subcontractors and/or their respective officers, employees, agents or affiliates;
- (c) under the Workers Compensation Act, or any other law, regardless of whether such injuries or damages are caused in part by the negligence of the parties indemnified hereunder; and
- (d) in connection with any breach or default by Supplier of the Order.

Supplier will reimburse any indemnified party for any and all costs, settlements, judgments, or expenses incurred by them in defending or investigating any such claim, including attorneys' fees, expert witness fees, investigative and court costs.

#### **10. ADDITIONAL INSURANCE REQUIREMENTS:**

In addition to the requirements in the Section titled "Insurance" in the General Terms and Conditions, and subject to the procedures set forth therein, Supplier shall carry and maintain the insurance coverage listed below.

##### **10.1 Umbrella or Excess Liability Insurance.**

Umbrella or Excess Liability Insurance written on an occurrence form in an amount not less than \$1,000,000 each occurrence and \$1,000,000 aggregate.

##### **10.2 Work around Railroads.**

Whenever any Services are performed within 50 feet of railroad tracks or upon railroad right-of-way, a Railroad Protective Liability Insurance policy will be required of Supplier. Such policy shall be issued in the name of the railroad company with such limits as required by the railroad company. In addition, such policy shall include the name of Qwest as the Contractor/Subcontractor on the declarations page with respect to its interest in the Project. Said insurance policy shall be in form and substance satisfactory both to Qwest and the railroad company and shall be delivered to and approved by both parties prior to the entry upon or use of such railroad property.

##### **10.3 Colorado Specific Requirements.**

Whenever any Services must be performed in the Colorado State Highway right-of-way, Supplier's policies and certificates of insurance shall also name the State of Colorado as an additional insured. Similar coverage shall be furnished by or on behalf of Supplier's Subcontractors. Copies of such certificates must be available on site during the performance of the Services. This paragraph shall appear in all of Supplier's subcontracts executed in connection with the performance of the Order.

##### **10.4 All Risk Builders Risk Insurance.**

Qwest shall effect and maintain "All Risk" builders risk insurance to cover that portion of the Services, materials and equipment incorporated in the Project and upon all materials and equipment on or about

the Site, and off-site storage within 1,000 feet of the Site which are ultimately intended for permanent use or incorporation in the Project, or incidental to the construction thereof. The builder's risk policy specifically does not provide coverage for any machinery, tools, equipment, appliances or other personal property owned, rented or used by Supplier, any of its Subcontractors, any construction manager, or anyone employed by Supplier in the performance of the Services. The policy also will cover renovations under construction but will not cover buildings or structures existing prior to the construction of improvements, alterations or repairs.

- (a) The builder's risk insurance policy obtained by Qwest shall provide sufficient limits of liability to cover the Services. In the event of a loss covered by this insurance and if the loss is due to the negligence of Supplier or any Subcontractor, Supplier will be responsible for the first \$10,000 of any such loss.
- (b) Qwest releases and waives and will cause its builder's risk property insurers to release and waive any and all right of recovery, claim, action or cause of action against Supplier for any loss or damage to the Services, materials and equipment incorporated in the Project and upon all materials and equipment on or about the Site, off-site storage, and while in transit which are ultimately intended for permanent use or incorporation in the Project, or incidental to the Services. This release and waiver with respect to builder's risk insurance coverage does not apply to the first \$10,000 of any loss if such loss is due to the negligence of Supplier or any Subcontractor.

## **11. CONSULTANT:**

### **11.1 Use of Consultant.**

At Qwest's option, Qwest may use a Consultant. If Qwest decides to use a Consultant on the Project, the Consultant will be identified in the Order for the Project or will be identified by Qwest in a written notice to Supplier. If Qwest does not designate a Consultant for the Project, all duties of Consultant set forth in these Terms will be performed by Qwest on the Project.

### **11.2 Communication with Consultant.**

Whenever practical, Qwest will endeavor to include Supplier in all communications with the Consultant regarding the Project. However, Consultant has no authority, and Supplier shall not rely on any communication from Consultant regarding any modification to the Order. Qwest approval must be obtained by Supplier in accordance with the Order for all decisions except with respect to clarifications or interpretations by Consultant of the Construction Documents.

### **11.3 Interpretation of Construction Documents.**

Consultant will be, in the first instance, the interpreter of the requirements contained in the Construction Documents and the judge of Supplier's proper performance of the Services. Consultant shall have the authority to reject any Services which do not conform to the Construction Documents, and to reject any Application for payment. In an attempt to reach agreement without resorting to the formal dispute resolution process set forth in these Terms, claims, disputes and disagreements between Qwest and Supplier relating to the Order and Supplier's execution of or the progress of the Services will be referred initially to Consultant for an opinion which Consultant will render in writing as quickly as possible. Qwest will not be bound by any Consultant decision, and any unresolved issues will be determined in accordance with the section of these Terms titled "Dispute Resolution."

### **11.4 Qwest Direction.**

In all circumstances, any information, communication, or directive of Qwest will supersede any conflicting information, communication, or directive of Consultant. If any resolution of a Construction Documents question by Consultant will result in increased costs of any kind to Qwest, Supplier will not implement the clarification from Consultant until or if Qwest confirms the additional costs in writing or Qwest executes a Change Order.

## 12. COSTS:

This Section applies only to Cost Plus Task Orders.

### 12.1 Included Costs.

The Cost shall include the costs necessarily incurred in the proper performance of the Services and paid by Supplier. Such costs shall be at rates not higher (and should be less) than the standard paid in the area of the Site and shall include the following items:

- (a) Direct labor: Costs of on-Site craft and/or field labor and on-Site supervision for the performance of the Services (or, with Qwest's prior consent, craft and/or field labor and supervision at off-Site workshops), including the amounts set forth below and all fringe benefits required by collective bargaining agreements.
- (b) Indirect Labor: Costs of project management and field office personnel, including safety personnel, located on-Site and/or directly attributed to the Services including amounts set forth below.
- (c) MOPs: Costs incurred by Supplier in preparing, reviewing, or replying to MOPs, either on-Site or at Supplier's office.
- (d) Materials, Supplies and Equipment: Costs of materials, supplies and equipment incorporated in the Services, including costs of transportation and storage. Small tools and equipment will not be considered to have been incorporated in the Services and so may not be billed to Qwest in accordance with this subsection; instead they should be billed to Qwest as described below in subsection (f).
- (e) Rental of Large Tools and Equipment: Reasonable rental costs of tools, equipment and machinery needed for the Services having a purchase price of at least \$750.00 necessarily used for the completion of the Services. This item does not include those tools normally furnished by workers and small tools and equipment as described below in subsection (f).
- (f) Small Tools and Equipment: Tools and equipment, including consumables, having an initial cost of \$750.00 or less will be reimbursed at a percent of direct labor costs as described above. Supplier's reimbursable percent shall be set forth in the Order. Small tools and equipment "used up" or otherwise consumed in connection with the Services will only be reimbursed as set forth in this subsection.
- (g) Office Tools and Equipment: Items typically used by office or field personnel such as computers and peripherals, cell phones, radios, automobiles, cameras, printers, fax machines, and adding machines will be reimbursed at a percent of indirect labor costs as allowed by the Order. Supplier's reimbursable percent shall be set forth in the Order.
- (h) Bonds, Fees and Insurance: Premiums for bonds and permit fees paid by Supplier and required in connection with the Services. Insurance required by Qwest and paid for by Supplier in connection with the Services. Insurance costs will be allocated by Supplier to all of its jobs, not just Qwest jobs, so that only a pro-rata amount of the cost of insurance will be charged to the Services.
- (i) Subcontractors: Payments made by Supplier to approved Subcontractors for Services. Payments made to Subcontractors shall be determined by competitive bidding or, if approved by Qwest in writing in advance, on a cost reimbursable basis with the fee agreed to by Qwest in writing.
- (j) Debris Removal: Cost of removal of debris from the Site.
- (k) Protection: Costs of arrangements necessary for protection of the public including signs and barricades.
- (l) Travel: Transportation, hotel and meal costs when Supplier's employees necessarily are away from their residence overnight performing the Services, or a per diem charge per employee if approved by Qwest in writing in advance. Mileage (using the standard mileage rate as

determined from time to time by the Internal Revenue Service) when driving between the Site and the closer of (i) an employee's home or (ii) Supplier's principal office, but only if the home or office is at least 40 miles away from the Site. Air fare will only be reimbursed at the lowest available coach rate if approved by Qwest's Representative in writing in advance.

- (m) Taxes: Sales and use taxes on the transaction between Supplier and Qwest as set forth in the Order. These taxes will be paid by Supplier and identified on the appropriate lines of the Application and Schedule of Values. Taxes paid by Supplier in connection with materials and subcontracted labor (i.e., any transaction between Supplier and its suppliers) are considered part of the cost of the materials or labor and shall be included in the cost of the materials or labor listed on the Schedule of Values.
- (n) Other: Any other cost specifically identified in the Order as reimbursable.

## 12.2 Allocated Costs.

The following items paid for by Supplier may be allocated to the Project on the basis of labor hours charged to the Project, but only to the extent that they are based on actual costs. These costs will be allocated by Supplier to all of its jobs, not just Qwest jobs, so that only a pro-rata amount of the costs will be charged to the Services:

- (a) Group insurance limited to health, dental, vision, life, disability, accidental death and dismemberment.
- (b) FICA and Medicare at the statutory rate.
- (c) State Unemployment.
- (d) Workers Compensation net of all premium, volume and other discounts granted to Supplier.
- (e) General Liability if assessed on the basis of wages.
- (f) Vacation, holiday, and sick leave accruals
- (g) Qualified 401(k), pension, profit sharing, and retirement benefits under a written plan.
- (h) State and local taxes assessed to employers on the basis of the number of employees.

## 12.3 Excluded Costs.

Supplier shall not include any of the following items in the Cost unless specifically allowed in the Order:

- (a) Compensation of Supplier's officers, managers (other than Supplier's Representative), safety personnel, estimators, auditors, accountants, purchasing and contracting agents and other employees at Supplier's principal office or branch offices, except employees performing those specific tasks for Qwest as set forth in this Section 12 or in the Order.
- (b) Overhead or general expenses of any kind including estimating, scheduling, project, or payroll accounting services, of Supplier's principal or branch offices other than the field office, except as specifically allowable in the Order.
- (c) Any part of Supplier's capital expenses, including interest on Supplier's capital used in connection with the Services.
- (d) Automobile costs, radios and mobile phones, warranty cost accruals, safety training, employee drug testing, safety personnel, human resources personnel, hiring fees, new hire expenses, clerical salaries, and bonuses.
- (e) Costs incurred due to the negligence of Supplier, any Subcontractor, or anyone employed by them, including without limitation the correction of defective Services or the disposal of materials or equipment wrongly supplied.
- (f) Costs incurred by Supplier in complying with its indemnification obligations contained in the Order.

- (g) Other costs not specifically included in this Section 12 or in the Order.
- (h) Costs in excess of the Not to Exceed Cost identified on the Order as the same may be modified by a Change Order.
- (i) Costs incurred by Supplier during the guarantee or warranty period in the event that Supplier is required to enforce a subcontract, purchase order, guarantee or warranty, or in the event that Supplier is required to honor any agreements or warranties applicable to the Services.
- (j) Sales and use taxes on the transaction between Supplier and Qwest. These taxes will be paid by Supplier and identified on the appropriate line of the Application. Qwest will reimburse Supplier for the actual amount of sales and use taxes incurred. Taxes paid on material and subcontract work (i.e., the transaction between Supplier and its suppliers) are considered part of the cost of that material and service and are included in the Cost.

**13. SURVIVAL:**

The provisions of these Construction Specific Terms and Conditions regarding “Additional Warranties,” “Additional Indemnification Obligations of Supplier” and all others that by their sense and context are intended to survive the expiration of the Order will survive.

**EXHIBIT AP**

**SWORN APPLICATION FOR PAYMENT**

Application No.: \_\_\_\_\_ Date: \_\_\_\_\_ Period covered by Application: \_\_\_\_\_  
 Name of Project: \_\_\_\_\_ Project Number: \_\_\_\_\_  
 Supplier Name: \_\_\_\_\_ ("Contractor")

**ORDER SUMMARY**

The Order dated \_\_\_\_\_ between Qwest and Contractor (the "Order").

Original Contract Sum		\$	_____
Change Orders Approved to Date	+/-	\$	_____
Contract Sum as of this Date		\$	_____

All capitalized terms in this Application that are not defined in this Application shall have the definitions given to the in the Order.

**CERTIFICATE OF CONTRACTOR**

I, \_\_\_\_\_, am the \_\_\_\_\_ (*title*) of Contractor, a \_\_\_\_\_ (*type of organization*), and I hereby certify that:

1. I am authorized to make this certification on behalf of Contractor;
2. All items, units, quantities and costs of labor and materials shown in this Application are correct;
3. All Services indicated in this Application (including without limitation labor and materials) has been supplied by Contractor in accordance with the terms and conditions of the Order;
4. All bills and charges owed by Contractor to Subcontractors in connection with the Services included in prior Applications have been paid, except as noted on the attached Statement of Unpaid Accounts, if any;
5. All bills and charges owed by Contractor to Subcontractors in connection with the Services included in this Application will be paid within 10 calendar days after payment by Qwest of this Application; and
6. If this is a Final Application, (a) all of the Services required by the Order have been completed in accordance with the Order, (b) all bills for labor and materials owed by Contractor to Subcontractors in connection with the Services have been fully paid, (c) evidence of such payment is attached, (d) Lien Waivers from Contractor and all Subcontractors are attached, and (e) the Lien Waivers state the dollar amount of all payments to Contractor and any Subcontractor in connection with the Services.

Contractor Signature: \_\_\_\_\_

**PAYMENT INFORMATION**

	<b>AMOUNT</b>	<b>TAX</b>	<b>TOTAL</b>
1. Value of Services completed to date: (Column 8 from Schedule of Values)	\$	\$	\$
2. Value of Services completed this Application	\$	\$	\$
3. Amount of Retainage retained (or released) this Application	XXX	XXX	\$
4. Total Retainage to date	XXX	XXX	\$
5. Total payment requested this Application (Line 2 minus line 3)	XXX	XXX	\$

**CONSULTANT'S CERTIFICATE OF PAYMENT**

In accordance with the Order between Consultant and Qwest, I have examined the Services for which payment is requested in this Application number \_\_\_\_, dated \_\_\_\_\_ and I recommend payment of the total payment requested in this Application.

**Consultant Name:**

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(Authorized Signature)

(Title)

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(Print or Type Name of Signatory)

(Execution Date)

**EXHIBIT SV**

**SCHEDULE OF VALUES**

Submitted with Application No.:\_\_ Date: \_\_\_\_\_ Period covered by Application: \_\_\_\_\_

Name of Project: \_\_\_\_\_ Project Number: \_\_\_\_\_

Supplier Name: \_\_\_\_\_ ("Contractor")

SPEC.  Item No. (1)	DESCRIPTION  (2)	LABOR COSTS		MATERIAL COSTS		% completed (7)	Total Costs completed to date (add Col. 4 and 6) (8)
		Contract Sum (3)	Value completed to date (4)	Contract Sum (5)	Value completed to date (6)		
	VALUE OF Services Sub Total						
	SALES & USE TAX						
	CONTRACT SUM						