

APPENDIX E: CONSTRUCTION CONTRACT Draft

This Construction Contract (this “**Contract**”) is made and entered into as of the ___ day of _____, 2010, by and between OpenCape Corporation, a Massachusetts nonprofit corporation (“**OpenCape**”), having a principal place of business at P.O. Box 762, West Barnstable, MA 02668, and _____, a _____ (the “**Contractor**”), having its principal place of business at _____.

RECITALS:

WHEREAS, OpenCape desires to have a fiber optic telecommunications system constructed and installed as more particularly described in **Exhibit A** (the “**System**”).

WHEREAS, the Contractor represents that it is experienced and well qualified to perform the work necessary to construct and install such a System.

WHEREAS, OpenCape desires the Contractor to construct and install the System on its behalf.

NOW, THEREFORE, for and in consideration of the foregoing, and in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follow:

1. SCOPE OF THE WORK

1.1. The Contractor agrees to construct and install the System as designated by OpenCape in accordance with **Exhibit A**, Scope of Work, which is attached hereto and incorporated herein by this reference. Such installation effort shall hereinafter be referred to as the “**Work**.”

1.2. Changes in the Work shall be accomplished only by amending this Contract or by a Change Order adopted in accordance with the provisions of **Exhibit C**, General Terms and Conditions, which is attached hereto and incorporated herein by this reference.

1.3. The Work will be performed in the right of way (the “**Right Of Way**”) as more particularly set forth in **Exhibit A-1**, System Route, which is attached hereto and incorporated herein by this reference. The Right of Way is owned by NSTAR, Verizon, National Grid and local municipalities, among others (the “**Right Of Way Owner**”).

2. SCHEDULE

The Contractor shall complete the Work in accordance with the schedule set forth in Section 2.0 of **Exhibit A**, Scope of Work. OpenCape may request the Contractor to alter the

schedule with respect to the order of completion of particular segments of the Work. Any adjustments or revisions to the schedule requested by OpenCape with respect to the order of completion shall be subject to the mutual agreement of the parties, and may require modifications to the Contract Price set forth in Section 4 and the Substantial Completion Date; provided, however, that the Contractor shall use commercially reasonable efforts to agree to any requested adjustments without modifying the Contract Price or Substantial Completion Date.

3. LIQUIDATED DAMAGES

Time is of the essence in the performance of the Work by the Contractor. The Contractor acknowledges that OpenCape is obligated to complete the System within certain strict time limits. The Contractor further acknowledges that a delay in performance of Work by the Contractor within the time permitted or in the manner provided for in this Contract will subject OpenCape to substantial costs, the exact amount of which are difficult or impossible to determine. Therefore, the Contractor agrees that in the event of any delay in the performance of Work by the Contractor within the time permitted or in the manner provided for in this Contract, the Contractor agrees to pay to OpenCape one thousand dollars (\$1,000.00) for each calendar day of delay in Substantial Completion of the Work; provided, however, that no liquidated damages shall be due and owing for any delays in the performance of Substantial Completion of the Work due to Excusable Delays.

The payment of such damages shall not release the Contractor from its obligations to otherwise fully perform under this Contract. Upon request by OpenCape, the Contractor shall furnish to OpenCape such evidence as OpenCape may require from time to time, confirming that the Contractor has the ability to fully perform under this Contract in the manner and within the time permitted.

4. CONTRACT PRICE

OpenCape shall pay the Contractor for completion of the Work in accordance with the Contract. This is a fixed price contract. Absent an approved Change Order between the parties, in no event shall the total cost of the System exceed _____ Dollars (\$ _____). The Contractor shall be paid at intervals upon the Contractor's attainment of certain milestones, all as more particularly set forth in **Exhibit B**, Cost Estimate, which is attached hereto and incorporated herein by this reference. The Contractor shall submit monthly on the 25th day of the month a pre-bill of anticipated invoices for the following month in accordance with the provisions of Section 33.0, Applications for Payment, of **Exhibit C**, General Terms and Conditions.

5. PERMITS AND OTHER GOVERNMENTAL APPROVALS

OpenCape shall obtain the Underlying Rights, including payment of pole attachment fees within the Right of Way, necessary to perform the Work in the Right of Way. It will be the responsibility of the Contractor to obtain all other governmental permits and approvals, work permits, and government-mandated inspections (other than the Underlying Rights) required to perform the Work. The Contractor will not contact any government agency with respect to the

Work unless authorized by or requested to do so by OpenCape. The Contractor will promptly report to the OpenCape Contract Administrator any inquiry or contact it receives from any government agency or any private individual with respect to the Work. The Contractor will fully instruct any of its subcontractors with respect to the requirements of this Section.

6. CONTRACT ADMINISTRATOR

During and for the performance of this Contract, OpenCape hereby designates the Chief Executive Officer (CEO) of OpenCape Corporation as the “**OpenCape Contract Administrator.**”

During and for the performance of this Contract, the Contractor hereby designates _____ as the “**Contractor’s Contract Administrator.**”

7. GUARANTEE

The Contractor warrants and guarantees that the Work will comply with Section 5.0, Guarantees, of **Exhibit C**, of the General Terms and Conditions.

Moreover, the Contractor acknowledges that OpenCape has received funds from the Broadband Technology Opportunity Program administered by the National Telecommunications and Information Administration as well as funds from the Commonwealth of Massachusetts, based on grant applications made by OpenCape. All or a portion of the funds received by OpenCape were provided under the American Recovery and Reinvestment Act (“ARRA”). As such, the Contractor warrants and guarantees that all actions by the Contractor under this Contract shall comply with all applicable laws, rules and regulations, OpenCape’s grant application, and laws, rules and regulations applicable to ARRA funds and OpenCape’s funding sources.

8. CONTRACT DOCUMENTS

The following Exhibits are hereinafter referred to as “**Contract Documents.**” They are attached hereto and are incorporated herein by this reference.

Exhibit A: Scope of Work
Exhibit A-1: System Route
Exhibit B: Cost Estimate
Exhibit C: General Terms and Conditions

Precedence to be given these Contract Documents shall be as set forth in Section 43, Order of Precedence, of **Exhibit C**, General Terms and Conditions.

In confirmation of their consent and agreement to the terms and conditions contained in this Contract and intending to be legally bound hereby, the parties have executed this Contract under seal as of the date first above written.

OPENCAPE:

OpenCape Corporation, a Massachusetts
nonprofit corporation

By: _____

Name:

Title:

CONTRACTOR:

_____, a

By: _____

Name:

Title:

APPENDIX E – EXHIBIT A
Scope of Work

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APPENDIX E - EXHIBIT A1
System Route

See RFP Appendix A

APPENDIX E – EXHIBIT B
Cost Estimate

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APPENDIX E - EXHIBIT C

GENERAL TERMS AND CONDITIONS

1. DEFINITIONS OF CAPITALIZED TERMS USED IN THE CONTRACT

- 1.1. “Acceptance Date” is defined in Section 14.2.
- 1.2. “Contract” shall mean the document which is executed by both OpenCape and the Contractor, and includes the documents setting forth the Scope of Work, compensation to the Contractor, and these General Terms and Conditions.
- 1.3. The “Drawings” are the graphic and pictorial depictions of the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.
- 1.4. “OpenCape Contract Administrator” is defined in Section 2.1.
- 1.5. “OpenCape Representative” is defined in Section 3.1.
- 1.6. “Project Manager” is defined in Section 3.1.
- 1.7. “Project Schedule” shall mean the schedule developed in order to complete the Work in accordance with the schedule set forth in Exhibit A.
- 1.8. “Contractor” shall mean the corporation, company, partnership, firm or individual named and designated in the Contract as the party who has entered into this Contract to perform the Work covered thereby.
- 1.9. “Scope of Work” shall mean the description of the services to be rendered by the Contractor and includes the Drawings and Specifications.
- 1.10. “Specifications” are the written requirements for materials, equipment, construction systems, standards and workmanship for the work, and performance of related services.
- 1.11. “Substantial Completion” means the date when the Work, or any designated part thereof, is sufficiently complete, in accordance with the Contract Documents, so that OpenCape can use the Work, or the designated part, for the use for which it is intended.
- 1.12. “Underlying Rights” shall mean easements, rights of ways, licenses or similar approvals from owners of the Right of Way that are necessary to perform the Work.

1.13. “Work” as used herein shall mean the construction and installation services required pursuant to the Scope of Work.

2. APPROVED CONSTRUCTION DRAWINGS AND SPECIFICATIONS; AND INTENT OF DRAWINGS AND SPECIFICATIONS

2.1. OpenCape shall designate a company contract administrator (the “OpenCape Contract Administrator”) to manage the Contract on behalf of OpenCape.

2.2. The Contractor shall develop detailed Drawings and Specifications for the project for OpenCape’s review and approval. Once approved by OpenCape, the Contractor shall perform the Work using only the Drawings and Specifications agreed to by the parties as part of this Contract, and written Change Orders pursuant to Section 15.0, CHANGES, hereof. The Contractor shall throughout the performance of the Work maintain an adequate and effective change order control system.

2.3. Should any conflict, error, omission or discrepancy appear in the Drawings, Specifications, instructions, or in work done by others, the Contractor shall immediately notify OpenCape. If the Contractor proceeds with any of the Work in question before receiving instructions, then all required corrections shall be at the Contractor’s expense. The Contractor shall not deviate from the final approved Drawings and Specifications without prior written approval from OpenCape. The Contractor may not substitute materials for those specified, or use “equal” items without OpenCape’s prior written approval.

3. PERFORMANCE OF THE WORK

3.1. OpenCape will notify the Contractor of the name of the OpenCape job site representative (the “OpenCape Representative”) who shall make inspections and make decisions on behalf of OpenCape as provided herein.

(a) At all times during the progress of the Work, the Contractor shall provide a qualified, competent, and responsible “Project Manager.” Whenever the Work is in progress, the Project Manager shall ensure adequate supervision and oversight at the work site to manage the performance of the Work. The Project Manager shall have full authority to represent the Contractor with respect to any and all matters pertaining to this Contract, and direction given to him by OpenCape shall be binding on the Contractor. The Contractor shall furnish the OpenCape Contract Administrator a written appointment of its Project Manager, within one (1) week from the effective date of this Contract.

(b) The Contractor shall not transfer or remove the Project Manager from performance of the Work without prior notice to OpenCape.

(c) The OpenCape Representative shall promptly advise the Contractor in the event the OpenCape Representative observes that the Work does not comply with the provisions of this Contract; provided that any formal notice of non-compliance must be provided in writing pursuant to the notice provisions of this Contract.

(d) The Contractor shall perform the Work in a workmanlike manner, using only qualified, careful and efficient workers, and in strict conformity with this Contract and related documents. The Contractor shall provide, at the Contractor's expense, all supervision, labor, materials not furnished by OpenCape, construction equipment, tools, consumables, temporary services and facilities, transportation, storage, and all other facilities and services necessary or appropriate for the satisfactory performance of the Work.

3.2. Coordination of operations is essential to efficiency and control of the Work, limitations of hazards, and good relations with owners of the right of way, governmental authorities and the public. The Contractor shall coordinate all required police details and coordinate with third parties, including the Right of Way Owners, to enable the Contractor to complete the Work timely and in accordance with the Project Schedule. The Contractor shall coordinate its activities with the activities being performed by others to the end that all facilities may be constructed with a minimum of delay or interference.

3.3. The Contractor shall not at any time offer OpenCape personnel or representatives any gift or entertainment.

4. PROJECT SCHEDULE AND PROGRESS

4.1. The Contractor agrees to perform the Work and all parts thereof in accordance with the schedule set forth in **Exhibit A**, Scope of Work.

The Contractor shall develop a construction schedule detailing the planning of the Work, within the limitations of this Contract. However, the sequence of the Work, number of work locations, and the means and methods of performing the Work are at the Contractor's discretion. The Contractor shall submit the initial Project Schedule for approval not later than seven (7) days following the date of execution of this Contract. The Project Schedule shall include the delivery of each and every submittal required under this Contract.

4.2. Throughout the term of this Contract, the Contractor shall be responsible for maintaining an updated schedule, monitoring the progress of its activities, and periodic reporting of the status of any and all activities, issues, and concerns relating to the performance of the Work. The Contractor will submit each month an updated Project Schedule in both printed and electronic copy to the OpenCape Representative and the OpenCape Contract Administrator. The monthly schedule update, when compared with the physical Work completed, will be used by OpenCape to verify the progress of construction. If the Contractor fails to submit the required schedules and progress reporting documentation, the OpenCape Contract Administrator may withhold approval of the Contractor's invoices until such time as the Contractor furnishes the required information.

4.3. If, in the opinion of OpenCape, the Contractor falls behind the Project Schedule for reasons other than Excusable Delays under Section 12.0, the OpenCape Representative shall so notify the Contractor in writing, and the Contractor shall take such steps as may be necessary to improve its progress. OpenCape may request the Contractor to increase the number of shifts, or overtime operations, days of work, or the amount of construction plant, or all of them, and to

submit for approval such supplementary schedules as necessary to demonstrate the manner in which the schedule will be regained, all without additional cost to OpenCape.

4.4. The Contractor shall promptly notify OpenCape of any Excusable Delay under Section 12.0 that may affect the times and sequences in the schedule, and shall use commercially reasonable efforts to make all requests for extensions of time to OpenCape, in writing, within ten (10) days of the date the Contractor became aware of the Excusable Delay.

4.5. Failure of the Contractor to comply with the requirements of this section shall be grounds for determination by OpenCape that the Contractor is not prosecuting the Work with such diligence as will ensure its completion within the time specified. Upon such determination, and in the event the Contractor does not cure any defect or delay within thirty (30) days of such notice, OpenCape may terminate the Work or any part thereof, in accordance with Section 11.0, TERMINATION FOR DEFAULT, hereof.

5. WARRANTIES

5.1. The Contractor warrants to OpenCape that as of the Acceptance Date, the Work will comply with the Drawings and the Specifications, and that the Work shall be professional in every particular, and free from defects, errors, and omissions in construction and workmanship, and shall remain in good condition and shall be free from any fault or defect. The Contractor further warrants that all materials, equipment, and supplies furnished for the Work by the Contractor, 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.

5.2. The Contractor's warranties set forth in Section 5.1 above shall extend for a period of twenty-four (24) months from the Acceptance Date. In addition, the Contractor shall warrant that the design and engineering, labor, equipment, and/or materials furnished by the Contractor pursuant to Section 5.1 above to correct defects, in accordance with the warranties set forth in Section 5.1 above, for a period of twenty-four (24) months from the date of completion of the correction.

5.3. If the Contractor is notified of any defects in the Work in breach of the Contractor's foregoing warranties and fails to adequately correct such defects within thirty (30) days of receipt of notice of the defect, OpenCape shall have the right to correct or to have such defects corrected for the account of the Contractor, and the Contractor shall promptly pay OpenCape for costs incurred in correcting such defects plus any damages suffered by OpenCape, or, alternatively, OpenCape may, at its discretion, deduct such costs and damages from any moneys due the Contractor.

5.4. With respect to any items of manufactured equipment specified by OpenCape and purchased by the Contractor from others, the Contractor warrants that the equipment is as specified, and agrees to use commercially reasonable efforts to pass on and assign to OpenCape the manufacturer's warranty.

6. INSPECTION, TESTING, AND QUALITY CONTROL

6.1. The Contractor shall inspect all materials, supplies, and equipment that are to be incorporated into the Work. In addition, the Contractor shall employ commercially reasonable, industry-standard quality control efforts throughout the execution of the Work.

6.2. The Contractor shall develop a testing plan for review and approval by OpenCape. During the course of performance of the Work hereunder, the Contractor shall make or cause to be made all tests specified in the approved testing plan, including testing of all fiber optic cable. OpenCape may request additional inspections and tests at OpenCape's expense. The Contractor shall furnish OpenCape with documentation satisfactory to OpenCape of the results of all inspections and tests. OpenCape shall be given not less than five (5) business days notice of any tests to be made by the Contractor or the Contractor's subcontractors and suppliers in order that OpenCape may witness any such tests.

6.3. OpenCape and its representatives, and others as may be required by applicable laws, ordinances and regulations, shall have the right at all reasonable times to inspect the Work and all material, supplies, and equipment used in the performance of the Work at the job site and at the Contractor's and its suppliers' and subcontractors' shops. OpenCape shall ensure that any of its representatives, contractors or agents who perform inspections pursuant to this Contract are reasonably qualified from a technical perspective to perform such inspection. The Contractor shall provide or cause to be provided access and sufficient, safe, and proper facilities for such inspections. The Contractor shall provide the OpenCape Representative every reasonable means for the purpose of inspection, even to the extent of dismantling or exposing portions of unfinished Work. If in the reasonable judgment of the OpenCape Representative any Work performed by the Contractor or materials furnished by the Contractor hereunder are defective or fail to comply with the requirements of this Contract, the Contractor shall, at the Contractor's expense, promptly repair or replace the work or materials found to be defective to the commercially reasonable satisfaction of the OpenCape Representative. Where the OpenCape Representative requests dismantling or exposing finished work, the Contractor shall receive compensation for extra work involved if the dismantled or exposed finished work meets the requirements of this Contract. Such compensation must be authorized as provided for in Section 15.0, CHANGES.

6.4. Failure on the part of the OpenCape Representative to discover or reject work or materials furnished by the Contractor or any of its subcontractors or suppliers, which are not in accordance with the requirements of this Contract, shall not be construed to imply acceptance of such work or materials.

6.5. If material furnished by OpenCape is defective, but the defect was not apparent at the time the Contractor installed it, the Contractor shall provide the labor and equipment necessary to replace said material and shall be reimbursed for such Work when authorized as provided for in Section 15.0, CHANGES. If the Contractor installs obviously defective OpenCape furnished material, the Contractor shall provide, at the Contractor's expense, the labor and equipment necessary to replace said material. OpenCape will replace defective material furnished by OpenCape. Material damaged by the Contractor will be charged to the Contractor.

6.6. Rejection by OpenCape of all or any part of defective Work shall be final and binding provided that OpenCape shall have notified the Contractor in writing of any such defect and reviewed its objections with the Contractor, and provided the Contractor has had no less than thirty (30) days from receipt of written notice to cure the deficiency. The Contractor shall, at the Contractor's expense, promptly correct or replace rejected Work. If the Contractor fails to commence and diligently continue correction or replacement of such rejected Work within thirty (30) days after receipt of written notice from OpenCape to correct or replace the rejected Work, OpenCape may at its option remove and replace the rejected Work, and the Contractor shall promptly reimburse OpenCape for the costs of such removal and replacement of defective and rejected Work, or, alternatively, OpenCape may at its option deduct any such costs so incurred from any money due the Contractor.

6.7. All Work performed by the Contractor shall be subject to coordination and inspection by the OpenCape Representatives, the representatives of permitting agencies, owners of the right of way, and all city, county, or state inspectors. The Contractor and its subcontractors at their sole cost shall correct work rejected in any such inspections, as expeditiously as possible, until it passes inspection.

7. CONDITIONS AND RISKS OF WORK

7.1. The Contractor represents that it has carefully examined the Scope of Work and has fully investigated and acquainted itself with all conditions on the right of way relevant to the Work and its surroundings. The Contractor assumes the risk of such conditions and, regardless of such conditions, the expense, and difficulty of performing the Work, will fully complete the Work for the stated contract unit prices without further recourse to OpenCape. OpenCape does not guarantee the accuracy of information on the site of the Work and local conditions at such site which may have been furnished by OpenCape, which is furnished only for the convenience of the Contractor.

8. SAFETY

8.1. The Contractor shall manage the job in a safe manner. The Contractor shall develop an appropriate safety management plan and take all necessary safety and other precautions to protect property and persons from damage, injury, or illness arising out of the performance of the Work. The Contractor agrees, in performing or otherwise acting under this Contract, to comply with all applicable federal, state, and local laws, statutes, ordinances, and regulations, and all rules of the owner of the right of way, including but not limited to those related to the environment, health and/or safety (collectively "EHS Requirements"), including but not limited to EHS Requirements arising under: the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §651 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.; the Toxic Substances Control Act, 15 U.S.C. §2601 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq.; the Clean Air Act, 42 U.S.C. §7401 et seq.; Hazardous Materials Transportation Act, 49 U.S.C. App. §1801 et seq., all as amended, and including their state counterparts. In so agreeing, the Contractor warrants that its employees, agents and subcontractors are fully competent in the practices applicable to the Work and are aware of all EHS Requirements that apply or relate to its activities under this Contract, and that it and its employees, agents and subcontractors, prior to performing under this Contract, have the

training, experience and knowledge necessary to comply with all applicable EHS Requirements. The Contractor further agrees that it will identify itself, rather than OpenCape, as the generator of any waste generated as a result of its performance under this Contract. The Contractor warrants that the materials, equipment and facilities, whether temporary or permanent, furnished by the Contractor in connection with the performance of the Work shall comply therewith.

8.2. The Contractor shall inspect the working environments where its employees, agents, or subcontractors are or may be present on the Right of Way Owners' premises and shall promptly take action to correct conditions that cause or may reasonably be expected to cause these working environments to become an unsafe place of work.

8.3. The Contractor shall indemnify and hold harmless OpenCape and the Right of Way Owners, their respective directors, officers, employees, servants, heirs, assigns, and agents from and against any and all claims, losses, or liabilities in any manner arising directly or indirectly out of the Contractor's failure to comply with this section. This indemnification includes, but is not limited to, OSHA fines and penalties, costs and attorney's fees incurred as the result of the conduct caused by or contributed to by the Contractor.

8.4. The Contractor shall appoint a suitably qualified safety inspector to manage its safety management program. The safety inspector will be responsible for developing a required safety management plan, ensuring attendance by all the Contractor's and its subcontractors' personnel at applicable training classes, and enforcing compliance therewith in accordance with the applicable safety rules, requirements, laws, regulations, codes, and the Contract Documents.

8.5. Accidents, injuries, and illnesses requiring medical attention other than first aid, damage to property of OpenCape, Right of Way Owners, and the Contractor, and fires shall be orally reported to the OpenCape Representative at the time of the incident. Written reports, satisfactory in form and content to the OpenCape Representative and meeting applicable codes/regulations, shall be submitted, promptly following such oral notification, by the Contractor to all involved parties as required by applicable laws, regulations, codes, and other requirements.

8.6. The Contractor shall maintain job site accident, injury and illness records and statistics as required by all applicable laws, statutes, ordinances, regulations, and codes; and such records and statistics shall be available for inspection and copying by OpenCape, and shall be submitted to governmental agencies as required by law.

8.7. When the possibility of injury to persons or damage to property is anticipated, the Contractor shall take immediate remedial action, including the stoppage of Work, where necessary to prevent such injury or damage. Should the Contractor encounter any unexpected hazardous, toxic, or other condition in performing the Work, the Contractor shall immediately cease such activity and shall notify OpenCape, and shall thereafter coordinate with OpenCape and the pertinent Right of Way Owners in efforts to remedy such condition.

8.8. The Contractor shall take reasonable measures to avoid causing damage to railroad tracks, any water, sewer, steam, gas, fuel, or other pipe lines, mains or service pipes, electrical, communications, other energy transmission conduits, cables, wires, or service

connections, other private, utility, or governmental facilities, and any hazardous, toxic, or dangerous condition or thing, whether they are located upon, below, or above the ground surface. The Contractor shall be responsible for protection of all railroad tracks. Repair of any and all damage caused by the Contractor or its subcontractors shall be borne by the Contractor. The Contractor shall take all necessary and/or customary precautions to prevent injury to persons or property from open manholes, excavations, ditches, and from materials or equipment left on the job site, by placing signs and lights, erecting barricades, or doing other things as prudence may require or as mandated by law, local regulations, or the Right of Way Owners.

8.9. If hazardous substances of a type of which an employer is required by law to notify its employees are being used on the site by the Contractor, or by a subcontractor or anyone directly or indirectly employed by them, the Contractor shall, prior to harmful exposure of any employees on the site to such substance, give both immediate oral notice and follow up written notice of the chemical composition thereof to OpenCape in sufficient detail and time to permit compliance with such laws by OpenCape, other contractors and employers on the site. To the extent Material Safety Data Sheets (MSDS) exist, the Contractor shall provide them. The Contractor shall be responsible for the safe and secure storage of any hazardous substances used on a job site.

8.10. The Contractor shall be responsible for, at the Contractor's expense, the provision of all-necessary warning devices, barricades, flaggers, and uniformed patrolmen as are necessary to safely perform and protect the work. The Contractor, at its expense, shall determine the necessity for, and provide security to, materials, work in progress, and finished work.

8.11. If the Contractor encounters on the site material reasonably believed to be asbestos, lead, or polychlorinated biphenyl (PCB), or other potentially dangerous substance, which has not been rendered harmless, the Contractor shall immediately stop work in the area affected and report the condition to the OpenCape Representative orally and in writing. The Work in the affected area shall resume in the absence of such substances, or when it has been rendered harmless. In case of a dispute, OpenCape shall have the right to determine whether work should resume and shall so state in writing.

8.12. The Contractor agrees that if any of the work to be performed under this Contract is subcontracted, the requirements of the preceding paragraphs in this section shall be incorporated into a written agreement executed between the Contractor and the subcontractor.

8.13. The Contractor and each subcontractor shall comply with the following minimum safety and construction standards:

- (a) National Electrical Manufacturer's Association (NEMA).
- (b) Code of Federal Regulations, Title 29, Occupational Safety and Health Standards (OSHA).
- (c) National Electrical Code (NEC).
- (d) National Fire Protection Association (NFPA).

- (e) Underwriters Laboratories, Inc. (UL).
- (f) Applicable local, state, and county ordinances.

9. CLEAN-UP

9.1. The Contractor shall at all times keep its work area in a neat, clean, and safe condition, and shall remove from the right of way and the vicinity thereof, and properly dispose of, all debris and rubbish caused by the Contractor. Upon completion of the Work, the Contractor shall promptly return unused materials furnished by OpenCape or purchased with funds received from OpenCape and remove all of the Contractor's equipment, material, and like items, leaving such premises and the vicinity clean, safe, and ready for use. The Contractor and its subcontractors shall restore all work areas to their original conditions, ordinary wear and tear excepted.

9.2. If the Contractor or any of its subcontractors fails to maintain the work area as described above in a manner satisfactory to OpenCape, the Right of Way Owners, or other authorities with jurisdiction, or fails to effect clean up or removal in compliance with applicable regulations, codes, OpenCape's or Right of Way Owners' requirements within ten (10) calendar days after having received OpenCape's written order to do so, OpenCape shall have the right, without further notice to the Contractor, to perform such cleanup and remove such items on behalf of, at the risk of, and at the expense of, the Contractor. OpenCape may deduct any and all costs and expenses so incurred from any moneys due the Contractor.

9.3. The Contractor shall properly dispose of waste materials including, but not restricted to, refuse, garbage, sanitary wastes, industrial wastes, oil and other petroleum products. Waste materials removed from the construction area shall be disposed of at an approved disposal site in compliance with applicable law. Any and all hazardous materials used in the performance of the Work shall be removed from a job site upon the completion of the Work at such site. It shall be the responsibility of the Contractor to make any necessary arrangements with private parties and state and local officials pertinent to locations and regulations of such disposal. The Contractor shall pay any fees or charges required to be paid for dumping of materials. Material to be disposed of by removal shall be removed from the construction area prior to completion of the Work.

9.4. The Contractor shall restore, at the Contractor's expense, all property damaged by the Contractor or its subcontractors in connection with all Work under this Contract.

10. SUBCONTRACTS

10.1. The Contractor shall provide OpenCape with documentation of the competitive selection process used to select and purchase goods and service and award contracts that shall be invoiced to OpenCape. For all awards or contracts in excess of \$5,000, but less than \$10,000, the Contractor shall provide to OpenCape evidence of at least two telephonic quotations. For all awards or contracts greater than \$10,000, the Contractor shall provide to OpenCape the written bids or quotations used in the selection process. Sole source contracts shall be fully justified to OpenCape.

10.2. The Contractor guarantees that the performance of all portions of the Work performed by its subcontractors will comply with the terms of this Contract.

10.3. Where a portion of the Work is subcontracted, the Contractor shall remain fully responsible for proper and safe performance of the Work, and shall be responsible to OpenCape for all acts and omissions of the subcontractor and its employees. Nothing contained in this Contract shall create any contractual obligation or other liability on OpenCape's part to the Contractor's subcontractors and suppliers.

11. TERMINATION FOR DEFAULT

11.1. If the Contractor fails to prosecute the Work or separable parts thereof with diligence so as to place in jeopardy the completion of the Work according to the schedule and in conformance with the Specifications, or if the Contractor defaults in the performance of any of its obligations under this Contract and shall fail to correct such default (or if immediate correction is not possible, shall fail to commence and diligently continue effective action to correct such default) within thirty (30) calendar days following written notice thereof from OpenCape, OpenCape may, at its option and without prejudice to any other rights or remedies OpenCape may have, hold in abeyance further payments to the Contractor and/or terminate this Contract by written notice to the Contractor specifying the date of termination. In the event of such termination, OpenCape may take possession of the Work at the job site and any or all OpenCape-owned materials and plant equipment (whether delivered to the job site or on order therefor by the Contractor at job site) and finish the Work by whatever method OpenCape deems expedient. The foregoing notwithstanding, if the Contractor vacates the job site, OpenCape may terminate this Contract for default without opportunity for the Contractor to correct such default.

11.2. In the event of termination by OpenCape under Section 11.1 above, the Contractor shall, within seven (7) calendar days from the effective date of termination, advise OpenCape of all outstanding subcontracts, rental contracts, purchase orders, and any other agreements which the Contractor may have with others pertaining to performance of the Work, and furnish OpenCape with complete copies thereof. Upon request by OpenCape, the Contractor shall assign to OpenCape in form and content satisfactory to OpenCape, the Contractor's title to materials and plant equipment purchased by or on behalf of OpenCape for the Work and such of the subcontracts, rental agreements, purchase orders, and other agreements as may be designated by OpenCape.

11.3. In the event of termination by OpenCape under Section 11.1 above, the Contractor shall not be entitled to receive any further payment until the Work is completed. If the amounts due the Contractor, including retainage, for Work completed by the Contractor at the time of termination, shall exceed the sum of the total cost to OpenCape for completing the Work, such excess amount, including retainage, shall be paid to the Contractor. If the sum of the total cost to OpenCape of completing the Work plus amounts previously paid to the Contractor exceed the Contract Price for the completed Work, the Contractor shall promptly pay the difference to OpenCape, or, at OpenCape's discretion, OpenCape may deduct this excess cost from money due the Contractor. OpenCape shall have the right and is authorized to offset against and deduct from any moneys due the Contractor any other damages suffered by OpenCape due to said default or event giving rise to the termination or due to any other defaults

of the Contractor. The Contractor shall continue to be fully liable for all damages suffered by OpenCape. A waiver by OpenCape of one default by the Contractor shall not be considered to be a waiver of any subsequent default by the Contractor, nor be deemed to amend or modify the terms of this Contract. Except as set forth herein and to the extent permitted by law, the Contractor expressly waives any formal notice by OpenCape of the Contractor's failure to perform, or passive breach of the Contractor's express obligations under this Contract.

11.4. The Contractor (and its sureties) agree that a termination by OpenCape under Section 11.1 above will not be cause for the discharge of the payment and performance bonds defined in Section 27.0, BONDS, hereof.

11.5. Upon the voluntary or involuntary filing of a petition in bankruptcy by or against the Contractor, or any general assignment by the Contractor for the benefit of its creditors, or the appointment of a receiver to take charge of the Contractor's assets, OpenCape may treat the Contractor as in default under Section 11.1 above; provided, however, that if any such filing, assignment or appointment was initiated by someone other than the Contractor, the Contractor shall not be in default if it succeeds in having the petition, assignment, or appointment dismissed or otherwise terminated within twenty (20) days after the same is filed or is effective.

11.6. If the Contractor and OpenCape have entered into an Indefeasible Right to Use and Operating Agreement or a Lease of dark fiber, such agreement or lease shall automatically terminate in the event this Contract is terminated pursuant to the terms of this section, without further notice to the Contractor.

12. EXCUSABLE DELAYS AND TIME EXTENSIONS

12.1. If the Contractor or OpenCape is delayed in performing any of its respective obligations in this Contract, and such delay is caused by acts of God, war, riots, civil insurrection, acts of the public enemy, strikes, lockouts, accidents, acts of civil or military authority, fires, floods, or earthquakes, or any other condition beyond the reasonable control of the party delayed, such delay shall be excused and the period of such delay shall be added by a Contract Change Order to the time for performance of the obligation delayed. In the event of any such delay, the party delayed shall, at no cost to the other party, exercise 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 cause of the delay. The Contractor shall not be entitled to additional or extra compensation by reason of any delay covered by this section. In addition to the above, the Contractor shall be entitled to treat as an Excusable Delay hereunder any delay caused by the acts of a railroad, utility, state or municipal authority or the grantor of any Underlying Rights, the failure of OpenCape to discharge any of its obligations hereunder, or any other delay which OpenCape and the Contractor agree in writing should be treated as an Excusable Delay hereunder.

13. [INTENTIONALLY OMITTED]

14. NOTICE OF COMPLETION AND FINAL ACCEPTANCE

14.1. Substantial Completion. When the Contractor considers that the Work, or a portion thereof as is acceptable to OpenCape, is substantially complete, and when the Contractor has satisfactorily completed inspections, tests and documentation to demonstrate that the Work was satisfactorily completed and that the System is functional and operational, all as required by this Contract, the Contractor shall promptly deliver a Notice of Completion to OpenCape, specifying the Work completed and the date it was completed. The Contractor and OpenCape shall then promptly participate in an inspection of the Work, and shall jointly prepare a punch-list of items remaining to be completed or corrected. The failure to include any items on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. When OpenCape determines, on the basis of this review, that the Work or portion thereof is Substantially Complete, OpenCape and the Contractor shall execute a Certificate of Substantial Completion that shall establish the Date of Substantial Completion. The Certificate of Substantial Completion shall also establish the responsibilities of OpenCape and the Contractor for security, maintenance, heat, utilities, damage to the Work, and insurance, and shall fix the time within which the Contractor shall complete or correct the items listed therein.

Upon Substantial Completion of the Work, or designated portion thereof, and upon application by the Contractor, OpenCape shall make payment, reflecting adjustment in retention, if any, for such Work or portion thereof as provided in the Contract Documents.

14.2. Final Completion. Upon receipt of written notice that the Work is ready for final review and acceptance, and upon receipt of a final Application for Payment, OpenCape will promptly review the completed Work and, if it finds the work acceptable under the Contract Documents and the Contract fully performed, OpenCape shall make final payment to the Contractor. Such date is hereinafter referred to as the "Acceptance Date." Warranties required by the Contract Documents shall commence on the Acceptance Date, or designated portion thereof.

The foregoing notwithstanding, neither the final payment nor the remaining retained percentage shall become due until the Contractor submits to OpenCape:

- (a) An affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Contractor or its property might in any way be responsible, have been paid or otherwise satisfied;
- (b) A complete set of as-built documents, all data sheets, operational manuals, and other documents or information related to the operation of the System and the related equipment and components;
- (c) A consent of the Surety to final payment; and

(d) If required by OpenCape, other data establishing payment or satisfaction of all such obligations, such as receipts, releases and waivers of liens arising out of the Contract, to the extent and in such form as may be designated by OpenCape. If any subcontractor refuses to furnish a release or waiver required by OpenCape, the Contractor may furnish a bond satisfactory to OpenCape to indemnify it against any such lien. If any such lien remains unsatisfied after all payments to the Contractor are made, the Contractor shall reimburse OpenCape for all monies that OpenCape may have been compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by the issuance of Change Orders affecting final completion, OpenCape shall, upon application by the Contractor, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the balance for Work not fully completed or corrected is less than the retainage stipulated in the Contract Documents, written Consent of Surety to the payment of the balance due for that portion of Work fully completed and accepted shall be submitted by the Contractor to OpenCape prior to certification of such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

The making of final payment shall constitute a waiver of all claims by OpenCape except those covered by express warranties provided herein and those arising from:

- (a) Unsettled liens;
- (b) Faulty or defective Work;
- (c) Failure of the Work to comply with the requirements of the Contract Documents, including the terms of any warranties required by the Contract Documents;
or
- (d) Incomplete Work appearing or discovered after Substantial Completion.

The acceptance of final payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and identified by the Contractor as unsettled at the time of the final application for payment.

14.3. If OpenCape rejects the Notice of Completion and specifies defective or incomplete portions of the Work, the Contractor shall, within thirty (30) days, commence to remedy such defective and incomplete portions of the Work. Thereafter, the Contractor shall again give OpenCape a written Notice of Completion of the Work specifying a new date for the completion of the Work based on the date such defective or incomplete portions of the Work were corrected. The foregoing procedure shall apply again and successively thereafter until OpenCape has executed the Certificate of Substantial Completion.

14.4. Neither final payment nor any provision in this Contract shall relieve the Contractor of responsibility for faulty workmanship or faulty material that may be discovered within one year from the date of final payment. The Contractor shall, at the Contractor's expense, remedy any such defects and pay for all damages resulting therefrom. OpenCape shall give notice of observed defects with reasonable promptness.

15. CHANGES

15.1. This Contract shall be subject to changes by additions, deletions, or revisions to the Work.

15.2. If a change order is requested by the OpenCape Contract Administrator, the Contractor shall submit to the OpenCape Contract Administrator within ten (10) business days after receipt of such notice of a change, a proposal comprised of a detailed estimate with supporting calculations and pricing for the change together with any adjustments in the Contract Schedule required for the performance of Work as changed. A change order request from the Contractor shall also include a proposal comprised of a reasonably detailed estimate with supporting calculations and pricing for the change together with any adjustments in the Contract Schedule required for the performance of Work as changed. Any requests for Time Extensions shall be accompanied with a fragmentary network for the Construction Schedule, or, if required, a complete Project Schedule to demonstrate the impact to the Project Schedule. Pricing of changes shall be in accordance with the unit prices or pricing structure of this Contract and shall clearly define any increase, decrease, or no change in compensation and performance period under this Contract.

15.3. No change in the Work shall be effective unless the OpenCape Contract Administrator and the Contractor's Project Manager have approved in writing, through the issuance of a Change Order, the pricing for the change and any adjustment in the schedule for performance of the Work. Upon receiving such written approval from OpenCape, the Contractor shall diligently perform the change in accordance with this Contract.

15.4. The Contractor shall not suspend performance of this Contract pending the review and negotiation of any change, except as may be directed by the OpenCape Contract Administrator pursuant to Section 16.0, SUSPENSION OF WORK, hereof. The pricing structure contained in this Contract shall constitute the basis for the pricing of all changes under this Contract, and deliverables shall remain unchanged until and unless the parties mutually agree to a Change Order in writing. If OpenCape and the Contractor are unable to reach agreement for pricing of a change, or time for performance of changed Work, the Contractor shall make a claim in the manner provided in Section 18.0, CLAIMS, hereof.

15.5. The Contractor shall have no obligation to comply with oral changes to the Work received from OpenCape unless the Contractor deems that such changes will not affect the cost, schedule, or integrity of the Work. If the Contractor believes that any oral change request may involve a change in the cost, time to perform, or integrity of the Work, the Contractor shall require that the change be given in writing and shall comply with the provisions set forth in this Contract. Any and all costs incurred by the Contractor to perform oral changes shall be for the Contractor's account and the Contractor shall not be entitled to claim any additional time to

perform the Work. The Contractor hereby waives any and all rights to claim from OpenCape such costs or additional time to perform the Work as a result of compliance by the Contractor with such oral changes.

15.6. No one other than the OpenCape Contract Administrator shall be authorized to issue Change Orders. In no event shall the Contractor be entitled to compensation for its costs in executing Change Orders given to the Contractor by anyone other than the OpenCape Contract Administrator.

16. SUSPENSION OF WORK

16.1. OpenCape may at any time, and from time to time, for good cause shown and by written notice to the Contractor suspend further performance of all or any portion of the Work by the Contractor. Said notice of suspensions shall specify the day of suspension, the reason for the suspension, and the estimated duration of the suspension. Upon receiving any such notice of suspension, the Contractor shall promptly suspend further performance of the Work to the extent specified, and during the period of such suspension shall properly care for and protect all Work in progress and materials, supplies, and equipment the Contractor has on hand for performance of the Work. Upon the request of OpenCape, the Contractor shall promptly deliver to OpenCape copies of outstanding invoices, purchase orders, rental agreements and subcontracts of the Contractor for materials, equipment and services for the Work. OpenCape may at any time withdraw the suspension of performance of the Work as to all or part of the suspended Work by written notice to the Contractor specifying the effective date and scope of withdrawal, whereupon the Contractor shall resume diligent performance of the Work for which the suspension is withdrawn.

16.2. If the Contractor believes that any such suspension or withdrawal of suspension justifies modification of the Contract Price or time of completion, the Contractor shall make a claim in the manner provided in Section 15.0, CHANGES, hereof. In no event shall the Contractor be entitled to any prospective profits or any damages because of such suspensions or withdrawals of suspension.

17. TERMINATION FOR CAUSE

17.1. OpenCape shall have the right at any time, with cause, to terminate further performance of the Work by written notice to the Contractor specifying the date of termination. Examples of cause include, without limitation, the federal or state government's revocation of grant funds, the failure of the government to provide the committed grant funds, or the failure of OpenCape to obtain or maintain the necessary Underlying Rights. On the date of termination stated in said notice, the Contractor shall discontinue performance of the Work and shall preserve and protect tools, construction equipment, and facilities on the job site, materials and plant equipment purchased for or committed to the Work (whether at job site or elsewhere), Work in progress, and completed Work (whether at job site or other locations) pending OpenCape's instructions, and, if requested by OpenCape, shall turn over the same to OpenCape, including assigning title to said materials and plant equipment, or dispose of same in accordance with OpenCape's instructions.

17.2. In the event of such termination, the Contractor shall, upon request of OpenCape, promptly advise OpenCape of outstanding subcontracts, rental agreements, purchase orders, and any other agreements that the Contractor has with others pertaining to performance of the Work, and shall furnish OpenCape with complete copies thereof. The Contractor shall assign to OpenCape, in form satisfactory to OpenCape, such of its subcontracts, rental agreements, purchase orders, and other agreements as are designated by OpenCape, or shall take such other action relative to such subcontracts, rental agreements, purchase orders, and other agreements as may be directed by OpenCape.

17.3. If the Contractor has fully and completely performed all of its obligations under this Contract up to the date of such termination, the Contractor shall recover from OpenCape as complete and full settlement for such termination:

(a) All amounts due to the Contractor for Work activities 100% completed;
plus

(b) All amounts due for partially completed Work based on the pricing structure in this Contract after making appropriate adjustments to reflect the percentage of completion; plus

(c) Actual costs (if any) incurred by the Contractor to remove tools, construction equipment and facilities to its premises or to otherwise withdraw its equipment and personnel from the project site; plus

(d) Actual costs necessarily incurred in terminating, in accordance with OpenCape's directions, pending subcontracts, rental agreements, purchase orders, and other agreements.

17.4. In no event shall the Contractor be entitled to any prospective profits or any damages because of such termination.

18. CLAIMS

18.1. Subject to the provisions of Section 15.0, CHANGES, hereof, the Contractor shall give the OpenCape Contract Administrator written notice within ten (5) business days after the happening of any event that the Contractor believes may give rise to a claim by the Contractor for an increase in the Contract Price or the period of performance.

18.2. Within thirty (30) days after the happening of such event, the Contractor shall supply the OpenCape Contract Administrator with a statement supporting the Contractor's claim, which statement shall include the Contractor's detailed estimate of any change in the Contract Price and period of performance occasioned thereby. If requested by OpenCape in writing, the Contractor shall substantiate its claim with payroll documents, paid invoices, receipts, records of performance, and other documents satisfactory to the OpenCape Contract Administrator. OpenCape shall not be liable for, and the Contractor hereby waives, any claim or potential claim of the Contractor of which the Contractor knew or should have known and which was not reported by the Contractor in accordance with the provisions of this section.

18.3. The Contractor agrees to continue performance of the Work during the time any claim of the Contractor hereunder is pending. Neither OpenCape shall not be bound to any adjustments in the Contract Price or scheduled time for the Contractor's claim unless expressly agreed to by OpenCape in writing. No claim hereunder by the Contractor shall be allowed if asserted after final payment under this Contract.

19. PROTECTION OF MATERIALS, EQUIPMENT, AND WORK

19.1. The Contractor shall at all times, in accordance with industry practices, preserve and protect all materials and equipment (whether furnished by the Contractor or OpenCape) used by the Contractor in the execution of the Work from damage or loss due to weather, fire, theft, unexplained disappearance, or other casualty.

19.2. The Contractor shall at all times, in accordance with the best industry practices, protect from damage due to the Contractor's and its subcontractors' operations, equipment and materials (whether stored or installed), paving, structures and any and all other items on a job site belonging to a Right of Way Owners, the OpenCape, or others.

20. CONTRACTOR'S CONSTRUCTION EQUIPMENT

20.1. The Contractor shall furnish all appropriate equipment required for the Contractor's own use in the performance of the Work in the time specified. The Contractor shall keep such equipment serviceable and in good operating condition. Although OpenCape does not hereunder lease, hire or rent such equipment, and shall exercise no rights, power, dominion or control over such equipment, if in the opinion of the OpenCape Representative the condition of any piece of equipment is such that it would adversely affect the workmanship of a completed job or unduly retard progress, it shall be repaired or replaced with equipment satisfactory to the OpenCape Representative.

20.2. The Contractor agrees that performance or inspection of equipment shall not be probative in any dispute over the quality of work performed with that piece of equipment.

21. MATERIAL

21.1. The Contractor shall furnish, at the Contractor's expense, all material necessary to complete the Work under this Contract unless otherwise specifically set forth in the Contract Documents.

21.2. The material specified to be furnished by OpenCape, if any, will be provided by OpenCape, at its cost, at locations to be mutually agreed upon by the parties. Whenever OpenCape materials are delivered to a job site by OpenCape, the Contractor shall be present and take responsibility for unloading.

21.3. The Contractor shall check and test the quantity and quality thereof of materials and equipment furnished by OpenCape (all of which, if any, are specified in the Scope of Work) for compliance with the Contract requirements. The Contractor shall make a written record of the delivery and the Contractor's receipt and acceptance of all such materials and equipment

shall be recorded in writing. If the Contractor elects not to perform such tests upon receipt of OpenCape-furnished materials and equipment, the receipt thereof, as evidenced by the Contractor's prepared documentation, will be construed as conclusive evidence of the Contractor's acceptance thereof and the full conformance therewith with the Contract requirements. Upon receipt by the Contractor, OpenCape-furnished material and equipment will be the sole responsibility of the Contractor, and the Contractor shall bear all risks for damage or loss thereto.

21.4. The Contractor shall carefully note any visible damage to OpenCape-furnished materials and equipment prior to the Contractor's acceptance of delivery. The Contractor shall notify OpenCape of any materials and equipment supplied to the Contractor by OpenCape which are surplus, and without additional compensation shall cooperate with OpenCape in the disposition of such surplus as directed by OpenCape.

21.5. The Contractor shall notify OpenCape of any lack of or requirement for materials and equipment supplied by OpenCape in sufficient time for OpenCape to furnish said materials or equipment in advance of the Contractor's need. In the event of misfit of OpenCape-furnished materials or equipment, the Contractor shall promptly notify OpenCape of such misfit. The Contractor shall take all reasonable steps to avoid standby time due to such misfit or lack of OpenCape-furnished materials or equipment and to continue the progress of other portions of the Work pending correction of such misfit and/or the furnishing of materials or equipment.

21.6. The Contractor shall return to OpenCape unused quantities of materials and supplies provided by OpenCape. Waste materials generated by the Contractor in completion of the Work, including empty containers of paint, glue, solvent, and similar products and paper and cloth material used for clean-up or application of paints, glue, solvents or other materials, shall be accumulated and disposed of by the Contractor.

21.7. All material furnished by the Contractor must be satisfactory to the OpenCape Representative, and any material that is not satisfactory shall, at the Contractor's expense, be removed and satisfactory material substituted.

21.8. The Contractor shall load, haul, and unload all materials, including those furnished by OpenCape, upon right of way or staging areas provided by OpenCape, or at such other places mutually agreed to by the parties. The Contractor shall perform all Work in a manner that will attempt to avoid damage to materials. The Contractor shall place materials in a manner that will cause the least interference with the normal use of the land crossed by the right of way.

21.9. The Contractor warrants that all materials and equipment furnished and incorporated by it in the System shall be new unless otherwise specified, and that all Work under this Contract shall be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these standards shall be considered defective. The warranty provided in this section shall be in addition to, and not in limitation of, any other warranty or remedy required by law or by the Contract Documents.

22. CARE, CUSTODY, CONTROL, AND TITLE TO MATERIALS AND EQUIPMENT

22.1. Good and clear title to all material, furniture, fixtures and equipment furnished by the Contractor under this Contract for the Work shall pass to OpenCape upon acceptance by OpenCape and full payment for such material, furniture, fixtures and equipment. The Contractor shall execute such other and additional documentation as OpenCape may require as evidence of such transfer of title to OpenCape.

22.2. The care, custody, and control (but not title) of the material and equipment incorporated into the Work shall remain with the Contractor until the Work has been accepted in writing by OpenCape pursuant to Section 14.0, NOTICE OF COMPLETION AND FINAL ACCEPTANCE, hereof, and shall thereupon pass to OpenCape unless the parties agree in writing that such care, custody, and control will be assumed by OpenCape at an earlier date.

23. CONTRACTOR'S PERSONNEL

23.1. The Contractor shall provide an adequate number of qualified and competent project management and supervisory staff, craft persons, and other personnel to perform the Work.

23.2. Any employees (including a subcontractor or its employees) of the Contractor deemed by OpenCape, in its sole judgment, to be objectionable shall be promptly replaced by the Contractor at no additional expense to OpenCape.

23.3. If requested by OpenCape, the Contractor shall furnish OpenCape with the names of the Contractor's employees, contractors, subcontractor's employees, and others who have performed or will perform the Work hereunder.

24. LABOR HARMONY

24.1. The Contractor shall maintain harmonious relations with its employees and between the Contractor's employees and subcontractors, and the employees of other subcontractors, OpenCape and the owners of Underlying Rights. Whenever the Contractor has knowledge that any actual or potential labor dispute specific to the Work on the project is delaying or threatens to delay the timely performance of the Work, the Contractor shall promptly give OpenCape notice thereof, including all relevant information. Harmonious relations shall mean the absence of picket lines, work stoppages or any other form of labor demonstrations on the job site by labor organizations representing the trades and/or crafts of the employees on the job sites. Any subcontractor who fails to comply with the harmony requirement shall, at the sole discretion of OpenCape, be prohibited from any further Work on the project. The Contractor shall reimburse OpenCape for any and all costs OpenCape incurs to provide security (such as in the form of police details, security fences, establishment of dual gates, etc.) due to the failure of the Contractor or any of its subcontractors to maintain labor harmony.

25. EMPLOYMENT CERTIFICATION AND PRACTICES

25.1. Upon request of OpenCape, the Contractor will furnish OpenCape with a certificate satisfactory in form to OpenCape that the Contractor's performance of this Contract is in full compliance with the requirements of the Fair Labor Standards Act of 1938 as amended and the regulations and orders of the U.S. Department of Labor issued under Section 14.0 hereof.

25.2. The Contractor shall in the performance of this Contract comply fully with the provisions of Executive Order No. 11246 (Equal Employment Opportunity) dated September 24, 1965, effective October 24, 1965, as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," including without limitation the reporting and affirmative action requirements thereof. Failure of the Contractor to comply with this clause may be deemed by OpenCape to be a material breach of this Contract.

25.3. The Contractor agrees and shall require all subcontractors for this project to agree in writing that they shall comply with the following:

(a) the provisions of M.G.L. c. 149 and shall pay the appropriate lawful prevailing wage rates to their employees as determined pursuant to the Massachusetts Division of Occupational Safety's Prevailing Wage Program.

(b) Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR Part 5).

(c) to the extent consistent with applicable law, endeavor to recruit and hire qualified workers who are residents of Cape Cod and Southeastern Massachusetts for each apprenticeable trade or occupation represented in their workforce.

(d) maintain or participate in a bona fide and active apprentice training program as defined by M.G.L. c. 23, § 11H and 11I for each apprenticeable trade or occupation represented in their workforce that is approved by the Division of Apprentice Training of the Department of Labor and Workforce Development of the Commonwealth of Massachusetts and shall abide by the apprentice to journeymen ratio for each trade prescribed therein in the performance of the contract. For the purposes of this paragraph, the word "active" shall mean an apprentice training program that has operated without suspension for at least three (3) years prior to the bid date for the project in question (except in the case of a company that has been in existence for less than three (3) years in which case such program must have operated without suspension for that period the company had been in existence), and that has completed or graduated at least two (2) apprentices per year per trade for the same period. Notwithstanding anything to the contrary in this Contract, the Contractor shall at all times comply with the terms, obligations and requirements of Chapter 30 of the Acts of 2009, including, without limitation, the apprenticeship requirements contained in Section 33 of said Act.

(e) maintain appropriate industrial accident insurance coverage for all the employees employed on the project in accordance with M.G.L. c. 152.

(f) classify employees employed on the project as employees rather than independent contractors and shall properly classify said employees accordingly for purposes of workers' compensation insurance coverage, employment taxes, Social Security taxes and income tax withholding pursuant to M.G.L. c. 149, Sec. 148B. Similarly, those personnel retained as independent contractors shall be treated as independent contractors, and shall not be subject to the insurance and tax obligations owed to employees.

(g) the Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"), which provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled.

(h) Section 1606 of the American Recovery and Reinvestment Act and the Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7), as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction"), which requires, among other things, contractors to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. The award of this Contract is conditioned upon the acceptance by the Contractor of the wage determination.

(i) the Byrd Anti-Lobbying Amendment (31 U.S.C. 1352), which requires the contractor or subcontractor to certify that it will not and has not used federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352, and to disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award.

25.4. The Contractor represents and warrants that neither the Contractor nor its principal employees are listed on the General Services Administration's List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with Executive Order Nos. 12549 and 12689, "Debarment and Suspension," as implemented by Department of Commerce regulations at 15 CFR part 26. Moreover, the Contractor agrees that it shall not retain any subcontractors who are listed on the List of Parties Excluded from Federal Procurement or Nonprocurement Programs.

25.5. An officer of the Contractor and each subcontractor shall certify under oath and in writing on a monthly basis to the OpenCape Representative that they are in compliance with the requirements of this section.

25.6. Any subcontractor who has been determined to have violated any of the obligations set forth in this section shall be barred from performing any work on this project for six (6) months for a first violation, two (2) years for a second violation, and permanently for a third violation.

26. WORK RULES AND LICENSE

26.1. The Contractor shall comply strictly with OpenCape, the Right of Way Owners, the terms of the Underlying Rights, and the federal, state, and local safety and health and performance rules governing the conduct of the Contractor and the Contractor's employees, agents, and subcontractors at and about the job site. The Contractor shall ensure that its supervisory personnel, employees, agents, and subcontractors at the job site comply strictly with such rules.

26.2. The Contractor represents and warrants to OpenCape that it possesses a valid license to perform the Work in the state or states where the Work is to be performed, and is in good standing with any and all applicable licensing boards in such jurisdictions. The Contractor shall remain licensed and in good standing during the performance of the Work. The Contractor shall bear all costs associated with said license and good standing.

27. BONDS

27.1. As required by 49 CFR 19.48, the Contractor shall provide the OpenCape Contract Administrator, within fifteen (15) calendar days from the execution of this Contract, payment and performance bonds payable to OpenCape in form satisfactory to OpenCape, each in the full amount of this Contract and all subsequent modifications, with surety thereon satisfactory to OpenCape, for the faithful performance of this Contract, including changes, alterations, or extras thereto without consent of surety, and for the payment of all labor, services, materials and supplies used in, or furnished for, performance or prosecution of Work. The bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

27.2. In the event the Contractor fails to provide such bonds, OpenCape shall be entitled to terminate this Contract for default pursuant to Section 11.0, TERMINATION FOR DEFAULT, hereof.

27.3. The period of validity of the payment and performance bonds shall extend to the expiration of the warranty period set forth in Section 5.0, WARRANTIES, hereof.

28. INDEMNITY/LIMITATION OF LIABILITY

28.1. The Contractor agrees to defend, indemnify, and hold harmless OpenCape, the Right of Way Owners, the grantors of Underlying Rights, the affiliated entities of each, and all of

their directors, officers, employees, agents, servants, customers, successors, heirs, representatives, and assigns (collectively the “**Indemnitees**”), from and against, any and all claims, proceedings, losses, demands, actions (and all expenses associated therewith asserted against, suffered, or incurred by Indemnitees) with respect to:

- (a) Death or injury to any persons or damage to property arising out of the acts or omissions of the Contractor, its subcontractors and its or their employees or agents during performance of the Work.
- (b) Any violation of applicable law, ordinance, regulation, or rule by the Contractor, its subcontractors, and its or their employees or agents during the performance of the Work.
- (c) Infringement of patents covering products manufactured or supplied by the Contractor for the Work or their use in combination with products manufactured or supplied by others for use in the Work.
- (d) Actual contamination or pollution (within the meaning of applicable laws or regulations) caused by the Contractor, its subcontractors and its or their employees or agents during performance of the Work.
- (e) Any failure by the Contractor, its subcontractors and its or their employees or agents to comply with any obligation imposed on any of them under this Contract.

28.2. The Contractor’s indemnification obligation as set forth in this section shall include indemnification of the Indemnitees from and against any and all consequential, special, exemplary, punitive, or other damages; fines, penalties, assessments asserted by any governmental agency; and/or claims therefor which the Indemnitees, or any of them, may suffer and/or incur as a result of any claim or action included within the Contractor’s said indemnification obligation.

28.3. OpenCape shall promptly notify the Contractor of any claim(s) within the Contractor’s indemnification obligation of which OpenCape has knowledge and shall give the Contractor any assistance and information reasonably available to OpenCape for the defense of any such claim(s). Any such assistance or information given to the Contractor by OpenCape shall be at the Contractor’s sole cost and expense. The Contractor shall not settle or compromise any such claims(s) without OpenCape’s prior written approval in each such instance.

28.4. Under no circumstances shall the Contractor be liable for damages or claims of any kind, by way of indemnification or otherwise, in excess of the Contract Value.

28.5. Any and all costs, expenses, and attorney’s fees which OpenCape may incur in the furtherance of the disposal or defense of any claim or action set forth above, or in the enforcement of the Contractor’s indemnification obligations under this section shall be solely the responsibility of and be reimbursed by the Contractor. At the Contractor’s sole cost and expense, OpenCape shall cooperate with and assist the Contractor in the defense of any claim or action included in the Contractor’s indemnification obligation.

29. INSURANCE

29.1. Prior to commencement of the Work, and at all times during the performance of the Work, the Contractor shall secure and maintain insurance coverage in form and amounts set forth in the following paragraphs from companies lawfully approved to do business in the Commonwealth of Massachusetts, and provide OpenCape with an insurance certificate confirming compliance with this requirement for each policy providing such required coverage. The insurance certificate shall indicate that OpenCape shall be notified not less than thirty (30) days prior to any cancellation or material change in coverage. All coverage secured by the Contractor shall be on a "Per Occurrence" basis. All insurance policies shall be obtained and maintained with companies rated "A" or better by AM Best. The Contractor's insurance shall cover its subcontractors that perform any of the Work, or the Contractor shall require each such subcontractor to maintain insurance of the type and amounts required of the Contractor.

29.2. OpenCape, its subsidiaries, affiliates, directors, officers and owners shall be listed as additional insureds for general liability, protection and indemnity, excess liability, and automobile liability coverages required under this Contract. This coverage shall be primary and non-contributory. The Contractor and all of its subcontractors hereby waive all rights of subrogation against OpenCape, its subsidiaries, affiliates, directors, officers and owners. In addition, the Contractor hereby waives any and all rights to recover against OpenCape, or its subsidiaries, affiliates, directors, officers and owners, for any loss or damage to the Contractor arising from any cause covered by any insurance required to be carried pursuant to this section or any other insurance actually carried by the Contractor. The Contractor, from time to time, will cause its insurers to issue appropriate waiver of subrogation rights endorsements to all property, general liability and workers' compensation insurance policies carried in connection with this Contract.

29.3. Insurance coverage provided for under this Contract shall be written for not less than the limits of liability described in the following paragraphs or such limits as may be required by law, whichever are greater.

(a) Workers' Compensation and Employer's Liability Insurance covering all employees of the Contractor and any subcontractors wherever they may be in the United States, so long as they are engaged in the work covered by this Contract. Workers' Compensation insurance in amounts required by applicable law and Employer's Liability insurance with a limit of at least two million dollars (\$2,000,000.00) per occurrence is required. For any activity that takes place over water, such Workers' Compensation policy shall include a Federal Act Longshore Harbor Workers Coverage Act "endorsement," which shall be specifically listed on the required insurance certificate.

(b) Commercial General Liability Insurance (Bodily Injury and Property Damage) which shall provide not less than five million dollars (\$5,000,000.00) combined single limit liability insurance, per job aggregate, on a per occurrence basis, with the railroad exclusion and marine liability exclusion deleted, protecting the Contractor and any subcontractors from liability arising out of the Work for: (1) bodily injury, sickness, or disease, including death at any time resulting therefrom, sustained by any person; and (2) damage to or destruction of property, including loss of use thereof.

(c) Protection and Indemnity Policy in an amount not less than two million dollars (\$2,000,000).

(d) An Excess/Umbrella policy in an amount not less than two million dollars (\$2,000,000).

(e) The Contractor shall maintain at all times during the term of this Contract "All Risk" property insurance in an amount equal to the replacement cost of any and all equipment owned, leased, or borrowed while in the Contractor's or subcontractor's care, custody, or control, including while in transport at the direction of the Contractor or subcontractor. Such "All Risk" insurance shall also cover all materials and equipment stored on a project site for incorporation into the Work as well as all partially constructed structures.

(f) The Contractor shall procure and maintain automobile liability insurance covering death or injury to any person or persons, or damage to property arising from the operation of vehicles or equipment, with limitations of not less than two million dollars (\$2,000,000).

(g) Prior to commencing any design or engineering work, the Contractor, or the subcontractor performing such design or engineering work, shall procure and maintain professional liability insurance, with limitations of not less than one million dollars (\$1,000,000) combined single limit for each occurrence and two million dollars (\$2,000,000) in the aggregate.

(h) Any other insurance coverages required pursuant to the terms of the Underlying Rights or the rules and regulations of the owner of such Underlying Right.

29.4. If the Contractor fails to obtain the required insurance or to obtain the required certificates from any subcontractor, and a claim is made or suffered, such party shall indemnify and hold harmless OpenCape from any and all claims for which the required insurance would have provided coverage. Further, if any such failure continues after seven (7) days' written notice thereof by OpenCape, OpenCape may, but shall not be obligated to, obtain such insurance, and will have the right to deduct the cost of such insurance from the moneys due the Contractor.

29.5. If coverage is denied or reimbursement of a properly presented claim is disputed by a carrier for insurance provided above, the Contractor or subcontractor carrying such coverage shall make good faith efforts to pursue such claim with its carrier.

30. INDEPENDENT CONTRACTOR

30.1. Nothing in this Contract shall be deemed to make the Contractor or any of the Contractor's subcontractors, or the employees or agents of the Contractor or a subcontractor, an agent, representative, or employee of OpenCape. The Contractor shall at all times be an independent contractor and shall have sole responsibility for and control over the details and means for performing the Work. Anything in this Contract that may appear to give OpenCape the right to direct the Contractor as to the details of the performance of the Work or to exercise

any measure of control over the Contractor, shall be construed to mean only that the Contractor shall follow the desires of OpenCape in achieving the results of the Work.

31. CONFIDENTIAL INFORMATION AND OWNERSHIP OF DOCUMENTS

31.1. Confidential information, including but not limited to design criteria, performance specifications, and other information obtained by the Contractor from OpenCape, and working Drawings, Specifications and network maps prepared by the Contractor shall be held in confidence by the Contractor, and shall not be used by the Contractor for any purposes other than for the performance of the Work or as authorized in writing by OpenCape. The Contractor agrees not to disclose any such Confidential Information to anyone except employees and consultants of the Contractor to whom disclosure is necessary for the purposes of this Contract, and who have agreed to be bound by the obligations of confidentiality and restrictions on use hereunder, or as required by applicable law. The Contractor shall cause its employees and consultants to whom it makes disclosure to observe the obligations of confidentiality and restrictions on use in accordance with this Contract. All such documents furnished by OpenCape to the Contractor, and documents prepared by the Contractor, shall immediately become the property of OpenCape; and upon completion of the Work, or earlier upon termination of this Contract, or when requested by OpenCape, the Contractor shall return to OpenCape all such documents including any copies thereof.

32. PUBLICITY

32.1. Neither party shall publish or use any advertising, sales promotions, or other publicity materials that use the other party's name, logo, trademarks, or service marks without the prior written approval of the other party.

32.2. Each party shall have the right to review and approve any publicity material, press releases, or other public statements by the other that refer to such party or that describe any aspect of this Contract or which relate to the System. Each party agrees not to issue any such publicity, press releases, or public statements without the prior written approval of the other party, except as is required by applicable law.

33. APPLICATIONS FOR PAYMENT

33.1. Form of Application. The Contractor shall submit to OpenCape on the 25th day of each month a pre-bill of the anticipated invoices for the following month. The Contractor shall then submit to OpenCape within two weeks following the end of each calendar month, on a form approved by OpenCape, an application for each payment requested. Each application for payment shall also include a statement of the Work performed by the Contractor during such billing period, including production reports and itemization of payment according to the pricing set forth in **Exhibit B**, as well as the project number, route name, contract number, billing period, and an itemization of any charges expended by the Contractor which may be due (including payments to subcontractors), all certified as correct by the Contractor. The OpenCape Representative shall verify each application for payment before being submitted for payment.

33.2. Payment. OpenCape shall pay the amount so stated, subject to any retainage described in Subsection 33.3, within forty-five (45) days of approval of the application for payment by OpenCape.

33.3. Retention. OpenCape, at its option and discretion, shall retain and withhold from each payment ten percent (10%) of any payment plus any other withholdings or retainage which may be authorized by the Contract Documents, for up to forty-five (45) days after the Acceptance Date in accordance with the provisions of the Contract Documents and the acceptance of such work by OpenCape. OpenCape, at its option and discretion, may retain and withhold the final payment of the entire unpaid balance of any Work for up to thirty (30) days after Final Acceptance of the Work in accordance with the provisions of the Contract Documents and the acceptance of the Work by OpenCape.

33.4. Lien Waivers. OpenCape reserves the right, before making any payments, or at any time during the progress of the Work, to require the Contractor to furnish evidence in a form satisfactory to OpenCape, that all claims, liens and causes of action, if any, for the payment of wages or salaries, or the payment of charges for labor, materials, tools, machinery, or supplies, have been satisfied, released or settled, and in case such evidence is not furnished, the amount of such claims, liens, and causes of action may be retained from any moneys otherwise due the Contractor hereunder until they shall have been furnished.

33.5. Right to Audit. In addition to any applicable requirements in 15 CFR Part 14, the American Recovery and Reinvestment Act, and the terms of any grant approvals, the Contractor shall maintain for a period of three (3) years after final payment under this Contract, all books, documents, papers and records which are pertinent to the Work. OpenCape, the Department of Commerce and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to such materials for the purpose of making audits, examinations, excerpts and transcriptions. The Contractor shall reasonable cooperate with the conduct of any audit.

34. COMPLIANCE WITH LAWS

34.1. The Contractor shall comply strictly with all local, municipal, state, federal and governmental laws, orders, ordinances, codes, and regulations applicable to the Contractor's operations in the performance of the Work hereunder.

34.2. The Contractor shall not under any circumstance apply to or enter into negotiations with any governmental authority or agency for acceptance of variations from or revisions to safety or health, or air, water or noise pollution laws or regulations relating to this Contract or the performance thereof, without OpenCape's prior written approval, which approval may be withheld in OpenCape's reasonable discretion.

35. NOTICES

35.1. Unless specified in this Contract, all notices or other communications required or permitted by this Contract shall be in writing and shall be personally delivered (including by means of professional messenger service) or sent by overnight courier or express mail delivery

service, and addressed to the party at the address stated on the first page of the Contract, and shall be deemed given when actually received or refused. Either party may by similar notice given change the address to which future notices or other communications shall be sent.

36. TAXES, DUTIES, AND FEES

36.1. The Contractor shall pay all taxes, including sales, use, gross receipts, federal/state/local income, and all other taxes, duties, fees, and other assessments of whatever nature imposed by governmental authorities and applicable to the performance of the Work and this Contract. The Contractor shall not be responsible for taxes unrelated to its performance of the Work under this Contract or for OpenCape's income taxes or property or ad valorem taxes.

36.2. The Contractor shall pay or cause to be paid when due, all payroll taxes and contributions which are measured by remuneration paid to persons employed by the Contractor or its subcontractors in connection with the Work or which arise by virtue of their employment, and which now or hereafter are imposed by any governmental authority.

37. LIENS

37.1. To the fullest extent permitted by applicable laws, the Contractor hereby waives and releases any and all rights of mechanics, materialmen, or other liens and rights for payment for services, labor, equipment, or materials furnished by the Contractor in performance of the Work and granted by law to persons supplying materials, equipment, services and other things of value to improve or modify land or structures thereon, which the Contractor may have against OpenCape or the Right of Way Owners' or landlord's premises, property belonging to OpenCape, or to any of them, or funds payable by OpenCape to the Right of Way Owners, if any.

37.2. The Contractor shall at all times promptly pay for all services, materials, equipment, and labor used or furnished by the Contractor in the performance of the Work under this Contract, and shall at its expense keep the Right of Way Owners' premises and all property belonging to OpenCape and/or the Right of Way Owners or landlord free and clear of any and all of the above mentioned liens and rights of lien arising out of services, labor, equipment, or materials furnished by the Contractor or its employees, materialmen, or subcontractors in the performance of the Work. If the Contractor fails to release and discharge any such claim of lien against the premises of a Right of Way Owners or landlord within ten (10) business days after receipt of written notice from OpenCape to remove such claim of lien, OpenCape may, at its option, discharge or release the claim of lien or otherwise deal with the lien claimant, and the Contractor shall pay OpenCape any and all costs and expenses of OpenCape in so doing, including reasonable attorney's fees incurred by OpenCape, or, alternatively, OpenCape may, at its choosing, deduct such costs and fees from amounts due the Contractor.

38. RIGHT TO OFFSET

38.1. OpenCape, without waiver of any rights or remedies which it may at any time have against the Contractor, shall be entitled from time to time to deduct from any amounts due or owing by OpenCape to the Contractor in connection with this Contract (or any other contract

with OpenCape), any and all amounts owed by the Contractor to OpenCape in connection with this Contract.

39. IMMIGRATION REFORM AND CONTROL ACT

39.1. The Contractor represents, warrants and agrees that it will not assign any individual to perform work under this Contract who is an unauthorized alien under the Immigration Reform and Control Act of 1986, as the same may be amended, or its implementing regulations.

39.2. In the event any employee of the Contractor working under this Contract is discovered to be an unauthorized alien, the Contractor will immediately remove this individual from the Work site and replace that individual with one who is not an unauthorized alien.

40. ASSIGNMENTS

40.1. Except as set forth herein, the Contractor shall not assign or otherwise transfer its obligations under this Contract or any interest herein without the express written consent of OpenCape; provided that the Contractor may transfer or assign this Contract to its parent company or an affiliated company wholly-owned by the Contractor's parent company upon thirty (30) days written notice to OpenCape. OpenCape may assign this Contract in whole or part without the consent of the Contractor or its sureties and without invalidating this Contract. Such consent shall not relieve the Contractor from full responsibility and liability for the work hereunder and the proper performance of all the terms and conditions of this Contract.

41. GOVERNING LAWS

41.1. The rights and obligations of the parties hereto shall be construed and interpreted in accordance with the substantive law of the Commonwealth of Massachusetts without giving effect to its principles for choice of law.

42. DISPUTE RESOLUTION

42.1. All claims and disputes relating to this Contract shall be subject to arbitration in Boston, Massachusetts. Any controversy or claim arising out of or relating to this Contract, or a breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment of the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

43. ORDER OF PRECEDENCE

43.1. Except as otherwise set forth herein, in the event of inconsistency between provisions of the Contract Documents, the inconsistency shall be resolved by giving precedence in the following order:

- (a) The Contract
- (b) Exhibit A, Scope of Work (includes Construction Specifications)

- (c) Exhibit B, Cost Estimate
- (d) Exhibit C, General Terms and Conditions