

**WESTERN RIVERSIDE COUNCIL OF GOVERNMENTS
EQUIPMENT PURCHASE AGREEMENT**

This Equipment Purchase Agreement (“Agreement”) is entered into this _____ day of _____, 20____, by and between the Western Riverside Council of Governments, a public agency with its principal place of business at _____ (“WRCOG”), and [***INSERT NAME***], a [***INSERT TYPE OF ENTITY - CORPORATION, PARTNERSHIP, SOLE PROPRIETORSHIP OR OTHER LEGAL ENTITY***] with its principal place of business at [***INSERT ADDRESS***] (“Contractor”). WRCOG and Contractor are sometimes individually referred to as “Party” and collectively as “Parties” in this Agreement.

Section 1. DEFINITIONS.

A. “Equipment” means all machinery, equipment, items, parts, materials, labor or other services, including design, engineering and installation services, provided by Contractor as specified in Exhibit “A,” attached hereto and incorporated herein by reference.

B. “Delivery Date(s)” means that date or dates upon which the Equipment is to be delivered to WRCOG, ready for approval, testing and/or use as specified in Exhibit “B.”

Section 2. MATERIALS AND WORKMANSHIP.

When Exhibit “A” specifies machinery, equipment or material by manufacturer, model or trade name, no substitution will be made without WRCOG’s written approval. Machinery, equipment or material installed in the Equipment without the approval required by this Section 2 will be deemed to be defective material for purposes of Section 4. Where machinery, equipment or materials are referred to in Exhibit “A” as equal to any particular standard, WRCOG will decide the question of equality. When requested by WRCOG, Contractor will furnish WRCOG with the name of the manufacturer, the performance capabilities and other pertinent information necessary to properly determine the quality and suitability of any machines, equipment and material to be incorporated in the Equipment. Material samples will be submitted at WRCOG’s request.

Section 3. INSPECTIONS AND TESTS.

WRCOG shall have the right to inspect and/or test the Equipment prior to acceptance. If upon inspection or testing the Equipment or any portion thereof are found to be nonconforming, unsatisfactory, defective, of inferior quality or workmanship, or fail to meet any requirements or specifications contained in Exhibit “A,” then without prejudice to any other rights or remedies, WRCOG may reject the Equipment or exercise any of its rights under Section 4.C. The inspection, failure to make inspection, acceptance of goods, or payment for goods shall not impair WRCOG’s right to reject nonconforming goods, irrespective of WRCOG’s failure to notify Contractor of a rejection of nonconforming goods or revocation of acceptance thereof or to specify with particularity any defect in nonconforming goods after rejection or acceptance thereof.

Section 4. WARRANTY.

A. Contractor warrants that the Equipment will be of merchantable quality and free from defects in design, engineering, material and workmanship for a period of two (2) years, or such longer period as provided by a manufacturer's warranty or as agreed to by Contractor and WRCOG, from the date of final written acceptance of the Equipment by WRCOG as required for final payment under Section 7. Contractor further warrants that any services provided in connection with the Equipment will be performed in a professional and workmanlike manner and in accordance with the highest industry standards.

B. Contractor further warrants that all machinery, equipment or process included in the Equipment will meet the performance requirements and specifications specified in Exhibit "A" and shall be fit for the purpose intended. WRCOG's inspection, testing, approval or acceptance of any such machinery, equipment or process will not relieve Contractor of its obligations under this Section 4.B.

C. For any breach of the warranties contained in Section 4.A and Section 4.B, Contractor will, immediately after receiving notice from WRCOG, at the option of WRCOG, and at Contractor's own expense and without cost to WRCOG:

1. Repair the defective Equipment;
2. Replace the defective Equipment with conforming Equipment, F.O.B. WRCOG's plant, office or other location of WRCOG where the Equipment was originally performed or delivered; or
3. Repay to WRCOG the purchase price of the defective Equipment.

If WRCOG selects repair or replacement, any defects will be remedied without cost to WRCOG, including but not limited to, the costs of removal, repair and replacement of the defective Equipment, and reinstallation of new Equipment. All such defective Equipment that is so remedied will be similarly warranted as stated above. In addition, Contractor will repair or replace other items of the Equipment which may have been damaged by such defects or the repairing of the same, all at its own expense and without cost to WRCOG.

D. Contractor also warrants that the Equipment is free and clear of all liens and encumbrances whatsoever, that Contractor has a good and marketable title to same, and that Contractor owns or has a valid license for all of the proprietary technology and intellectual property incorporated within the Equipment. Contractor agrees to indemnify, defend and hold WRCOG harmless against any and all third party claims resulting from the breach or inaccuracy of any of the foregoing warranties.

E. In the event of a breach by Contractor of its obligations under this Section 4, WRCOG will not be limited to the remedies set forth in this Section 4, but will have all the rights and remedies permitted by applicable law, including without limitation, all of the rights and remedies afforded to WRCOG under the California Commercial Code.

Section 5. PRICES.

Unless expressly provided otherwise, all prices and fees specified in Exhibit “C,” attached hereto and incorporated herein by reference, are firm and shall not be subject to change without the written approval of WRCOG. No extra charges of any kind will be allowed unless specifically agreed to in writing by WRCOG’s authorized representative. The total price shall include (i) all federal, state and local sales, use, excise, privilege, payroll, occupational and other taxes applicable to the Equipment furnished to WRCOG hereunder; and (ii) all charges for packing, freight and transportation to destination.

Section 6. CHANGES.

WRCOG, at any time, by a written order, and without notice to any surety, may make changes in the Equipment, including but not limited to, WRCOG’s requirements and specifications. If such changes affect the cost of the Equipment or time required for its performance, an equitable adjustment will be made in the price or time for performance or both. Any change in the price necessitated by such change will be agreed upon between WRCOG and Contractor and such change will be authorized by a change order document signed by WRCOG and accepted by Contractor.

Section 7. PAYMENTS.

A. Terms of payment, are net thirty (30) days, less any applicable retention, after receipt of invoice, or completion of applicable Progress Milestones. Final payment shall be made by WRCOG after Contractor has satisfied all contractual requirements. Payment of invoices shall not constitute acceptance of Equipment.

B. If Progress Milestones have been specified Exhibit “B,” then payments for the Equipment will be made as the requirements of such Progress Milestones are met. Progress payments for the Equipment will be made by WRCOG upon proper application by Contractor during the progress of the Equipment and according to the terms of payment as specified in Exhibit “B.” Contractor’s progress billing invoice will include progress payments due for the original scope of work and changes. Each “Item for Payment” shown in Exhibit “B” and each change order will be itemized on the invoice. Invoices for cost plus work, whether part of Exhibit “B” or a change order, must have subcontractor and/or supplier invoices attached to Contractor’s invoice. Other format and support documents for invoices will be determined by WRCOG in advance of the first invoice cycle.

C. Payments otherwise due may be withheld by WRCOG on account of defective Equipment not remedied, liens or other claims filed, reasonable evidence indicating probable filing of liens or other claims, failure of Contractor to make payments properly to its subcontractors or for material or labor, the failure of Contractor to perform any of its other obligations under the Agreement, or to protect WRCOG against any liability arising out of Contractor’s failure to pay or discharge taxes or other obligations. If the causes for which payment is withheld are removed, the withheld payments will be made promptly. If the said causes are not removed within a reasonable period after written notice, WRCOG may remove them at Contractor’s expense.

D. Payment of the final Progress Milestone payment or any retention will be made by WRCOG upon:

1. Submission of an invoice for satisfactory completion of the requirements of a Progress Milestone as defined in Exhibit "B" and in the amount associated with the Progress Milestone;
2. Written acceptance of the Equipment by WRCOG;
3. Delivery of all drawings and specifications, if required by WRCOG;
4. Delivery of executed full releases of any and all liens arising out of this Agreement; and
5. Delivery of an affidavit listing all persons who might otherwise be entitled to file, claim or maintain a lien of any kind or character, and containing an averment that all of the said persons have been paid in full.

If any person refuses to furnish an actual release or receipt in full, Contractor may furnish a bond satisfactory to WRCOG to indemnify WRCOG against any claim or lien at no cost to WRCOG.

E. Acceptance by Contractor of payment of the final Progress Milestone payment pursuant to Section 7.D will constitute a waiver, release and discharge of any and all claims and demands of any kind or character which Contractor then has, or can subsequently acquire against WRCOG, its successors and assigns, for or on account of any matter or thing arising out of, or in any manner connected with, the performance of this Agreement. However, payment for the final Progress Milestone by WRCOG will not constitute a waiver, release or discharge of any claims or demands which WRCOG then has, or can subsequently acquire, against Contractor, its successors and assigns, for or on account of any matter or thing arising out of, or in any manner connected with, the performance of this Agreement.

Section 8. SCHEDULE FOR DELIVERY.

A. The time of Contractor's performance is of the essence for this Agreement. The Equipment will be delivered in accordance with the schedule set forth in Exhibit "B." Contractor must immediately notify WRCOG in writing any time delivery is behind schedule or may not be completed on schedule. In addition to any other rights WRCOG may have under this Agreement or at law, Contractor shall pay WRCOG the sum of \$[INSERT AMOUNT] per item of Equipment for each calendar day for which the item of Equipment is unavailable beyond the scheduled delivery date(s) specified in Exhibit "B."

B. In the event that the Equipment is part of a larger project or projects that require the coordination of multiple contractors or suppliers, then Contractor will fully cooperate in scheduling the delivery so that WRCOG can maximize the efficient completion of such project(s).

Section 9. TAXES.

A. Contractor agrees to timely pay all sales and use tax (including any value added or gross receipts tax imposed similar to a sales and use tax) imposed by any federal, state or local taxing authority on the ultimate purchase price of the Equipment provided under this Agreement.

B. Contractor will withhold, and require its subcontractors, where applicable, to withhold all required taxes and contributions of any federal, state or local taxing authority which is measured by wages, salaries or other remuneration of its employees or the employees of its subcontractors. Contractor will deposit, or cause to be deposited, in a timely manner with the appropriate taxing authorities all amounts required to be withheld.

C. All other taxes, however denominated or measured, imposed upon the price of the Equipment provided hereunder, will be the responsibility of Contractor. In addition, all taxes assessed by any taxing jurisdiction based on Contractor property used or consumed in the provision of the Equipment such as and including ad valorem, use, personal property and inventory taxes will be the responsibility of Contractor.

D. Contractor will, upon written request, submit to WRCOG written evidence of any filings or payments of all taxes required to be paid by Contractor hereunder.

Section 10. INDEPENDENT CONTRACTOR.

Contractor enters into this Agreement as an independent contractor and not as an employee of WRCOG. Contractor shall have no power or authority by this Agreement to bind WRCOG in any respect. Nothing in this Agreement shall be construed to be inconsistent with this relationship or status. All employees, agents, contractors or subcontractors hired or retained by the Contractor are employees, agents, contractors or subcontractors of the Contractor and not of WRCOG. WRCOG shall not be obligated in any way to pay any wage claims or other claims made against Contractor by any such employees, agents, contractors or subcontractors or any other person resulting from performance of this Agreement.

Section 11. SUBCONTRACTS.

Unless otherwise specified, Contractor must obtain WRCOG's written permission before subcontracting any portion of the Equipment. Except for the insurance requirements in Section 13.A, all subcontracts and orders for the purchase or rental of supplies, materials or equipment, or any other part of the Equipment, will require that the subcontractor be bound by and subject to all of the terms and conditions of the Agreement. No subcontract or order will relieve Contractor from its obligations to WRCOG, including, but not limited to Contractor's insurance and indemnification obligations. No subcontract or order will bind WRCOG.

Section 12. TITLE AND RISK OF LOSS.

Unless otherwise agreed, WRCOG will have title to, and risk of loss of, all completed and partially completed portions of the Equipment upon delivery, as well as materials delivered to and stored on WRCOG property which are intended to become a part of the Equipment.

However, Contractor will be liable for any loss or damage to the Equipment and/or the materials caused by Contractor or its subcontractors, their agents or employees, and Contractor will replace or repair said Equipment or materials at its own cost to the complete satisfaction of WRCOG. Notwithstanding the foregoing, in the event that WRCOG has paid Contractor for all or a portion of the Equipment which remains in the possession of Contractor, then WRCOG shall have title to, and the right to take possession of, such Equipment at any time following payment therefor. Risk of loss for any Equipment which remains in the possession of Contractor shall remain with Contractor until such Equipment has been delivered or WRCOG has taken possession thereof. Contractor will have risk of loss or damage to Contractor's property used in the construction of the Equipment but which does not become a part of the Equipment.

Section 13. INDEMNIFICATION.

A. Contractor shall defend, indemnify and hold WRCOG, its officials, officers, employees, volunteers and agents free and harmless from any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury, in law or equity, to property or persons, including wrongful death, in any manner arising out of or incident to any alleged acts, omissions, negligence or willful misconduct of Contractor, its officials, officers, employees, agents, subcontractors and subconsultants arising out of or in connection with the Equipment or the performance of this Agreement, including without limitation the payment of all consequential damages and attorneys' fees and other related costs and expenses except such loss or damage which was caused by the sole negligence or willful misconduct of WRCOG.

B. Contractor's defense obligation for any and all such aforesaid suits, actions or other legal proceedings of every kind that may be brought or instituted against WRCOG, its officials, officers, employees, agents or volunteers shall be at Contractor's own cost, expense and risk. Contractor shall pay and satisfy any judgment, award or decree that may be rendered against WRCOG or its officials, officers, employees, agents or volunteers, in any such suit, action or other legal proceeding. Contractor shall reimburse WRCOG and its officials, officers, employees, agents and/or volunteers, for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided.

C. Contractor's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by WRCOG, its officials, officers, employees, agents or volunteers.

Section 14. INSURANCE.

A. General. Contractor shall take out and maintain:

1. Commercial General Liability Insurance, of at least \$1,000,000 per occurrence/ \$2,000,000 aggregate for bodily injury, personal injury and property damage, at least as broad as Insurance Services Office Commercial General Liability most recent Occurrence Form CG 00 01;

2. Automobile Liability Insurance for bodily injury and property damage including coverage for owned, non-owned and hired vehicles, of at least \$1,000,000 per

accident for bodily injury and property damage, at least as broad as most recent Insurance Services Office Form Number CA 00 01 covering automobile liability, Code 1 (any auto);

3. Workers' Compensation in compliance with applicable statutory requirements and Employer's Liability Coverage of at least \$1,000,000 per occurrence; and

4. Pollution Liability Insurance of at least \$1,000,000 per occurrence and \$2,000,000 aggregate shall be provided by the Contractor if transporting hazardous materials.

5. If Contractor is also the manufacturer of any equipment included in the Equipment, Contractor shall carry Product Liability and/or Errors and Omissions Insurance which covers said equipment with limits of not less than \$1,000,000.

B. Additional Insured; Primary; Waiver of Subrogation; No Limitation on Coverage. The policies required under this Section shall give WRCOG, its officials, officers, employees, agents or volunteers additional insured status. Such policies shall contain a provision stating that Contractor's policy is primary insurance and that any insurance, self-insurance or other coverage maintained by WRCOG or any additional insureds shall not be called upon to contribute to any loss, and shall contain or be endorsed with a waiver of subrogation in favor of WRCOG, its officials, officers, employees, agents, and volunteers. The limits set forth herein shall apply separately to each insured against whom claims are made or suits are brought, except with respect to the limits of liability. Requirements of specific coverage or limits contained in this section are not intended as a limitation on coverage, limits, or other requirement, or a waiver of any coverage normally provided by any insurance. Any available coverage shall be provided to the parties required to be named as additional insured pursuant to this Agreement.

C. Insurance Carrier. All insurance required under this Section is to be placed with insurers with a current A.M. Best's rating no less than A-:VII, licensed to do business in California, and satisfactory to WRCOG.

D. Evidence of Insurance. Contractor shall furnish WRCOG with original certificates of insurance and endorsements effecting coverage required by the Agreement. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf, and shall be on forms supplied or approved by WRCOG. All certificates and endorsements must be received and approved by WRCOG before delivery commences. WRCOG reserves the right to require complete, certified copies of all required insurance policies, at any time.

E. Subcontractors. All subcontractors shall meet the requirements of this Section before commencing work. In addition, Contractor shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

F. Freight. Contractor shall ensure that third party shippers contracted by Contractor have adequate insurance coverage for the shipped Equipment.

Section 15. LIENS.

A. Contractor, subcontractors and suppliers will not make, file or maintain a mechanic's or other lien or claim of any kind or character against the Equipment, for or on account of any labor, materials, fixtures, tools, machinery, equipment, or any other things furnished, or any other work done or performance given under, arising out of, or in any manner connected with the Agreement (such liens or claims referred to as "Claims"); and Contractor, subcontractor and suppliers expressly waive and relinquish any and all rights which they now have, or may subsequently acquire, to file or maintain any Claim and Contractor, subcontractor and suppliers agree that this provision waiving the right of Claims will be an independent covenant.

B. Contractor will save and hold WRCOG harmless from and against any and all Claims that may be filed by a subcontractor, supplier or any other person or entity and Contractor will, at its own expense, defend any and all actions based upon such Claims and will pay all charges of attorneys and all costs and other expenses arising from such Claims.

Section 16. TERMINATION OF AGREEMENT BY WRCOG.

A. Should Contractor at any time refuse or fail to deliver the Equipment with promptness and diligence, or to perform any of its other obligations under the Agreement, WRCOG may terminate Contractor's right to proceed with the delivery of the Equipment by written notice to Contractor. In such event WRCOG may obtain the Equipment by whatever method it may deem expedient, including the hiring of another contractor or other contractors and, for that purpose, may take possession of all materials, machinery, equipment, tools and appliances and exercise all rights, options and privileges of Contractor. In such case Contractor will not be entitled to receive any further payments until the Equipment is delivered. If WRCOG's cost of obtaining the Equipment, including compensation for additional managerial and administrative services, will exceed the unpaid balance of the Agreement, Contractor will be liable for and will pay the difference to WRCOG.

B. WRCOG may, for its own convenience, terminate Contractor's right to proceed with the delivery of any portion or all of the Equipment by written notice to Contractor. Such termination will be effective in the manner specified in such notice, will be without prejudice to any claims which WRCOG may have against Contractor, and will not affect the obligations and duties of Contractor under the Agreement with respect to portions of the Equipment not terminated.

C. On receipt of notice under Section 16.B, Contractor will, with respect to the portion of the Equipment terminated, unless the notice states otherwise,

1. Immediately discontinue such portion of the Equipment and the placing of orders for materials, facilities, and supplies in connection with the Equipment,

2. Unless otherwise directed by WRCOG, make every reasonable effort to procure cancellation of all existing orders or contracts upon terms satisfactory to WRCOG; and

3. Deliver only such portions of the Equipment which WRCOG deems necessary to preserve and protect those portions of the Equipment already in progress and to protect material, plant and equipment at the Equipment site or in transit to the Equipment site.

D. Upon termination pursuant to Section 16.B, Contractor will be paid a pro rata portion of the compensation in the Agreement for any portion of the terminated Equipment already delivered, including material and services for which it has made firm contracts which are not canceled, it being understood that WRCOG will be entitled to such material and services. Upon determination of the amount of said pro rata compensation, WRCOG will promptly pay such amount to Contractor upon delivery by Contractor of the releases of liens and affidavit, pursuant to Section 7.C.

Section 17. MISCELLANEOUS PROVISIONS.

A. Delivery of Notices. All notices permitted or required under this Agreement shall be given to the respective parties at the following address or at such other address as the respective parties may provide in writing for this purpose:

WRCOG:

CONTRACTOR:

[INSERT NAME, ADDRESS & CONTACT PERSON]

INSERT NAME, ADDRESS & CONTACT PERSON]

Such notice shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid and addressed to the party at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

B. Assignment or Transfer. Contractor shall not assign or transfer any interest in this Agreement whether by assignment or novation, without the prior written consent of WRCOG, which will not be unreasonably withheld. Provided, however, that claims for money due or to become due Contractor from WRCOG under this Agreement may be assigned to a financial institution or to a trustee in bankruptcy, without such approval. Notice of any assignment or transfer, whether voluntary or involuntary, shall be furnished promptly to WRCOG.

C. Successors and Assigns. This Agreement shall be binding on the successors and assigns of the Parties.

D. Amendment; Modification. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.

E. Waiver. No waiver of any default shall constitute a waiver of any other default or breach, whether of the same or other covenant or condition. No waiver, benefit, privilege or service voluntarily given or performed by a Party shall give the other Party any contractual rights by custom, estoppel or otherwise.

F. Governing Law. This Agreement shall be governed by the laws of the State of California. Venue shall be in Yolo County.

G. Interpretation. Since the Parties or their agents have participated fully in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party.

H. No Third Party Beneficiaries. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.

I. Authority to Enter Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right and authority to make this Agreement and bind each respective Party.

J. Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

K. Counterparts. This Agreement may be signed in counterparts, each of which shall constitute an original.

L. WRCOG's Right to Employ Other Contractors. WRCOG reserves its right to employ other contractors in connection with the Equipment.

M. Entire Agreement. This Agreement constitutes the entire agreement between the Parties relative to the Equipment specified herein. There are no understandings, agreements, conditions, representations, warranties or promises with respect to this Agreement, except those contained in or referred to in the writing.

[SIGNATURES ON FOLLOWING PAGE]

**SIGNATURE PAGE FOR EQUIPMENT PURCHASE AGREEMENT
BETWEEN WESTERN RIVERSIDE COUNCIL OF GOVERNMENTS
AND [***INSERT NAME***]**

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

**WESTERN RIVERSIDE COUNCIL OF [INSERT CONTRACTOR NAME]
GOVERNMENTS**

Approved By:

[INSERT NAME]
[INSERT TITLE]

Date

Approved As To Form:

General Counsel

Signature

Name

Title

Date

EXHIBIT "A"
EQUIPMENT SPECIFICATIONS

EXHIBIT "B"
DELIVERY SCHEDULE

EXHIBIT "C"
FEE SCHEDULE