



# Commonwealth of Kentucky

## MASTER AGREEMENT

**IMPORTANT**

Show Doc ID number on all packages, invoices and correspondence.

<b>Doc Description:</b> Next Generation Kentucky Information Highway-Dark Fiber		
<b>Doc ID No:</b> MA 758 1500000563 1	<b>Proc Folder:</b> 3435401	
<b>Procurement Type:</b> Standard Services		
<b>Effective Date:</b> 2014-12-22	<b>Expiration Date:</b> 2044-12-21	<b>Not To Exceed Amount</b>
<b>Administered By:</b> Sharon Purvis		<b>Cited Authority:</b> FAP111-57-00-S2
<b>Telephone:</b> 502-564-8096		<b>Issued By:</b> Stephanie Williams
<b>V E N D O R</b>	Macquarie Infrastructure Developments LLC  Level 16, 125 West 55th Street  New York NY 10019  US	

Line	CL Description	Delivery Days	Quantity	Unit Issue	Unit Price	Contract Amt	Total Price
1	Next Generation Kentucky Information Highway-Dark Fiber	0	0.00		0.00000	0.00	0.00

**Extended Description**

Next Generation Kentucky Information Highway-Dark Fiber

<b>1500000563</b>	<b>Document Phase</b> Final	<b>Document Description</b> Next Generation Kentucky Information Highway Dark Fiber	<b>Page 2</b> <b>of 2</b>
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See "Attachment A" for Terms and Conditions. The terms and conditions set out in "Attachment A" and any subsequent addenda, are incorporated into and are a part of this Master Agreement.

**ATTACHMENT A  
MASTER AGREEMENT  
FOR  
NEXT GENERATION  
KENTUCKY INFORMATION HIGHWAY (NG-KIH) INITIATIVE  
CONCESSIONAIRE PARTNER  
BETWEEN  
THE COMMONWEALTH OF KENTUCKY Finance and Administration  
Cabinet**

**AND  
MACQUARIE INFRASTRUCTURE DEVELOPMENTS LLC  
Level 16, 125 West 55th Street  
New York, New York 10019**

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**MA 758 1500000563**

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WHEREAS, pursuant to KRS 45A.605, the Commonwealth of Kentucky, by and through the Finance and Administration Cabinet (the "Commonwealth"), has the authority to enter into contracts for the development of an information highway on behalf of state agencies and other specified entities;

WHEREAS, the Commonwealth has established networks for the use of state government, institutions of higher learning, K-12 education and local governments;

WHEREAS, the Commonwealth, through its government agencies, educational entities, local government and other stakeholders, supports the finance, design, construction, operation, maintenance and refreshing of the Next Generation Kentucky Information Highway middle mile infrastructure ("NG-KIH" or "Project") to serve the public sector, private interests and Kentucky's citizens;

WHEREAS, the NG-KIH will consist of a statewide dark fiber middle-mile network constructed to provide communication services based on an optical fiber backbone which will improve the quality, reliability, and access to network services across the Commonwealth;

WHEREAS, the Commonwealth issued RFP 758 1500000003-5 ("RFP" or "Solicitation") through a competitive bidding process to select a long-term vendor/partner to assist with this Project;

WHEREAS, Macquarie Infrastructure Developments, LLC ("Contractor"), having acknowledged and accepted, as of the date of submission of Contractor's proposal, the initial terms and scope of the Project as set forth in the RFP, as amended, bid upon the Solicitation and continues to design and develop all aspects of the Project in cooperation with the Commonwealth;

WHEREAS, Contractor has extensive experience in the design, implementation, financing and operation of complex public-private telecommunications projects and was awarded the contract;

NOW, THEREFORE, in consideration of the mutual covenants expressed herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Commonwealth and Contractor (collectively referred to as "Parties"), hereby covenant and agree as follows:

This Master Agreement ("Agreement") is entered into, by and between the Commonwealth and Contractor.

The Commonwealth and Contractor agree to the following:

**I. Scope of Contract**

The purpose of this Agreement is to engage Contractor to explore the feasibility of the finance, design, construction, operation, maintenance, and refreshing of the NG-KIH initiative (the feasibility phase being the "Initial Project" and the ultimate

implementation of the NG-KIH under the Concession Agreement being the "Project") and to exclusively negotiate the Concession Agreement between the Parties governing the Project.

## **II. Contract Components and Order of Precedence**

The Commonwealth's acceptance of Contractor's proposal in response to Solicitation RFP 758 1500000003, indicated by the issuance of a Contract Award by the Office of Procurement Services, shall create a valid agreement between the Parties consisting of the following:

- A. procurement statutes, regulations and policies (adopted as regulations or otherwise incorporated therein pursuant to KRS Chapter 13A);
- B. any written agreements between the Parties;
- C. any addenda to Solicitation RFP 758 1500000003;
- D. Solicitation RFP 758 1500000003 and all attachments;
- E. any Best and Final Offer;
- F. any clarifications concerning the Contractor's proposal in response to Solicitation RFP 758 1500000003;
- G. Contractor's proposal, as finally amended and agreed to, in response to Solicitation RFP 758 1500000003.

In the event of any conflict between or among the provisions contained in the foregoing, the order of precedence shall be as enumerated above. With respect to items C, D, E, F and G above, the Solicitation and associated RFP process is complete and there will be no further amendments thereto.

## **III. Negotiated Items**

1. **Definitions** as used herein, capitalized terms shall have the meanings set forth in Attachment C or as further defined in the Agreement.
2. **Milestones**
  - a. The Parties agree to work cooperatively and in good faith to achieve three (3) Milestones, as further defined in Attachment D: (1) Guaranteed Maximum Pricing; (2) Commercial Close; and (3) Financial Close.

The indicative timeline for the Milestones is as follows:

- Contractor shall deliver a Guaranteed Maximum Pricing proposal on or before February 27, 2015, or such later date as the Parties agree, acting reasonably;
- The Parties shall achieve Commercial Close within three (3) months of the Commonwealth's acceptance of the Guaranteed Maximum

Price, or such longer period as the Parties agree, acting reasonably;  
and

- The Parties shall achieve Financial Close within three (3) months of Commercial Close, or such longer period as the Parties agree, acting reasonably.
- b. The Parties agree to work cooperatively and in good faith to finalize the scope, budget, deliverables and time line for each Milestone as described in the "Milestone Workplan." The Milestone Workplans are set forth at Attachment D. However, the Parties agree to negotiate in good faith as to the final Milestone Workplan for each Milestone.
- c. At or prior to the conclusion of the previous Milestone, Contractor shall submit the Milestone Workplan for the subsequent Milestone to the Commonwealth for approval. Within fifteen (15) days of the Commonwealth's receipt of the Milestone Workplan, the Commonwealth must either formally accept or reject the Milestone Workplan. During this fifteen (15) day review period, the Contractor may, in consultation with the Commonwealth, continue developing plans and taking reasonable and appropriate actions to advance to the next Milestone. If the Commonwealth accepts the Milestone Workplan, then the Commonwealth shall provide Contractor with a notice that it may proceed based on the Milestone Workplan (the "Notice to Proceed"). If the Commonwealth does not formally accept or reject the Milestone Workplan within fifteen (15) days, then Contractor may, in its sole discretion, either (a) commence work on the Milestone in accordance with the Milestone Workplan submitted to the Commonwealth or (b) treat inaction as a "Default" subject to cure as set forth in Section III.8. of this Agreement. In the event that Contractor commences work on the Milestone, all provisions of this Agreement continue in full force and effect.
- d. At the conclusion of each Milestone, Contractor shall submit a summary of the conclusions and results of the Milestone ("Working Assumptions"). The Parties acknowledge that these Working Assumptions are the basis for the subsequent Milestones and commit to apply the Working Assumptions to subsequent Milestones and the Concession Agreement.
- e. For purposes of workload planning, the Commonwealth shall use good faith efforts to accommodate and adapt to Contractor's proposed Milestone Workplan, within the practical limitations on availability of the Commonwealth's personnel appropriate for performing the types of services in question. Contractor shall accommodate and adapt its proposed Milestone Workplan to the

practical limitations on availability of personnel of the Commonwealth.

- f. Upon Completion of each Milestone set forth in the Milestone Workplan in Attachment D, the Commonwealth and Contractor agree to review this Agreement to determine if any amendments or modifications are necessary.
- g. Contractor agrees that the costs of each Milestone shall not exceed the Total Costs as set forth in Attachment D. Provided, however, subsequent Milestone budgets may be amended by mutual agreement of the Parties.

**3. Open Book Process:**

The Parties commit to an Open Book Process for developing the costs and financing terms for the Project. Contractor will share the proposals it receives from third parties and will provide the Commonwealth the opportunity to review, comment on and reasonably approve all Costs. Contractor intends to run competitive best value processes for selection of legal, technical and other advisors and for selection of lenders or other debt providers.

**4. Contractor's Obligations.**

Contractor shall:

- a. use commercially reasonable efforts to achieve each Milestone in accordance with the Milestone Workplan;
- b. design the Initial Project and each Milestone, as applicable, in accordance herewith and all applicable laws, regulations and ordinances;
- c. advance all incurred External Costs and incurred Internal Costs as set forth in the Milestone Workplan;
- d. In the event that Contractor will not be able to achieve a Milestone in accordance with the budget and/or schedule set forth in the Milestone Workplan, provide reasonable notice of not less than seven (7) days to the Commonwealth and negotiate in good faith with the Commonwealth as to a revised budget and/or schedule;
- e. Conduct a weekly conference call to provide the Commonwealth with progress reports regarding the current Milestone;
- f. Ensure that there is sufficient auditing capability to track actions taken by Contractor and its staff; and

- g. As needed, but at least at the beginning and conclusion of each Milestone, attend in-person meetings with Commonwealth representatives at a mutually agreed upon location.

**5. Commonwealth's Obligations**

The Commonwealth shall:

- a. Provide Contractor with support as mutually agreed upon and reasonably necessary for Contractor to achieve the Milestones, including without limitation providing reasonable access to Commonwealth staff, key stakeholders, permitting agencies, and other relevant parties;
- b. Provide any relevant information requested by Contractor or its subcontractors;
- c. Provide timely feedback on all plans and proposals submitted to the Commonwealth by Contractor, including without limitation the Milestone Workplan;
- d. In the event of termination as provided herein, reimburse Contractor; pursuant to this Agreement and 200 Ky. Admin. Reg. 5:312.
- e. In the event that Contractor will not be able to achieve a Milestone in accordance with the budget and/or schedule set forth in the Milestone Workplan, negotiate in good faith with the Contractor as to a revised budget and/or schedule;
- f. Participate in weekly conference calls regarding Milestone progress reports;
- g. As needed, but at least at the beginning and conclusion of each Milestone, attend in-person meetings with Contractor representatives at a mutually agreed upon location;

**6. Work Product/Ownership**

- a. Upon the earlier of Financial Close or a termination prior to Financial Close, the Commonwealth will assume ownership of all Work Product so that future development of the NG-KIH can be leveraged from the analysis already undertaken, but not for any commercial sale to third parties. "Work Product" refers to all materials presented by Contractor and its subcontractors to the Commonwealth, except for the Models, plans, specifications and related design information created by Fujitsu Network Communications and its affiliates ("FNC") and Black & Veatch and



its affiliates ("BV"), (the "FNC Design" and "BV Design", respectively). Further, Work Product includes, but is not limited to, all network design and engineering information, contract drafts, reports from third party advisors, cost estimates, and financial models., etc. Contractor shall be granted a non-exclusive license to use such Work Product after the transfer of ownership (subject to any lawful public disclosure requirements). Furthermore, following a termination prior to Financial Close, the Commonwealth shall not be permitted to provide such Work Product to another concessionaire for use in a "Similar Project," subject to the Parties' negotiations. The Commonwealth acknowledges and agrees that in the event that the Commonwealth provides the Work Product to a third party, the Contractor and FNC and BV, as applicable, shall not be liable for and the Commonwealth expressly waives any claim for any fees, penalties, claims, obligations, damages, costs, expenses, fines, demands and causes of action arising in connection with or related to the Commonwealth's or such third party's use of the Work Product.

- b. Prior to the earlier of Financial Close or termination, all Work Product, and all copies thereof, shall remain exclusively the property of Contractor and its subcontractors, including FNC and BV, as applicable, notwithstanding any delivery of copies thereof to the Commonwealth.
- c. Contractor may prepare one or more financial models in connection with this Agreement and/or the Initial Project ("Models"). The Models may include financial models developed for consideration and potential use by the Contractor, Commonwealth and capital providers and advisers to the Project. The Models are anticipated to show forward estimates of future cash flows and are based on Contractor's best understanding of future outcomes at the current time.

While the Models will be prepared in good faith, unless and until expressly included within the Concession Agreement, neither Contractor nor any of its affiliates, nor their respective directors, officers, employees, advisors or agents, nor any other person, have made, or are making, any representation or warranty as to the completeness, accuracy, reliability or appropriateness of the Models or any of their respective contents or outputs, and no legal or other commitments or obligations shall arise by reason of the provision of the Models or their respective contents, or any outputs derived. The information contained in the Models will not be independently verified by Contractor. Accordingly, neither Contractor nor any of its affiliates, nor their respective directors, officers, employees, advisors or agents, nor any other person, shall be liable for any

direct, indirect or consequential loss suffered by any person as a result of relying on any statement in or omission from the Models or any other information provided in connection therewith.

- d. Contractor, FNC and BV, respectively, will retain all of their respective intellectual property rights in relation to the Models and the underlying technology and engineering specifications set forth in the FNC Design and BV Design, as applicable, including patent, trademark, copyright and rights to confidential information, but excluding any agency or other third party intellectual property rights. However, Contractor and any of its subcontractors, as applicable, will grant the Commonwealth a royalty-free, perpetual, irrevocable license to use the Models, and such technology. As set forth in the Solicitation, Contractor, FNC, BV and any other subcontractors agree to maintain an archival copy in data store of any software or other intellectual property, as applicable, that shall be available to the Commonwealth in the event the Contractor, FNC, BV or any other subcontractors are unable to continue the business for financial or other business reasons.
- e. The Commonwealth may insert other variables or assumptions to consider alternative scenarios or outcomes. However, Contractor will not be responsible for failure of a Model or for output errors resulting from incorrect or inappropriate inputs by Commonwealth. Notwithstanding the foregoing, the Commonwealth may not use, reproduce or adapt any Model other than in relation to the Initial Project, including all expansions thereto, without Contractor's prior written consent. In addition, data, outcomes and estimates and forecasts contained in or derived from Models shall only be disseminated beyond the Commonwealth's directors, officers, employees and advisors of the Initial Project in accordance with a joint and collaborative plan derived by the mutual cooperation of the parties. Contractor does not represent that estimates or forecasts derived from any Model will actually be achieved or that the assumptions, variables and other inputs used in any Model are reasonable, reliable or accurate.
- f. The Models may contain forward-looking statements, forecasts, estimates, projections and opinions ("Forward Statements"). No representation is made or will be made that any Forward Statements will be achieved or will prove correct. Actual future results and operations could vary materially from the Forward Statements. Similarly no representation is given that the assumptions disclosed in the Models upon which Forward Statements may be based are reasonable. The Commonwealth acknowledges that circumstances may change and the contents of the Models may become outdated as a result.

- g. In further consideration of Contractor allowing the Commonwealth access to the Models and the information contained therein, the Commonwealth agrees that the Commonwealth will make no claim against Contractor, its partners, employees or affiliates, that relates in any way to any Model, any information contained therein, or the Commonwealth' access to any Model.
- h. The Commonwealth shall not disclose records identified and prominently marked as such by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto, in response to a request made pursuant to the Open Records Act as such records are exempt under KRS 61.878(1)(c). The Commonwealth shall assert such exemption in response to any request for disclosure of the records identified by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto. Furthermore, the Commonwealth shall give Contractor reasonable notice of any such record request and give the Contractor the right to defend its information against disclosure. The Commonwealth and Contractor shall cooperate with each other and participate if requested by the other in any appeal based upon an exemption contained within KRS 68.878(1)(c).

7. **Web-Based Data Site**

A secure web-based data site will be used as an electronic repository of the Work Product and Models, and will be available to approved transaction participants, including anyone the Commonwealth reasonably approves to receive any portion of the Work Product and Models for use in connection with the Project. This will be the means by which all Work Product and Models will be transmitted and made available to the Commonwealth. All Work Product and Models will be made available in real-time subject to reasonable practicalities. The web-based data site shall be constructed, administered and hosted by Contractor.

The Commonwealth shall not disclose records identified by Contractor and prominently marked as such by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto, in response to a request made pursuant to the Open Records Act as such records are exempt under KRS 61.878(1)(c). The Commonwealth shall assert such exemption in response to any request for disclosure of the records identified by Contractor as proprietary or constituting trade secrets, including without limitation the Models, or any information related thereto. Furthermore, the Commonwealth shall give Contractor reasonable notice of any such record request and give the Contractor the right to defend its information against disclosure. The Commonwealth and the Contractor shall cooperate with each other and

participate if requested by the other Party in any appeal based upon an exemption contained within KRS 68.878(1)(c).

**8. Right to Cure.**

In the event of the occurrence and continuance of a Default by either Party, the Commonwealth or Contractor, as applicable, may in writing request a thirty (30) day period in which to cure the Default. If the Party is unable to cure the Default within that period, the Default may be considered as a basis to terminate this Agreement as set forth in Section III.26.

**9. No Third Party Beneficiaries**

Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.

**10. No Joint Venture, Partnership or Alter Ego; Independent Contractor**

Nothing contained in this Agreement, any document executed in connection herewith or any other Agreement with any other party shall be construed as making the Parties joint partners, joint venturers or alter egos of each other or any other entity. Contractor shall at all times remain an independent contractor of Commonwealth.

**11. Notice, Confirmation of Force Majeure Event; Suspension of Performance**

Upon giving written notice to the other Party, a Party affected by a Force Majeure Event shall be released without any liability on its part from the performance of its obligations under this Agreement, but only to the extent and only for the period that its performance of such obligations is prevented by a Force Majeure Event. Such notice shall include a description of the nature of the Force Majeure Event, and its cause and possible consequences. The Party claiming a Force Majeure Event shall promptly notify the other party of the termination of such event.

The Party invoking the Force Majeure Event shall provide to the other Party confirmation of the existence of the circumstances constituting a Force Majeure Event. Such evidence may consist of a statement or certificate of an appropriate governmental department or agency where available, or a statement describing in detail the facts claimed to constitute a Force Majeure Event.

**During the period that the performance by one of the Parties of its obligations under this Agreement has been suspended by reason of a Force Majeure Event, the other Party may likewise suspend the performance of all or part of its obligations hereunder to the extent that such suspension is commercially reasonable.**

## **12. Letter of Credit**

Upon Commercial Close, Contractor will provide a letter of credit with commercially reasonable terms ("Letter of Credit") or at the option of the Contractor provide a performance bond and a payment bond, in form and substance reasonably acceptable to the Commonwealth. With regard to Contractor's performance, it is anticipated that the Letter of Credit security provided at Commercial Close will be replaced at Financial Close by an alternative security package. The alternative security package shall be from the Contractor, and shall be in a form and content reasonably acceptable to the Commonwealth. The alternative security package shall also provide that the Commonwealth is a co-obligee in addition to the lenders provided therein.

- a. The amount of the Letter of Credit shall be as follows:
  1. From Commercial Close until Financial Close an amount equal to ten million dollars (\$10,000,000.00).
  2. From Financial Close until completion of the Project, the Contractor shall provide the alternative security package referenced in III.12, or at a minimum, an amount equal to \$10,000,000.00.
- b. The Letter of Credit shall be in the form of an irrevocable letter of credit from an approved bank, as may amended in the Concession Agreement, and must be presentable for payment in New York City. The Letter of Credit shall only be transferable in its entirety (but not in part) to the lenders, the collateral agent or agencies of the Commonwealth. The Commonwealth shall only provide a Transfer Letter of Credit to the issuing bank for transfers to agencies of the Commonwealth, the collateral agent or lenders, as may be modified in the Concession Agreement.
- c. The Letter of Credit (or a replacement letter of credit provided prior to the expiration or termination of the Letter of Credit) shall be in full force and effect from the date provided to Commonwealth until the applicable date referenced in Section III. The Commonwealth, or the subsequent beneficiary, shall provide a Reduction Notice to the issuing bank of the Letter of Credit, with a copy to Contractor, in the commercial customary form within two business days of the Substantial Completion Date and the Final Acceptance Date,

respectively, adjusting the amount of the Letter of Credit as provided in Section III.

- d. The Letter of Credit may be drawn upon by Commonwealth, or subsequent beneficiary, in Dollars in the United States of America from time to time (a) to the extent amounts are due and owing under the Concession Agreement from Contractor to the Commonwealth under Section III as may be amended in the Concession Agreement, (b) at any time when there are fewer than thirty (30) days remaining prior to the expiration of such Letter of Credit and the expiring letter of credit has not been replaced by a new letter of credit to be effective no later than such expiration; provided that a letter of credit is still required to be in place under this Section, as may be amended in the Concession Agreement, (c) at any time when the credit rating of the institution providing the Letter of Credit has been downgraded (or withdrawn) such that it no longer qualifies as an approved bank, and Contractor has not replaced such Letter of Credit with a new letter of credit from an approved bank within 15 business days after the date of the relevant downgrade or (d) at any time, if a Contractor Default has occurred and is continuing.
- e. Contractor's sole remedy in connection with an improper draw on the Letter of Credit shall be to obtain from the Commonwealth, or subsequent beneficiary, a refund of the proceeds of such improper draw and the reasonable costs Contractor incurs as a result of such improper draw; provided that at the time of such refund Contractor increases the amount of the Letter of Credit to the amount then required under applicable provisions of the Concession Agreement. Contractor acknowledges that an improper draw on the Letter of Credit could not under any circumstances cause Contractor injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Contractor covenants (a) not to request or instruct the issuer of the Letter of Credit to refrain from paying any legitimate sight draft presented with respect to the Letter of Credit and (b) not to commence or pursue any legal proceeding seeking, and Contractor irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any legitimate draw on the Letter of Credit.
- f. To the extent the Commonwealth, or subsequent beneficiary, draws on the Letter of Credit under the circumstances set forth in Section III. and the basis for such draw is subsequently cured, The Commonwealth, or subsequent beneficiary, shall return to Contractor the funds so drawn (to the extent not applied as part of such cure) and the Letter of Credit will be restored for the full

amount of such draw prior to the return of such funds, if such Letter of Credit was not already replaced as part of the cure.

**13. Agreement Claims**

The Parties acknowledge that KRS 45A.225 to 45A.290 governs contract claims.

**14. Limitation of Liability**

The liability of the Commonwealth related to contractual damages is set forth in KRS 45A.245.

**15. Changes and Modifications to the Agreement**

Pursuant to KRS 45A.210 (1) and 200 KAR 5:311, no modification or change of any provision in this Contract shall be made, or construed to have been made, unless such modification is mutually agreed to in writing by the Contractor and the Commonwealth, and incorporated as a written amendment to this Contract and processed through the Office of Procurement Services and approved by the Finance and Administration Cabinet prior to the effective date of such modification or change pursuant to KRS 45A.210(1) and 200 KAR 5:311. Memoranda of understanding, written clarifications, and/or correspondence shall not be construed as amendments to this Agreement. The Parties shall establish a detailed change order process prior to Commercial Close to accommodate any required changes to the Project.

If the Contractor finds at any time that existing conditions make modification of this Agreement necessary, it shall promptly report such matters to the Commonwealth for consideration and decision.

**16. Changes in Scope**

The Commonwealth may, at any time by written order, make changes within the general scope of this Agreement. No changes in scope are to be conducted except with the approval of the Commonwealth. Notwithstanding the foregoing, Contractor shall not be bound by any unilateral material changes in scope, and any change in scope, unilateral or agreed upon, must provide for additional compensation to the Contractor, in form and substance, as agreed to by the Parties.

**17. Assignment**

This Agreement shall not be assigned in whole or in part without the prior written consent of the non-assigning Party. Notwithstanding the foregoing, the Commonwealth consents to Contractor assigning its rights and obligations hereunder to an appropriate Affiliate or a special purpose

entity to carry out the terms of this Agreement, provided that the Contractor requires the Affiliate to be bound by the terms of this Agreement pursuant to a written agreement.. In the event of the Affiliate transferee's insolvency, involuntary or voluntary bankruptcy, dissolution or the termination of this Agreement for Contractor's failure to perform, the Commonwealth may step in and assume responsibility for, and control of, the Project, subject to coordination with secured lenders in connection with the exercise of remedies upon default. The Parties will develop detailed default and termination provisions with respect to the foregoing sentence in the Concession Agreement.

**18. Payment**

The Commonwealth will make payment within thirty (30) working days of receipt of Contractor's invoice or of acceptance of goods and/or services in accordance with KRS 45.453 and KRS 45.454.

Payments are predicated upon successful completion and acceptance of the described work, services, supplies, or commodities, and delivery of the required documentation. Invoices for payment shall be submitted to the Commonwealth's designated representative.

**19. Contractor Cooperation in Related Efforts**

The Commonwealth may undertake or award other contracts for additional or related work, services, supplies, or commodities, and the Contractor shall fully cooperate with such other contractors and Commonwealth employees. The Contractor shall not commit or permit any act that will materially interfere with the performance of work by any other contractor or by Commonwealth employees. The Commonwealth shall ensure that such other contractor or its employees will not commit or permit any act that will materially interfere with Contractor's work performance.

**20. Contractor Affiliation**

"Affiliate" shall mean an entity that controls or is under common control with Contractor together with any fund or investment vehicle managed or advised by any such entity, or a fund or investment vehicle which has delegated to any such entity responsibility for the management of its interest in the Project. If any Affiliate directly involved in the Project shall take any action related to this Agreement that, if done by the Contractor, would constitute a material breach of this Agreement and would also materially impair Contractor's or the Commonwealth's ability to perform the Agreement, the same shall be deemed a breach by Contractor. Actions by Affiliates that do not relate to or adversely impact the Parties' rights and obligations under this Agreement shall not be considered breaches.



**21. Commonwealth Property**

The Contractor shall be responsible for the proper custody and care of any Commonwealth-owned property furnished for Contractor's use in connections with the performance of this Agreement. The Contractor shall reimburse the Commonwealth for its actual loss or damage, normal wear and tear excepted.

**22. Confidentiality of Agreement Terms**

The Contractor and the Commonwealth agree that all information communicated between them before the effective date of this Agreement shall be received in strict confidence and shall not be disclosed by the receiving party, its agents, or employees without prior written consent of the other party. Such material will be kept confidential subject to Commonwealth and Federal public information disclosure laws.

Upon signing of this Agreement by all Parties, terms of this Agreement become available to the public, pursuant to the provisions of the Kentucky Revised Statutes, subject to any exemptions to disclosure set forth in KRS 61.878, which the Commonwealth agrees to assert

The Contractor shall have an appropriate agreement with its subcontractors extending these confidentiality requirements to all subcontractors' employees.

**23. Confidential Information**

a. If either Party provides or has provided Confidential Information prominently designated as such to the other Party, the receiving Party shall hold such information in confidence and shall afford it the same care and protection that it affords to its own confidential and proprietary information (which in any case shall be not less than reasonable care) to avoid disclosure to or unauthorized use by any third party, except as otherwise provided below. All Confidential Information shall be used by the receiving Party only for the intended purposes set forth in this Agreement. Except as otherwise required by law, after the receiving Party's need for Confidential Information has expired, or upon the reasonable request of the disclosing Party, or promptly following the termination or expiration of this Agreement, the receiving Party shall destroy or return to the disclosing Party all Confidential Information, including all copies of such information, and all notes, summaries, or other writings reflecting Confidential Information. The receiving Party shall not reproduce Confidential Information, except to the extent reasonably necessary to perform under this Agreement, or as otherwise may be permitted in writing by the disclosing Party.

b. Contractor shall comply with the provisions of the Privacy Act of 1974 and instruct its employees to use the same degree of care as it uses with its own data to keep confidential information concerning client data, the business of the Commonwealth, its financial affairs, its relations with its citizens and its employees, as well as any other information which may be specifically classified as confidential by the Commonwealth in writing to the Contractor. All Federal and State Regulations and Statutes related to confidentiality shall be applicable to the Contractor. The Contractor shall have an appropriate agreement with its employees, and any subcontractor employees, to that effect, provided however, that the foregoing will not apply to:

i. Information which the Commonwealth has released in writing from being maintained in confidence;

ii. Information which at the time of disclosure is in the public domain by having been printed or published and available to the public in libraries or other public places where such data is usually collected; or

iii. Information, which, after disclosure, becomes part of the public domain as defined above, through no act of the Contractor.

#### **24. Permits, Licenses, Taxes and Commonwealth Registration**

The Contractor shall procure all necessary permits and licenses and abide by all applicable laws, regulations, and ordinances of all Federal, State, and local governments in which work under this Agreement is performed.

The Contractor shall maintain certification of authority to conduct business in the Commonwealth of Kentucky during the term of this Agreement. Such registration is obtained from the Secretary of State, who will also provide the certification thereof. Additional local registration or license may be required.

The Contractor shall pay any sales, use, and personal property taxes arising out of this Agreement and the transaction contemplated hereby. Any other taxes levied upon this Agreement, the transaction, or the equipment or services delivered pursuant hereto shall be borne by the Contractor.

#### **25. Provisions for Termination of the Contract**

This Agreement shall be subject to the termination provisions set forth in 200 Ky. Admin. Reg. 5:312.

#### **26. Reimbursement of Costs**

In the event of a termination that does not arise from a material default solely by Contractor, in accordance with 200 Ky. Admin. Reg. 5:312 the Contractor may request reimbursement of its costs. Provided, however, the costs Contractor may recover shall not exceed the Total Costs set forth in Attachment D. The Parties agree to establish a cost process to be utilized during each Milestone to permit the Parties to monitor the costs incurred.

**27. Bankruptcy**

In the event the Contractor becomes the subject debtor in a case pending under the Federal Bankruptcy Code, the Commonwealth's right to terminate this Agreement may be subject to the rights of a trustee in bankruptcy to assume or assign this Agreement. The trustee shall not have the right to assume or assign this Agreement unless the trustee (a) promptly cures all defaults under this Agreement; (b) promptly compensates the Commonwealth for the monetary damages incurred as a result of such default, and (c) provides adequate assurance of future performance, as determined by the Commonwealth.

**28. Conformance with Commonwealth & Federal Laws/Regulations**

This Contract is subject to the laws of the Commonwealth of Kentucky and where applicable Federal law. Any litigation with respect to this Contract shall be brought in state court in Franklin County, Kentucky in accordance with KRS 45A.245.

**29. Access to Records**

Contractor constitutes a "contractor," as defined in KRS 45A.030 (9) and agrees that the contracting agency, the Finance and Administration Cabinet, the Auditor of Public Accounts, and the Legislative Research Commission, or their duly authorized representatives, shall have access to any books, documents, papers, records, or other evidence, which are directly pertinent to this Agreement for the purpose of financial audit or program review. Records and other prequalification information confidentially disclosed as part of the bid process, including without limitation items identified as proprietary or confidential, including without limitation the Models, Work Product, trade secrets, any information related to the web-based secure data site and all other Confidential Information, shall not be deemed as directly pertinent to this Agreement and shall be exempt from disclosure as provided in KRS 61.878(1)(c), or any other applicable exemption contained with KRS 61.878. The contractor also recognizes that any books, documents, papers, records, or other evidence, received during a financial audit or program review shall be subject to the Open Records Act, KRS 61.870 to 61.884, including the exemption from disclosure contained in KRS 61.878, which the Commonwealth agrees to assert.

In the event of a dispute between Contractor and the contracting agency, the Attorney General, or the Auditor of Public Accounts over documents that are eligible for production and review, the Finance and Administration Cabinet shall review the dispute and issue a determination, in accordance with Secretary's Order 11-004. (See Attachment B).

**30. Prohibitions of Certain Conflicts of Interest**

In accordance with KRS 45A.340, the Parties mutually represent and warrant, and each of the Parties rely upon such representation and warranty, that to the best of their respective knowledge neither party presently has any actual identifiable interest and shall not acquire any actual identifiable interest, which would directly conflict with the performance of their respective obligations under this Agreement.

The Parties further mutually represent and warrant that in the performance of the Agreement, no person having any such interest shall be employed by either party. In accordance with KRS 45A.340 and KRS 11A.040 (4), the Parties both agree that they shall not knowingly allow any official or employee of the Commonwealth who exercises any function or responsibility in the review or approval of the undertaking or carrying out of this Agreement to voluntarily acquire any ownership interest, direct or indirect, in this Agreement prior to the completion of this Agreement.

**31. Intentionally Left Blank**

**32. Agencies to Be Served**

This Agreement shall be for use by all Agencies of the Commonwealth of Kentucky as defined in 45A.605.

**33. Extending the Contract Use to Other Agencies**

The Commonwealth reserves the right, with the consent of the Contractor, to offer this Agreement to other state agencies and stakeholders.

**34. Term of Agreement**

The term of this Agreement shall begin on the date hereof, and at Financial Close shall continue upon completion of the Concession Agreement for a period of thirty (30) years.

Notwithstanding the foregoing, if the Commonwealth fails to approve any Milestone Work Plan as envisioned in Section III.2.c., or fails to consummate Commercial Close or Financial Close on agreed upon terms, Contractor may terminate this Agreement, subject to Section III.8., and seek reimbursement for Costs in accordance with Section III.27.

Upon final termination of the Concession Agreement, Contractor shall provide all relevant data in a form that can be practically converted to any subsequent system of the Commonwealth's reasonable choice. The Commonwealth and Contractor will cooperate to this end with any subsequent vendor of the Commonwealth's choice, in a timely and efficient manner.

**35. Notices**

All programmatic communications with regard to day-to-day performance under this Agreement are to be made to the agency technical contact(s) identified below.

Mike Hayden, Director  
Finance and Administration Cabinet  
Room 456  
Capitol Annex  
Frankfort, KY 40601  
502-564-782-2535  
[mike.hayden@ky.gov](mailto:mike.hayden@ky.gov)

All communications of a contractual or legal nature are to be made to the Commonwealth buyer. The Commonwealth reserves the right to change the contacts throughout the life cycle of any agreement awarded as a result of this RFP.

Stephanie R. Williams, CPPO, CPPS, MPA  
Assistant Director  
Finance and Administration Cabinet  
Office of Procurement Services (OPS)  
Division of Technology Services Procurement  
(502) 564-8621  
[stephanier.williams@ky.gov](mailto:stephanier.williams@ky.gov)

**36. Subcontractors**

Contractor is permitted to make subcontract(s) with any other party for furnishing any of the work or services herein. Contractor shall be solely responsible for performance of the entire Agreement whether or not subcontractors are used. The Commonwealth shall not be involved in the relationship between Contractor and any subcontractor. Any issues that arise as a result of this relationship shall be resolved by Contractor. All references to the Contractor shall be construed to encompass both the Contractor and any subcontractors of the Contractor.

**37. Reporting Requirements**

In conjunction with and in addition to all specific reports and notices required in the Agreement, the Contractor shall be required to provide the following reporting to the Commonwealth:

- a. Weekly progress reports regarding the current Milestone, including but not limited to, a report of any material events, developments or circumstances arising in relation to issues identified by the Commonwealth, including but not limited to, the Project schedule and budget, since the last weekly report;
- b. On a frequency to be reasonably determined by the Commonwealth, provide reports detailing the fulfillment of all contractual obligations to include, but not be limited to, acquisition of required insurances, mandated licenses and permits, executed financial documentation, and audited financial model;
- c. On a frequency to be reasonably determined by the Commonwealth, provide compliance reports itemizing safeguards in place to ensure adherence to the NIST Special Publication 800-53 Security Control Framework;
- d. Such other periodic reports as the Commonwealth may from time to time reasonably require; and
- e. Throughout each Milestone, a response delivered in a timely manner to any inquiry reasonably made by the Commonwealth in relation to any aspect of the relevant business of the Contractor, the Project, the O&M, or this Agreement.

Provided that, to the extent that such reporting includes sensitive data, as defined by the enterprise standards, it must be delivered to the Commonwealth in a confidential manner. All electronic transmissions of sensitive data must, at a minimum, comply with the Commonwealth Office of Technology Enterprise Standard 5100 documented at <https://Ootsource.kv.Qov/docushare/dsweb/Get/Document-30111 o/>.

The Parties agree that this is not an extensive list of reporting requirements governing the entire Agreement. The Parties agree further that future reporting requirements will be addressed by the Commonwealth and Contractor as the need arises based on the Milestone objectives agreed to by both Parties. Specific metrics and deliverables requisite to achieve the corresponding reporting will be implemented at that time.

#### **IV. Entire Agreement**

This Agreement and the attached Exhibits to this Agreement constitute the entire agreement between the Parties on the subject matter hereof. There are no



**ATTACHMENT B**

**SECRETARY'S ORDER 11-004**

**FINANCE AND ADMINISTRATION CABINET**

**Vendor Document Disclosure**

WHEREAS, in order to promote accountability and transparency in governmental operations, the Finance and Administration Cabinet believes that a mechanism should be created which would provide for review and assistance to an Executive Branch agency if said agency cannot obtain access to documents that it deems necessary to conduct a review of the records of a private vendor that holds a contract to provide goods and/or services to the Commonwealth; and

WHEREAS, in order to promote accountability and transparency in governmental operations, the Finance and Administration Cabinet believes that a mechanism should be created which would provide for review and assistance to an Executive Branch agency if said agency cannot obtain access to documents that it deems necessary during the course of an audit, investigation or any other inquiry by an Executive Branch agency that involves the review of documents; and

WHEREAS, KRS 42.014 and KRS 12.270 authorizes the Secretary of the Finance and Administration Cabinet to establish the internal organization and assignment of functions which are not established by statute relating to the Finance and Administration Cabinet; further, KRS Chapter 45A.050 and 45A.230 authorizes the Secretary of the Finance and Administration Cabinet to procure, manage and control all supplies and services that are procured by the Commonwealth and to intervene in controversies among vendors and state agencies; and

NOW, THEREFORE, pursuant to the authority vested in me by KRS 42.014, KRS 12.270, KRS 45A.050, and 45A.230, I, Lori H. Flanery, Secretary of the Finance and Administration Cabinet, do hereby order and direct the following:

- I. Upon the request of an Executive Branch agency, the Finance and Administration Cabinet ("FAC") shall formally review any dispute arising where the agency has requested documents from a private vendor that holds a state contract and the vendor has refused access to said documents under a claim that said documents are not directly pertinent or relevant to the agency's inquiry upon which the document request was predicated.
- II. Upon the request of an Executive Branch agency, the FAC shall formally review any situation where the agency has requested documents that the agency deems necessary to conduct audits, investigations or any other formal inquiry where a dispute has arisen as to what documents are necessary to conclude the inquiry.



- III. Upon receipt of a request by a state agency pursuant to Sections I & II, the FAC shall consider the request from the Executive Branch agency and the position of the vendor or party opposing the disclosure of the documents, applying any and all relevant law to the facts and circumstances of the matter in controversy. After FAC's review is complete, FAC shall issue a Determination which sets out FAC's position as to what documents and/or records, if any, should be disclosed to the requesting agency. The Determination shall be issued within 30 days of receipt of the request from the agency. This time period may be extended for good cause.
- IV. If the Determination concludes that documents are being wrongfully withheld by the private vendor or other party opposing the disclosure from the state agency, the private vendor shall immediately comply with the FAC's Determination. Should the private vendor or other party refuse to comply with FAC's Determination, then the FAC, in concert with the requesting agency, shall effectuate any and all options that it possesses to obtain the documents in question, including, but not limited to, jointly initiating an action in the appropriate court for relief.
- V. Any provisions of any prior Order that conflicts with the provisions of this Order shall be deemed null and void.

## **ATTACHMENT C DEFINITIONS**

- a. "Commercial Close" means the execution of a Concession Agreement by the Parties.
- b. "Completion" means the completion of a Milestone in accordance with the respective scope and deliverables for each Milestone outlined in this Agreement.
- c. "Concession Agreement" means the long-term agreement between the Commonwealth and the Contractor pursuant to which the Commonwealth procures the Contractor's services to design, build, finance, operate and maintain the state-wide fiber-optic middle-mile network to be called the Next Generation Kentucky Information Highway.
- d. "Confidential Information" means all commercially sensitive, secret, or otherwise confidential business, financial, marketing, or technical information, and other confidential information belonging to a Party, including, but not limited to, the terms of this Agreement. Confidential Information shall not include information that (a) is or becomes (other than by disclosure by the other Party) publicly known, (b) is furnished by the Party to others without restrictions similar to those imposed by this Agreement, (c) is rightfully in the other Party's possession without the obligation of nondisclosure prior to the time of its disclosure under this Agreement, (d) is obtained from a source other than the Party without the obligation of confidentiality, (e) is disclosed with the written consent of the Party or (f) is independently developed by employees or agents of the other Party who can be shown to have had no access to the Confidential Information. Any reports or other documents or items (including software) that result from the use of the Confidential Information by the other Party shall be treated with respect to confidentiality in the same manner as the Confidential Information.
- e. "Costs" shall mean the sum of External Costs and Internal Costs.
- f. "Default" shall (i) have the same definition as in 200 Ky. Admin. Reg. 5:312 or (ii) either Party fails to timely perform any material covenant, condition, agreement, and/or provision contained in this Agreement, subject to Section III.26 of this Agreement.
- g. "External Costs" are costs incurred by the Contractor relating to discrete workstreams undertaken by third party consultants, as well as the Contractor's and its subcontractors' out of pocket expenses, as required by the Milestone Workplan to achieve each Milestone, and as set forth in such Milestone's pre-agreed upon budget. In the

absence of any updates thereto, Milestone budgets shall be those outlined in Exhibit A of this Agreement.

- h. "Financial Close" means the when the Project financing is secured, the Parties have entered into the Concession Agreement, and the Project formally commences.
- i. "Force Majeure Event" means, without limitation, the following: acts of God; strikes, lockouts or other industrial disturbances; the inability of Contractor to access Community Anchor Institutions sites; acts of public enemies and terrorists; orders or restraints of the Federal Government of the United States, or any of their departments, agencies or officials; insurrections; riots; landslides; earthquakes; storms; droughts; floods; explosions; breakage or accidents to machinery, transmission pipes or canals; or any other cause or event not reasonably within the control of either party and not due to their respective negligence.
- j. "Guaranteed Maximum Pricing" means a not-to-exceed dollar amount of the availability payment required for the Project, as agreed to by the Parties.
- k. "Internal Costs" are the Contractor's pre-agreed lump sums for internal staff time cost incurred in connection with a Milestone on the Project, and which expenses are set forth in a Milestone's budget in advance and pre-agreed upon by all Parties in writing before the beginning such Milestone.
- l. "Milestone" means a discrete subpart of the Initial Project with deliverables, budgets, and deadlines, all as pre-agreed upon by the Parties in accordance with this Agreement, and following which there may exist certain opportunities for either Party to terminate this Agreement, subject to any applicable termination conditions. The Milestones are set forth in Section III. 2. of this Agreement.
- m. "Models" has the meaning set forth in Section III. 6.
- n. "Notice" means any written notice required hereunder, which shall be delivered in accordance with Section III.35 of this Agreement.
- o. "Open Book Process" means full transparency for the Commonwealth into the Contractor's proposed models, financial vehicles, cost proposals, technical specifications, operational role and responsibilities, and any other aspect of the Project, such that the Commonwealth fully understands each aspect of the Project, including profit and direct and indirect expenses. As between the Parties there shall be no aspect of or information related to Project which is not shared, with the exception of proprietary information,

information that consists of internal drafts or relates to Contractor's internal approvals process required to arrange and potentially provide financing for the Project.

- p. "Open Records Act" means the Kentucky Open Records Act set forth at Kentucky Revised Statute 61.870 et. seq.
- q. "Similar Project" means a project to design, build, finance, operate and maintain, under a long term concession agreement, a regional or statewide information highway infrastructure of similar scope, terms and conditions to the Project for the use and benefit of the Commonwealth, its agencies or subsections of government, or any commercial user in addition thereto.
- r. "Working Assumptions" has the meaning set forth in Section II.2(d) of this Agreement.

## ATTACHMENT D

### MILESTONE WORKPLAN

Milestone	Details
<b>I-Guaranteed Maximum Price ("GMP")</b>	<p>Contractor will provide the Commonwealth a not-to-exceed dollar amount of the availability payment required for the NGKIH. The availability payment will be based on a detailed list of Working Assumptions.</p> <p>The scope items for this Milestone will be:</p> <ul style="list-style-type: none"> <li>Engage all necessary advisors for this Milestone;</li> <li>List of Working Assumptions on which the not-to exceed availability payment is based, including the actions that the Parties can take, individually or together, to reduce the GMP;</li> <li>Negotiated, detailed term sheet for the Concession Agreement;</li> <li>Proposed detailed scope, schedule and budget to reach Commercial Close;</li> <li>Provide the Commonwealth a proposal summarizing the above deliverables and providing a not-to-exceed availability payment;</li> <li>For the avoidance of doubt the Working Assumptions will include reasonable assumptions regarding the financing terms, including interest rates, applicable to debt sourced for the Project but changes in the financing terms, including the interest rates, post the GMP will result in upward or downward adjustments to the not to exceed GMP.</li> <li>Commonwealth to confirm that it has the legal authority to enter into the transaction;</li> <li>This Milestone will be considered complete once Contractor has provided confirmation that the scope items within its control have been completed and delivered to the Commonwealth.</li> </ul>
<b>II - Commercial Close ("CC")</b>	<p>Contractor and the Commonwealth will sign a Concession Agreement based on a fixed-price, date certain design-build agreement and a fixed price, long-term operating agreement. The availability payment's escalation profile will be agreed, along with any adjustment factors, such as base interest rates, for which the availability payment can be adjusted upward or downward to account for market movements in the period between commercial and financial close.</p> <p>The scope items for this Milestone will be:</p> <ul style="list-style-type: none"> <li>• Engage all necessary advisors for the Initial Project;</li> <li>• Due diligence reports from Contractor advisors;</li> <li>• Fixed price, date certain, design-build agreement (the "DB Contract");</li> <li>• Fixed price long-term operating, maintenance and refresh agreement (the "O&amp;M Contract");</li> <li>• Commitment letters from debt financiers;</li> <li>• Commitment letters from equity providers;</li> <li>• Executed Concession Agreement, including without limitation a revenue sharing mechanism, performance standards regime,</li> </ul>

	<p>and project designbuild schedule;</p> <ul style="list-style-type: none"> <li>Proposed detailed scope, schedule and budget to reach Financial Close</li> </ul> <p>Contractor's obligations under the Milestone will be considered complete once Contractor submits an executable Concession Agreement, DB Contract and O&amp;M Contract to the Commonwealth.</p>
III - Financial Close ("FC")	<p>The Concessionaire will raise all private capital in this Milestone. The availability payment at financial close will be adjusted for any movement in base interest rates or any other adjustment factors as agreed in the Concession Agreement, with the adjustment quantified in the audited financial model provided to the Commonwealth. The deliverables for this Milestone will be:</p> <p>Executed financing documentation;  Audited financial model; and  Proof of required insurances;</p> <p>This Milestone will be complete once the Concessionaire has executed all financing documentation with capital providers and received the funds or letters of credit.</p>

**EXHIBIT A  
MILESTONE BUDGETS**

<b>External Costs</b>	<b>To GMP</b>	<b>To CC</b>	<b>To FC</b>	<b>At FC</b>	<b>Total</b>
Project Counsel	100	600	300	250	1,250
Local Counsel	28	50	50	83	210
Lenders' Counsel	-	275	350	-	625
Lenders' Technical Advisor	-	200	50	-	250
Sponsors Insurance	-	25	-	-	25
Lenders Insurance	-	-	20	-	20
Rating Agencies	-	300	-	270	570
Accounting & Tax	-	100	-	-	100
Model Audit	-	-	65	-	65
Out of Pockets	40	60	60	-	160
Contingency (incl. WSP Agmt)	72	242	134	-	448
<b>Total External Costs</b>	<b>240</b>	<b>1,852</b>	<b>1,029</b>	<b>603</b>	<b>3,723</b>

<b>Internal Costs</b>	<b>To GMP</b>	<b>To CC</b>	<b>To FC</b>	<b>At FC</b>	<b>Total</b>
Concessionaire	50	250	300	-	600
Equipment, O&M	150	278	354	-	782
Design-Build	250	663	655	-	1,568
<b>Total Internal Costs</b>	<b>450</b>	<b>1,191</b>	<b>1,309</b>	<b>-</b>	<b>2,950</b>

<b>Total Costs</b>	<b>690</b>	<b>3,043</b>	<b>2,338</b>	<b>603</b>	<b>6,673</b>
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