



# **RADIO SYSTEMS AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF SAN ANTONIO, TEXAS**

**AND**

**DAILEY AND WELLS COMMUNICATIONS,  
INC.**

REF: RFP-016-035



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## PUBLIC SAFETY RADIO SYSTEMS AGREEMENT

The City of San Antonio, Texas (“**Buyer**”), and Dailey and Wells Communications, Inc. (“**Vendor**”), enter into this Public Safety Radio Systems Agreement (the “**Agreement**”), on the Effective Date.

### RECITALS

1. On January 7, 2016, Buyer issued a “Request for Proposal for San Antonio Public Safety Radio System (SAPSRS),” RFP-016-035 (the “**RFP**”), under the terms of Texas Local Gov’t Code § 252.042 which permits Buyer to conduct competitive discussions with offerors who submit proposals, a copy of which is included as Exhibit II-01.
2. On June 6, 2017, Vendor delivered a proposal to Buyer (“**Vendor’s Proposal**”).
3. Over July through September, 2017, Buyer and Vendor negotiated certain updates to the RFP (included in the “**Consolidated Listing of Amendments to the RFP**,” Exhibit II-02), and deal terms modifying some of the required features of the Best and Final Offer (“**BAFO**”).
4. On October 10, 2017, Buyer and Vendor agreed to a term sheet that specified certain terms for inclusion in this Agreement (“**Term Sheet**”).
5. On October 18, 2017, Vendor delivered a BAFO to Buyer as a package of Services and Deliverable intended to deploy and maintain a public safety radio system that would meet the operational requirements of Buyer, along with Bexar County and CPS Energy as Third Party Beneficiaries.
6. Buyer has incorporated elements of each proposal Buyer has received from each of the proposers into this SAPSRS Procurement Agreement, which now represents the terms and conditions on which Buyer is prepared to go forward with the acquisition of a new wireless radio system.
7. This SAPSRS Agreement, together with the Exhibits to the Agreement, represents the full and complete agreement of the Parties. Except as explicitly declared in the Hierarchy of Interpretation, prior proposals and negotiations are not controlling and have no effect on this Agreement, even though they may be referred to in these Recitals and may be used to clarify the Vendor’s Deliverables.
8. Buyer has selected Vendor and now desires to contract with Vendor to provide Buyer with the System and the Services, as provided herein.
9. Buyer and Vendor intend the performance bond required by this Agreement to cover all construction costs of the public work involved in this Agreement, and Buyer and Vendor intend that no retainage shall be reserved pursuant to this Agreement.



In consideration of these Recitals and the covenants and agreements of the parties as hereinafter set forth, the Parties agree as follows:

## 1. DEFINITIONS

Except as otherwise defined herein, the following terms, phrases, words, abbreviations and their derivations, when capitalized, have the meanings given below. Appendices, exhibits, and attachments to this Contract may include further definitions. To the extent that those definitions are consistent with the definitions presented in this Contract, they are included here. Any inconsistency between definitions in this contract and any appendix, exhibit or attachment are to be resolved according to the Hierarchy of Interpretation defined in this Contract.

When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number; and words in the singular number include the plural number. Section titles are descriptive, not normative.

1. “**Acceptance Test**” means a test included in the testing protocols included in any of Exhibits II-01, II-02, II-07, or II-09.
2. “**Accessible Testing Location**” means any area within 500 feet, at no more than a 25% grade, of a location reachable via either a Vendor-owned, commercially available 4x4 vehicle or an alternative motorized vehicle provided by Buyer.
3. “**Agreement**” means this Contract and all of its Exhibits, Appendices, and Attachments, interpreted according to the Hierarchy of Interpretation.
4. “**Beneficial Use**” means when Buyer first uses the System or subsystem for operational purposes (excluding training or testing) before System Acceptance.
5. “**Buyer**” means the City of San Antonio, Texas.
6. “**Buyer Guaranteed Risk**” means any Deliverable, Deadline, Milestone, or other Performance, for which Buyer shall assume responsibility for any increased disbursements, costs or expenses incurred by Buyer, whether direct or indirect, as a result of any breach, nonperformance, or partial performance of Vendor.
7. “**Change Order**” means a document, signed by both parties, amending the scope, timeline, quantity, or quality of any Deliverables, Performances, or Services specified by an Exhibit to this Agreement. A Change Order has higher precedence than the Exhibit that it modifies.
8. “**Comparable System**” means a Project 25 Phase II (or later) radio system provided by Vendor or Primary Subcontractor that is within plus or minus 33% of the total Contract Price.



9. “**Component**” means any part of the System, any Deliverable, any Service, or other Performance, including any subcomponents (which are themselves Components).
10. “**Confidential Information**” means any information that is disclosed in written, graphic, verbal, or machine-readable form, and is marked, designated, or identified at the time of disclosure as being confidential or its equivalent; or if the information is in verbal form, it is identified as confidential at the time of disclosure and is confirmed in writing within thirty (30) days of the disclosure. Confidential Information does not include any information that: is or becomes publicly known through no wrongful act of the receiving Party; is already known to the receiving Party without restriction when it is disclosed; is or becomes, rightfully and without breach of this Agreement, in the receiving Party’s possession without any obligation restricting disclosure; is independently developed by the receiving Party without breach of this Agreement; or is explicitly approved for release by written authorization of the disclosing Party.
11. “**Consolidated Listing of Amendments to the RFP**” means the collected changes, scope updates, clarifications, and other modifications to the RFP as contained in Exhibit II-02.
12. “**Contract**” means this document as executed, together with Appendix A, “Summary Pricing,” and Appendix B, “Summary Timeline.”
13. “**Contract Price**” means the prices included in Appendix A, “Summary Pricing,” as well as the detailed pricing (including future and optional Component pricing) included in Exhibits II-04 and II-05.
14. “**Coverage Acceptance Test**” means the Acceptance Test based on the protocol attached to this Agreement at Exhibit II-09.
15. “**Deadline**” means 4:00pm Central Time on any date associated with a Deliverable, Milestone, or other Performance, unless a more-specific time is associated with the Deliverable, Milestone, or other Performance.
16. “**Deliverable**” means any object, tangible or intangible, either required to be transferred to Buyer or actually transferred to Buyer.
17. “**Detailed Design Review**” (or “**DDR**”) has the meaning provided in Section 7.2.2 of the RFP and the corresponding section of the Vendor’s BAFO.
18. “**Dispute**” has the meaning provided in Section 12.
19. “**Dispute Resolution Process**” has the meaning provided in Section 12.
20. “**Documentation**” means the manuals, operating information, documents, training information, and other written material to be provided by Vendor to Buyer in connection with the delivery by Vendor to Buyer of the System and all documentation to be provided by the Vendor to Buyer pursuant to this Agreement, including at least the items identified in Exhibit II-20(g).





21. “**Effective Date**” means the date the Agreement is approved by Buyer after it has been fully executed.
22. “**End of Life**” means the last date on which a Component, or any subcomponent, is supported, developed, repaired, maintained, or tested by its original supplier.
23. “**End of Sale**” means the last date on which a Component of the System is offered for sale by its original supplier or any intermediate supplier with the same hardware, software, and/or subcomponents.
24. “**Existing Radio System**” means the radio systems and associated infrastructure currently in use by Buyer and Designated Third Party Beneficiaries.
25. “**Expendables**” means any portion of the System that is used up, reduces in quantity or availability, or degrades in performance with use, specifically including batteries.
26. “**Final System Acceptance**” means that Vendor has completed the Fully Loaded Burn-In, resolved any Persistent Systemic Reductions in Service as provided for in Sections 3.2.3 and 3.2.4, and has received the Final System Acceptance Certificate as provided in Exhibit II-15.
27. “**Fire Radios**” means the Harris XL-200P with “Ergonomically friendly exterior” for Fire Service, or any significantly similar successor product.
28. “**Fit for its Intended Purpose**” means fit for use as a public safety communications system.
29. “**Force Majeure**” means a circumstance that: a) is not within the reasonable control of the Party affected; b) for which it would have been unreasonable for the affected Party to take precautions or to anticipate; c) cannot be prevented, avoided, removed, or mitigated by a Party despite the exercise of reasonable care; and d) materially and adversely affects the ability of the Party to perform its obligations under this Agreement, even after such Party has taken all reasonable precautions, due care and reasonable alternative measures in order to avoid the effect of such circumstance and to mitigate the events thereof. Force Majeure does not include bankruptcy of a Party, general economic conditions or other general market effects.
30. “**Fully Loaded Burn-In**” means a sixty (60) consecutive day test of a Fully Loaded System without a Major Interruption of Services or any Persistent Systemic Reductions in Service.
31. “**Fully Loaded System**” has the meaning provided in Section 3.2.1.
32. “**General Warranty Period**” means two (2) years from Final System Acceptance. To the extent identified in the RFP as Amended, individual Components or subsystems may have the terms of the General Warranty apply for longer than two years; notwithstanding these longer periods, Vendor liability for the General Warranty Period shall be two (2) years from Final System Acceptance.



33. “**Good Faith**” means and refers to the combination of (a) honesty in fact, (b) observation of the highest commercial standards of fair dealing, (c) adherence to the highest commercial standards of disclosure and frankness, (d) the avoidance of any form of deception, and (e) not using any means, whether direct or indirect, to achieve a result that cannot properly be achieved.
34. “**Initial Purchases**” means all Hardware, Software, Services, supplies, incidental hardware, and materials in the Bill of Materials included in Exhibit II-20(a).
35. “**Hardware**” means the hardware, equipment, parts, and materials provided by the Vendor for the System, including Subscriber Units, and all items on the Hardware List. Hardware includes, but is not limited to, any physical things of value that constitute “goods” within the meaning of the Uniform Commercial Code.
36. “**Hierarchy of Interpretation**” means the following documents or sets of documents incorporated into this Agreement, in the following priority order: 1) this Contract as executed; 2) the Term Sheet attached as Exhibit II-033; 3) the Consolidated Listing of Amendments to the RFP attached as Exhibit II-02; and 4) the RFP attached as Exhibit II-01; and Vendor’s BAFO attached as Exhibit II-04. In the event of any inconsistencies between these documents, the document higher in the priority order will control (e.g., the Amendments to the RFP supplement and/or replace requirements in the RFP). Any other Exhibits to this Agreement, including the vendor’s proposal, City’s Questions and Vendor’s answers/clarifications, and Vendor’s compliance matrix may be consulted to give meaning to a term or requirement at the lowest possible priority.
37. “**Infrastructure**” means all Hardware, Software, and Services included in and related to the System as described in the Technical and Implementation Documents and as detailed in Exhibit II-19, including all Hardware related to ensuring coverage for the Mandatory Facilities.
38. “**Key Milestones**” has the meaning provided in Section 5.1.
39. “**Latent Defect**” means any deficiencies relative to the specifications in the RFP as Amended identified during the General Warranty Period if it can be established that the failure was due to a flaw inherent in the proposed design or the implementation of the System.
40. “**Liquidated Damages**” has the meaning provided in Section 5.2.
41. “**Local Government Record**” means any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws of the state, created or received by local government or any of its officials or employees pursuant to law including an ordinance, or in the transaction of official business.
42. “**Major Default**” has the meaning provided in Section 7.1.



43. “**Major Interruption of Services**” has the meaning provided in Section 3.2.2.
44. “**Milestone**” means an associated set of Performances and Deliverables, as laid out in the Detailed Timeline attached as Exhibit II-06.
45. “**New Product Families**” means system components compatible with the System that are designed on a hardware platform differing from the components originally deployed in the System.
46. “**Notice Period**” means 30 days, unless a more-specific meaning applies as provided in a subsequent section of this Agreement.
47. “**Open Source**” means any copyrightable material distributed under a license accepted by the Open Source Initiative as an Open Source license.
48. “**Parties**” means Buyer and the Vendor.
49. “**Performance**” means the discharge of any duty or obligation required by this Agreement, or any action taken to support or enable the discharge of any duty or obligation required by this Agreement.
50. “**Performance Standards**” means all standards of operation, coverage, availability, and quality included in the RFP as Amended, Vendor Proposal, and BAFO, interpreted according to the Hierarchy of Interpretation, applicable industry standards, including the Project 25 Phase II standards, as well as Vendor’s obligations to provide a System that passes the Acceptance Tests, the Fully Loaded Burn-In, and is Fit for its Intended Purpose.
51. “**Preliminary Acceptance Test**” means an Acceptance Test performed by Vendor prior to any use of the tested System component.
52. “**Persistent Systemic Reductions in Service**” has the meaning provided in Section 3.2.3.
53. “**Pre-Cutover Costs**” means all new and incremental costs associated with tower sites prior to delivery of the System Infrastructure to Buyer.
54. “**Pricing Guarantee**” has the meaning provided in Section 4.7.
55. “**Primary Subcontractor**” means Harris Corporation.
56. “**Project 25**” (or “**P25**”) means the set of standards for digital radio communications at ANSI/EIA/TIA-102, Phase II.
57. “**Project Completion**” means that a) there has been Final System Acceptance by Buyer, and b) no Deliverables, Services, Deadlines, or other Punchlist items arising from activities occurring prior to Final System Acceptance remain.



58. “**Project Timeline**” means the schedule of Deadlines, Deliverables, and Milestones as described in Appendix B, “Summary Timeline,” or laid out in detail in Exhibit II-06.
59. “**Proportionally Allocated Risk**” means any Deliverable, Deadline, Milestone, or other Performance, for which Vendor and Buyer shall assume proportional responsibility for any increased disbursements, costs or expenses incurred by Buyer as a result of any breach, nonperformance, or partial performance of Vendor, with such proportion being specified on a percentage or total dollar basis relative to each contractual item being so identified.
60. “**Punchlist**” means any Performance, Service, or Deliverable arising out of or relating to the initial delivery and configuration of the System that is still incomplete at the time of Final System Acceptance.
61. “**Purchasers**” means Buyer and any authorized third-party purchasers under the terms of this Agreement.
62. “**RFP**” has the meaning provided in the Recitals of this Agreement. The “**RFP as Amended**” means the RFP as updated by the Consolidated Listing of Amendments to the RFP.
63. “**Risk Matrix**” means the allocation of risks included in Exhibit II-08.
64. “**Security Vulnerabilities**” means flaws or weaknesses in System security procedures, design, implementation, or internal controls that could be exercised (accidentally triggered or exploited) and result in a security breach such that data is compromised, manipulated, or stolen or the System damaged.
65. “**Service**” means and refers to any and all of the services provided by Vendor and its subcontractors to Buyer in connection with the provision, operation, or maintenance of the System by Vendor.
66. “**Service Level Agreement**” (or “**SLA**”) means a measurable standard of performance, uptime, responsiveness, or quality associated with any Service provided by Vendor or Vendor’s subcontractor, the System, or any subcomponent thereof, including those laid out in Exhibit II-10.
67. “**Software**” means the computer software necessary to the successful operation of the System. This includes, without limitation, any proprietary computer software Buyer is authorized to use by Vendor and/or a subcontractor in accordance with the Software License Agreement and this Agreement.
68. “**Software License Agreement**” means any license agreement applicable to any Component of the System, a copy of which is attached to this Agreement as part of Exhibit II-20(f).
69. “**Specifications**” means the functionality and performance requirements that are described in the Technical and Implementation Documents.



70. “**Statement of Work**” means the description at Exhibit II-19 of the work to be performed by Vendor to deliver the Hardware, install the System, and provide the Services.
71. “**Subscriber Units**” means mobile radios, portable radios, and control station radios as listed in Exhibit II-20(a)
72. “**Supplemental Buyer**” means the Designated Third-Party Beneficiaries and any entity with whom the Buyer has executed an intergovernmental agreement.
73. “**Support**” means patches, refreshes, maintenance, regularly scheduled upgrades, all other long-term support as specified in the RFP as Amended, as well as the services outlined in the System Support and Maintenance Agreements attached at Exhibit II-11.
74. “**Support and Maintenance Period**” means fifteen (15) years from Final System Acceptance. The first two years of the Support and Maintenance Period will run concurrently with the General Warranty Period.
75. “**System**” means the public safety Project 25 Phase II radio communications system to be furnished by Vendor to Buyer under this Agreement and which is comprised of the Infrastructure, Hardware, Software, Services, supplies, incidental hardware, and materials combined together into a system, as more specifically described in Exhibit II-20 and providing coverage, capacity, and reliability as described in the Technical and Implementation Documents.
76. “**Technical and Implementation Documents**” means the System description, Hardware listings, Software listings, RFP, Consolidated Listing of Amendments to the RFP, BAFO, and Vendor Proposal, as amended by the Vendor, plus any technical or System information included in the Exhibits, interpreted according to the Hierarchy of Interpretation.
77. “**Term**” has the meaning provided in Section 9
78. “**Test Date**” means any date set for the Parties to conduct any Acceptance Test.
79. “**Third-Party Beneficiaries**” means the Designated Third-Party Beneficiaries included in Section 14, as well as any future tenants on the System or Supplemental Buyers.
80. “**Third-Party Component**” means any Component provided by an entity other than the Vendor.
81. “**Unselected Component**” means any Component or other feature, advertised as an option or not, that was not selected or purchased by Buyer in the initial purchase, including non-Harris proprietary features, Upcoming Capabilities, or other planned features or capabilities (e.g. future P25 Standards, etc....) other than those explicitly set out as future Deliverables herein by Vendor to fulfill the requirements in the RFP as Amended.
82. “**Unsupported Component**” means any System component compatible with or deployed on the System that has reached either End of Sale or End of Life.



83. “**Upcoming Capability**” means any planned but unreleased change or improvement to any Component identified by Vendor during the negotiation process.
84. “**Vendor**” means Dailey and Wells Communications, Inc.
85. “**Vendor Guaranteed Risk**” means any Deliverable, Deadline, Milestone, or other Performance, for which Vendor shall indemnify and hold harmless the Buyer from and against all losses, damages, penalties, increased disbursements, costs or expenses incurred by Buyer, whether direct or indirect, as a result of any breach, nonperformance, or partial performance of Vendor, except for the limitations associated with Liquidated Damages provided in Section 5.
86. “**Vendor Proposal**” has the meaning provided in the Recitals of this Agreement.
87. “**Vendor-Supplied**” means any Component provided to Buyer, or integrated by Vendor into the System, regardless of whether the Component is a Third-Party Component.

## 2. SCOPE OF AGREEMENT

### 2.1. Sale and Purchase of a Reliable, Functioning Project 25, Phase II Wireless Public Safety System

#### 2.1.1. Vendor Obligations

**Fulfillment of Purpose.** In consideration for the promises to pay included herein, Vendor will provide a complete, functioning, and supported P25 radio system for Buyer, including the necessary infrastructure, equipment, software, design and consulting, radio band licensing, personnel, and other professional services, including project management and ancillary services as needed to provide a System that is Fit for the Buyer’s Purpose in a “turnkey” fashion. Vendor will provide all Deliverables and Performances necessary to effectuate the delivery of the System to Buyer, including spearheading, managing, and coordinating all interactions with third parties and facilitating all necessary Buyer internal processes.

**Delivery of System.** Vendor will provide the System and all Components thereof, including all Infrastructure, Hardware, Software, or other material listed or referenced in the Technical and Implementation Documents, including all elements of the System required to meet the needs of the Designated Third-Party Beneficiaries.

**Adherence to Project Timeline.** Vendor will deliver the System and each Milestone on time based upon Project Timeline, and commits that the System will meet the Performance Standards over the Term of this Agreement. Vendor promises the System will meet the standards specified in the Acceptance Tests in the attached Exhibits.

**Maintenance of Price.** Vendor will deliver the System at the Contract Price. Any options or future components purchased by Buyer, prior to the end of the Support and



Maintenance period, will also be subject to the Contract “on-going percentage discount.” In the event that Hardware, Software, or Services, in addition to that specified in the Technical and Implementation Documents, must be added to the System to meet the obligations and commitments set forth in this Agreement, then Vendor shall supply such missing elements at no additional cost to Buyer. For clarity, the “no additional cost” guarantee applies only Hardware, Software, and/or Services that are necessary to meet the obligations and commitments in this Agreement, and excludes Unselected Components.

**Participation in Meetings.** When invited, Vendor will attend and participate in monthly meetings with the Buyer’s operating committee and/or executive leadership.

**Site Acquisition Services.** Except to the extent that Buyer explicitly assumes control of some aspect of site acquisition, Vendor will perform all aspects of the site acquisition process including a) site lease/file review to determine existing entitlements, b) candidate identification for new site builds should any be necessary, c) identifying and ordering engineering and design services, d) review of engineering reports, e) lease negotiations, f) identifying zoning and permitting requirements, g) applying for and securing municipal permits, and h) arranging title services.

## 2.2. Buyer Obligations

**Fulfillment of Purpose.** Buyer will pay Vendor for the System and designated Subscriber Units, in accordance with Exhibit II-20(a) and shall take any other action that it has agreed to perform in this Agreement.

**Participation in Processes.** Buyer will perform any necessary duties identified by Vendor as necessary to enter into required site tower and/or land leases and directly enter into contracts for facilities to support the SAPSRS design. Where the Vendor may purchase land on Mark Wayne Drive, the Vendor will transfer the title to same directly from the land owner to the Buyer. Buyer will assist in any planning, zoning, and permitting process as the owner of the project. Buyer will assist in any regulatory proceeding or licensure of the system and facilities as the owner of the project.

**Tax Exemption.** Buyer is a tax-exempt entity and it is understood that all products purchased under this contract will be sales tax exempt and all project products delivered or stored by the Vendor will be considered the property of the Buyer for Ad Valorem tax purposes.

**Insurance upon Delivery.** Buyer will be responsible for insurance on all items as they are delivered to Buyer. Risk of Loss is detailed in Section 13.9.

## 2.3. Mutual Obligations

Each Party shall fulfill its respective responsibilities as assigned in the Technical and Implementation Documents and this Agreement.



### **3. PERFORMANCE UNDER THIS AGREEMENT**

#### **3.1. Perfect Performance**

Vendor is responsible for perfect performance of every term of the Agreement, including the standards for performance laid out in the RFP as Amended. The standards for performance laid out in the RFP as Amended supersede any representations by Vendor.

##### **3.1.1. Unilateral Acceptance of Partial Performance**

Buyer has the unilateral option to accept the partial performance of one or more terms of the Agreement. Buyer's acceptance of partial performance relative to one term of this Agreement does not constitute a waiver of Buyer's right to perfect performance of every other term. Penalties for nonconformance will still apply.

##### **3.1.2. Errors; Default Allocation of Risk**

Vendor is responsible for the correction of any errors in the Vendor Proposal or BAFO. If any Deliverable, Deadline, Milestone, or other Performance does not have an explicit Allocation of Risk laid out in Exhibit II-08, it is a Vendor Guaranteed Risk.

##### **3.1.3. Budget and Schedule Reporting**

Vendor will report monthly on progress. Any proposed Change Order and the associated costs must be specifically justified as soon as Vendor becomes aware of the necessity for the change. Any anticipated item of work that ends up not being delivered, either in part or to any significant degree, must be reported and credited to Buyer.

##### **3.1.4. No Beneficial Use**

Vendor agrees that it will not claim beneficial use of the System, or any Component thereof, prior to Final System Acceptance.

##### **3.1.5. No Stoppage of Work**

Vendor shall not stop work on any Deliverable that does not have a Change Order pending, even if a Change Order or Dispute is pending on a different Deliverable.





### **3.1.6. Independent Obligation of Vendor to Continue Performance Through Resolution of Dispute or Judicial Proceedings**

Because of the critical importance of the System to the operations of Buyer and the Third-Party Beneficiaries, Vendor shall ensure that it will continually perform its obligations under this Agreement and the Service Level Agreement during the course of any Dispute or judicial proceedings that may arise out of the performance of this Agreement. None of Vendor's obligations under this Agreement and the Service Level Agreement shall be curtailed by Vendor or result in a degradation of System performance in response to any dispute or judicial proceeding. Such an act shall be considered impermissible retaliation and breach of contract. Buyer shall pay the Vendor for all amounts due under this Agreement and the Service Level Agreement, even though the issue of whether the payment amounts are "due" may be contested and/or disputed by Buyer while proceeding is pending. Vendor undertakes this independent obligation without prejudice to any rights or remedies it may otherwise have in connection with any dispute between the Parties, including any rights Vendor has under Section 7.1.

## **3.2. Key Performance Terms**

### **3.2.1. Fully Loaded System**

A Fully Loaded System is defined as a state in which all System Components, Subsystems, Hardware, Software, and Infrastructure, Subscriber Units, control systems, and associated features are installed, optimized, integrated, configured, deployed, tested and operational per the performance standards in the RFP as Amended, with the following minimum usage levels:

- a) No more than 5% of portable Subscriber Units are pending configuration and deployment, based upon the total expected usage by Buyer and the Designated Third-Party Beneficiaries
- b) No more than 15% of mobile Subscriber Units are pending configuration and deployment, based upon the total expected usage by Buyer and the Designated Third-Party Beneficiaries

The following items may still be pending during a Fully Loaded Burn-In:

- a) Implementation of ISSI links and associated features to non-LCRA members
- b) Integration of emerging features associated with ancillary third-party applications such as CAD and Fire Alerting systems. Legacy or base capabilities shall have been integrated and tested.
- c) Completion of system documentation and non-service affecting Punchlist items.



The Fully Loaded System includes Subscriber Units and loads associated with tenant agencies that are currently using the Existing Radio System, but the Fully Loaded Burn-In will not be delayed more than five (5) calendar days to accommodate tenant agencies.

### **3.2.2. Major Interruption of Services**

A Major Interruption of Services is defined as any Severity One (1) disruption as laid out in RFP Section 5.25.1.25, resulting in the inability of any portion of the System to conduct business as usual. This is defined as:

- a) Loss of Master Site or switchover to Backup Master Site
- b) Loss of one Master Controller or switchover to Redundant Master Controller
- c) Master Site LAN/WAN / Audio Distribution Equipment Failure
- d) Loss of one Simulcast Trunking Controller or switchover to Redundant Simulcast Trunking Controller
- e) Failure resulting in any Simulcast sub-system reverting to Site-Trunking
- f) Loss of one (1) or more System Manager/Alarm Terminals
- g) If purchased from Vendor, loss of 5% or more Dispatch Consoles or loss of one (1) Dispatch Console where only one (1) exists
- h) Loss of Full-Featured Dispatch capability (revert to RF Dispatch control)
- i) Logging Recorder Interface failure
- j) Backhaul system failure resulting in path switch or revert to standby radio
- k) Loss of Simulcast or Multicast Repeater site
- l) Repeater Site Antenna System Failure adversely effecting multiple channels
- m) Any component or module failure which results in loss of 20% or more of trunked channel resources

### **3.2.3. Persistent Systemic Reductions in Service**

Persistent Systemic Reductions in Service are design, equipment, or implementation defects as follows:

- a) Any defects that result in substantial slowdowns, persistent quality or capacity losses, or frequent minor interruptions of service across the System as a whole or a full class of end user or dispatch Vendor-provided equipment
- b) Defects resulting in errant, misrouted, lost, or persistently bad quality audio, including but not limited to radios locking up, shutting down, changing talkgroups at random, or audio bleed-over
- c) Any defects, minor or not, that do not have an identified root cause within a week of being reported to Vendor
- d) Any defects that have triggered recalls or are identified to be prevalent among the Vendor's customer base



### **3.2.4. Reset of Fully Loaded Burn-In**

Any Major Interruption of Services will result in early termination of the Fully Loaded Burn-In and a resetting of the 60-day Burn In clock.

Any Persistent Systemic Reductions in Service occurring during the 60-day Burn test period shall be resolved prior to the issuance of the 60-day Burn in test completion certificate.

If the resolution of any issues resulting in early termination requires a software, firmware, or hardware fix to be applied to Vendor-supplied end user equipment and the console subsystem, then the proposed solution shall be applied to a subset of user equipment for a period of two weeks for evaluation. If the solution corrects the problem and does not introduce new problems, then the solution shall be rolled out to the rest of the end user radio equipment. When the software fix has been applied to all end user radios, a new Fully Loaded Burn-In test can begin.

### **3.2.5. Fire Radios**

Acceptance tests for the Fire Radios to be delivered under the Agreement will be supplied by Buyer to Vendor by the completion of the Detailed Design Review. Based upon the results of the Fire Radio acceptance tests, Buyer may, in its sole discretion, reduce the quantities of Fire Radios purchased without affecting the pricing of any other portion of the Agreement.

Both Parties will work in good faith to incorporate the Buyers requirements and feedback into the development of the upcoming Fire Radios by the Primary Subcontractor.

### **3.2.6. Included Components**

Unless specifically excluded by Vendor, any and all Components, materials, equipment and systems provided under the Agreement shall be supported by the Vendor's initial warranty and optional maintenance periods. Any existing materials, equipment and systems incorporated by Vendor into the System Design, including BDAs owned by Buyer and used to establish in-building coverage shall be provided Support on a time and material basis. An existing piece of equipment will be considered incorporated by Vendor into the System Design if the equipment is used to meet performance requirements under the RFP.

### **3.2.7. Support Contracts**

Vendor shall, where available and at extra cost, arrange for (or enter into and assign to Buyer at the Closing) long-term service agreements with respect to any equipment not provided by Vendor but incorporated by Vendor into the System Design on terms acceptable to Buyer.



### **3.2.8. Replacement of Unsupported Components**

During the Support and Maintenance period, any key deployed Component that is scheduled to become End of Life by the upstream manufacturer will be identified by the Vendor to the Buyer at least one (1) year prior to End of Life or when Vendor first becomes aware of the End of Life date, whichever is greater. Vendor will also identify the closest equivalent supported Component and verify that the proposed replacement Component version, O/S, and options are compatible for the intended application.

Buyer may elect to either purchase the proposed replacement Component directly and provide it to the Vendor, or Buyer may elect to purchase the replacement Component from the Vendor. Vendor agrees to provision, program, test and install the replacement Component, in addition to installing the Harris software available under the Harris FX software agreement as applicable.

Key deployed Components generally include, but are not limited to, routers, switches, firewalls, servers, PCs, CPU motherboards, and storage area networks that generally accept periodic software patches and updates, and major operating system or third-party software applications required for System operation.

This Section replaces and supersedes the 5 and 10-year Hardware Refresh as laid out in the RFP as Amended, and the responsive “Hardware FX” line item in Vendor’s BAFO, and the hardware refresh amounts proposed shall be re-allocated to this section.

### **3.2.9. Restoration of Prior Condition**

Vendor shall remove and dispose of any packaging or debris that is a result of the delivery, installation, or site improvements provided by Vendor. Vendor will also restore to its prior condition any equipment, buildings, or appurtenances damaged or altered by Vendor or its subcontractors during the performance of this Agreement, reasonable wear and tear excepted.

### **3.2.10. Utility Power Integration**

Vendor will integrate new antenna sites into the utility power grid.

### **3.2.11. Third Party Application Integration**

Vendor will integrate and guarantee subcontracted portions of the system, not natively provided by Vendor, including FSA, 911, CAD, and other required functionality and will ensure Harris interfaces are integrated with the defined feature set. It is the responsibility of the Buyer that the FSA, 911, CAD portions of the system not natively provided by Vendor be at the then-current or required software and O/S revisions for interface to the existing applications. Third-



Party Applications and required operating system versions covered under this section will be subject to the replacement of Unsupported Components as outlined in Section 3.2.8.

### **3.2.12. System Vetting**

Vendor is required to perform preliminary acceptance tests on the System or any part thereof before migrating any “live” users onto the System.

### **3.2.13. Minimum Performance of Existing Radio System**

Vendor’s design and rollout plan will maintain a Buyer-defined minimum “floor” of functionality at all times, as defined by section 1.1.30 of the RFP as Amended as well as in relevant specifications delivered by Buyer to Vendor by the completion of the Detailed Design Review.

## **3.1. Staff Commitment and Training**

Key Project Personnel identified as part of the implementation team shall be engaged for the entire System Implementation. Any replacements of Key Project Personnel are subject to approval by Buyer.

## **3.2. Force Majeure**

If a Party wishes to claim that a Force Majeure event has occurred, it shall, as soon as possible following the occurrence of such event but no later than ten (10) days after the event, notify the other Party of the nature and expected duration of such event and shall thereafter keep the other Party informed until such time as it is able to perform its obligations. The Parties shall use best efforts to:

- a) overcome the effects of the Force Majeure event;
- b) mitigate the effect of any delay occasioned by the Force Majeure event, including by recourse to alternative mutually acceptable sources of services, equipment and materials; and
- c) ensure resumption of normal performance of this Agreement as soon as reasonably practicable and shall perform their obligations to the maximum extent practicable.

If a Force Majeure occurs, the Parties will execute a Change Order to extend the Performance Schedule for a time period that is reasonable under the circumstances. Each Party shall bear its own costs associated with mitigating Force Majeure events, but a Force Majeure event will excuse any penalties associated with late delivery of a milestone or part thereof.



If a single Force Majeure event delays performance under this Agreement for more than twelve (12) months, Buyer shall have the option to terminate the Agreement or to engage with Vendor to renegotiate the scope of performance.

## **4. PRICE AND PRICING**

### **4.1. Contract Price**

The Contract Price is provided in summary in Appendix A, “Summary Pricing” and in Exhibit II-20(e). Vendor will at all times provide sufficient pricing detail for Buyer to understand shared Infrastructure costs, as well as costs applicable to each of the Buyer and the Designated Third-Party Beneficiaries.

All discounts incorporated into the pricing for the Agreement must be allocated to individual Deliverables or work items. Offered percentage discounts off particular Deliverables (e.g. Subscriber Radios) shall be specified in terms of the offered per-item discount and the resulting per-item cost.

### **4.2. Costs Associated with Change Orders**

Any work made necessary by a Change Order approved by Buyer will be billed at the rates as contained in the BAFO, tab 15 “Hourly & Unit Rates” up to the initial Contract Price. Any additional work made necessary by a Change Order approved by Buyer will be billed at the cost necessary to provide the additional work, and shall not be subject to an additional fee or profit margin during the Pre-Implementation, Implementation, and General Warranty periods.

### **4.3. Reductions in Scope**

If any element of the Agreement is a) deleted by Buyer post-award, or b) partial performance is unilaterally accepted by Buyer, c) or the actual performance of the obligation does not require the full anticipated scope of work, then the contract amounts associated with any avoided work shall be credited back to Buyer for reallocation or reimbursement at Buyer’s discretion. Any equipment already deployed, work already performed that directly and uniquely relates to the deleted or accepted element will still be payable to Vendor, but Vendor shall bear the responsibility of providing documentation of performance and the direct and unique correspondence between the performed work and the deleted element. Unilateral reductions in the scope by Buyer, including unilateral reductions in scope of coverage, testing procedures, and optional Components, and any reduction in cost that may therefore occur shall accrue to Buyer, subject to good faith negotiation concerning the effect of the change on the remainder of the System.



Other than as laid out herein, Vendor's offer is "All or None". Changes in quantity of P25 Hardware Components, including Subscriber Radios, Consoles, and Terminals, may be allowed on a one-for-one basis within each product category. Any change that alters the quantities bid in each product category by more than 5% shall be negotiated. Any products that have been shipped by the manufacturer and cancelled by the Buyer may be subject to the manufacturer's restocking charge. This excludes "Fire Radio" items defined in section 3.2.5 herein.

#### **4.4. Milestone Payment Schedule**

The Milestone Payment schedule is provided in summary in Appendix A, "Summary Pricing" and in detail in Exhibit II-06. Vendor shall be paid in accordance with the Texas Prompt Pay Act, Texas Gov't Code, Ch. 2251.

#### **4.5. Promotional Features**

Any capabilities advertised by Vendor as being "extra" and/or "included at no cost," are defined in the BAFO. Any planned capabilities referenced by Vendor in its 1.1.25 Upcoming Features Matrix and relied upon for meeting the requirements of the RFP as Amended, shall be provided at no additional cost to Buyer. This "no additional cost" guarantee excludes Unselected Components.

#### **4.6. Pre-Cutover Costs**

All new and incremental defined costs associated with tower sites prior to delivery of the System Infrastructure to Buyer are included in the Contract Price as detailed and priced in the Vendor's BAFO.

#### **4.7. Pricing Guarantee**

##### **4.7.1. Maintenance of Hardware and Subscriber Radio Pricing**

Any Hardware or Software provided as part of the original implementation of the Agreement shall be provided to Purchasers at the same "on-going percentage discount" pricing during the entire Term of the Agreement, including the Support and Maintenance Period.

##### **4.7.2. Outdated Hardware**

In the event that any Hardware or Software provided as part of the original implementation of the Agreement becomes an Unsupported Component, the closest equivalent supported Component provided by Vendor or Primary Subcontractor will be provided at the same "on-going percentage discount" pricing as the original Component for the entire Term of



the Agreement, including the Support and Maintenance Period. Any third-party Components that become Unsupported Components will be updated under the provisions of Section 3.2.8.

#### **4.7.3. New Product Families**

Any New Product Families purchasable through Vendor during the term of the Agreement, including the Support and Maintenance Period, shall be subject to the same “on-going percentage discount” as is applied to the equipment delivered as part of the original implementation of the Agreement. If there are different percentage discounts applied to different classes of equipment, then the percentage discount applicable to the closest purchased class of equipment will be applied. If a product in a New Product Family is also the closest equivalent supported Component, then the lowest price between the original pricing for the now-Unsupported Component and the price with the original percentage discount applied will be used.

#### **4.7.4. Break/Fix Costs**

Vendor shall maintain set device break/fix costs for Depot repair, spare components, and other reasonably foreseeable equipment wear and tear for Purchasers over the Support and Maintenance Period at the rates detailed in the BAFO, tab 15.

#### **4.7.5. Most Favored Nation**

If Vendor provides a better Component price to any other entity for a Comparable System, either in absolute dollars for the same Hardware or Software supplied or for the closest equivalent supported Component, Buyer will have the benefit of the better price for a subsequent purchase on a one-time basis.

### **4.8. Supplemental Buyers**

#### **4.8.1. Use of Vendor and Primary Subcontractor Marks**

Vendor and Primary Subcontractor authorize the Buyer’s use of Vendor’s and Primary Subcontractor’s names, trademarks and the use of Vendor-provided materials in Buyer communications to other governmental organizations for purposes of soliciting and negotiating intergovernmental agreements.

#### **4.8.2. Effect of Supplemental Buyers**

Quantity percentage discounts for supplemental buyers are provided in document 4.2.20 (RFP Section 5.27.5), Revised 11/1/2017 BAFO Clarifications and attached hereto as Exhibit II-





05. The Buyer shall utilize this document to convey the contract pricing discounts for the benefit of Supplemental Buyers.

#### **4.8.3. Supplemental Buyer Independence**

Supplemental Buyer purchase orders shall be submitted directly to Vendor by the Supplemental Buyer, and result in a separate contract between the Supplemental Buyer and Vendor. Other than the representations made in this Agreement relative to the Designated Third-Party Beneficiaries, Buyer makes no representation or guarantee as to any minimum amount being purchased by any other Supplemental Buyer, any Supplemental Buyer's participation and use of the System, or any Supplemental Buyer's participation in the bulk buying and pricing guarantees under this Agreement.

### **5. SCHEDULE**

The Timeline and Milestones are provided in summary in Appendix B, "Summary Timeline" and in Exhibit II-06. Each Milestone will be considered accepted when all associated Milestone acceptance criteria have passed, as laid out in Exhibit II-07.

#### **5.1. Key Milestones**

The following shall be considered Key Milestones under this Agreement:

- a) Completion of all Civil Engineering elements of the System Design
- b) Completion of Coverage Testing
- c) Completion of Vendor staging of System
- d) Beginning of 60-day Fully Loaded Burn-In

#### **5.2. Penalties for Missed Key Milestones**

If an unexcused failure by Vendor to complete a Key Milestone occurs, the following Liquidated Damages will be assessed:

- a) For failure to complete the Key Milestone within 15 days of schedule: a penalty of one quarter of one percent (0.25%) of the total contract value.
- b) For failure to complete the Key Milestone within 30 days of schedule: an additional three quarters of one percent (0.75%) of the total contract value.
- c) For failure to complete the Key Milestone within 60 days of schedule: an additional one percent (1%) of the total contract value.

An unexcused failure to complete a Key Milestone within 60 days of schedule will also be considered a Major Default.



Buyer shall inform Vendor, in writing, thirty (30) days prior to levying a claim for liquidated damages as a result of Vendor's unexcused failure to complete a Key Milestone as referenced herein, giving Vendor a reasonable time to cure.

### **5.3. Limitations on Liquidated Damages**

Liquidated damages are the sole and exclusive remedy available to Buyer for a Missed Key Milestone. The payment of liquidated damages, if any, shall be in lieu of and replace any and all other damages of any type or nature that Buyer might claim, either directly, indirectly, or consequentially as a result of the Vendor to timely perform the Work. Additionally, the maximum amount of liquidated damages charged against the Vendor will not exceed \$3,200,000 (4x 1% LD).

### **5.4. Mutual Waiver of Consequential Damages**

EXCEPT FOR THE REQUIREMENT TO INDEMNIFY BUYER GROUP FROM AND AGAINST THIRD PARTY CLAIMS AS SET FORTH IN SECTION 10, IN NO EVENT, WHETHER AS A RESULT OF BREACH OF AGREEMENT, WARRANTY, TORT (INCLUDING NEGLIGENCE OR INFRINGEMENT), STRICT LIABILITY OR OTHERWISE, SHALL EITHER PARTY BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL, INDIRECT OR EXEMPLARY DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUES, LOSS OF USE OF THE HARDWARE OR ANY OTHER EQUIPMENT, COST OF CAPITAL, COST OF SUBSTITUTE GOODS, FACILITIES, SERVICES OR DOWNTIME COSTS.

## **6. GENERAL WARRANTY**

### **6.1. Freedom from Defects**

Any and all Components, Deliverables, and Services related to or included in the System or otherwise provided under the Agreement shall be free of defects and deficiencies in materials, assembly and workmanship when installed, suitable for use under the climatic and normal operating conditions extant at the site of the System and otherwise consistent with and in compliance with the proposed design of the System, as provided in the RFP as Amended and accepted by Buyer (the "**System Design**") for at least the entire General Warranty Period.

### **6.2. Services to Be Provided in a Workmanlike Manner**

The construction, procurement and installation services included in the System shall be performed with the Vendor's best skill and judgment, in a good and workmanlike manner and



shall otherwise be consistent with and in compliance with the System Design. The completed Project shall perform its intended functions as a complete, integrated System as described in the RFP as Amended.

### **6.3. Repair, Replacement, or Re-work Under Warranty**

Any Latent Defects or plan deficiencies identified after the Detailed Design Review must be corrected by Vendor within a reasonable time after they are detected or reported to Vendor.

If, during the General Warranty Period, or no later than thirty (30) days after the expiration of the General Warranty Period, Buyer notifies the Vendor of a defect, or Vendor detects a defect, or there is another indication that a breach of the foregoing warranty has occurred, the Vendor shall correct (or cause to be corrected) the defects and deficiencies promptly at no cost to Buyer. The Vendor's obligation to correct defects and deficiencies shall include labor, parts, transportation, factory repair and testing, dismantling, re-erecting, re-testing and commissioning.

Batteries are supplied with the standard OEM warranty. One set of portable radio replacement batteries (18,488ea) are included in the BAFO at no charge. Other Expendables are excluded.

## **7. DEFAULT**

Failure to provide any Deliverable, Service, or Performance required under this Agreement is a Default. Unless defined otherwise, a Default is a Minor Default.

### **7.1. Major Defaults**

The following shall be considered Major Defaults by Vendor under this Agreement:

- a) Vendor's unexcused failure to complete a Key Milestone within 60 days of schedule;
- b) Vendor's unexcused failure to make any bona fide undisputed payment due to Buyer, including Liquidated Damages;
- c) Vendor's incurring of Liquidated Damages more than three times;
- d) The occurrence of more than 12 uncured Minor Defaults within the immediately preceding 12 months;
- e) Vendor's unexcused and material failure to substantially perform in accordance with the warranties in this Agreement;
- f) Vendor's failure to maintain training and certification levels relative to Primary Subcontractor;
- g) Vendor's failure to provide any necessary financial assurances to Buyer (e.g. Bonding requirements and maintenance of the Letter of Credit);



- h) Vendor's failure to pass the Fully Loaded Burn-In within 180 days of the first attempt;
- i) Vendor's termination of any intellectual property licenses provided as part of the hardware or software provided with the System, unless the termination is a result of a breach of an applicable agreement by Buyer;
- j) Vendor's unexcused and material making of any general assignment or general arrangement for the benefit of creditors; or the filing by or against Vendor of a petition to have Vendor adjudged a bankrupt, or a petition for reorganization or arrangement under any law relating to bankruptcy unless the same is dismissed within sixty (60) days; or the appointment of a trustee or a receiver to take possession of substantially all of Vendor's assets or Vendor's interest in this Agreement, where possession is not restored by Vendor within thirty (30) days; or the attachment, execution or other judicial seizure of substantially all of Vendor's assets or of Vendor's interest in this Agreement, where that seizure is not discharged within thirty (30) days; and
- k) Any resolution of a claim for infringement of third-party intellectual property that causes a major diminution in value of, or a substantial reduction in the functionality of, the System.

The following shall be considered Major Defaults by Buyer under this Agreement:

- a) Buyer's unexcused failure to make any bona fide undisputed payment due to Vendor according to Buyer's regular payment schedule;
- b) Buyer's delay of Vendor work on the System for more than six consecutive calendar months.

## **8. PRIMARY SUBCONTRACTOR RESPONSIBILITY**

### **8.1. Maintenance of Relationship with Vendor**

Vendor shall maintain at least the same level of certification relative to the Primary Subcontractor as exists on the Effective Date of the Agreement for the entire Term of the Agreement, including the Support and Maintenance Period.

During the entire Term of the Agreement, Primary Subcontractor will provide pricing and responsiveness guarantees to Prime Vendor at the best terms available to any other commercial affiliate of Primary Subcontractor.

### **8.2. Warranty of Primary Subcontractor-Provided Deliverables and Services**

Buyer will have the right to enforce any warranty terms in this Agreement for Primary Subcontractor-Provided Deliverables and Services directly against the Primary Subcontractor.



### **8.3. Primary Subcontractor as Guarantor**

The document addressing the Primary Subcontractor as a guarantor for the performance of the Vendor under this Agreement is included as Exhibit II-17.

## **9. TERM AND TERMINATION**

This Agreement will be valid from the Effective Date until the date fifteen (15) years after the date of Final System Acceptance at which time it will terminate automatically unless Terminated under this Section or extended by mutual agreement in writing by the Parties (the “**Term**”).

### **9.1. Term Periods**

The Term is divided into the following portions (some of which run concurrently):

- a) “**Pre-implementation**” (From the Effective Date to the completion of the Detailed Design Review);
- b) “**Implementation**” (From the completion of the Detailed Design Review until Final System Acceptance);
- c) General Warranty Period (As defined);
- d) Support and Maintenance Period (As defined).

### **9.2. Termination for Convenience**

Buyer shall have the right to stop work by Vendor and terminate the execution of this Agreement at any time upon 180 days’ notice to Vendor (the “**Termination Notice Period**”). As an exception to the above, the Termination Notice Period will be reduced to 15 days for the 30 days immediately following the termination of the Detailed Design Review. No liability will accrue to Primary Subcontractor in the event of Termination for Convenience.

### **9.3. Termination for Funding/Non-Appropriation**

Buyer shall have the right to stop work by Vendor and terminate the execution of this Agreement at the expiration of each of Buyer’s budget periods. Agreement is conditioned on a best effort attempt by Buyer to obtain and appropriate funds for payment of any debt due by Buyer herein. No liability will accrue to Primary Subcontractor in the event of Termination for Funding.



#### **9.4. Termination for Breach**

In the event of a Major Default under this Agreement, the non-defaulting party shall present the defaulting party with a Notice of Dispute, further including the text “Notice of Major Default” prominently displayed, as well as a reference to the circumstances and/or occurrences comprising the Major Default (the “**Notice of Major Default**”). The Notice of Major Default will begin the Dispute Resolution Process. If the Major Default is not cured within 60 days of the Notice of Major Default, or such other period as agreed by both parties through the Dispute Resolution Process, the non-defaulting party will issue a Notice of Termination for Breach to the defaulting party.

#### **9.5. Result of Termination**

If Buyer provides notice to Vendor of termination of the Agreement for whatever reason detailed herein, Vendor and Buyer will work together to wind down all ongoing work in the most efficient way possible. Buyer will be responsible for all work actually performed by Vendor prior to giving notice of termination, and shall be responsible for costs incurred by Vendor resulting from mutually agreed-upon winding-down activities. Termination for Breach shall not relieve Vendor of any liability to Buyer for damages sustained by virtue of breach by Vendor.

### **10. RELEASE AND INDEMNIFICATION**

#### **10.1. Release**

Vendor agrees to and shall release Buyer, its agents, employees, officers, and legal representatives, as well as those of all Designated Third-Party Beneficiaries (collectively the “**Buyer Group**”) from all liability directly to Vendor for injury, death, damage, or loss to persons or property sustained in connection with or incidental to performance under this agreement.

#### **10.2. Indemnification**

Vendor agrees to and shall defend, indemnify, and hold the Buyer, its agents, employees, officers, and legal representatives, as well as those of all Designated Third-Party Beneficiaries (collectively the “**Buyer Group**”) harmless for all claims, causes of action, liabilities, fines, and expenses (including, without limitation, attorneys’ fees, court costs, and all other defense costs and interest) for injury, death, damage, or loss to persons or property sustained in connection with or incidental to performance under this agreement including, without limitation, those caused by:



- a) Vendor's and/or its agents', employees', officers', directors', contractors', or subcontractors' (collectively in sections a-c, "Vendor's") actual or alleged negligence or intentional acts or omissions;
- b) Buyer Group's and/or Vendor's actual or alleged concurrent negligence, whether Vendor is immune from liability or not;
- c) Buyer Group's and Vendor's actual or alleged strict products liability or strict statutory liability, whether Vendor is immune from liability or not; and
- d) Any accusation of infringement of third-party intellectual property rights, under patent, copyright, trademark, or trade secret law.

Vendor shall defend, indemnify, and hold the Buyer harmless during the term of this Agreement and for four years after the Agreement terminates.

Vendor shall require all of its subcontractors (and their subcontractors) to release and indemnify the Buyer Group to the same extent and in substantially the same form as its release and indemnity to the Buyer Group.

IN THE EVENT VENDOR AND BUYER ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO BUYER UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

The provisions of this indemnity are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. Vendor shall advise Buyer in writing within 24 hours of any claim or demand against Buyer or any designated Third-Party Beneficiary or Vendor known to Vendor related to or arising out of Vendor's activities under this Agreement and shall see to the investigation and defense of such claim or demand at Vendor's cost. Buyer shall have the right, at its option and at its own expense, to participate in such defense without relieving Vendor of any of its obligations under this Section.

### **10.3. Indemnification Procedures**

If Buyer receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other party. The notice must include the following:

- a) a description of the indemnification event in reasonable detail, and
- b) the basis on which indemnification may be due.

This notice does not estop or prevent Buyer from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice.



If Buyer does not provide this notice within the ten (10) day period, it does not waive any right to indemnification except to the extent that Vendor is prejudiced, suffers loss, or incurs expense because of the delay.

#### **10.4. Defense of Claims**

Vendor may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to Buyer. Vendor shall then control the defense and any negotiations to settle the claim.

Vendor may settle the claim without the consent or agreement of Buyer, unless it (a) would result in injunctive relief or other equitable remedies or otherwise require Buyer and/or Designated Third-Party Beneficiaries (collectively the “Buyer Group”) to comply with restrictions or limitations that adversely affect Buyer Group, (b) would require Buyer Group to pay amounts that Vendor does not fund in full, or (c) would not result in Buyer Group’s full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

#### **10.5. Limitation on Liability**

EXCEPT FOR VENDOR’S LIABILITY TO INDEMNIFY BUYER GROUP FROM AND AGAINST THIRD-PARTY CLAIMS AS SET FORTH IN THIS SECTION 10, IN NO EVENT, WHETHER AS A RESULT OF BREACH OF AGREEMENT, WARRANTY, TORT (INCLUDING NEGLIGENCE OR INFRINGEMENT), STRICT LIABILITY OR OTHERWISE, SHALL EITHER PARTY BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL, INDIRECT OR EXEMPLARY DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUES, LOSS OF USE OF THE HARDWARE OR ANY OTHER EQUIPMENT, COST OF CAPITAL, COST OF SUBSTITUTE GOODS, FACILITIES, SERVICES OR DOWNTIME COSTS.

### **11. BONDING REQUIREMENTS AND LETTER OF CREDIT**

#### **11.1. Performance and Payment Bond**

In accordance with Tex. Gov’t Code § 2253.021, Vendor shall execute to Buyer: (a) a performance bond in the amount of the combined Contract Price and Subscriber Radio purchases; and (b) a payment bond in the same amount. The bonds shall be in the form similar to the exemplars in Exhibit II-13. and reasonably acceptable to Buyer. The bonds shall expire at the end of the General Warranty Period.





### **11.1.1. Limits on Bonded Obligations**

The bond only covers the Implementation and General Warranty Periods. Any additional extended maintenance or other extended costs arising out of this Agreement will require separately requested and issued bonds. Notwithstanding the above, CNA Surety's failure to issue subsequent bonds will not be considered a Default under this Agreement, nor be recoverable under the bonds.

### **11.2. Letter of Credit**

To guarantee the promises of Vendor, Vendor shall provide Buyer an unconditional and irrevocable letter of credit from a bank chartered for business in the United States that is reasonably acceptable to Buyer in the form similar to Exhibit II-14. The Letter of Credit shall be callable at the sole discretion of Buyer provided that Buyer has notified the Vendor of a Major Default under the terms of this Agreement and Vendor has failed to cure such Default within thirty (30) days after the receipt of written notice from Buyer or such longer cure period as permitted under the terms of this Agreement. The letter of credit shall be in the amount of five hundred thousand dollars (\$500,000.00) and shall have an annually-renewable term for the principal amount remaining. The letter of credit and renewals shall not exceed a total duration of four (4) years, or the final acceptance of the system, whichever is later.

## **12. DISPUTES**

The Parties will use the Dispute Resolution Procedure to address any dispute arising under this Agreement (a "**Dispute**"). The use of the Dispute Resolution Procedure will not be construed under the doctrines of laches, waiver or estoppel to affect adversely the rights of either Party.

### **12.1. Notice of a Dispute**

Either Party may initiate the Dispute resolution procedures by sending a written notice to the other Party outlining of the basic facts and circumstances necessary to understand the dispute ("**Notice of Dispute**").

### **12.2. Negotiation**

The Parties will attempt to resolve the Dispute promptly through good faith negotiations including 1) timely escalation of the Dispute to executives who have authority to settle the Dispute and who are at a higher level of management than the persons with direct responsibility for the matter and 2) direct communication between the executives. If the Dispute has not been resolved within ten (10) days from the Notice of Dispute, the Parties may proceed to mediation.



### **12.3. Mediation**

If a Dispute cannot be resolved through Negotiation, either Party may send the other a Notice to Mediate and the party requesting mediation will propose the name of an independent mediator, times, dates and locations for a mediation session. Neither Party may unreasonably withhold consent to the selection of the mediator. If the Parties are unable to agree upon a mediator, either Party may request that American Arbitration Association nominate a mediator. Each Party will bear its own costs of mediation, but the Parties will share the cost of the mediator equally. Each Party will participate in the mediation in Good Faith and will be represented at the mediation by a business executive with authority to settle the Dispute.

### **12.4. Litigation**

If a Dispute remains unresolved for sixty (60) days after receipt of the Notice of Dispute, and the Parties have engaged in mediation as required by Section 12.3, then either Party may then submit the Dispute to a court of competent jurisdiction located in Bexar County, Texas.

## **13. GENERAL**

### **13.1. Relationship Between the Parties**

Regardless of the application of other governmental agencies in the pricing guarantee and bulk purchasing arrangements, Buyer will not be considered a dealer, remarketer, agent or other representative of Vendor or Primary Subcontractor. Buyer will also not be considered an agent, partner or representative of any Supplemental Buyer making purchases hereunder, and shall not be obligated or liable for any such order.

Vendor agrees and understands that Vendor and all persons designated by Vendor to provide services in connection with the Agreement, are and shall be deemed to be independent entities, responsible for their respective acts or omissions, and that neither Buyer nor any Designated Third-Party Beneficiary is in no way responsible for Vendor's actions, and that none of the parties hereto will have authority to bind the others or to hold out to third parties, that it has such authority.

### **13.2. Entire Agreement**

This Agreement constitutes the entire understanding and agreement between the Parties concerning the subject matter hereof and any request for proposals, proposals, letters of clarification, Best and Final Offers, negotiations, prior discussions, representations, promises, understandings, agreements, warranties, course of dealing, or trade usage not expressly contained or referenced herein shall not be binding on either Party.



### **13.3. Insurance**

Vendor shall at all times during the Term of this Agreement maintain the minimum insurance levels and agreements laid out in the original RFP.

### **13.4. Notices**

Official notices and other communications required by this Agreement between the Parties shall be transmitted in writing by certified mail or overnight express delivery, return receipt requested. They shall be sent to the Parties at the addresses set forth below and shall be deemed effective upon receipt by the receiving party. Either Party may change its address by giving notice in writing thereof to the other Party. All notices sent to Vendor shall also be sent to Primary Subcontractor at the address below.

If to Buyer:

City of San Antonio, Information Technology Services Department  
515 South Frio  
San Antonio, Texas 78205  
Attention: Craig Hopkins  
Telephone: (210) 207-7907

If to Vendor:

Dailey and Wells Communications, Inc.  
3440 E. Houston St.  
San Antonio, TX 78219  
Attention: Richard Wells  
Telephone: (210) 893-6501

If to Primary Subcontractor:

Harris Corporation  
221 Jefferson Ridge Parkway  
Lynchburg, VA 24501  
Attention: President  
Telephone (434) 455-6600

### **13.5. Assignment**

Neither Party may assign this Agreement without written authorization from the other Party, which authorization shall not be unreasonably withheld. In the event of an assignment, this Agreement shall continue and inure to the benefit of all permitted successors and assigns.



Notwithstanding the above, assignments that reasonably call into question the ability of Vendor to perform all its obligations under this Agreement may be refused by Buyer.

### **13.6. Primary Contact for Operations**

Buyer shall designate to Vendor an individual or individuals to act as a primary contact for operations (the “**Buyer Manager**”). The Buyer Manager will have the authority to authorize on incidental changes and modifications to the technical specifications under this Agreement as necessary for the continuation of work under this Agreement.

### **13.7. Modification and Waiver**

No provision of this Agreement may be amended or modified unless such amendment or modification is agreed to in writing by both Parties. Change Orders may change Performance obligations, required Deliverables or Services, or change the price or schedule, but to the extent any Change Order purports to change a term in this Agreement, it is void. A delay in enforcing any element of this Agreement does not constitute of waiver of that element, and any explicit waiver of a particular condition or provision does not constitute a waiver of any other condition or provision.

### **13.8. Inspections and Audits**

Upon reasonable notice to Vendor and during normal business hours, Buyer representatives shall have the right to perform, or have performed, (1) audits of Vendor’s books and records, and (2) inspections of all places where work is undertaken in connection with this Agreement. Vendor shall keep its books and records available for this purpose for at least three (3) years after this Agreement terminates. This provision does not affect the applicable statute of limitations.

### **13.9. Risk of Loss**

Risk of Loss associated with any Deliverable will pass to Buyer upon possession of the Deliverable by Buyer.

### **13.10. Survival**

If any provision of this Agreement is found to be unenforceable or inconsistent with applicable law, it shall be modified to the limited extent necessary to be consistent with applicable law and enforced as so modified.



### **13.11. Choice of Law.**

This agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Texas, without regard to its conflict of laws provisions. Both Parties further agree that venue is proper and claims arising from this Agreement may only be brought in Bexar County, Texas.

### **13.12. Execution by Counterparts**

This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all counterparts together shall constitute a single Agreement.

### **13.13. Sovereign Immunity**

Notwithstanding any other provisions of this Agreement to the contrary, nothing in this Agreement nor any action taken by Buyer pursuant to this Agreement, nor any document that arises out of this Agreement shall constitute or be construed as a waiver of either the sovereign immunity or governmental immunity of Buyer, or of its elected and appointed officials, officers and employees.

### **13.14. Government Records**

In accordance with Texas law, Vendor acknowledges and agrees that all Local Government Records created or received in the transaction of official business or the creation or maintenance of which were paid for with public funds are declared to be public property and subject to the provisions of Chapter 201 of the Texas Local Government Code and Subchapter J, Chapter 441 of the Texas Government Code. Vendor acknowledges and agrees that all Local Government Records, as described in herein, produced in the course of the work required by any contract awarded pursuant to this RFP, will belong to and be the property of Buyer. Vendor is required to turn over to Buyer all such Local Government Records in its possession. Vendor shall not, under any circumstances, release any Local Government Records created during the course of performance of this Agreement to any entity without Buyer's written permission, unless required to do so by a court of competent jurisdiction.

Vendor will comply with all applicable federal, state and local laws, rules and regulations governing documents and ownership, access and retention thereof.

Notwithstanding any other provision of this agreement, the parties understand that Buyer is a governmental entity required to comply with the Texas Public Information Act (Chapter 552 of the Texas Government Code) ("TPIA" or the "Act") when responding to records requests made under the Act. Pursuant to the requirements of TPIA, if Buyer receives a request for information which Vendor has marked or identified as being confidential, trade secret,



commercial, financial, copyrighted or proprietary information, Buyer will respond to the request in accordance with the procedures set forth in Section 552.305 of the Act. Specifically, Buyer will notify Vendor of its receipt of the request and request an attorney general decision identifying the exception(s) to disclosure believed to apply. The Parties acknowledge that TPIA requires a brief to be submitted to the attorney general explaining why the claimed exceptions apply to the information in issue. Buyer is not obligated to submit the brief supporting those claimed exceptions. Vendor is solely responsible for submitting the brief and the documents in issue to the attorney general.

Should the attorney general render a decision indicating that all or a part of the information must be disclosed, Buyer will be permitted to disclose the information unless Vendor successfully contests the attorney general decision in accordance with the requirements of TPIA. Nothing in this agreement shall require Buyer to institute or participate in any litigation relating to an open records request for information that Vendor considers to be confidential.

### **13.15. Anti-Boycotting**

Texas Government Code §2270.002 provides that a governmental entity may not enter into an Agreement with a company for goods or services, unless the Agreement contains a written verification from the company that it:

- a) does not boycott Israel; and
- b) will not boycott Israel during the term of the Agreement.

“**Boycott Israel**” means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

Vendor hereby verifies that it does not boycott Israel, and will not boycott Israel during the term of the Agreement. Buyer hereby relies on Vendor’s verification. If found to be false, Buyer may terminate the contract for material breach.



## 14. SIGNATURES

### For Buyer:

Signed: \_\_\_\_\_

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

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

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

### For Vendor:

Signed: \_\_\_\_\_

Name: Richard Wells

Title: President

Date: 9 FEB 2018

### For Designated Third Party Beneficiary Bexar County:

Signed: \_\_\_\_\_

By: Nelson W. Wolff, County Judge

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

*Attest:*

\_\_\_\_\_  
Gerard Rickhoff, County Clerk

*Approved as to Legal Form:*

\_\_\_\_\_  
Assistant Criminal District Attorney  
Chief-Civil Section

*Approved as to Financial Content:*

\_\_\_\_\_  
Susan Yeatts, County Auditor

\_\_\_\_\_  
David Smith, County Manager

### For Designated Third Party Beneficiary CPS Energy:

Signed: \_\_\_\_\_

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

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

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