

SERIAL 99214 RFP COOLING LOOP SERVICES, COUNTY BUILDINGS

DATE OF LAST REVISION: September 12, 2007

CONTRACT END DATE: April 30, 2020

CONTRACT PERIOD THROUGH APRIL 30, 2020

TO: All Departments

FROM: Department of Materials Management

SUBJECT: Contract for **COOLING LOOP SERVICES, COUNTY BUILDINGS**

Attached to this letter is published an effective purchasing contract for products and/or services to be supplied to Maricopa County activities as awarded by the Board of Supervisors on **April 19, 2000**.

All purchases of products and/or services listed on the attached pages of this letter are to be obtained from the vendor holding the contract. Individuals are responsible to the vendor for purchases made outside of contracts. The contract period is indicated above.

Wes Baysinger, Director
Materials Management

SD/mm
Attach

Copy to: Clerk of the Board
Steve Varscak, Facilities Management
Materials Management

COOLING LOOP SERVICES, COUNTY BUILDINGS

1.0 INTENT:

Maricopa County (hereafter referred to as the County) is actively pursuing the construction of several new facilities in their downtown informal campus area. As part of their design process, the County must consider various options for the provision of energy and energy-related services. As the County's facilities in this downtown area begin to take on the characteristics of a campus environment it is prudent to consider energy options that have proven successful in similar campus settings. One such option is the provision of chilled water through a "district cooling loop". Recently, it has become evident that a number of independent parties are quite interested in providing the County and other downtown cooling loads with a district system. The County recognizes the success of these systems in other metropolitan areas and would like to analyze this potential opportunity.

The Facilities Management Department (FMD) of the County therefore seeks specific proposals from interested providers that are capable of serving the County's downtown facilities via a downtown chilled water cooling loop. The County seeks these proposals to better evaluate a district cooling approach versus more traditional methods of addressing cooling requirements. It is the County's intention to compare the responses to this RFP against each other, and then against the estimated costs and benefits of owning and operating a County central plant. The County retains the option to provide these services internally or through some other means and is in no way obligated to award a contract to one of the bidding organizations. If it is deemed to be in the best interest of the County to proceed with a received proposal, a contract will be negotiated and executed between the selected proposer and the County.

The scope of this project shall include, but not necessarily be limited to, the turnkey provision of chilled water as required by the County and described in the technical specification (Section 2 .0) of this RFP. Although the County is seeking bids that clearly define costs for the provision of commodity chilled water, it is also of importance to the County to understand qualitative differentiation issues that bidders may provide through their systems and services. These issues may include discussion of energy flexibility and contract flexibility, as well as any other less quantifiable features the bidder deems appropriate. These qualitative issues will be given due consideration and will be factored into the overall proposal evaluation scoring system.

To facilitate and simplify the County's evaluation of the proposals, and to ensure that each submittal receives the same orderly review, all proposals must follow the format described in §5.32.. Proposals shall contain all elements of the information requested. Exceptions must be noted in the manner described in §5.30..

THE COUNTY WILL NOT ALLOW THE USE OR LEASE OF ANY FACILITY OR LAND TO ANY PROPOSER FOR USE IN CONNECTION WITH THIS CONTRACT.

2.0 TECHNICAL SPECIFICATIONS

2.1 Facilities Served:

Maricopa County's downtown complex consists of a number of existing and planned facilities in an area bounded by Jefferson Street on the north, Jackson Street on the south, 1st Avenue on the east, and 8th Avenue on the west. The following individual facilities are to be considered in this RFP. Other facilities could be considered in the future, but will not be addressed in this RFP.

New Downtown Facilities	Occupied* Sq. Ft.	Cooling* Peak (Tons)	Completion* Date
New Downtown Jail	400,000	1,500**	1/2004
New Office Complex	550,000 710,000	1500 2,000	12/2003
New Records Retention	120,000	300	3/2001
New Forensic Sciences	40,000	115	11/2001
Existing Buildings that may be Included in a Cooling Loop			
Security Building	230,000 230,000	700 550	Existing
Facilities Management	35,000	100	Existing

* Estimates used for bid evaluation purposes only.

** Load could approximately double based on the potential to double-bunk prisoners

Exhibit 2 contains a site map of the area proposed.

2.2 ADMINISTRATIVE QUESTIONS:

The Proposer shall provide the following information pertaining to this project. This information must be provided by each discrete team member, including any project partners and all subcontractors, vendors, and/or investors with an equity stake in the project.

- 2.2.1 Firm name and business address, including telephone and fax number, and e-mail address.
- 2.2.2 Year established, including former firm name, if any.
- 2.2.3 Type of ownership, such as proprietorship, partnership, or corporation.
- 2.2.4 Provide state of incorporation or registration and related information on corporate ownership and parent company, if any.
- 2.2.5 Indication of whether firm is licensed to do business in the State of Arizona, and in the City of Phoenix.
- 2.2.6 Provide names of corporate management and project manager, including mailing address and telephone numbers. Also indicate the authorized negotiator who would be the person who is empowered to make binding commitments on behalf of the company and/or proposal team.

2.3 PROJECT APPROACH:

The Proposer shall discuss and clearly explain the technical, financial, and business approach that is suggested for undertaking this project. This section shall include general information of proposed contract terms and project performance. Please include the following detailed information:

- 2.3.1 The method for pricing delivery of chilled water to Maricopa County. Please describe qualitatively the proposed pricing structure including cost-per-unit [ton-hr] of cooling capacity, demand charges, monthly service fees, variable fees, start-up fees, etc.
- 2.3.2 Pricing – Commodity Charges:
For each facility listed in the table in §2.1, indicate on attachment A the cost-per-ton-hour proposed for cooling services.
- 2.3.3 Pricing – Demand Charges
For each facility listed in the table in §2.1, indicate on attachment A the monthly cost-per-peak-ton proposed for cooling services.
- 2.3.4 Pricing – Ancillary Fees
For each facility listed in the table in §2.1, indicate on attachment A ancillary fees such as monthly or annual service fees, or any other fees occurring during the life of the contract.
- 2.3.5 Pricing – Initial Costs
For each facility listed in the table in §2.1, indicate on attachment A initial costs or services that would be expended by Maricopa County in implementing the proposed project. These include infrastructure and property costs, and other anticipated direct expenses, which would be required of Maricopa County in the execution of this project. Do not estimate contract negotiation, legal, or management costs. Examples might include rights-of-way, County personnel support, or permitting expenses that the Proposer will expect the County to provide.
- 2.3.6 How will future energy price and supply risks be managed by the proposer?
What demonstrable experience does the proposer have in hedging energy costs? Will a variety of energy sources be utilized in the production of chilled water to guard against price volatility?
- 2.3.7 Identify guarantees and remedies regarding the potential disruption of chilled water delivery:
Please describe contingencies for meeting the County's cooling requirements should the primary source or distribution system of chilled water be disrupted for any reason.

- 2.3.8 Identify and describe any other proposed benefits to Maricopa County that will result from the Proposer's involvement in this project. These may include other quantifiable savings not otherwise listed above or perceived benefits of a more qualitative nature.
- 2.3.9 How does the Proposer intend to finance the project?:
If debt financing is anticipated, provide information on debt/equity structure, lender(s), and experience with project financing. If other approaches, such as leases (including leveraged leases), bonds or grants are to be used, describe the precise nature and arrangement of the transaction. Identify and describe all significant sources of funds that will be used to construct the project. The Proposer shall expect to provide a Letter of Commitment from all financial parties prior to final authorization of a contract with Maricopa County.
- 2.3.10 Contract terms:
- 2.3.10.1 Preferred payment arrangement (for example, fixed price, floating price related to electric rates, take or pay minimums, price floors or caps).
- 2.3.10.2 Proposed approaches for dealing with load variations. How does the Proposer suggest dealing with annual variations in cooling loads due to weather or change of facility use? How will this affect the fixed and variable pricing for services?
- 2.3.10.3 Will there be provisions for adding or reducing capacity based upon modified load characteristics due to building use changes in the future?
- 2.3.10.4 How does the Proposer suggest allowing for flexibility in the contract through re-openers or indexed/competitive rate provisions.
- 2.3.10.5 In the event of a performance default by the Proposer, will the County be allowed to operate or modify the system to provide necessary cooling for County buildings?
- 2.3.10.6 What methods are proposed for independent validation of metering and billing? How are errors to be remedied? Note that the County will require hourly chilled water consumption data for each building for each month of the year.
- 2.3.10.7 What performance or reliability guarantees is the Proposer willing to provide?
- 2.3.10.8 **Escalation/De-Escalation. How do you propose to adjust prices?**
- 2.3.11 Technical Description of Project:
Provide a detailed explanation and description of the operating strategy and design specifications for the project. Please include the following:
- 2.3.11.1 The proposer shall provide a Process and Instrumentation Diagram (PID) indicating the capacity and type of all prime movers and major components, temperature and flows, primary control points, and energy balances. Specifically indicate the following:
- (A) Proposed delivery temperature of the chilled water.
 - (B) Maximum and minimum flow rates.
 - (C) Method for varying capacity of the system.
 - (D) Sizes and energy sources for the chillers.
 - (E) Hardware and controls to be used for system capacity control.
 - (F) Sizes and type of cooling towers.
- 2.3.11.2 Energy supply requirements, such as electrical voltage and distribution power needs. If equipment voltages greater than 12 kV are anticipated, describe the equipment and systems for transformation and distribution of electrical power. Single-line diagrams may be provided to assist in describing the systems. Describe provisions for reliability of electrical supply.
- 2.3.11.3 Provide a guaranteed project operational delivery date including a time line indicating significant project activities. This project schedule should include fundamental information on major project development activities, such as design, permitting, material and equipment delivery lead times, installation, start-up, and commissioning.

2.4 RELATED EXPERIENCES AND REFERENCES:

- 2.4.1 The Proposer shall provide a summary of their background and experience in providing district cooling systems similar to this project. Include projects for which the proposer has acted as a prime or general contractor, developer, or financier, or has a major role in such projects. Include information on the project's customers, location, size, operational characteristics, contract size, and years of operation. This project description should also clearly identify the Proposer's role in the project and its affiliation with other principals in completing it.
- 2.4.2 Provide a description of those special projects, awards, or opportunities which make the proposer especially experienced for this type of project.
- 2.4.3 Describe and quantify the firm's success rate for completing projects on time and within budget. For each project cited, include information on the planned construction start and end dates, and the actual date of completion.
- 2.4.4 The Proposer shall specifically state the ability to complete this project within the time frame described in Technical Description (§2.3.11.3). Please provide a listing of other projects currently underway and potential conflicts that may arise as a result of current and future committed workload.
- 2.4.5 Provide customer references as described in §5.15. Place in proposal as indicated in §5.32.10 using attachment C.

3.0 SPECIAL TERMS & CONDITIONS:

3.1 TERMS AND PAYMENT:

Payment under contract will be made in the manner provided by law. Invoices shall be prepared and submitted in accordance with the instructions provided on the Purchase Order. Invoices shall contain the following information: Purchase Order number, item numbers, description of supplies and or/services, sizes, quantities, unit prices and extended totals and applicable sales/use tax. The County is not subject to excise tax.

3.2 USAGE REPORT:

The Contractor shall furnish the County a monthly usage report delineating the acquisition activity governed by the Contract. The format of the report shall be approved by the County and shall disclose the quantity and dollar value of each contract item by individual unit. In addition to total monthly consumption and cost figures, hourly chilled water consumption data for each building shall be provided in electronic format via electronic mail or other means.

3.3 ACCEPTANCE

Upon successful completion of the test performance period, the system shall be deemed accepted and the contract period will begin. All documentation shall be completed prior to final acceptance.

Compensation to either party occurring from a project schedule delay (delayed construction completion on the part of the County, or delayed loop completion on the part of the proposer) shall be negotiated and developed after selection of a proposal, and prior to final contract approval. The County recognizes the need to begin the sale of predictable commodity amounts, within predictable timeframes, on the part of the proposer.

~~3.4 TECHNICAL AND DESCRIPTIVE LITERATURE:~~

~~Proposer(s) must include complete manufacturer's technical and descriptive literature regarding the material they propose to provide. Literature shall be sufficient in detail in order to allow full and fair evaluation of the offer submitted. Failure to include this information may result in the bid being rejected.~~

4.0 CONTRACT TERMS & CONDITIONS:**4.1 LANGUAGE FOR REQUIREMENTS CONTRACTS:**

Contractors signify their understanding and agreement by signing this document, that the Contract resulting from this proposal will be a requirements contract. However, this Contract does not guarantee that any purchases will be made. It only indicates that if purchases are made for the services contained in this Contract, that they will be purchased from the Contractor awarded that item. Orders will only be placed when a need is identified by a Using Agency or Department and proper authorization and documentation have been approved.

4.2 CONTRACT LENGTH:

This Request for Proposals is for awarding a firm fixed price contract to cover a ~~FIFTEEN (15)~~ **TWENTY (20)** year period.

4.3 OPTION TO EXTEND:

The County may, at their option and with the approval of the Contractor, extend the period of this agreement up to a maximum of **TWO (2), FIVE (5)** year options. The Contractor shall be notified in writing by the Materials Management Department of the County's intention to extend the contract period at least thirty (30) calendar days prior to the expiration of the original contract period.

4.4 ESCALATION OR DE-ESCALATION:

Any requests for price adjustments must be submitted thirty (30) days prior to the ~~Contract~~ **annual** renewal date. Justification for the requested adjustment in cost of labor and/or materials must be accompanied by appropriate documentation. ~~Escalation shall not exceed the increase in the U.S. Department of Labor (Bureau of Labor Statistics) Consumer Price Index for Urban Consumers.~~ Increases shall be approved in writing by the Materials Management Department prior to any adjusted invoicing submitted for payment.

4.5 UNCONDITIONAL TERMINATION FOR CONVENIENCE:

Maricopa County may terminate the resultant Contract for convenience by providing sixty (60) calendar days advance notice to the Contractor.

4.6 DEFAULT:

The County may suspend, terminate, or modify this contract immediately upon written notice to the Contractor in the event of a nonperformance of stated objectives or other material breach of contractual obligations; or upon the happening of any event which would jeopardize the ability of the Contractor to perform any of its contractual obligations. Maricopa County reserves the right to have service provided by other than the Contractor if the Contractor is unable or fails to provide requested service within the specified time frame.

4.7 TERMINATION BY THE COUNTY:

If the Contractor should be adjudged bankrupt or should make a general assignment for the benefit of its creditors, or if a receiver should be appointed on account of its insolvency, the County may terminate this Agreement. If the Contractor should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to provide enough properly skilled workers or proper materials, or persistently disregard laws and ordinances, or not proceed with work or otherwise be guilty of, a substantial violation of any provision of this Agreement, then the County may terminate this Agreement. Prior to termination of this Agreement, the County shall give the Contractor fifteen (15) calendar days written notice. Upon receipt of such termination notice, the Contractor shall be allowed fifteen (15) calendar days to cure such deficiencies.

4.8 APPROPRIATION CONTINGENCY:

The Contractor recognized that any agreement entered into shall commence upon the day first provided and continued in full force and effect until termination in accordance with its provisions. The Contractor and the County herein recognized that the continuation of any contract after the close of any given fiscal year of the County which fiscal years end on June 30 of each year, shall be subject to the approval of the budget of the County providing for or covering such contract item as an expenditure therein. The County does not represent that said budget item will be actually adopted, said determination being the determination of the County Board of Supervisors at the time of the adoption of the budget.

4.9 ORGANIZATION - EMPLOYMENT DISCLAIMER:

The Contract is not intended to constitute, create, give rise to or otherwise recognize a joint venture agreement or relationship, partnership or formal business organization of any kind, and the rights and obligations of the parties shall be only those expressly set forth in the Contract.

The parties agree that no persons supplied by the Contractor(s) in the performance of obligations under the agreement are considered to be County employees, and that no rights of County civil service, retirement or personnel rules accrue to such persons. The Contractor(s) shall have total responsibility for all salaries, wages, bonuses, retirement withholdings, workmen's compensation, other employee benefits and all taxes and premiums appurtenant thereto concerning such persons, and shall save and hold the County harmless with respect thereto.

4.10 STATUTORY RIGHT OF CANCELLATION FOR CONFLICT OF INTEREST:

Notice is given that pursuant to A.R.S. § 38-511 the County may cancel this Contract without penalty or further obligation within three years after execution of the contract, if any person significantly involved in initiating, negotiating, securing, drafting or creating the contract on behalf of the County is at any time while the Contract or any extension of the Contract is in effect, an employee or agent of any other party to the Contract in any capacity or consultant to any other party of the Contract with respect to the subject matter of the Contract. Additionally, pursuant to A.R.S. § 38-511 the County may recoup any fee or commission paid or due to any person significantly involved in initiating, negotiating, securing, drafting or creating the contract on behalf of the County from any other party to the contract arising as the result of the contract.

4.11 INDEMNIFICATION AND INSURANCE:

4.11.1 INDEMNIFICATION

To the fullest extent permitted by law, the CONTRACTOR shall defend, indemnify, and hold harmless the COUNTY, its agents, representatives, officers, directors, officials, and employees from and against all claims, damages, losses and expenses, including but not limited to attorney fees, court costs, expert witness fees, and the cost of appellate proceedings, relating to, arising out of, or alleged to have resulted from the acts, errors, omissions or mistakes relating to the performance of this Contract. CONTRACTOR'S duty to defend, indemnify and hold harmless the COUNTY, its agents, representatives, officers, directors, officials, and employees shall arise in connection with any claim, damage, loss or expense that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of property, including loss of use resulting therefrom, caused by any acts, errors, omissions or mistakes in the performance of this Contract including any person for whose acts, errors, omissions or mistakes, the CONTRACTOR may be legally liable.

The amount and type of insurance coverage requirements set forth herein will in no way be construed as limiting the scope of the indemnity in this paragraph.

Abrogation of Arizona Revised Statutes Section 34-226:

In the event that A.R.S. § 34-226 shall be repealed or held unconstitutional or otherwise invalid by a court of competent jurisdiction, then to the fullest extent permitted by law, the CONTRACTOR shall defend, indemnify and hold harmless the COUNTY, its agents, representatives, officers, directors, officials and employees from and against all claims, damages, losses and expenses (including but not limited to attorney fees, court costs, and the cost of appellate proceedings), relating to, arising out of, or resulting from CONTRACTOR'S work or services. CONTRACTOR'S duty to defend, indemnify and hold harmless, and the COUNTY, its agents, representatives, officers, directors, officials and employees shall arise in connection with any claim, damage, loss or expense that is attributable to bodily injury, sickness, disease, death, injury to, impairment or destruction of property including loss of use resulting therefrom, caused in whole or in part by any act or omission of the CONTRACTOR, anyone CONTRACTOR directly or indirectly employs or anyone for whose acts CONTRACTOR may be liable, regardless of whether it is caused in part by a party indemnified hereunder, including the COUNTY.

The amount and type of insurance coverage requirements set forth below will in no way be construed as limiting the scope of the indemnity in this paragraph.

The scope of this indemnification does not extend to the sole negligence of the COUNTY.

4.11.2 INSURANCE REQUIREMENTS

CONTRACTOR, at CONTRACTOR'S own expense, shall purchase and maintain the herein stipulated minimum insurance with companies duly licensed, possessing a current A.M. Best, Inc. Rating of B++6, or approved unlicensed companies in the State of Arizona with policies and forms satisfactory to the COUNTY.

All insurance required herein shall be maintained in full force and effect until all work or service required to be performed under the terms of the Contract is satisfactorily completed and formally accepted. Failure to do so may, at the sole discretion of the COUNTY, constitute a material breach of this Contract.

The CONTRACTOR'S insurance shall be primary insurance as respects the COUNTY, and any insurance or self-insurance maintained by the COUNTY shall not contribute to it.

Any failure to comply with the claim reporting provisions of the insurance policies or any breach of an insurance policy warranty shall not affect coverage afforded under the insurance policies to protect the COUNTY.

The insurance policies may provide coverage which contains deductibles or self-insured retentions. Such deductible and/or self-insured retentions shall not be applicable with respect to the coverage provided to the COUNTY under such policies. The CONTRACTOR shall be solely responsible for the deductible and/or self-insured retention and the COUNTY, at its option, may require the CONTRACTOR to secure payment of such deductibles or self-insured retentions by a surety bond or an irrevocable and unconditional letter of credit.

The COUNTY reserves the right to request and to receive, within 10 working days, certified copies of any or all of the herein required insurance policies and/or endorsements. The COUNTY shall not be obligated, however, to review such policies and/or endorsements or to advise CONTRACTOR of any deficiencies in such policies and endorsements, and such receipt shall not relieve CONTRACTOR from, or be deemed a waiver of the COUNTY'S right to insist on strict fulfillment of CONTRACTOR'S obligations under this Contract.

The insurance policies required by this Contract, except Workers' Compensation, shall name the COUNTY, its agents, representatives, officers, directors, officials and employees as Additional Insureds.

The policies required hereunder, except Workers' Compensation, shall contain a waiver of transfer of rights of recovery (subrogation) against the COUNTY, its agents, representatives, officers, directors, officials and employees.

- 4.11.3 Commercial General Liability. CONTRACTOR shall maintain Commercial General Liability insurance with a limit of not less than \$1,000,000 for each occurrence with a \$2,000,000 Products/Completed Operations Aggregate and a \$2,000,000 General Aggregate Limit. The policy shall include coverage for bodily injury, broad form property damage, personal injury, products and completed operations and blanket contractual coverage including, but not limited to, the liability assumed under the indemnification provisions of this Contract which coverage will be at least as broad as Insurance Service Office, Inc. Policy Form CG 00 00 01 1093 or any replacements thereof. The coverage shall include X, C, U.

The policy shall contain a severability of interest provision, and shall not contain a sunset provision or commutation clause, or any provision which would serve to limit third party action over claims.

The Commercial General Liability additional insured endorsement shall be at least as broad as the Insurance Service Office, Inc.'s Additional Insured, Form , CG 20 10 11 85, and shall include coverage for CONTRACTOR'S operations and products and completed operations.

If the CONTRACTOR subcontracts any part of the work, services or operations awarded to the CONTRACTOR, he shall purchase and maintain, at all times during prosecution of the work, services or operations under this Contract, an Owner's and CONTRACTOR'S Protective Liability insurance policy for bodily injury and property damage, including death, which may arise in the prosecution of the CONTRACTOR'S work, service or operations under this Contract. Coverage shall be on an occurrence basis with a limit not less than \$1,000,000 per occurrence, and the policy shall be issued by the same insurance company that issues the CONTRACTOR'S Commercial General Liability insurance.

- 4.11.4 Automobile Liability. CONTRACTOR shall maintain Automobile Liability insurance with an individual single limit for bodily injury and property damage of no less than \$1,000,000, each occurrence, with respect to CONTRACTOR'S vehicles (whether owned, hired, non-owned), assigned to or used in the performance of this Contract.
- 4.11.5 Workers' Compensation. The CONTRACTOR shall carry Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of CONTRACTOR'S employees engaged in the performance of the work or services, as well as Employer's Liability insurance of not less than \$1,000,000 for each accident, \$1,000,000 disease for each employee, and \$1,000,000 disease policy limit.

In case any work is subcontracted, the CONTRACTOR will require the Subcontractor to provide Workers' Compensation and Employer's Liability insurance to at least the same extent as required of the CONTRACTOR.

4.12 CERTIFICATES OF INSURANCE

Prior to commencing work or services under this Contract, CONTRACTOR shall furnish the COUNTY with Certificates of Insurance, or formal endorsements as required by the Contract, issued by CONTRACTOR'S insurer(s), as evidence that policies providing the required coverages, conditions and limits required by this Contract are in full force and effect. Such certificates shall identify this contract number and title.

In the event any insurance policy(ies) required by this contract is(are) written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of the CONTRACTOR'S work or services and as evidenced by annual Certificates of Insurance.

If a policy does expire during the life of the Contract, a renewal certificate must be sent to the COUNTY fifteen (15) days prior to the expiration date.

4.13 CANCELLATION AND EXPIRATION NOTICE:

Insurance required herein shall not expire, be canceled, or materially changed without thirty (30) days prior written notice to the COUNTY.

4.14 PERFORMANCE BOND:

The successful Contractor will be required to furnish a performance bond in the amount of \$5,000,000.00 within 10 days from receipt of notification of award. Date of U.S. postmark will be accepted as date of delivery of performance bond. Contractors are requested to tender this bond on a Document approved by the Arizona Department of Insurance. One Contractor failing to supply a performance bond as required will forfeit his right to the contract. A cashier's check, certified commercial check, irrevocable letter of credit or certificate of deposit, will be accepted in lieu of bond. **Performance bonds are to be identified with bid serial number, title and return address.**

4.15 OFFSET FOR DAMAGES:

In addition to all other remedies at Law or Equity, the County may offset from any money due to the Contractor any amounts Contractor owes to the County for damages resulting from breach or deficiencies in performance under this Contract.

4.16 ADDITIONS/DELETIONS OF SERVICE:

The County reserves the right to add and/or delete services to this Contract. Should a service requirement be deleted, payment to the Contractor will be reduced proportionally, to the amount of service reduced in accordance with the bid price. Should additional services be required from this Contract, prices for such additions will be negotiated between the Contractor and the County.

4.17 ASSIGNMENT OR SUBCONTRACTING:

Neither this Agreement, nor any portion thereof, may be assigned by Contractor without the written consent of the County first having been obtained. Any attempt by the Contractor to assign or subcontract any performance of this Contract without the written consent of the County shall be null and void and shall constitute a breach of this Contract.

The Subcontractor's rate for the job shall not exceed that of the Prime Contractor's rate, as bid in the pricing section, unless the Prime Contractor is willing to absorb any higher rates. The Subcontractor's invoice shall be invoiced directly to the Prime Contractor, who in turn shall pass-through the costs to the County, without mark-up. A copy of the Subcontractor's invoice must accompany the Prime Contractor's invoice.

4.18 AMENDMENTS:

All amendments to this Contract must be in writing and signed by both parties.

4.19 CONFORMATION WITH THE LAW:

This service shall be accomplished in conformity with the laws, ordinances, rules, regulations and zoning restrictions of the United States of America, the State of Arizona, County of Maricopa, and the City of Phoenix.

4.20 CONTRACT COMPLIANCE MONITORING:

The Materials Management Department and Facilities Management Department shall monitor the Contractors compliance with, and performance under, the terms and conditions of the Contract. The Contractor shall make available for inspection and/or copying by the County all records and accounts relating to the work performed or the services provided in this Contract.

4.21 RETENTION OF RECORDS:

The Contractor agrees to retain all financial books, records, and other documents relevant to this Contract for five (5) years after final payment or until after the resolution of any audit questions which could be more than five (5) years, whichever is longer. The Department, Federal or State auditors and any other persons duly authorized by the Department shall have full access to, and the right to examine, copy and make use of any and all said materials.

4.22 ADEQUACY OF RECORDS:

If the Contractor's books, records and other documents relevant to this Contract are not sufficient to support and document that allowable services were provided to eligible clients the Contractor shall reimburse Maricopa County for the services not so adequately supported and documented.

4.23 AUDIT DISALLOWANCES:

If at any time it is determined by the Department that a cost for which payment has been made is a disallowed cost, the Department shall notify the Contractor in writing of the disallowance and the required course of action, which shall be at the option of the Department either to adjust any future claim submitted by the Contractor by the amount of the disallowance or to require repayment of the disallowed amount by the Contractor forthwith issuing a check payable to Maricopa County.

4.24 P.O. CANCELLATION LANGUAGE:

The Department of Materials Management reserves the right to cancel Purchase Orders within a reasonable period of time after issuance. Should a Purchase Order be canceled, the County agrees to reimburse the Contractor but only for actual and documentable costs incurred by the Contractor due to and after issuance of the Purchase Order. The County will not reimburse the Contractor for any costs incurred after receipt of County notice of cancellation, or for lost profits, shipment of product prior to issuance of Purchase Order, etc. Contractors agree to accept verbal notification of cancellation from the Department of Materials Management with written notification to follow. By submitting a proposal in response to this solicitation, the Contractor specifically acknowledges to be bound by this cancellation policy.

4.25 RIGHTS IN DATA:

The County shall have the use of data and reports resulting from this Contract without additional cost or other restriction except as may be established by law or applicable regulation. Each party shall supply to the other party, upon request, any available information that is relevant to this Contract and to the performance hereunder.

4.26 SECURITY AND PRIVACY:

The Contractor agrees that none of its officers or employees shall use or reveal any research or statistical information furnished by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained. Copies of such information shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceedings, unless ordered by a court of competent jurisdiction. The County shall be notified immediately upon receipt of any such order of court, pertaining to production of such information.

The Contractor shall incorporate the foregoing provisions of this paragraph in all of its authorized Subcontracts.

4.27 SEVERABILITY:

Any provision of this Contract which is determined to be invalid, void, or illegal shall in no way affect, impair, or invalidate any other provision hereof, and remaining provisions shall remain in full force and effect.

4.28 VALIDITY:

The invalidity, in whole or in part, of any provision of this Agreement shall not void or affect the validity of any other provision of this Contract.

4.29 CONTRACTOR RESPONSIBILITY:

The Contractor will be responsible for any damages whatsoever to County property as applicable when such property is the responsibility or in the custody of the Contractor, his Employees or Subcontractors.

Contractor agrees that all Subcontractors performing work under this Contract shall comply with its provisions and it is expressly understood that all persons employed by the Contractor, either directly or indirectly, shall be considered employees of the Contractor, and not employees of Maricopa County.

Contractor acknowledges and agrees that it is liable and responsible for any act or omission by the Contractor, its employees, agents, officers, representatives, and subcontractors occurring in the course of Contractor's performance of this Contract, whether such act or omission occurs on County property or elsewhere. Contractor shall be liable for any loss or damage arising out of or related to Contractor's performance of this contract, Contractor shall bear the above stated liability, even in absence of its own negligence, unless County actions caused the loss or damage (i.e., if regulation, but damage occurs, Contractor is responsible for such damages.) Contractor shall bear the above stated liability, consequential, incidental, direct, and indirect damages, and shall be liable for all costs, including attorney's fees, incurred by the County to enforce this provision.

4.30 FAILURE TO PROVIDE SERVICES:

Maricopa County reserves the right to have service provided by other than the Contractor if the Contractor is unable or fails to provide requested service within the specified time frame.

4.31 DELIVERY:

It shall be the Contractor's responsibility to meet the County's delivery requirements, as called for in the Technical Specifications. Maricopa County reserves the right to obtain material on the open market in the event the Contractor fails to make delivery and any price differential will be charged against the Contractor.

4.32 PRICE REDUCTIONS:

By submitting a bid or proposal in response to this solicitation, Contractors agree to guarantee that Maricopa County is receiving the lowest price offered by your company to other customers **added to this loop or generating plant.** ~~for similar services at comparable volumes in a similar geographic area.~~ If at any time during the contract period your company offers a lower price to another customer, notification not be made of price reductions, upon discovery Maricopa County shall reserve the right to take any or all of the following actions:

4.32.1 Cancel the Contract, if it is currently in effect.

4.32.2 Determine the amount which the County was overcharged and submit a request for payment from the Contractor for that amount.

4.32.3 Take the necessary steps to collect any performance surety provided on the applicable contract.

4.33 CHANGES:

The County may require changes in the scope of the services to be performed by the Contractor hereunder. All such changes, which are mutually agreed upon by and between all the parties, shall be incorporated in written amendments to this Contract. All such amendments shall state any increase or decrease in the amount of the compensation due to the Contractor for the change in scope.

4.34 EMPLOYEE RESPONSIBILITY:

No responsibility will attach to a county employee for the premature opening of a proposal not properly addressed and identified in accordance with the proposal documents.

NORTHWIND PHOENIX, LLC, PO BOX 53920 M/S 9996, 400 E VAN BUREN ST SUITE 750, PHOENIX, AZ, 85072-3920

S049101 / B0604562 / NIGP 9069201

WILLING TO ACCEPT FUTURE SOLICITATIONS VIA EMAIL: YES

INTERNET ORDERING CAPABILITY: NO

OTHER GOV'T. AGENCIES MAY USE THIS CONTRACT: NO

		Commodity Charges:	Demand Charges:	Ancillary Fees:	Initial Project Costs (if any):
6.1	<u>NEW DOWNTOWN JAIL</u>	\$ <u>.085</u> /per ton-hr.	\$ <u>15.83*</u> /per peak ton	\$ <u>0</u>	\$ <u>0</u>
6.2	<u>NEW OFFICE COMPLEX</u>	\$ <u>.085</u> /per ton-hr.	\$ <u>15.83*</u> /per peak ton	\$ <u>0</u>	\$ <u>0</u>
6.3	<u>NEW RECORDS RETENTION</u>	\$ <u>.085</u> /per ton-hr.	\$ <u>15.83*</u> /per peak ton	\$ <u>0</u>	\$ <u>0</u>
6.4	<u>NEW FORENSIC SERVICES</u>	\$ <u>.085</u> /per ton-hr.	\$ <u>15.83*</u> /per peak ton	\$ <u>0</u>	\$ <u>0</u>
6.5	<u>FACILITIES MANAGEMENT</u>	\$ <u>.085</u> /per ton-hr.	\$ <u>15.83*</u> /per peak ton	\$ <u>0</u>	\$ <u>0</u>

*Per Month

COMPANY WEB SITE: www.apses.com

COMPANY CONTACT (REP): **Larry Russell**

E-MAIL ADDRESS (REP): Larry.Russell@apses.com

Terms: Net 10 days

Vendor Number: **W000004535 X**

Telephone Number: (602) 744-**5254**

Fax Number: (602) 744-**5136**

Contract Period: To cover the period ending **APRIL 30, 2020.**

MASTER CHILLED WATER SERVICE AGREEMENT

Dated as of June 21, 2000

Between

Northwind Phoenix, LLC

and

Maricopa County,
By and Through its
Facilities Management Department

MASTER CHILLED WATER SERVICE AGREEMENT COVER PAGE

This Cover Page is attached to and made a part of that certain Master Chilled Water Service Agreement dated June 21, 2000, by and between the Customer identified below and Northwind Phoenix, LLC, a Delaware Limited Liability Company.

CUSTOMER: Maricopa County, a political subdivision of the State of Arizona, by and through its Facilities Management Department.

CUSTOMER'S INTEREST IN PREMISES: Sole Owner

OWNER OF PREMISES: Sole Owner

ADDRESS OF PREMISES: New Downtown Jail (Bounded by 3rd-4th Ave & Jefferson – Madison St.)
New Office Complex (bounded by 6th-7th Ave. & Jefferson–Madison St.
Phoenix, Arizona

PROJECTED COMMENCEMENT DATE: By April 1, 2003

DURATION OF INITIAL TERM: Twenty (20) years beginning upon the Commencement Date together with an option for two (2) additional five-year extensions.

CONTRACT CAPACITY: 3,000 Tons of chilled water service, subject to a one-time adjustment as provided for in Section 1.1 of the Agreement.

INITIAL CONTRACT CAPACITY CHARGE: \$ 47,500 per month. This charge shall be adjusted from time to time in accordance with the terms of the Chilled Water Service Agreement.

INITIAL CONSUMPTION CHARGE: \$.085 per Ton-Hour of chilled water service. This charge shall be adjusted from time to time in accordance with the terms of the Chilled Water Service Agreement.

NOTICES: All notices and other communications shall be addressed as follows:

If to Supplier:
Northwind Phoenix, LLC
400 E. Van Buren St., Su 750
Phoenix, AZ 85004
Attn: General Manager

If to Customer:
Maricopa County
401 W. Jefferson St
Phoenix , AZ 85003
Attn: Director, Facility Management Dept.

This Cover Page is an integral part of the Chilled Water Service Agreement and its terms are incorporated into such Agreement by reference.

MASTER CHILLED WATER SERVICE AGREEMENT

THIS MASTER CHILLED WATER SERVICE AGREEMENT is dated as of June 21, 2000 (the "Effective Date"), by and between **NORTHWIND PHOENIX, LLC**, a Delaware Limited Liability Company (the "Supplier"), and the customer (the "Customer") identified on the Cover Page (this and all other capitalized terms used in this Agreement shall have the meanings ascribed to those terms in Appendix A attached to this Agreement).

RECITALS:

- A. Customer possesses an interest in the Premises, which interest is described more fully on the Cover Page.
- B. Customer desires to purchase from Supplier, and Supplier desires to provide to Customer, chilled water service to cool space within the Premises, on the terms and subject to the conditions set forth in this Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Supplier and Customer agree as follows:

- 1. Chilled Water Service. Supplier agrees to supply Customer with Customer's requirements for chilled water service up to the Contract Capacity to cool space within the Premises. If Customer's demand exceeds the Contract Capacity by ten percent (10%) during a period of three (3) consecutive months during the term of this Agreement, such shall be addressed by the parties in accordance with the provisions of the Contingency Plan adopted pursuant to Section 12.1 of this Agreement.
 - 1.1 Adjustment in Contract Capacity. Customer shall have the right to adjust the Contract Capacity provided for it under this Agreement giving consideration to the needs for chilled water services at the Premises served under this Agreement as determined upon the experience gained in operating the Premises over the 2003 and 2004 cooling seasons (May through September). If Customer elects to adjust its Contract Capacity based upon this experience, it shall do so by written notice to Supplier no later than October 31, 2004. Such adjustment may not be more than twenty-five percent (25%) from the Contract Capacity stated in the Cover Page.
 - 1.2 Additional Facilities. From time to time after the Effective Date of this Agreement, the parties may agree to add other facilities owned and/or operated by the Customer to receive chilled water service under this Agreement, upon terms and conditions to be mutually agreed upon by the parties in writing, which shall be deemed subject to the terms of this Agreement, except to the extent otherwise agreed by the parties. Supplier agrees to provide such additional chilled water services, subject to capacity limitations that may then exist in its ability to serve additional Customer facilities.
 - 1.2.1 Northwind Distribution System. Northwind will extend the Northwind chilled water distribution pipe on Madison Street from 4th Avenue to approximately 2nd Avenue (the distribution pipe would terminate just east of the tap into the County courts Central Plant) to serve the County Courts Central Plant and Madison Jail. Northwind shall install a "T" and valves at the west side of the Madison Street & 4th Avenue intersection for future extension to the government Services (Blue) Building.
 - 1.2.2 County Central Plant. 111 S. 3rd Avenue. Northwind shall install a 1,100 ton chilled water service into the County Central Plant in lieu of the capacity associated with the Plaza de Maricopa office complex at 5th Avenue and Jefferson St. The service would be for a 20-year term and the County would reimburse Northwind for expenses associated with the service installation. In-Service date of June 1,2003.
 - (a) Upon commencement of services the Completion Bond required in Section 2.1 of the Master Agreement may be cancelled.
 - (b) The County has a right to transfer the chilled water service from the Central Plant to the Madison Street Jail, but would be subject to a transfer payment.

- (1) The transfer payment is determined by the total cost to reimburse Northwind for its additional investment and related costs associated with only serving the Madison Street Jail and assumes a 1,100 ton capacity charge for the Madison Street Jail.
- (2) The transfer payment due to Northwind is \$ 1.45 million at time of transferring the service. (This cost is Northwind's "stranded" costs if the County were to disconnect the Central Plant.)
- (3) The termination payment in the Master Agreement (applies only if the Central Plant Northwind service was terminated and the Madison Street Jail was not connected to Northwind) for the Central Plant would be calculated by adding the transfer payment and the present value of the remaining capacity charge payments on the term of the agreement escalated at 2.5% annually and discounted at 9% per this Agreement.

1.2.3 Madison Street Jail, 225 W. Madison. Northwind shall install a service stub-out capable of serving 1,100 tons to the property line for future connection to the Jail at the location directed by the County. The County would reimburse Northwind for expenses associated with the service stub-out.

- (a) The Madison Street Jail capacity amount and commencement date is allowed to vary without any limitations up the beginning of the remodeling project design development.
- (b) The County would be allowed to modify the contract capacity up to 25% for two summers after connection to Northwind.
- (c) Northwind would have up to the beginning of the remodeling project design development to commit to the County it will serve the Madison Street Jail by the in-service date required by the County.
- (d) At the time the Madison Street Jail is connected, Northwind will extend the service from the stub-out to the heat exchanger(s), up to 40 feet of piping. Northwind will pay for the costs to install the service pipe, heat exchanger and other related service work on the primary side of the heat exchanger(s) if the Central Plant remains connected to Northwind. If at any time the Central Plant is disconnected, the Northwind would be reimbursed their costs associated with the connection of the service to the Madison Street Jail. The County would be responsible for connecting the building loop to the secondary side of the heat exchanger(s).

1.2.4 Government Services (Blue) Building, 5th Avenue and Jefferson St. Northwind will allow the building capacity amount and commencement date to vary with out any limitations up to the beginning of project design development.

- (a) Northwind would have up to the beginning of the project design development to commit to the County it will seeve the building by the in-service date required by the County.
- (b) Northwind will extend the service from the stub-our at 4th Avenue and Madison to the heat exchanger(s) in the building. Northwind will pay for the costs to install the service pipe, heat exchanger(s)
- (c) The County would be allowed to modify their contract capacity up to 25% for two summers after connection to Northwind.

1.2.5 4th Avenue Jail. The County is allowed to adjust the Capacity Amount of the 4th Avenue Jail by no greater than 25% of the 1,600 tons per Section 1.1 of this Agreement.

1.3 Specifications for Chilled Water Service. The specifications for chilled water services provided to Customer under this Agreement, including the temperature and pressure of the chilled water, are set forth in the IOM Specifications attached to this Agreement as Appendix E. Customer may not use the chilled water provided to Customer pursuant to this Agreement to cool space within properties other than the Premises. The parties acknowledge and agree that the Customer's new Jail Facility, to be served under this Agreement with chilled water service is to be accorded the highest priority of service provided by Supplier, second only to the chilled water service to be provided by the Supplier to the Bank One Ballpark, and above all other customers served or to be served with chilled water service in the Downtown Phoenix Area.

2. Term.

- 2.1 Commencement Date This Agreement is effective upon its execution by the parties. The Commencement Date shall be the date on which Supplier is ready and able to begin supplying Customer with the chilled water service in accordance with the terms of this Agreement, provided such date shall not be earlier than the Projected Commencement Date unless otherwise agreed by Supplier and Customer. If the Commencement Date fails to occur within fifteen (15) days after the Projected Commencement Date for any reason other than the occurrence of a Force Majeure Event or a delay caused by Customer, then Supplier shall provide Customer with a temporary substitute cooling system reasonably acceptable to Customer within eighteen (18) days after the Projected Commencement Date, provided that the use of such temporary substitute service or system shall not relieve Customer from the obligation of paying the Contract Capacity Charge or any other amounts set forth in this Agreement. If Supplier does not begin to supply Customer with the chilled water service required by this Agreement within forty-five (45) days after the Projected Commencement Date for any reason other than the occurrence of a Force Majeure Event or Customer Default, then Customer may terminate this Agreement upon not less than five (5) days prior written notice to Supplier given at any time prior to the sixtieth (60th) day following the Projected Commencement Date, in which event Supplier shall be liable to the Customer for the positive difference, if any, between the cost of cooling Customer would have incurred under this Agreement and the cost it actually incurs to acquire a cooling substitute for its Premises to be served under this Agreement. If Customer fails to take chilled water service under this Agreement on the Commencement Date for any reason other than the occurrence of a Force Majeure Event or a delay caused by Supplier, Customer shall nevertheless be obligated to commence payment to Supplier of the Contract Capacity Charge. Supplier will provide a completion bond in the initial amount of five million dollars (\$5,000,000.00) within ten (10) business days after execution of this Agreement. The completion bond will be provided on a form acceptable to the Arizona Department of Insurance. The completion bond will be identified with bid serial number, title and return address.
- 2.2 Initial Term; Extensions. The Initial Term of this Agreement commences on Commencement Date and continues for the period specified on the Cover Page, unless terminated earlier pursuant to the terms of this Agreement. Customer shall have the option of extending the Initial Term for two (2) additional five-year renewal terms, upon ninety (90) days' prior written notice to Supplier, subject to the same terms and conditions as provided for in this Agreement.
- 2.3 Charges and Adjustments:
- 2.3.1 Monthly Contract Capacity Charge. From and after the Commencement Date, Customer shall pay to Supplier monthly during the term of this Agreement the Contract Capacity Charge for Supplier's undertaking to supply chilled water service up to the Contract Capacity.
- 2.3.2 Consumption Charge. Customer shall pay to Supplier the monthly Consumption Charge for chilled water service actually provided to Customer during such month.
- 2.3.3 Pricing Verification. Supplier has represented to Customer that during the term of this Agreement, Customer shall be afforded pricing for chilled water service that is consistent with the lowest pricing afforded Supplier's customers connected to the Supplier's district cooling system in Downtown Phoenix, with substantially similar services at substantially similar volumes. Customer or Customer's designated representative shall have the right to verify this representation annually on the anniversary date of the Commencement Date by reviewing Supplier's records reflecting pricing afforded Supplier's most preferred customers; provided, however, that Customer understands and agrees that such information is confidential and as between Supplier and Customer shall remain the exclusive property of Supplier. Customer may inspect such information but may not make copies or excerpts or otherwise disclose such information.

2.4 Adjustments.

2.4.1 Contract Capacity Charge. On February 1, 2001, and on February 1 of each year thereafter, the Contract Capacity Charge shall be adjusted by the sum of the following:

- (a) The initial Contract Capacity Charge, plus
- (b) The product of (i) the initial Contract Capacity Charge, multiplied by (ii) the percentage change, if any, in the Consumer Price Index ("CPI"). The percentage change is calculated by dividing the column headed "ANN" of the table included in Appendix D for the calendar year immediately preceding the calendar year in which the adjustment to the Contract Capacity Charge is to occur by the column headed "ANN" of the table included in Appendix D for year 1999 (base year) and subtracting 100%.

The foregoing adjustment shall in no event result in a decrease in the Contract Capacity Charge in any year except as otherwise expressly provided for in this Agreement. The Contract Capacity Charge, if adjusted as aforesaid, shall remain unchanged until it is adjusted again pursuant to the terms of this Section or Section 2.4.3 below. Attached hereto as Appendix D is an illustration that contains a sample of the CPI values and an example of the calculation of the adjustment provided for in this Section 2.4.1. Actual CPI values will be updated accordingly.

2.4.2 Consumption Charge. On February 1, 2001, and on February 1 of each year thereafter, the Consumption Charge shall be adjusted by the sum of the following:

- (a) The initial Consumption Charge; plus
- (b) The product of (i) the initial Consumption Charge, multiplied by (ii) fifty percent (50%) of the percentage increase or decrease, if any, in the CPI. The percentage change is calculated by dividing the column headed "ANN" of the table included in Appendix D for the calendar year immediately preceding the calendar year in which the adjustment to the Consumption Charge is to occur by the column headed "ANN" of the table included in Appendix D for year 1999 (base year) and subtracting 100%; plus
- (c) The product of (i) the initial Consumption Charge, multiplied by (ii) fifty percent (50%) of the percentage increase, if any, in the Producer Price Index ("PPI"). The percentage change is calculated by dividing the column headed "ANN" of the table included in Appendix D for the calendar year immediately preceding the calendar year in which the adjustment to the Consumption Charge is to occur by the column headed "ANN" of the table included in Appendix D for year 1999 (base year) and subtracting 100%.

The Consumption Charge, if adjusted as aforesaid, shall remain unchanged until it is adjusted again pursuant to the terms of this Section or Section 2.4.3 below. Attached hereto as Appendix D is an illustration which contains sample indices and calculation of the adjustment provided for in this Section 2.4.2. Actual index values will be updated accordingly.

2.4.3 Effects of Changes of Law; Taxes, Fees and other Charges. Supplier may adjust the Contract Capacity Charge and the Consumption Charge to reflect any other increases or decreases in Supplier's costs of providing chilled water service that result from the adoption or modification of any applicable laws, rules, ordinances, regulations or orders of any governmental authority, or from any change in the interpretation by any court, tribunal or regulatory agency of any such applicable laws, rules, ordinances, regulations or orders, after the date of this Agreement, and such adjustment shall become effective immediately upon notice of the adjustment to Customer. By way of illustration and not exclusion, Customer shall pay to Supplier any Taxes levied upon the acquisition and installation of the Connection Equipment for Customer's benefit, and the supply of chilled water service under this Agreement, including without limitation any use or license fee, upon receipt of Supplier's invoice for such Taxes.

3. Payment Terms

- 3.1 Invoices. Beginning on the Commencement Date, Supplier shall deliver to Customer monthly invoices reflecting all amounts then owing by Customer. Each invoice shall provide the Customer's monthly measured ton-hours consumed and peak demand tonnage. In addition, Supplier will provide Customer with hourly chilled water consumption data measured in tons, or flowrate and temperature difference, for each building served, for each month of service. The data will be provided electronically by way of spreadsheet or delimited text format within thirty (30) days after the end of each billing cycle. Attached to this Agreement, as Appendix D, is a sample bill that illustrates the manner in which Customer's monthly billing will be calculated. The Contract Capacity Charge shall be prorated for partial first and last months within the term of this Agreement and shall be due and payable each month in advance. The Consumption Charge shall be due and payable each month in arrears. Payment shall be due in full, on or before the tenth (10th) day following receipt of each invoice. Customer shall not be permitted to setoff any amounts owing by Customer to Supplier against any amounts owing by or claimed to be owing by Supplier to Customer or otherwise reduce any amounts owing by Customer to Supplier.
- 3.2 Disputed Invoices. If Customer provides Supplier with written notice of its good faith belief that a Consumption Charge set forth on an invoice from Supplier is incorrect within ten (10) days after receipt of such invoice, then Customer may withhold the payment of the disputed portion of such Consumption Charge; provided, however, that at no time may Customer withhold payment of Consumption Charges exceeding Thirty Thousand and 00/100 Dollars (\$30,000.00) in the aggregate, nor may Customer withhold payment of any amounts that are not in dispute. If Customer fails to pay any portion of the Consumption Charges withheld pursuant to the terms of the preceding sentence, no Customer Default shall be deemed to exist because of such failure of payment provided that Customer pays the amount the Customer and Supplier agree is owing to Supplier within ten (10) days following the resolution of such dispute.
- 3.3 Default Rate Interest. Any amounts owing by Customer to Supplier pursuant to the terms of this Agreement and not paid when due shall bear interest until paid at the rate defined in Section 35-342, Arizona Revised Statutes, and such interest shall be due and payable upon receipt of Supplier's invoice.

4. Installation, Maintenance and Ownership of Transfer Station and Connection Equipment

- 4.1 Installation of Equipment. Supplier shall install the Equipment in accordance with the IOM Specifications attached to this Agreement as Appendix E. Customer shall cooperate with Supplier to the extent necessary to facilitate the installation of the Equipment in a timely, safe and efficient manner. The Transfer Station shall remain the personal property of Supplier and shall not be deemed a fixture of the Premises.
- 4.2 Location of Equipment. Customer shall provide a safe and secure space within the Premises that is reasonable and appropriate for the installation, inspection, testing, servicing, maintenance, operation, replacement and removal of the Equipment, which space shall include the location(s) described in the IOM Specifications. Supplier shall be given a reasonable right of ingress to and egress from the Equipment on the Premises in accordance with Section 6.
- 4.3 Maintenance of Transfer Station. Supplier shall maintain the Transfer Station during the term of this Agreement, at Supplier's sole cost and expense, in accordance with IOM Specifications, provided that if the Transfer Station is damaged or destroyed as a direct result of the acts of Customer or its agents, employees, tenants, customers, contractors or other Persons for whom Customer is responsible, then Customer shall be liable for the cost of the required repair or replacement.
- 4.4 Connection Equipment. Customer shall maintain the Connection Equipment during the term of this Agreement, at Customer's sole cost and expense, in accordance with IOM Specifications. The Connection Equipment shall become the property of Customer upon the actual Commencement Date.

4.5 Point of Responsibility. The parties agree that Supplier shall be responsible for the operation and maintenance of its Equipment up to and at the heat exchanger (the “Point of Interconnection”) and Customer shall be responsible for operation and maintenance of its equipment after the Point of Interconnection.

5. Metering.

Chilled water service provided by Supplier shall be metered through devices provided by Supplier for such purpose as provided for in the IOM Specifications attached to this Agreement as Appendix E. Such meters shall be owned and maintained by the Supplier. Customer shall not tamper with or otherwise interfere with such devices.

6. Rights of Access.

6.1 Generally. Commencing on the date of this Agreement, Supplier and its employees, agents, contractors and representatives shall have a non-exclusive right of access to and through the Premises (and, if applicable, any additional Customer facilities made subject to this Agreement) at all times to the extent reasonably necessary for the convenient and efficient exercise and performance of Supplier’s rights, duties and obligations under this Agreement, including the installation, testing, maintenance, operation, repair, replacement and removal of the Equipment.

6.2 Protection of Transfer Station. Neither Customer nor its agents, employees, tenants, customers, contractors or other Persons under its control shall authorize or permit any Person (other than a duly authorized employee or agent of Supplier) to operate, maintain, alter or otherwise have access to the Transfer Station, any component of the Transfer Station or other property of Supplier located on or in the Premises, or to break or replace any seal or lock of Supplier, or to alter or interfere with the operation of meters or Supplier’s connection or metering equipment, or any other equipment (other than the Connection Equipment) installed by Supplier on the Premises; provided, however, that if Customer reasonably believes that access to the aforementioned equipment or property is necessary to prevent imminent harm to persons or property, then such access shall be permissible if and only if Customer takes only those actions with respect to such equipment or property, as are reasonably necessary to prevent said imminent harm and Supplier is promptly notified of such access and other action taken by Customer.

7. Insurance Requirements The respective insurance requirements for Supplier and Customer are set forth in Appendix C attached hereto, and except as otherwise provided in Appendix C, the insurance described therein shall be maintained throughout the term of this Agreement. The liability of each party under this Agreement to the other party shall not be diminished or limited by the insurance limitations set forth in said Appendix C. All insurance policies required by this Section shall provide that such policies may not be canceled or terminated without thirty (30) days prior written notice to both Customer and Supplier. Either party may self-insure all or any portion of the insurance requirements.

8. Events of Default

8.1 Supplier Default. The occurrence at any time of any of the following events shall constitute a “Supplier Default”:

8.1.1 Failure to Provide Chilled Water Service. The unexcused failure of Supplier to provide the chilled water service as required by this Agreement, if and only if

(a) Supplier has not provided Customer with temporary substitute chilled water service reasonably acceptable to Customer up to the lesser of the Contract Capacity or the Tons of chilled water service then required by Customer for the comfort, use and enjoyment of the Premises as contemplated in this Agreement and

(b) such failure is not due to an interruption of service that is permitted pursuant to Section 9, below and such failure continues for more than three (3) consecutive days, and

- (c) Customer is ready, willing and able to receive such chilled water service and Supplier's failure is not otherwise the result of Customer's acts or omissions or those of its agents, employees, tenants, customers or contractors or of any other Persons for whom Customer is responsible or over which Customer has control.

8.1.2 Failure to Perform Other Obligations. The failure of Supplier to perform or cause to be performed any obligation required to be performed by Supplier under this Agreement other than a failure described in the preceding Section; provided, however, that if by agreement of the parties such failure by its nature can be cured, then Supplier shall have a period of forty-five (45) days after receipt of written notice from Customer of such failure to cure the same and a Supplier Default shall not be deemed to exist during such period, and provided further, that if Supplier commences to cure such failure during such period and is diligently and in good faith attempting to effect such cure, said period shall be extended for sixty (60) additional days.

8.2 Customer Default. The occurrence at any time of any of the following events shall constitute a "Customer Default":

8.2.1 Failure to Pay. The failure of Customer to pay any undisputed amounts owing to Supplier on or before the tenth (10th) day following the date on which such amounts are due and payable under the terms of this Agreement.

8.2.2 Failure to Perform Other Obligations. The failure of Customer to perform or cause to be performed any other obligation required to be performed by Customer under this Agreement; provided, however, that if by agreement of the parties such failure by its nature can be cured, then Customer shall have a period of forty-five (45) days after written notice from Supplier of such failure to cure the same and a Customer Default shall not be deemed to exist during such period, and provided further, that if Customer commences to cure such failure during such period and is diligently and in good faith attempting to effect such cure, said period shall be extended for sixty (60) additional days.

9. Planned Maintenance; Other Service Interruptions

9.1 Planned Maintenance. Supplier shall have the right to interrupt or reduce Customer's chilled water service for a reasonable duration not to exceed three (3) consecutive days (unless otherwise agreed to or addressed by the parties in the Contingency Plan adopted pursuant to Section 12.1), upon prior written notice to Customer, for the purpose of performing ordinary maintenance, repairs, replacements, connections or changes (on or off the Premises) of or to the Transfer Station or any other equipment or apparatus which is required by good engineering and operating practices or by manufacturer's specifications. In addition, Supplier shall provide at least thirty (30) days' prior written notice when it plans to undertake planned maintenance on its chiller plant located at the Bank One Ballpark. Supplier shall diligently attempt to restore service as soon as is reasonably possible and, in order to minimize interference with the normal operations of the Premises, Supplier shall schedule such interruptions and reductions during non-summer months and during non-business hours to the extent reasonably practicable.

9.2 Other Interruptions. Supplier shall have the right to interrupt or reduce Customer's chilled water service for a duration determined necessary by Supplier, in its good faith judgment if (i) a Force Majeure Event has occurred that causes or requires such interruption or reduction of such service, or (ii) the Connection Equipment or the Premises has become dangerous or defective in Supplier's good faith judgment and, as a result thereof, Supplier believes that such interruption or reduction is necessary to prevent injury to other Persons or damage to or destruction of any component of the Transfer Station or Supplier's other equipment and piping or to prevent the interruption or reduction of Supplier's service to its other customers. In such event, Supplier shall endeavor in good faith and in the exercise of reasonable diligence to provide Customer with as much advance notice of such interruption or reduction as may be reasonably practicable taking into consideration the prevailing circumstances existing at the time.

10. Force Majeure Events. If either party to this Agreement is prevented from or delayed in performing any of its obligations under this Agreement by reason of a Force Majeure Event, such party shall notify the other party in writing as soon as practicable after the onset of such Force Majeure Event and shall be excused from the performance of its obligations under this Agreement to the extent such Force Majeure Event has interrupted such performance. The party whose performance under this Agreement is prevented or delayed as the result of a Force Majeure Event shall use reasonable efforts to remedy its inability to perform. If a party's failure to perform its obligations under this Agreement is due to a Force Majeure Event, then such failure shall not be deemed a Supplier Default or a Customer Default, as appropriate. Except as expressly provided otherwise in this Agreement, no payment obligation of Customer under this Agreement may be excused or delayed as the result of a Force Majeure Event. If a Force Majeure Event prevents the Supplier from providing chilled water services to Customer under this Agreement for a period of thirty (30) consecutive days or more, then the Monthly Contract Capacity Charge provided for in Section 2.3.1 shall be abated for the remaining period of the Force Majeure Event; provided, however, that the parties contemplate that during such period of time, cooling shall be provided in accordance with the Contingency Plan agreed to by the parties under Section 12, unless the Force Majeure Event impairs Supplier's ability to do so. If a Force Majeure event lasts longer than sixty (60) consecutive days, either party shall have the right to terminate this Agreement.

11. Customer's Rights and Remedies

11.1 Customer's Remedies upon Occurrence of a Supplier Default.

Notwithstanding anything contained in this Agreement, or as set forth at law or in equity to the contrary, the following shall be the exclusive remedies available to Customer in the event of a Supplier Default. Customer may pursue any or all of the remedies set forth below, as appropriate, and the pursuit of any particular remedy shall not be deemed to be an election of remedies to the exclusion of the other remedies set forth in this Section 11.1.

- (a) Abatement. If a Supplier Default described in Section 8.1.1, above, has occurred, Customer shall be entitled to an abatement of the Contract Capacity Charge from the date on which such Supplier Default commenced through the date on which chilled water service is resumed in accordance with the terms of this Agreement or this Agreement is terminated.
- (b) Termination. If a Supplier Default as described in Section 8.1, above has occurred and the conditions causing such Supplier Default have continued thereafter for not less than forty-five (45) consecutive days, and if Supplier fails to correct or cure such conditions within five (5) days after the date on which Customer gives Supplier written notice of Customer's intent to terminate this Agreement as a result of such Supplier Default, then, except as otherwise provided in Sections 13.1 and 14.5, this Agreement shall terminate and be of no further force or effect as of the last day of such five (5) day period.
- (c) Other Rights and Remedies. If a Supplier Default has occurred other than the Supplier Default described in Section 8.1.1, or if a Supplier Default as described in Section 8.1.1, above, has occurred and Customer has terminated this Agreement as a result thereof in accordance with the terms of Section 11.1(b), above, Customer may pursue any and all rights or remedies available to it at law or in equity, subject, however, to the limitations set forth in Section 11.3, below, and provided that Customer's right to terminate this Agreement or abate the Contract Capacity Charge shall be permitted only in accordance with Sections 11.1(a) and 11.1(b), above.

11.2 Supplier's Remedies upon Customer Default.

- (a) Discontinue of Performance. If any Customer Default has occurred and is continuing, Supplier shall have the right, upon five (5) days' prior written notice to Customer, to immediately discontinue the supply of chilled water service to Customer, and also shall have the right to disconnect all related piping and connections and remove its Equipment from the Premises.

- (b) Termination. If a Customer Default as described in Section 8.2, above has occurred and is continuing, and if Customer fails to correct or cure the conditions causing such Customer Default as provided in Section 8.2, and if Customer fails to cure such conditions within five (5) days after the date on which Supplier gives Customer written notice of Supplier’s intent to terminate this Agreement as a result of such Customer Default, then, except as otherwise provided in Sections 13.1 and 14.5, this Agreement shall terminate and be of no further force or effect as of the last day of such five (5) day period. If this Agreement is terminated pursuant to the terms of this Section, the Customer shall be liable to Supplier for the Termination Payment, which shall be immediately due and payable without further notice. The Termination Payment shall be calculated by multiplying the Monthly Capacity Charge, then in effect, by the remaining months of the term of this Agreement had it not been terminated. The Termination Payment shall be discounted to a then present value utilizing a nine percent (9%) per annum discount rate. In addition, Supplier acknowledges that this Agreement may be canceled by Customer without any obligation on the part the Customer with respect to performance after the effective date of cancellation, in the event that sufficient appropriated funding is unavailable to assure full performance of its terms. Customer does not represent that the budget item providing for funding of this Agreement will actually be adopted (such determination being the determination of the County Board of Supervisors at the time of the adoption of the budget); *provided, however*, that Customer agrees that it will cause its Facilities Management Department, or other appropriate department or unit of Maricopa County to diligently and in good faith advocate for full funding of this Agreement; and *further, provided*, that the parties may mutually agree that, to the extent it is funded, this Agreement will continue in full force and effect in accordance with its terms. Customer will notify Supplier in writing of such non-appropriation at the earliest practical opportunity.
- (c) Other Rights and Remedies. In addition to the rights and remedies of Supplier set forth above, Supplier may pursue any and all other rights or remedies available to it at law or in equity upon the occurrence of a Customer Default, subject, however, to the limitations set forth in Section 11.3 below and the notice requirements of this Agreement.
- (d) Compensatory Damages. Supplier will pay Customer direct compensatory damages if Supplier or any affiliate of Supplier to which this Agreement may be assigned (an “Affiliated Successor”) fails to provide chilled water services to the Customer’s facilities under this Agreement and as contemplated by this Agreement, subject to the terms and conditions set forth in this subsection (d):
- i. Statement of Intent. The payment of compensatory damages under this subsection (d) is intended to be made to Customer if Supplier or an Affiliated Successor fails to perform its obligations as provided in this Agreement. The provisions of this subsection (d) are intended to assure Customer recovery from Supplier or its Affiliated Successor if Supplier or its Affiliated Successor fails to discharge its obligations to Customer including, but not limited to any failure to perform in connection with bankruptcy or insolvency proceedings in which Supplier or an Affiliated Successor is a party. The parties agree that the determination of these direct damages over the term of the Agreement would be difficult to determine with any precision, and that the formulation provided for in this subsection (d) is a fair and reasonable substitution therefor and is not a penalty.
 - ii. Determination of Compensatory Damages. The direct compensatory damages called for herein are intended to provide to Customer an amount roughly equivalent to the direct damages, if any, Customer would be expected to incur as a result of the Supplier’s or an Affiliated Successor’s failure to perform. In determining direct damages the parties shall identify the reasonably anticipated net present value (NPV) of the Supplier’s district cooling savings the Customer would have realized over the remainder of the term of the Agreement, which shall be made up of (x) eight hundred thousand and 00/100 dollars

(\$800,000.00) per year, representing the anticipated savings to the Customer which it anticipated as a result of selecting Supplier as its chilled water service provider; plus (y) the positive difference in cost to the Customer, if any, between the cost of temporary cooling Customer obtains to cover the shortfall in cooling resulting from the default and the cost to Customer for cooling services under this Agreement had Supplier or and Affiliated Successor not defaulted in the performance of its obligations; plus (z) the positive difference in cost to Customer, if any, between the construction of a new cooling plant to provide permanent cooling, or, alternatively, a new contract with a third party supplier to provide substitute chilled water service substantially equivalent to that contemplated under this Agreement, compared with the cost to Customer of cooling services under this Agreement had Supplier or an Affiliated Successor not defaulted in the performance of its obligations, minus (aa) any costs which the Customer in the exercise of commercial reasonableness could mitigate or otherwise avoid, but without giving consideration to indirect, special or consequential damages which are excluded pursuant to Section 11.3 of the Agreement. Attached to this Agreement as Exhibit G is a formula that describes the measure of the Customer's compensatory damages pursuant to this Agreement, as well as examples of the formula's operation.

- 11.3 No Consequential Damages. Nothing in this Agreement is intended to cause either party to be, and neither party shall be, liable to the other party for any lost business, lost profits or revenues from others or other special or consequential damages, all claims for which are hereby irrevocably waived by Customer and Supplier. Notwithstanding the foregoing the following shall not be considered to be consequential damages for the purposes of this Section 11.3: (i) third party claims against Supplier or Customer against which the other party has a right of indemnification pursuant to Section 14, below; (ii) the Consumption Charges, the Contract Capacity Charges or the amounts payable by Customer to Supplier under the terms of this Agreement upon the termination of this Agreement; (iii) damages payable pursuant to Section 2.1; and (iv) reasonable costs actually incurred in connection with self-help pursuant to Section 12.2.

12. Contingency Plan: Self-Help.

- 12.1 Contingency Planning. Supplier and Customer acknowledge and agree that the nature of the Customer's activities at the Premises is materially dependent upon the chilled water service that Supplier will provide under this Agreement. It is essential, therefore, that planned outages be scheduled and determined in advance by mutual agreement of Supplier and Customer, as contemplated in this Agreement, and that the effects and consequences of unplanned interruptions in chilled water service be identified, planned for and addressed in advance in a written contingency plan (the "Contingency Plan") that is intended to alleviate, to the greatest extent possible, the effects of unplanned service outages. Within sixty (60) calendar days after execution of this Agreement, the Supplier and Customer will negotiate in good faith and agree upon a written Contingency Plan that is to be followed by them in the event of unplanned service interruptions. The Contingency Plan shall be based upon and incorporate at least the following principles, as well as such others as to which the parties mutually agree:

12.1.1 Supplier will make all reasonable attempts to minimize any unplanned outages and no unplanned outage will last longer than three (3) consecutive days in duration before backup cooling is placed in operation as a temporary measure until Supplier has remedied the cause of the outage and resumed normal chilled water service under this Agreement;

12.1.2 The Contingency Plan shall state such agreed upon actions as the parties shall take to minimize the affects of scheduled outages.

- 12.1.3 The Supplier and Customer shall remain in continuing communication pending the remediation of the outage to assure that all occurrences and contingencies are promptly and effectively addressed;
 - 12.1.4 The Contingency Plan will be reviewed and revised after each instance of unplanned outage to assure that it is updated and in keeping with the experience gained by the Supplier and Customer; and
 - 12.1.5 In no event will the Contingency Plan be reviewed and, if need be, revised less than annually to assure that it is updated, kept current and capable of achieving the outcomes contemplated by this Section.
 - 12.1.6 The Contingency Plan shall address the manner in which Customer may attempt to restore interrupted or reduced chilled water service at its own expense so as to provide for the avoidance of interference with the initiation or implementation of the Contingency Plan or with Supplier's efforts to reinitiate chilled water service to Customer's Premises.
 - 12.1.7 The Contingency Plan shall provide that no temporary measure may be used for a period in excess of fifteen (15) days unless the parties otherwise agree, and shall address circumstances as to which use in excess of said fifteen (15) day time limitation are acceptable.
 - 12.1.8 The Contingency Plan shall address actions to be taken by the parties if Customer's demand exceeds the Contract Capacity as provided in Section 1.
- 12.2 Self-Help Costs. Supplier shall be liable for the payment of the costs incurred by Customer in connection with Customer's attempt to restore interrupted or reduced Chilled Water Service and for temporary substitute chilled water up to the lesser of the Contract Capacity or the Tons of Chilled Water Service then required by Customer (i) if Supplier fails to provide a Contingency Plan within the time provided in Section 12.1, (ii) if Supplier fails to abide by the terms of the Contingency Plan in a material manner (unless Supplier's failure is principally and directly the result of a Force Majeure Event or Customer's acts or omissions or those of its agents, employees, tenants, customers or contractors or of any other Persons for whom Customer is responsible or over which Customer has control), or (iii) from and after the eighth (8th) day following the day on which a Supplier Default described in Section 8.1, above, has occurred. If Chilled Water Service is interrupted or reduced due to the occurrence of a Customer Default or a Force Majeure Event, then Supplier shall be relieved of the obligations set forth in this Section 12.2 (although Customer may still attempt to restore the interrupted or reduced Chilled Water Service at its own expense).

13. Effect of Termination of Agreement

- 13.1 Payment; No Further Obligations. Upon the termination or expiration of this Agreement, any amounts then owing by a party to this Agreement to other party to this Agreement shall become immediately due and payable (including the Termination Payment, if applicable under the terms hereof), and the then future obligations of Customer and Supplier under this Agreement shall be terminated (other than the provisions set forth in Sections 2.1 and 14). Such termination shall not relieve either party from obligations accrued prior to the effective date of termination or expiration. Notwithstanding the termination, the provisions of this Agreement shall continue to be utilized to resolve any rights or claims of the parties arising on or prior to the effective date of termination.

13.2 Disconnection. As soon as reasonably practicable after the date on which this Agreement is terminated or expires, Supplier shall physically disconnect the Transfer Station. Within thirty (30) days after such termination or expiration, Supplier shall give Customer written notice of Supplier's intent to (a) remove from the Premises any or all of the components of the Transfer Station and Supplier's other equipment, piping and other property installed or located on the Premises, in which case Supplier shall have the right to do so, and Customer shall provide Supplier with access to the Premises as reasonably requested by Supplier to allow Supplier to complete such removal, or (b) abandon any or all of such property to Customer without liability to Customer. If Supplier elects to remove the Transfer Station and its other equipment from the Premises pursuant to the preceding sentence, Supplier shall restore the Premises to the condition that existed prior to the installation of the Transfer Station and such other equipment, ordinary wear and tear excepted, provided that Supplier shall in no event be required to remove any piping from the inside of any walls of the Premises.

14. Indemnification

14.1 General Responsibilities Each party (the "Indemnifying Party") will be responsible to each Indemnified Party for any damages whatsoever to tangible property of the Indemnified Party when such property is the responsibility or in the custody of the Indemnified Party, its employees or subcontractors. The Indemnifying Party agrees that all subcontractors performing work under this Agreement shall comply with its provisions and it is expressly understood that all persons employed by the Indemnifying Party, either directly or indirectly, shall not be considered employees of the Indemnified Party. The Indemnifying Party acknowledges and agrees that it is liable and responsible for its acts or omissions, or those of its employees, agents, officers, representatives, and subcontractors occurring in the course of its performance of this Agreement, whether such act or omission occurs on the Indemnified Party's property or elsewhere. The Indemnifying Party shall be liable for any physical property loss or damage arising out of or related to its performance of this Agreement. The Indemnifying Party shall bear the above stated liability, even in absence of its own negligence, unless the Indemnified Party (including its employees, agents or contractors) caused the loss or damage. The Indemnifying Party shall bear the above stated liability, but shall not be liable for consequential, incidental, and indirect damages, and shall be liable for all costs, including reasonable attorney's fees, incurred by the Indemnified Party to enforce this provision.

14.2 Notice of Claims. Any Indemnified Party seeking indemnification under this Section 14 shall deliver to the Indemnifying Party a Claim Notice describing the facts underlying its indemnification claim and the amount of such claim. A notice describing any action at law or in equity involving an Indemnified Party shall be delivered promptly to the Indemnifying Party after the such Indemnified Party receives notice of a claim being made, or notice that such action or suit has commenced; provided, however, that failure to deliver such notice as aforesaid shall not relieve the Indemnifying Party of its obligations under this Section 14, except to the extent that such Indemnifying Party has been prejudiced by such failure.

14.3 Amount of Claim. The amount to which an Indemnified Party is entitled under this Section 14 shall be determined by (i) a mutually satisfactory written agreement between such Indemnified Party and the Indemnifying Party, (ii) a final judgment or decree of any court of competent jurisdiction, or (iii) any other means agreed upon by such Indemnified Party and the Indemnifying Party.

- 14.4 Defense of Action. If requested by an Indemnified Party, the Indemnifying Party shall assume on behalf of the Indemnified Party, and conduct with due diligence and in good faith, the defense of such Indemnified Party with counsel reasonably satisfactory to the Indemnified Party; provided, however, that the Indemnified Party shall have the right to select separate counsel to participate in the defense of such action at the Indemnifying Party's expense if it reasonably determines such selection to be necessary to defend its interests in the proceeding. If any claim, action, proceeding or investigation arises as to which the indemnity provided for in this Section 14 applies, and the Indemnifying Party fails to assume the defense of such claim, action, proceeding or investigation after having been requested to do so by the Indemnified Party, then the Indemnified Party may, at the Indemnifying Party's expense, contest or, with the prior written consent of the Indemnifying Party, which consent shall not be unreasonably withheld, settle such claim, action, proceeding or investigation. All costs and expenses incurred by the Indemnified Party in connection with any such contest or settlement shall be paid upon demand by the Indemnifying Party.
- 14.5 Survival of Provisions. The provisions of this Section 14 shall survive the expiration or termination of this Agreement.

15. Warranties

Concurrently with the transfer to Customer of the Connection Equipment pursuant to the terms of this Agreement, Supplier shall assign to Customer without recourse any warranties that third parties have provided to Supplier with respect to the Connection Equipment and which are assignable. SUPPLIER WARRANTS THAT THE CONNECTION EQUIPMENT SHALL BE OF GOOD QUALITY AND NEW WHEN INSTALLED AND, FOR A PERIOD OF ONE (1) YEAR FROM THE COMMENCEMENT DATE, THAT THE CONNECTION EQUIPMENT SHALL BE FREE FROM MATERIAL FAULTS OR DEFECTS (OTHER THAN THOSE CAUSED BY CUSTOMER OR ITS AGENTS, EMPLOYEES OR CONTRACTORS), ORDINARY WEAR AND TEAR EXCEPTED. ALL WARRANTIES OF SUPPLIER, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE REGARDING THE CONNECTION EQUIPMENT OR THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT ARE HEREBY DISCLAIMED.

16. Miscellaneous Provisions

- 16.1 Notices. All notices, communications and waivers under this Agreement shall be in writing and shall be (i) delivered in person or (ii) mailed, postage prepaid, either by registered or certified mail, return receipt requested, or (iii) sent by facsimile, or (iv) sent by overnight express courier, addressed in each case as set forth on the Cover Page, or to any other address as to either of the parties to this Agreement as such party shall designate in a written notice to the other party to this Agreement. All notices sent pursuant to the terms of this Section shall be deemed received (w) if personally delivered, then on the date of delivery, (x) if sent by overnight, express courier, then on the next Business Day immediately following the day sent, or (y) if sent by facsimile when confirmed electronically by the sender's facsimile, or (z) if sent by registered or certified mail, then on the earlier of the third (3rd) Business Day following the day sent or when actually received.
- 16.2 Assignment, Delegation and Assumption of Obligations; Change in Ownership.
- 16.2.1 Customer may assign to any other Person the rights and delegate the obligations of Customer under this Agreement if such other Person concurrently acknowledges and accepts such assignment and assumes Customer's obligations in a writing reasonably acceptable to Supplier and possesses a creditworthiness reasonably acceptable to the Supplier. Such assignment and delegation shall not relieve Customer from liability for any of the payment obligations of Customer then existing or which arise under this Agreement subsequent to such assignment.

16.2.2 Supplier may assign to any other Person the rights and delegate the obligations of Supplier under this Agreement if and only if such other Person concurrently acknowledges and accepts such assignment and assumes Supplier's obligations under this Agreement in a writing reasonably acceptable to Customer. Such assignment and delegation shall not relieve Supplier from liability for any of the payment obligations of Supplier then existing or which arise under this Agreement subsequent to such assignment. No assignment by Supplier may result in a change in the terms and conditions of this Agreement, including, without limitation, the charges provided for under Section 2.3 of this Agreement. It is agreed that any financing of Supplier secured by its assets will include a subordination and non-disturbance agreement, in a form and content agreed upon by the parties, from Supplier's lender providing that such lender and its assignees and transferees will honor the Agreement as originally entered into.

16.3 Memorandum of Agreement; Informational Financing Statement. Supplier shall have the right to record a memorandum of this Agreement in the real estate records for the county in which the Premises is located, which memorandum shall set forth or summarize the interest of Supplier in the Transfer Station and the Connection Equipment and the rights granted to Supplier under this Agreement with respect to the Premises and shall otherwise be in a form substantially similar to the form attached hereto as Appendix F. Supplier shall also have the right to file an informational financing statement with the Office of the Arizona Secretary of State.

16.4 Condition Precedent. As a condition precedent to Customer's obligations under this Agreement, the Customer shall have received a guarantee or a substantially equivalent form of assurance of the Supplier's performance of its obligations under this Agreement from an Affiliate or Affiliates of the Supplier, which is, in form and in substance, reasonably satisfactory to the Customer. The Customer shall act reasonably and in good faith in this regard.

17. **INTENTIONALLY OMITTED.**

18. **INTENTIONALLY OMITTED**

19. **INTENTIONALLY OMITTED**

20. Successors and Assigns. The rights, powers and remedies of each party to this Agreement shall inure to the benefit of such party and its successors and permitted assigns.

21. Entire Agreement This Agreement (including any Appendices attached hereto) represents the entire agreement between the parties to this Agreement with respect to the subject matter of this Agreement and supersedes all prior and contemporaneous oral and prior written agreements. Supplier's proposal to the Customer, dated February 11, 2000 (the "Proposal"), is incorporated herein by this reference. In the event of an inconsistency between this Agreement and the Proposal, the terms of this Agreement shall govern.

22. Amendments to Agreement. This Agreement shall not be amended, modified or supplemented without the written agreement of Supplier and Customer at the time of such amendment, modification or supplement.

23. Waivers; Approvals. No waiver of any provision of this Agreement shall be effective unless set forth in writing signed by the party making such waiver, and any such waiver shall be effective only to the extent it is set forth in such writing. Failure by a party to this Agreement to insist upon full and prompt performance of any provision of this Agreement, or to take action in the event of any breach of any such provision or upon the occurrence of any Supplier Default or Customer Default, as applicable, shall not constitute a waiver of any rights of such party, and, subject to the notice requirements of this Agreement, such party may at any time after such failure exercise all rights and remedies available under this Agreement with respect to such Supplier Default or Customer Default. Receipt by a party to this Agreement of any instrument or document shall not constitute or be deemed to be an approval of such instrument or document. Any approvals required under this Agreement must be in writing, signed by the party whose approval is being sought.

- 24. Partial Invalidity. In the event that any provision of this Agreement is deemed to be invalid by reason of the operation of law, or by reason of the interpretation of such provision by any administrative agency or any court, Supplier and Customer shall negotiate an equitable adjustment in the provisions of the same in order to effect, to the maximum extent permitted by law, the purpose of this Agreement and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected by such adjustment and shall remain in full force and effect.
- 25. Execution in Counterparts. This Agreement may be executed in counterparts, and all said counterparts when taken together shall constitute one and the same Agreement.
- 26. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona, without giving effect to its conflict of laws rules or procedures.
- 27. No Third Party Rights. This Agreement is only for the benefit of the parties to this Agreement, their successors and permitted assigns and Persons expressly benefited by the indemnity provisions of this Agreement. No other Person (including, without limitation, tenants of the Premises) shall be entitled to rely on any matter set forth in, or shall have any rights on account of the performance or non-performance by any party of its obligations under, this Agreement.
- 28. Dispute Resolution. If a dispute shall arise under this Agreement, it shall be resolved in accordance with the dispute procedures set forth in the Customer's procurement rules, as they may be amended from time to time during the term of this Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Agreement as of the date set forth above.

NORTHWIND PHOENIX, LLC

**MARICOPA COUNTY, a political subdivision
of the State of Arizona**

BY: _____
NAME: _____
TITLE: _____

BY: _____
NAME: _____
TITLE: _____

ATTESTED: _____
Clerk of the Board

Approved As To Form:

Maricopa Deputy County Attorney

APPENDIX A

DEFINITIONS

The following terms shall have the meanings set forth below:

“Affiliate” means, with respect to any Person, any other Person which directly or indirectly controls, is controlled by or is under common control with such Person.

“Agreement” means this Master Chilled Water Service Agreement, the Cover Page and all appendices attached hereto, and any amendments or modifications made thereto from time to time.

“Business Day” means a day on which commercial banks generally are open for business in the City of Phoenix.

“Claim Notice” means a notice by a Customer Group Member or a Supplier Group Member seeking indemnification pursuant to Section 14 of this Agreement.

“Commencement Date” shall have the meaning ascribed to such term in Section 2.1 of this Agreement.

“Connection Equipment” means all equipment and piping necessary to connect the Customer’s Premises to the heat exchanger assembly included in the Transfer Station, as more fully described in the IOM Specifications.

“Consumer Price Index” or “CPI” means the Western Region, Size A City Average Consumer Price Index as published by the Bureau of Labor Statistics, all items other than food and energy, not seasonably adjusted, Series ID: CUURA400SA0L1E , as it appears in the “News” as published monthly by the United States Department of Labor, Bureau of Labor Statistics, a sample copy of which is included in Appendix E); provided, however, that if said Consumer Price Index shall cease to exist or is changed, then the term “Consumer Price Index” shall mean such other or similar index or formula as the parties shall in good faith mutually agree upon to measure change in the purchasing power of the U.S. dollar.

“Consumption Charge” means the monthly charge payable by Customer to Supplier for Ton-Hours of chilled water service provided to Customer during each month of the term of this Agreement, as the same may be adjusted from time to time pursuant to the terms of this Agreement, the initial amount of which is specified on the Cover Page.

“Contract Capacity” means the number of Tons of chilled water service specified on the Cover Page that Supplier is obligated by this Agreement to make available to Customer from and after the Commencement Date through the date on which this Agreement expires or is terminated.

“Contract Capacity Charge” means the monthly charge payable by Customer to Supplier for making chilled water service up to the Contract Capacity available for use by Customer pursuant to this Agreement, as the same may be adjusted from time to time pursuant to the terms of this Agreement, the initial amount of which is specified on the Cover Page. Customer’s obligation to pay the monthly Contract Capacity Charge for chilled water service up to the Contract Capacity is unrelated to the amount of chilled water service actually required by Customer.

“Cover Page” means the Cover Page attached to and made a part of this Agreement, as the same may be amended from time to time.

“Customer Default” shall have the meaning ascribed to such term in Section 8.2 of this Agreement.

“Customer Group Member” means Customer and its Affiliates, and the directors, officers, agents, employees, successors and assigns of each of them.

“Delivery Point” means the point of connection between the Connection Equipment and the Transfer Station, at which point Supplier delivers chilled water service to Customer.

“Equipment” means the Transfer Station and the Connection Equipment, including associated piping, metering and other equipment.

“Force Majeure Event” means, to the extent not caused by the act or omission of the party affected hereby and which is otherwise beyond the reasonable control of such party and which cannot be avoided or overcome by the exercise of commercially reasonable means, acts of God, war, civil disobedience, embargoes, strikes, epidemic, fires, cyclones, droughts, floods, labor, production or transportation disruptions or shortages or accidents to or involving machinery, equipment or lines of pipe, shortages of materials, power, fuel, equipment, transportation or labor, or any governmental law, regulation (or its interpretation), order, request, instruction or injunction, or failure to obtain or provide or cancellation of rights-of-way, permits, licenses or other authorization, whether valid or invalid, or any other cause whether or not similar to the foregoing; provided that a Force Majeure Event shall not include events caused by the gross negligence or willful misconduct of the party claiming the Force Majeure Event.

“Indemnified Party” means a Customer Group Member or a Supplier Group Member seeking indemnification pursuant to Section 14 of this Agreement.

“Indemnifying Party” means the Person from which indemnification is sought pursuant to Section 14 of this Agreement.

“Initial Term” shall mean the initial term of this Agreement, the duration of which is set forth on the Cover Page.

“IOM Specifications” means the Installation, Operation and Maintenance Specifications attached hereto as Appendix D, as the same may be amended from time to time by the parties to this Agreement. In the event of any conflict between the provision of the IOM Specifications and the other provisions of this Agreement, such other provisions shall govern.

“Person” means any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or governmental authority or regulatory body.

“Projected Commencement Date” means April 1, 2003.

“Premises” means the building[s] located on the property at the address stated on the Cover Page alongside the caption “Address of Premises” and legally described on Appendix B attached to this Agreement.

“Producer Price Index” or “PPI” means the Producer Price Index for Mountain commercial electric power, product code 4981-128, not seasonably adjusted, as it appears in the Producer Price Index published by the United States Department of Labor, Bureau of Labor Statistics; provided, however, that if said Producer Price Index shall cease to exist or is changed, then the term “Producer Price Index” shall mean such other or similar index or formula as the parties shall in good faith mutually agree upon to measure change in the price for commercial electric power.

“Return Point” means the point of connection between the Transfer Station and Supplier’s chilled water delivery system, at which point chilled water returns to Supplier’s pipes after it has passed through the Transfer Station.

“Supplier Default” shall have the meaning ascribed to such term in Section 8.1 of this Agreement.

“Supplier Group Member” means Supplier and its Affiliates, and the directors, officers, agents, employees, successors and assigns of each of them.

“Tax” means any present or future tax (including any sales and use taxes), levy, impost, duty, charge, assessment or fee of any nature (including interest, penalties and additions thereto) that is imposed or levied by any federal, state, local or other taxing authority on chilled water service or equipment

provided or used by Supplier or on any aspect of such service, or on any payments made by Customer to Supplier, under this Agreement, provided that Taxes shall not include general federal and state taxes on Supplier's gross income.

“Ton” means refrigeration capacity equivalent to the cooling capacity of one ton of ice melting in a period of twenty-four hours (at a rate of 12,000 BTU per hour).

“Ton-Hour” means cooling service equivalent to 12,000 BTU of cooling, measured as a function of the gallons of chilled water which pass through the Transfer Station and the temperature difference of the chilled water at the Delivery Point and the Return Point, and calculated on the basis of the aggregate BTU gain occurring.

“Transfer Station” means the equipment and related piping and apparatus between Supplier's distribution piping and the Connection Equipment, including, without limitation, a plate frame heat exchanger assembly or equivalent device, piping, valves, metering equipment and controls and additional equipment, if any, described in the IOM Specifications, installed by Supplier on the Premises pursuant to the terms of this Agreement for use in providing chilled water service to Customer, and all replacements and additions from time to time. The Connection Equipment is not a part of the Transfer Station.

APPENDIX B TO CHILLED WATER SERVICE AGREEMENT

Legal Description of Premises

[A legal description is not available at the time the agreement was executed (see cover page for building location)]

APPENDIX C TO CHILLED WATER SERVICE AGREEMENT

Insurance Requirements

- (a) **General.** Except as may otherwise be specifically provided in this Appendix C, all insurance required herein shall be maintained in full force and effect until all work, service or other performance required to be undertaken under the terms of this Agreement is satisfactorily completed and formally accepted. Failure to do so may constitute a material breach of this Agreement. Any failure to comply with the claim reporting provisions of the insurance policies or any breach of an insurance policy warranty shall not affect coverage afforded under the insurance policies. The insurance policies may provide coverage that contains deductibles or self-insured retentions. Such deductible and/or self-insured retentions shall not be applicable with respect to the coverage provided to the Customer under such policies. The Supplier shall be solely responsible for the deductible and/or self-insured retention and the Customer, at its option, may require the Supplier to secure payment of such deductibles or self-insured retentions by a surety bond or an irrevocable and unconditional letter of credit, or other appropriate forms of security. Each party reserves the right to request and to receive, within ten (10) working days, certified copies of any or all of the herein required insurance policies and/or endorsements. The requesting party shall not be obligated, however, to review such policies and/or endorsements or to advise the other party of any deficiencies in such policies and endorsements, and such receipt shall not relieve Supplier from, or be deemed a waiver of the requesting party's right to insist on strict fulfillment of the other party's obligations under the Agreement.
- (b) **Supplier's Insurance.** Except as may otherwise be specifically provided in this Subsection (b), at all times during the term of this Agreement, Supplier, at its sole expense, shall purchase and maintain in full force and effect stipulated minimum insurance with companies duly licensed, possessing a current A.M. Best, Inc. Rating of B++6, or approved unlicensed companies in the State of Arizona with policies and forms satisfactory to the Customer as stated below. The Supplier's insurance shall be primary insurance as respects the Customer, and any insurance or self-insurance maintained by the Customer shall not contribute to it. These insurance policies, except Workers' Compensation, shall name the Customer, its agents, representatives, officers, directors, officials and employees as Additional Insureds. The policies required hereunder, except Workers' Compensation, shall contain a waiver of transfer of rights of recovery (subrogation) against the Customer, its agents, representatives, officers, directors, officials and employees.
- (i) Workers' compensation insurance in statutory amounts and employers' liability insurance with limits of not less than \$1,000,000 per claim; and
- (ii) General comprehensive public liability insurance on an occurrence basis (including a contractual liability endorsement) with limits of not less than \$2,000,000 per occurrence and \$5,000,000 annually and in the aggregate and with a deductible not exceeding \$200,000 (provided that Supplier may from time to time increase the minimum deductible amount based upon the results of its periodic review and reevaluation of its insurance coverage), covering liability claims arising or resulting from insured acts or omissions of Supplier and its agents and employees, which insurance shall name Customer as an additional insured. (This general comprehensive public liability insurance coverage shall be obtained and be in place prior to the date upon which Supplier enters upon Customer's Premises to install the Equipment for the purpose of interconnecting its cooling system to the Premises).
- (iii) All risk property insurance (including boiler and machinery insurance) covering physical loss and damage to all improvements forming part of the Premises, including all machinery, equipment and fixtures on or connected to the Premises, for the full replacement value thereof.
- (b) **Customer's Insurance.** At all times during the term of this Agreement, Customer, at its sole expense, shall purchase and maintain in full force and effect, the following insurance coverages:
- (i) General comprehensive public liability insurance on an occurrence basis (including a contractual liability endorsement) with limits of not less than \$2,000,000 per occurrence and annually in the aggregate, and with a deductible not exceeding \$10,000, covering liability claims arising or resulting from insured acts or omissions of Customer, its agents, employees and others under its control, which insurance shall name Supplier as an additional insured; and

- (ii) All risk property insurance (including boiler and machinery insurance) covering physical loss and damage to all improvements forming part of the Premises, including all machinery, equipment and fixtures on or connected to the Premises, for the full replacement value thereof.

All such insurance shall be placed with reputable companies licensed to do business in the State of Arizona. Prior to the commencement of the construction required by this Agreement, Customer shall deliver to Supplier certificates of insurance evidencing the insurance described in this Section. Additionally, not later than thirty (30) days prior to the stated expiration date of any such policy of insurance, Customer shall deliver to Supplier evidence of the renewal or replacement of such policy and of the premium due on such policy. All such insurance will require not less than thirty (30) days prior written notice to Supplier in the event of modification, cancellation or nonrenewal of coverage.

- (c) Customer and Supplier each hereby irrevocably and unconditionally waives all rights of recovery against the other, and agree that each shall cause its property insurance policies to be endorsed to reflect that the insurer waives all rights of subrogation against Customer (in the case of Supplier's property insurance) or Supplier (in the case of Customer's property insurance) for all loss, damage and other costs due to or arising from an insured risk under such policy.
- (d) At the conclusion of each three year period during the term of this Agreement, the amount of the general liability insurance required under clauses (a)(ii) and (b)(i) above shall be reviewed and increased, if agreed upon by the parties hereto, by \$1,000,000 per occurrence and annually in the aggregate.
- (e) If either party at any time fails to provide the insurance coverage required under clauses (a) or (b) above, the other party upon prior written notice shall be entitled to purchase such coverage and charge the failing party for the costs of such coverage and all other costs incurred in connection with obtaining the same.
- (f) Notwithstanding anything in this Appendix C to the contrary, Supplier and Customer may self-insure against any or all of the risks enumerated in this Appendix, provided that such party is able to meet its financial obligations as they mature and that its self-insurance is maintained in accordance with a bona fide plan or program of self-insurance which it shall have in force and effect at all relevant times and which follows sound accounting practices. Upon request of the other party, an officer of the self-insuring party shall certify that its plan or program of self-insurance is in full force and effect and that it has sufficient cash reserves to meet the needs of such self-insurance plan or program.

Appendix D TO CHILLED WATER SERVICE AGREEMENT

Sample Billing Calculation and Adjustment of Charges

1. Sample Bill Calculation

See attached.

2. Example for calculating the percentage change in the CPI:

	CPI Annual Average (ANN)	% Change from Base Year 1999
Year 1999 (base year)	177.8	N/A
Year 2000	182.8	+ 2.8
Year 2001	200.0	+ 12.5
Year 2002	198.0	+ 11.4
Year 2003	198.0	+ 11.4
Year 2004	192.0	+ 8.0
Year 2005	200.0	+ 12.5

Example for calculating the percentage change in the PPI:

	PPI Annual Average (ANN)	% Change from Base Year 1999
Year 1999 (base year)	104.9	N/A
Year 2000	105.9	+ 0.1
Year 2001	104.9	0
Year 2002	105.9	+ 0.1
Year 2003	103.9	- 1.0
Year 2004	102.9	-1.9
Year 2005	102.9	-1.9

APPENDIX E TO CHILLED WATER SERVICE AGREEMENT

Installation, Operation and Maintenance Specifications

NORTHWIND PHOENIX CHILLED WATER SERVICE DESCRIPTION**DISTRICT COOLING DESCRIPTION**

Service: Northwind chilled water supply and return to the heat exchanger will be provided from an off-site district chilled water plant located at Bank One Ballpark.

Design: Northwind will design the Transfer Station (TS). All applicable codes and standards shall be followed. If required, Northwind will discuss any necessary modifications to secondary system with the Customer.

Primary Service Line: Northwind will install the service line running from the main distribution pipes to the primary side of building's heat exchangers.

Transfer Station Space: The Customer shall provide, at no cost to Northwind, suitable space for the installation of the interconnection equipment. This will include space for the service lines, control panel, heat exchangers and interconnecting piping. Northwind and Customer shall agree on the routing of pipes through the building and the location of heat exchangers to determine the most cost effective solution.

Equipment: Northwind will provide all equipment on the primary side including isolating valves, strainer, heat exchangers, thermometers, thermowells, control valves and energy meter. On the secondary side, Supplier will provide the interconnecting piping to the Transfer Station.

Controls: Chilled water control valves will be of two-way modulating type and will be selected to close against the differential pressures involved.

TS control will be direct digital control (DDC), complete with ton-hour metering, temperature displays, capacity and consumption displays, customer adjustable chilled water supply reset, and read only data interface with customer DDC system.

The primary chilled water system flow will be modulated to maintain a secondary chilled water reset temperature.

In order to prevent accidental chilled water consumption beyond the Contract Capacity, a demand limiter will be provided on the chilled water service. The demand limiter will limit the flow rate based upon the Contract Capacity and a differential temperature between the primary supply and return water of 20°F.

The secondary chilled water system flow shall be modulated (if possible) to achieve maximum water return temperature. The objective of the control system shall be to provide as low a supply temperature as is necessary to the building and at the same time maximize the differential temperature on the primary and secondary sides.

Installation: Northwind will install heat exchangers and the service line with all necessary equipment. The installation of the Transfer Station will be designed for parallel operation to the existing building chiller plant (**if applicable**). The Customer will provide, at no cost to Northwind, personnel required for the drain down (if required) of and tie-in to the Customer's cooling system. Northwind will also install the necessary electrical and control equipment. All piping systems associated with this work shall be pressure tested for leakage in accordance with the ASME/ANSI B31 Code. The Customer is responsible for all asbestos removal required for the installation.

Commissioning: Northwind, together with the Customer's chief operator, will commission the primary system. This will include the flushing of the primary side and start-up of control equipment. During the commissioning, the Customer's operator shall be responsible for the building's internal chilled water system.

Make-up Water: Northwind will provide the make-up water for the primary side of the system. Necessary water treatment will be accomplished at the district cooling plant. The Customer side will be filled up, drained as required by the work, and managed by the building owner.

BUILDING INTERCONNECTION

Building’s Primary Connection:

- ◆ Primary Piping will be **sized to meet the agreed upon Capacity Amount** ~~8” diameter~~ from Northwind service entrance point to heat exchangers.
- ◆ **Primary Side Strainer: The strainer basket in the primary service line will be “40 mesh”.**
- ◆ BTU monitoring of Northwind-side of heat exchangers.

Transfer Station:

- ◆ The Transfer Station will include all equipment associated with the metering and transfer of energy between the Northwind’s primary piping and the Customer’s connection equipment. This includes the heat exchangers, control valves, metering equipment and control equipment.
- ◆ Two ~~(2) 750 ton~~ Heat exchangers **will be designed based on individual** per building **requirements.** ~~with cold side temperatures of 34°F to 54°F and hotside temperatures of 42°F to 58°F.~~ Pressure ratings will be 150 psi.
- ◆ The heat exchanger(s) frame selection will allow for 25% additional plates for future expansion capability.

Building’s Secondary Connection:

- ◆ Equipment necessary to connect the Customer’s cooling system to the TS heat exchangers including piping, valves and strainers.
- ◆ Interconnecting piping will be **sized based on the individual building requirements** ~~8” diameter~~ on building side of heat exchangers.
- ◆ **Building Side Strainer: The strainer basket on the building side will be “40 mesh”.**
- ◆ Building side supply chilled water temperature control.

Other Northwind Responsibilities

- ◆ Pipe Insulation.
- ◆ Engineering.
- ◆ Testing and balancing.

SYSTEM PARAMETERS

Chilled Water Temperatures:

Northwind **Maximum** Supply **34 ~~39~~ °F**
 Northwind **Minimum** Return **54 °F**
(unless agreed upon by both parties)

Customer Supply **42 °F (based on agreed building design criteria by both parties)**

Customer Return **58 ~~56~~ °F**
(unless agreed upon by both parties)

Installed Heat Exchanger Capacities: ~~_____~~ **(2) 750 Ton per building**

Contract Capacity: ~~_____~~ **1500 Tons per building**

The distribution system supply temperature will be increased to 39°F at nighttime during the hours of 8 pm to 5 am.

Design Operating pressure: Primary: 150 psig
Secondary: 150 psig

Northwind will maintain a minimum differential pressure at the point the primary supply and return pipes enter the building in order to provide sufficient chilled water flow.

Incoming Service Room: Indoor Conditions: Winter: 65°F, Summer: Ventilated

Ventilation Rate: As required by City of Phoenix Building Code and load

Pipe Sizing Criteria:

Primary - All piping will be sized to generally accommodate maximum velocity of 10 feet/second based on contract capacity.

Secondary (maximum velocity for piping); C = 130:

8" diameter and larger	10.0 feet/second
6" diameter	8.0 feet/second
4" diameter	6.5 feet/second
3" diameter	5.5 feet/second
2½" diameter	5.0 feet/second
2" diameter	4.0 feet/second
1½" and 1¼" diameter	3.0 feet/second

SERVICE STOP VALVES

- A. The service stop valves on the connection equipment will be operated only by authorized personnel of the Customer. Supplier may close the service stop valves when necessary due to emergency circumstances believed to require immediate cessation of the operation of the Customer’s cooling system. Supplier will give the Customer immediate notice of any such cessation. The Customer will close the service stop valves to allow Supplier to repair or perform maintenance on the TS within five days of Supplier’s written request. In emergency circumstances, if Supplier is unable to close the service stop valves, the Customer will use reasonable efforts to close the valves as soon as is practicable.
- B. The service stop valves and meter stop valves and other equipment on Supplier’s side of the ETS will be operated only by authorized personnel of Supplier. The Customer may close the service stop valves when necessary due to emergency circumstances which require immediate cessation of chilled water supply. The Customer will give Supplier immediate notice of any such cessation. Supplier will close the service stop valves on the ETS to allow the Customer to repair or perform maintenance on the building cooling system within five (5) days of the Customer’s written request. In emergency circumstances, if the Customer is unable to close the service stop valves, Supplier will use all reasonable efforts to close the valves as soon as practicable.

Authorized Agents:

The Customer will not authorize any person except authorized employees of Supplier to operate, maintain, alter or otherwise affect the TS or any Supplier service equipment installed on the premises.

MAINTENANCE

Supplier Responsibility:

- A. Primary Side Strainer: The strainer in the primary service line will be monitored and cleaned by Supplier.
- B. Water Treatment: Supplier will maintain the treatment of primary water from the production plants.
- C. Transfer Station Maintenance: Supplier will monitor the pressure drop across the primary and secondary side of the heat exchangers and clean as required. Supplier will check the calibration and operation of the primary control valve(s) yearly.
- D. Metering:
 - 1. All metering equipment will be furnished and maintained by Supplier. Customer will receive coincident demand metering among all buildings on the cooling loop served under this Agreement. Supplier will calibrate the metering equipment in accordance with the manufacturer's recommendations yearly. If the Customer requests additional testing, Supplier will conduct the test. Unless the testing indicates the equipment provides metering results which are inaccurate by 5% or more adversely to the building, the building will pay all costs and expenses incurred by Supplier to conduct the test.
 - 2. If the metering records for the chilled water service are interrupted, or if a test of the metering equipment indicates that the equipment is not accurately measuring service usage (within a margin of error of 5%), Supplier will determine the Customer's consumption of chilled water based upon one of the following:
 - a. The metering records immediately before and after the interruption or before the date of the immediately preceding test which indicated that the metering equipment was accurately measuring service usage, or after the date when the equipment and apparatus were corrected.
 - b. The Customer's consumption during similar periods under similar conditions.
 - c. Contemporaneous or prior use by other buildings whose consumption requirements are similar to the building's.
 - d. Some reasonable combination of the methods described above.
 - 3. Customer shall be provided with written results of chilled water meter calibration and/or be present at such testing. Customer reserves the right to request or arrange third-party meter accuracy validation, or verification of Supplier's calibration results.

Customer Responsibility:

- A. Changes to the System: Any future changes to the Customer's chilled water system that will impact the district cooling system shall be reported and, when applicable, subject to approval by Supplier.
- B. Water Treatment: Customer will maintain a corrosion inhibitor in the building's chilled water system with a pH level between 9.0 and 10.0, and total bacteria count of less than or equal to 100 cfu/ml.
- C. Connection Equipment Maintenance: The Customer will maintain the secondary isolation valves and strainer.
- D. TS Equipment Room: The Customer will maintain adequate ventilation/space conditioning of the TS equipment room.

CODES AND STANDARDS

The design, fabrication and installation of the Transfer Station will be in accordance with the laws and regulations of the City of Phoenix, Maricopa County, and the State of Arizona. The TS will also be designed and installed with the latest editions of the applicable Codes and Standards from the following authorities:

- A. Latest issue as of this date of American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) Handbooks on “Fundamentals” and “Systems”
- B. American Water Works Association (AWWA)
- C. ASHRAE Energy Standard 90-80
- D. National Fire Protection Association (NFPA)
- E. Underwriters’ Laboratories (UL)
- F. Air Conditioning and Refrigeration Institute (ARI)
- G. American National Standards Institute (ANSI)
- H. American Society of Mechanical Engineers (ASME)
- I. American Society of Testing and Materials (ASTM)
- J. National Electrical Manufacturer’s Association (NEMA)
- K. ANSI-MSS SP-58-1983, Pipe Hangers and Supports - Materials, Design and Manufacturer
- L. Standards of Tubular Heat Exchanger Manufacturer’s Association (TEMA)
- M. American Standards Association (ASA)

MATERIALS:

- A. Piping: All piping shall be black steel to ASTM A53, Grade A or B as follows:
 - 1. NPS ½” to 1½” Schedule 80, ERW or Seamless, plain ends screwed
 - 2. NPS 2” to 10” Schedule 40, ERW or Seamless, bevel ends welded, or mechanical coupling
 - 3. NPS 12” or larger Standard wall, ERW or Seamless, bevel ends welded, or mechanical coupling
- B. Fittings:
 - 1. NPS ½” to 1½”: Class 300, forged steel screwed or socket welded ends to ASTM A181.
 - 2. NPS 2” and larger: Standard weight, forged steel welded to ASTM A234, Grade WPB, or mechanical coupling.
 - 3. Couplings, caps, plugs: NPS ½” to 1½”, Class 300, screwed or socket welded to ASTM A181, Class 70.
 - 4. Nipples for drains, vents, pressure gauges and thermometers, etc.: NPS ½” to 1½” Schedule 80, screwed to ASTM A53, Grade A.

5. Unions: NPS ½” to 1½”, Class 300, screwed ends, forged steel, steel-to-steel ground joints to ASTM 181.
6. Outlets for branch connections: Where prefabricated T-fittings are not used, Weld Bevel “Weldolets” for butt weld connection shall be used, NPS ½” to NPS 24”, ASTM A105 Standard.
7. Flanges: NPS ½” to 1½” Class 300, flat faced screwed to ASTM A216 Grade WCB; NPS 2” and larger, Class 300, flat faced, weld neck to ASTM A216 Grade WCB.
8. Bolts and nuts: Stud bolts, carbon steel, semi-finished with heavy hex nuts to ASTM A307, Grade B.
9. Gaskets: Red rubber or equivalent, rated for chilled water and system operating pressure.

Manufacturer: Crane, Garlock

C. Valves

1. Butterfly Valves: 4” to 24”. All valves shall be suitable for the pressure conditions, and shall close tight against the differential pressures involved. Valves shall have dry stem journals with no leakage to stems at rated pressure. Stem packing shall not be required.
 - a. Valve bodies shall be tapped full lug design for installation between ANSI 150 flanges. Valve bodies shall be rated comparable to the pipe rating. Lug valves shall be capable of end-of-line service at 200 psi with the downstream flange removed for liquid service only.
 - b. Discs shall be of a concentric design configured for high flow while maintaining strength consistent with the valve pressure rating. Valve disc shall employ a positive machined drive. Pins or bolts are not allowed for attaching the disc to the valve stems. Disc edge will be configured to minimize opening valve torque.
 - c. Valve seat shall consist of a resilient elastomer liner molded to a rigid backing ring. Valve seat shall be field replaceable with hand tools. Valve seat shall be capable of service up to piping system pressure rating.
 - d. The upper stem shall be guided by two self-lubricating bronze bearings to prevent galling and seizure.
 - e. Manual handles to be supplied with valves through 6” size; weatherproof worm gear operators with valves 8” and above. All valves have tamper proof seals.

Manufacture: Grinnell, Keystone or Equivalent

2. Drain and Air Vent Valves: Up to 1”. Bronze body, bronze or stainless steel ball, threaded ends, twin seal EPDM seats and seals, “O” ring, lever handle, rating 150 psi.

Manufacturer: Grinnell, Apollo, Crane

3. Needle Valves: Threaded, bronze body, needle type seating, 500 psig, non-shock water, backseat, Class 300, ½” - ¾”.

Manufacturer: Crane #88

4. Check Valves: 2” and over, minimum Class 150, silent check, cast iron body, flanged ends or wafer type, stainless steel spring, swing check disc, bronze trim. Full faced when flanged.

Manufacturer: Grinnell, Jenkins or Crane

5. Balancing Valves: 2" and smaller, bronze body, brass ball, TFE seat rings, differential pressure readout ports with check valves, drain/purge port, memory stop feature, calibrated pointer indicating degree of valve opening, tight shutoff with solder or thread ends.

3" and over, cast iron body, brass vane, differential pressure readout ports with check valves, memory stop feature, calibrated pointer with flanged ends.

Manufacturer: Bell & Gossett, Armstrong

6. Safety Relief Valves: Safety relief valves shall be ASME rated direct spring loaded type, level operated, non-adjustable factory set discharge pressure. The safety relief valves that are connected between isolation valves shall be sized to handle the expansion of the enclosed volume only. System expansion is handled by existing safety relief valves within the chilled water loop.

Manufacturer: Watts

7. Flow Meter: Magnetic/Inductive Type, Accuracy $\pm .5\%$ of rate from 1 to 30 feet/sec. Output suitable for the software controlled energy calculation.

Manufacturer: Rosemount or Equal

8. Temperature Sensors: Industrial grade, 4-wire connected Pt-100 sensors, watertight encapsulated, installed in thermowells.

9. Ball Valves - 2" and smaller ball valves shall be 150SWP, 400WOG, bronze two piece body, full port, stainless steel ball, teflon seat and rings, lever handle and solder or threaded ends.

Manufacturers: Grinnell, Apollo, Crane.

D. Heat Exchangers: Plate Type:

1. The plate heat exchanger shall be shipped to the site assembled. The exchangers shall be pressure tested and flushed clean at the factory prior to shipment. All nozzle connections shall be factory sealed prior to shipment to prevent the entrance of foreign matter into the heat exchanger during shipment, storage and installation.
2. The plate heat exchanger shall be factory tested in accordance with the requirements of Section VIII, Division I of the ASME Code.
3. Flanged nozzle connections shall conform to ASA Standards and shall be of the pressure rating design as indicated on the schedule. Studded port construction is not acceptable.
4. Heat exchanger design is to be of diagonal flow to optimize fluid flow distribution across the plate surfaces.
5. Plates shall be fabricated from SA240-304 or 316 stainless steel and have a thickness for a design pressure of 150 psig design/test pressure requirements:
 - a. 150 psi design - .028 inches minimum plate thickness
6. Gaskets shall be of a one piece molded design formulated of Nitrile rubber. Gaskets shall be encapsulated by the plate gasket grooves to prevent movement during exchanger tightening and to prevent the gasket from being forced out of the groove under pressure.

SERIAL 99214-RFP

7. Heat exchanger frames shall have a minimum of two external lifting lugs per frame designed to support twice the dry weight of the exchanger.
8. Frame tightening bolts shall receive a rust-protective coating of molybdenum grease and shall also be covered with plastic sleeves.
9. All exposed frame parts shall be surface prepared to SSP-6 finish, receive two prime coats of a glycerophthalic zinc chromate primer and two finish coats of an epoxy enamel to a minimum dry thickness of 3mm.
10. Manufacturer shall be Alfa-Laval or Tranter.

E. Insulation:

1. Fiberglass type pipe insulation with all-service jacket will be provided for chilled water piping system. Average thermal conductivity will be 0.25 Btu/hr/sq.ft/deg F at 100 degrees F mean temperature per inch of thickness, as follows:

Chilled water piping 4" and smaller 1" thick
Chilled water piping 6" and larger 1½" thick
2. Primary side piping insulation will be 1½" thick fiberglass type with tight vapor barrier at joints and feed throughs. Thermometers, etc. shall have an insulating cap.

APPENDIX F TO CHILLED WATER SERVICE AGREEMENT

Form of Memorandum of Agreement

THIS MEMORANDUM is made by **NORTHWIND PHOENIX, LLC**, a Delaware Limited Liability Company (the "Supplier"), and _____ (the "Customer"). Reference is hereby made to that certain Chilled Water Service Agreement dated as of _____, 2000 (the "Agreement"), between Supplier and Customer, pursuant to which Supplier, at Customer's request, has agreed to provide certain chilled water service to the property commonly known as _____ and legally described in the manner set forth on Exhibit A attached hereto (the "Property").

The purpose of this Memorandum is to provide notice of the Agreement and, in accordance therewith, Supplier and Customer hereby acknowledge and agree that notwithstanding the manner or method by which the Transfer Station (as such term is hereinafter defined) is installed in the Property the Transfer Station is the personal property of Supplier (subject to the terms and conditions of the Agreement) and are not to be deemed part of the collateral pledged to any lender or creditor of Customer as security for the repayment of any indebtedness of Customer.

As used herein, the term "Transfer Station" shall mean the equipment and related piping and apparatus between Supplier's distribution piping and the Customer's Connection Equipment, including, without limitation, a plate frame heat exchanger assembly or equivalent device, piping, valves, metering equipment and controls and additional equipment, if any, described in the IOM Specifications (as defined in the Agreement) installed by Supplier on the Property pursuant to the terms of the Agreement for use in providing chilled water service to Customer, and all replacements and additions thereof.

As used herein, the term "Customer's Connection Equipment" shall mean all equipment and piping necessary to connect the HVAC system used by Customer to cool space within the Property to the heat exchanger assembly included in the Transfer Station.

IN WITNESS WHEREOF, Supplier and Customer have executed this instrument as of the day and year set forth below.

Dated: _____, 2000

NORTHWIND PHOENIX, LLC

**MARICOPA COUNTY, a political subdivision
of the State of Arizona**

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: _____

EXHIBIT A TO MEMORANDUM OF AGREEMENT

LEGAL DESCRIPTION OF PREMISES

[to be inserted]

STATE OF ARIZONA)
) SS.
COUNTY OF MARICOPA)

I, _____, a Notary Public in and for said County, in the State aforesaid, do hereby certify that _____, the _____ of NORTHWIND PHOENIX, LLC, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _____, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act and as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

WITNESS my hand and official seal in the County and State aforesaid this ____ day of _____, 2000.

SEAL

My commission expires:

STATE OF ARIZONA)
) SS.
COUNTY OF MARICOPA)

I, _____, a Notary Public in and for said County, in the State aforesaid, do hereby certify that _____, the _____ of _____, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _____, appeared before me this day in person and acknowledged that he signed and delivered the said instrument as his own free and voluntary act and as the free and voluntary act of said entity, for the uses and purposes therein set forth.

WITNESS my hand and official seal in the County and State aforesaid this ____ day of _____, 2000.

SEAL

My commission expires:

APPENDIX G TO CHILLED WATER SERVICE AGREEMENT

Scenario #1

If the district cooling system operation was closed and Maricopa County was required to install their own permanent cooling system, the County would be compensated based on the following formula:

$$A = \text{Payment to County} = B+C+D$$

Where:

B = Cost of temporary cooling system less the normal cost for Northwind District cooling service for the period of time required to construct a permanent cooling system

C = Present value of \$ 800,000/year annuity stream for the balance of the 20-year term of the contract upon completion of the new plant at a 6.25% discount rate

D = "Significant" cost differences in constructing a new vs. the original plant (with comparable efficiency ratings after adjusting for inflation)

Example # 1 – At the completion of the first full year of the 20-year contract, Northwind closes the business and there is not a new owner. The time required to have a new plant built after the business is closed is two years, thus temporary cooling will be required for two years at a cost of \$ 250,000 and the cost of Northwind district cooling service for the same two years is \$ 150,000. There are no significant cost differences in constructing a new plant vs. the original plant.

$$B = (\$ 250,000 - \$ 150,000)$$

$$C = \text{Present Value of } \$ 800,000 \text{ at } 6.25\% \text{ for } 17 \text{ years}$$

$$D = 0$$

$$A = \text{Payment to County} = (\$ 250,000 - \$ 150,000) + \text{Present Value of } \$ 800,000 \text{ at } 6.25\% \text{ for } 17 \text{ years} + 0$$

$$A = \$ 100,000 + \$ 7,293,021 + 0 = \boxed{\$ 7,393,021 = \text{Payment to County}}$$

Example # 2 – At the completion of 19 years of the 20-year contract Northwind closes the business and there is not a new owner. The time required to have a new plant built after the business is closed is two years, thus temporary cooling will be required for two years at a cost of \$ 300,000 and the cost of Northwind district cooling service for the same two years is \$ 100,000. There is a significant cost differences in constructing a new plant vs. the original plant totaling \$ 500,000 after adjusting for inflation due to having to build a new plant at a different location than what was first contemplated.

$$B = (\$ 300,000 - \$ 100,000)$$

$$C = 0$$

$$D = \$ 500,000$$

$$A = \text{Payment to County} = (\$ 300,000 - \$ 100,000) + 0 + \$ 500,000$$

$$A = \$ 200,000 + 0 + \$ 500,000 = \boxed{\$ 700,000 = \text{Payment to County}}$$

Scenario #2

If Northwind sold the district cooling system and Maricopa County now purchases the district cooling service at a higher price from the new provider, the County would be compensated based on the following:

Example # 1 – At the completion of the first full year of the 20-year contract Northwind sells the business. The cost to provide district cooling service from the new supplier is estimated to increase by \$ 10,000 (based on averaging the annual usage cost for the balance of the term of the contract) and the new service is available immediately upon Northwind selling the business (if the service was not available immediately following the sale, Northwind would pay an additional amount equal to the difference between temporary cooling and the Northwind service until the County obtained new district cooling service).

Payment to County = Present Value of \$10,000 @ 6.25% for 19 years = \$ 109,433

ASSIGNMENT AGREEMENT
FROM NORTHWIND PHOENIX, LLC TO
PINNACLE WEST CAPITAL CORPORATION

THIS ASSIGNMENT AGREEMENT (“ Assignment”) is entered into and made effective as of this 21st day of June, 2000, by and between Northwind Phoenix, LLC, a Delaware limited liability company (“ASSIGNOR”) and Pinnacle West Capital Corporation, an Arizona corporation (“ASSIGNEE”).

RECITALS

WHEREAS, ASSIGNOR and Maricopa County, a political subdivision of the State of Arizona (the “County”) have on this date, entered into a Chilled Water Service Agreement (the “Cooling Agreement”), pursuant to which ASSIGNOR has undertaken to provide cooling to certain new facilities to be constructed, owned and operated by the County in Downtown Phoenix, as more particularly described therein; and

WHEREAS, ASSIGNOR now desires to assign its rights and delegate its obligations under the Cooling Agreement to ASSIGNEE, its Affiliate for the purposes of the Cooling Agreement, upon the terms and conditions set forth herein.

Whereas, in addition to effectuating the assignment and delegation contemplated in the foregoing recitals, parties desire to enter into this Assignment in order to satisfy the Condition Precedent set forth in Section 16.4 of the Cooling Agreement.

AGREEMENT

NOW THEREFORE, in consideration of the premises, covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the ASSIGNOR AND the ASSIGNEE, intending to be legally bound, hereby agree as follows:

1. Assignment. ASSIGNOR hereby transfers, assigns and delegates all of its right, title, interest and obligations in, to and under the Cooling Agreement to ASSIGNEE. For the purpose of satisfying the condition precedent set forth in Section 16.4 of the Cooling Agreement, nothing contained herein shall be interpreted as a novation or substitution of parties, it being understood and agreed that this Assignment shall not release ASSIGNOR from its obligations under the Cooling Agreement.
2. Acceptance. ASSIGNEE hereby accepts all benefits, burdens, rights, liabilities, and obligations of ASSIGNOR in the Cooling Agreement, and agrees to be bound thereby.
3. Covenants of ASSIGNEE.
 - 3.1 Assumption. ASSIGNEE hereby assumes all the duties and obligations of ASSIGNOR under the Cooling Agreement.
 - 3.2 Indemnification. ASSIGNEE promises to indemnify, defend, and hold harmless ASSIGNOR, its officers, employees, agents, and representatives from any and all claims, demands, suits, actions, proceedings, loss, cost, and damages of every kind and description, including attorney’s fees and litigation expenses, arising out of the Cooling Agreement on and after the effective date of this Assignment, or incident to this Assignment of interests between ASSIGNOR and ASSIGNEE.

- 4. Governing Law. This Assignment shall be interpreted in accordance with the substantive and procedural laws of the State of Arizona.
- 5. Attorney's Fees. If any action is brought by any party in respect to its rights under this Assignment, the prevailing party shall be entitled to reasonable attorney's fees and court costs, as determined by the court.

This Assignment has been executed by the duly authorized representatives of the parties and shall be effective as of the date first above written.

“ASSIGNOR”:

NORTHWIND PHOENIX, LLC

By: _____
Title: _____

“ASSIGNEE”:

PINNACLE WEST CAPITAL CORPORATION

By: _____
Title: _____

Acknowledgement and Consent

Maricopa County, by and through its Materials Management Department, in accordance with Section MC1-310 of the Maricopa County Procurement Code, hereby consents to the assignment, transfer and delegation provided for in this Assignment Agreement pursuant to Section 16.2.2 of the Cooling Agreement.

MARICOPA COUNTY,
By and through its Materials Management Department

BY: _____
NAME: _____
TITLE: _____
DATE: _____

ASSIGNMENT AGREEMENT
FROM PINNACLE WEST CAPITAL CORPORATION TO
NORTHWIND PHOENIX, LLC

THIS ASSIGNMENT AGREEMENT (“ Assignment”) is entered into and made effective as of this 21st day of June, 2000, by and between Pinnacle West Capital Corporation, an Arizona corporation (“ASSIGNOR”) and Northwind Phoenix, LLC, a Delaware limited liability company (“ASSIGNEE”).

RECITALS

WHEREAS, ASSIGNOR and Maricopa County (the “County”) are parties to a Chilled Water Service Agreement, dated as of June 21, 2000 (the “Cooling Agreement”), pursuant to which ASSIGNOR has undertaken to provide cooling to certain new facilities to be constructed, owned and operated by the County in Downtown Phoenix as more particularly described therein; and

WHEREAS, ASSIGNOR now desires to assign its rights and delegate its obligations under the Cooling Agreement to ASSIGNEE, its Affiliate for the purposes of the Cooling Agreement, upon the terms and conditions set forth herein; and

WHEREAS, in addition to effectuating the assignment and delegation contemplated in the preceding recital, parties desire to enter into this Assignment in order to satisfy the condition precedent set forth in Section 16.4 of the Cooling Agreement

AGREEMENT

NOW THEREFORE, in consideration of the premises, covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the ASSIGNOR and the ASSIGNEE, intending to be legally bound, hereby agree as follows:

1. Assignment. ASSIGNOR hereby transfers, assigns and delegates all of its right, title, interest and obligations in, to and under the Cooling Agreement to ASSIGNEE. For the purpose of satisfying the condition precedent set forth in Section 16.4 of the Cooling Agreement, nothing contained herein shall be interpreted as a novation or substitution of parties, it being understood and agreed that this Assignment shall not release ASSIGNOR from its obligations under the Cooling Agreement.
2. Acceptance. ASSIGNEE hereby accepts all benefits, burdens, rights, liabilities, and obligations of ASSIGNOR in the Cooling Agreement, and agrees to be bound thereby.
3. Covenants of ASSIGNEE.
 - 3.1 Assumption. ASSIGNEE hereby assumes all the duties and obligations of ASSIGNOR under the Cooling Agreement.
 - 3.2 Indemnification. ASSIGNEE promises to indemnify, defend, and hold harmless ASSIGNOR, its officers, employees, agents, and representatives from any and all claims, demands, suits, actions, proceedings, loss, cost, and damages of every kind and description, including attorney’s fees and litigation expenses, arising out of the Cooling Agreement on and after the effective date of this Assignment, or incident to this Assignment of interests between ASSIGNOR and ASSIGNEE.

- 4. Governing Law. This Assignment shall be interpreted in accordance with the substantive and procedural laws of the State of Arizona.
- 5. Attorney's Fees. If any action is brought by any party in respect to its rights under this Assignment, the prevailing party shall be entitled to reasonable attorney's fees and court costs, as determined by the court.

This Assignment has been executed by the duly authorized representatives of the parties and shall be effective as of the date first above written.

“ASSIGNOR”:

PINNACLE WEST CAPITAL CORPORATION

By: _____
Title: _____

“ASSIGNEE”:

NORTHWIND PHOENIX LLC

By: _____
Title: _____

Acknowledgement and Consent

Maricopa County, by and through its Materials Management Department, in accordance with Section MC1-310 of the Maricopa County Procurement Code, hereby consents to the assignment, transfer and delegation provided for in this Assignment Agreement pursuant to Section 16.2.2 of the Cooling Agreement.

MARICOPA COUNTY,
By and through its Materials Management Department

BY: _____
NAME: _____
TITLE: _____
DATE: _____