**Addendum**

**SDG&E’s Energy Storage System (“ESS”)**

2016

Energy storage

Request for PROPOSALS (“RFp”)

**SCHEDULE D**

**ENGINEERING**, **PROCUREMENT AND CONSTRUCTION AGREEMENT**

**by and between**

**[OWNER ENTITY]**

**and**

**[CONTRACTOR ENTITY]**

**dated [ ]**, **201[\_]**

***[Timing and requirements relating to CPUC approval, project permits, interconnection arrangements, preliminary engineering and expected schedule for NTP/LNTP issuance are still under consideration by SDG&E, and final details will need to be incorporated accordingly into this EPC Agreement.]  
  
[In addition, bidders to note that many of the definitions and provisions relating to acceptance testing, performance testing, performance guarantees, buy down damages, delay liquidated damages, performance liquidated damages, warranties, corrective action plans and related provisions throughout this EPC Agreement have been drafted generically and/or bracketed, and are expected to be updated and completed as project details and the terms of the Long Term Service Agreement are developed and finalized.]***

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Exhibits

A Statement of Work

B Contractor Deliverables

C Owner-Acquired Permits

D Safety and Site Security Requirements/Hot Work Requirements

E Operating Personnel Training Program

F Form of Contractor’s Invoice and Forms of Lien Waiver and Releases

F-1 Conditional Waiver and Release Upon Final Payment

F-2 Unconditional Waiver and Release Upon Final Payment

F-3 Conditional Waiver and Release Upon Progress Payment

F-4 Unconditional Waiver and Release Upon Progress Payment

G Project Schedule Requirements

H Acceptance Tests and Guarantees

I Milestone Payment Schedule

J Form of Monthly Progress Report

K Legal Description of Site

L-1 Unit Rates for Changes In Work

L-2 Change In Work Form

M [\_\_\_\_\_\_\_\_\_] Test Letter of Credit ***[See notes to title page; to be updated]***

N Major Subcontractors

O Commissioning Procedures

P Key Personnel

Q Labor Agreements

R Liquidated Damages

S Form of Contractor Parent Guaranty

T Long-Term Services Agreement

This ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT is made and entered into as of this [ ] day of [ ], 201[\_], (the “**Execution Date**”) by and among [OWNER ENTITY], a [ ] (the “**Owner**”) and [CONTACTOR ENTITY], a [ ] (the “**Contractor**”). Each entity is sometimes individually referred to herein as a “**Party**” and the entities are sometimes collectively referred to herein as the “**Parties**.”

RECITALS

WHEREAS, Owner desires to have installed a nominally [20] MW energy storage system at the Site; and

WHEREAS, Owner desires to engage Contractor to design, engineer, procure, install, construct, test, commission and start-up the Project on a turnkey basis for the firm Contract Price stated herein (as the same may be adjusted pursuant to the terms hereof), and Contractor desires to provide such services, all in accordance with the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the sums to be paid to Contractor by Owner and of the covenants and agreements set forth herein, the Parties agree as follows:

AGREEMENT

# DEFINITIONS AND RULES OF INTERPRETATION

## Definitions.

For the purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires, the following terms shall have the following meanings.

“**[\_\_\_\_\_\_\_\_\_\_\_\_] Buy Down Amounts**”means the amounts paid or to be paid by Contractor pursuant to Section 15.2.2 and as calculated in Exhibit [\_\_\_]. ***[See notes on title page; update provision accordingly]***

“**Abandons**” means, except as permitted pursuant to Section 20.5.1, Contractor has substantially reduced personnel at the Site or removed required equipment from the Site such that Contractor would not be capable of maintaining progress sufficient to achieve Substantial Completion by the Substantial Completion Guaranteed Date and Contractor is not otherwise entitled to suspend the Work pursuant to the terms of this Agreement.

“**Abnormally Severe Weather Conditions**” means storms and other climatic and weather conditions that are abnormally severe for the period of time when, and the area where, such storms or conditions occur.

“**AC**” means alternating current.

“**Acceleration Plan**” has the meaning set forth in Section 7.5.

“**Acceptance Tests**” means each of the [\_\_\_\_\_\_\_\_\_] Tests, as further described in Exhibit H.***[See notes on title page; update provision accordingly. See also Energy Storage System Specification for additional details.]***

“**Acceptance Test Procedures**” means the written test procedures, standards, protective settings, and testing programs for the Acceptance Tests developed pursuant to Section 13.3 and Exhibit H.

“**Affiliate**” means, with respect to a specified Person, any other Person that directly, or indirectly through one or more intermediaries, Controls, is under common Control with, or is Controlled by such specified Person, but expressly excluding Subcontractors (of all tiers), independent contractors, and Owner’s Separate Contractors.

“**Agreement**” means this Engineering, Procurement and Construction Agreement, including all Exhibits hereto, as the same may be modified, amended or supplemented from time to time in accordance with the terms hereof.

“**Allowable Claim Period**” has the meaning set forth in Section 8.2.

“**Applicable Law(s)**” means and includes any applicable statute, license, law, rule, regulation, code, ordinance, judgment, arbitral award, Permit Requirement, decree, writ, legal requirement, order or the like, of any national, federal, provincial, state or local court or other Governmental Authority, and the binding written interpretations thereof, regulating, relating to or imposing liability or standards of conduct: (a) concerning the Work or otherwise relating to the Work, including the performance of the Work by Contractor or any of its Subcontractors; (b) concerning the protection of individuals or the environment during the performance of or as a result of the Work; or (c) concerning the operation of the Project.

“**Applicable Permit**” means each and every national, state, local or other license, consent, appraisal, authorization, ruling, exemption, variance, order, judgment, decree, declaration, regulation, certification, filing, recording, permit (including, where applicable, conditional permits) or other approval with, from or of any Governmental Authority, including each and every environmental, construction, operating or occupancy permit and any agreement, consent or approval from or with any other Person, that is required by any Applicable Law for the lawful performance of the Work by Contractor or the Subcontractors (including the acquisition and use of all Temporary Work) or operation of the Project, including the Owner Acquired Permits and the Contractor Acquired Permits, and, with respect to the construction of the Project, the applicable requirements of the California Independent System Operator Corporation, the North American Electric Reliability Council, and the Western Electricity Coordinating Council, or each of their respective successive agencies.

“**Bid Documents”** all documentary information used in Contractor’s preparation of the Contract Price, including all information which details how the components of the Contract Price were determined (i.e. assumptions regarding crews, equipment, quantities and rates of production, cost categories such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs, indirect costs, risk contingencies, markup, quantity takeoffs, rates of production and progress calculations, quotes from Subcontractors and suppliers, quotes for insurance and bond premiums etc.) For purposes of clarity, Bid Documents shall include electronic media data files associated with all such data.

“**Business Day**” means a day, other than a Saturday or Sunday or a public holiday, on which banks are generally open for business in Los Angeles, California.

“**Change In Law**” means the enactment, adoption, promulgation, modification (including a written change in interpretation by a Governmental Authority), or repeal (collectively, a “**Change**”) after the Execution Date of any Applicable Law; provided, however, that each of the following shall not be a Change in Law hereunder: (a) a Change in any requirement of any Contractor Acquired Permit, or the terms and conditions of, or the delay or denial in the issuance of, any Contractor Acquired Permit; (b) a Change in any national, federal, state, provincial or any other income or franchise tax law or any other law imposing a tax, duty, levy, impost, fee, royalty, or similar charge based on the importation or exportation of any item or service for which Contractor (or any Subcontractor) is responsible hereunder; and (c) a proposed Change of any Applicable Law of any Governmental Authority, which proposal was in existence prior to the Execution Date but not yet made effective; but only if such proposal has been published to the public by the applicable Governmental Authority. For purposes of clarity, any delay or denial in the issuance by the applicable Governmental Authority of a Contractor Acquired Permit, for any or no reason, shall not be considered a Change In Law or any other Excusable Event hereunder.

“**Change In Work**” means a change in the Work as defined in Section 16.1.

“**Change In Work Form**” means the form in respect of a Change In Work in the form of Exhibit L-2.

“**Claim Notice**” shall have the meaning set forth in Section 23.5.

“**Commissioning Plan**” shall have the meaning set forth in Exhibit O.

“**Communications Components**” shall have the meaning set forth in Exhibit [\_\_].

“**Component**” shall have the meaning set forth in Section 17.5.4.

“**Conditional Waiver and Release Upon Final Payment**” means a written statement in the form prescribed by California Civil Code § 8136, as such form may be amended from time to time, the current form of which is attached hereto as Exhibit F-1.

“**Conditional Waiver and Release Upon Progress Payment**” means a written statement in the form prescribed by California Civil Code §8132, as such form may be amended from time to time, the current form of which is attached hereto as Exhibit F-3.

“**Confidential Information**”means information, ideas or materials of a confidential or proprietary nature, including such information, ideas or materials, now or hereafter owned by or otherwise in the possession or control of, or otherwise relating to, one Party or any of its Affiliates, including proprietary or non-public information concerning such Party’s or its Affiliates’ business, operations, financial condition, projections, or assets, historical information, inventions, business or trade secrets, know-how, techniques, data, reports, drawings, specifications, blueprints, flow sheets, designs, or engineering, construction, environmental, operations, marketing or other information, disclosed by one Party (the “**transferor**”) to the other Party or any of its Affiliates or any of their respective directors, employees or agents (the “**transferee**”); provided, however, “**Confidential Information**” of Owner shall also mean information, ideas or materials related to the Work or the Project that are: (a) obtained, developed or created by or for Contractor directly through the use of Owner’s Confidential Information in connection with the Work; (b) disclosed by Owner or any of its Affiliates; or (c) deduced by Contractor or any of its Affiliates or any of their respective directors, employees or agents from Confidential Information supplied by Owner or of its Affiliates or agents, or as a result of visits by Contractor or any of its Affiliates or any of their respective directors, employees or agents to the premises of Owner or any of its respective Affiliates, which relate to the Project. In addition, “**Confidential Information**” of Owner shall also mean non-public information pertaining to Owner’s electrical infrastructure and properties, any data in GIS format pertaining to Owner’s electric and gas transmission facilities, including shapefiles for structures, biological and cultural resources survey shapefile data, tieline layers and access roads, electric transmission pole locations and any other information of a similar nature (collectively, “GIS Data”), information relating to Owner substation design (including, without limitation, design documents and drawings, security systems design and operation and similar information constituting critical energy infrastructure information as defined by 18 C.F.R. §388.113(c)(1)).

Confidential Information shall not include any information that: (w) is already in the public knowledge or which becomes public knowledge absent any violation of the terms of this Agreement; (x)  was already in the possession of a transferee prior to disclosure by the transferor; (y) the transferee obtains from another Person which such party reasonably believes was not under an obligation of confidentiality; or (z) is or becomes generally available to, or is independently known to or has been or is developed by, the transferee or any of its Affiliates other than materially as a result of any disclosure of proprietary information by the transferor to the transferee.

“**Contract Interest Rate**” means the interest rate at the prime rate as published in “The Money Rates” Section of the Wall Street Journal (U.S. Edition), plus four percent (4%) per annum, until paid, but not to exceed the maximum rate permitted by Applicable Law.

“**Contract Price**” has the meaning set forth in Section 5.1, as the same may be adjusted pursuant to the terms hereof.

“**Contractor**” shall have the meaning set forth in the preamble.

“**Contractor Acquired Permits**” means all Applicable Permits other than the Owner Acquired Permits. Contractor Acquired Permits includes, but is not limited to:

(a) Building permits required for the construction of the Project.

(b) Labor or health standard permits and approvals reasonably related to construction of the Project.

(c) Business permits reasonably related to the conduct of the operations of Contractor and all Subcontractors in the State of California and any other location where such permits may be required (including all contractors’ licenses and related documents).

(d) Permits, approvals, consents or agreements from or with any Person necessary for the performance by Contractor of the Work or its warranty obligations hereunder, for the transportation or importation of Equipment and Materials or for the transportation or importation of equipment, tools, machinery and other items used by Contractor in performance of the Work.

(e) Permits, visas, approvals and certifications required or necessary for Contractor’s employees to legally perform the Work in the State of California (including documentation of citizenship or legal residency in the United States).

(f) Permits, approvals and certifications required or necessary for temporary construction utilities and temporary sanitary facilities, dump permits, road use permits, permits related to the use, storage and disposal of Hazardous Materials, and permits issued pursuant to any building, mechanical, electrical, plumbing or similar codes.

“**Contractor Deliverables**” means all of the deliverables set forth on the final Contractor Deliverables Table.

“**Contractor Deliverables Table**” means the table of Contractor Deliverables attached hereto as Exhibit B.

“**Contractor Event of Default**” shall have the meaning set forth in Section 19.1.

“**Contractor Group**” Contractor, any Subcontractor (of any tier), or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable.

“**Contractor Indemnitee**” shall have the meaning set forth in Section 23.2.

“**Contractor Lien**” shall have the meaning set forth in Article 28.

“**Contractor Parent**” means [\_\_\_\_\_\_\_\_\_\_\_\_\_], a [ ]. ***[Contractor to provide details]***

“**Contractor Parent Guaranty**” means the guaranty of Contractor Parent in the form attached hereto as Exhibit S executed by Contractor Parent and delivered to Owner on or before the Execution Date. ***[Note to bidders, Owner will want to verify that the proposed guarantors are creditworthy entities]***

“**Contractor’s Invoice**” means the invoice from Contractor to Owner prepared in accordance with Section 6.2, in the form set forth in Exhibit F, and provided monthly for all Work pursuant to this Agreement, each in a form to be reasonably agreed upon by the Parties.

“**Contractor’s Construction Manager**” means the individual identified in Exhibit P, or any other construction manager appointed by Contractor and reasonably approved by Owner.

“**Contractor’s Safety and Site Security Procedures**” means those procedures and protocols set forth on Exhibit D.

“**Contractor’s Termination Invoice**” means an invoice from Contractor to Owner described in Section 20.2.2.

“**Control**” means (including with correlative meaning the terms “**Controlled**”, “**Controls**” and “**Controlled by**”), as used with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

“**Covered Work**” shall have the meaning set forth in the applicable Labor Agreements.

**“Critical Path Item(s)**”means the items identified as critical path items on the Critical Path Schedule.

“**Critical Path Schedule**” means a critical path logic schedule prepared by Contractor and meeting the requirements set forth in Exhibit G, which schedule shall be resource loaded and shall form a part of the Project Schedule, describing the time of completion by Contractor of the Critical Path Items, as such schedule may be modified in accordance with Section 7.3.

“**days**” means calendar days.

“**Defect**” means any Equipment and Materials, design, engineering or installation or other workmanship or service which forms a part of the Work or other Work that is either incomplete or that (a) does not conform to the Statement of Work or the Contractor Deliverables; (b) is of improper or inferior workmanship or material; or (c) contains errors or omissions in design; or (d) without extending the term of the Defect Warranty Period, could reasonably be expected to materially and adversely affect the mechanical, electrical or structural integrity of the Project or the normal operation of the Project, in each case, during the Project’s design life.

“**Defect Warranty**” means the warranties of Contractor under Section 17.1.1.

“**Defect Warranty Period**” shall have the meaning set forth in Section 17.2.

“**Delay Liquidated Damages**” means liquidated damages for delay payable to Owner as calculated in accordance with Exhibit R in the event that Substantial Completion has not been achieved by the Substantial Completion Guaranteed Date. ***[See notes on title page; update provision accordingly]***

“**Delay Notice**” shall have the meaning set forth in Section 8.2.

“**Dispute**” shall have the meaning set forth in Section 31.1.

“**Dollars**”, “**dollars**” or “**$**” means United States Dollars.

“**Equipment and Materials**” means all materials, supplies, apparatus, device, machinery, equipment, parts, tools, special tools, components, construction utilities, instruments, appliances, spare parts and appurtenances thereto that are required for the design, construction or operation of the entire Project in accordance with Industry Standards; or described in, required by, reasonably inferable from or incidental to the scope of Work set forth in Exhibit A or the Contractor Deliverables; and, in each case, which are intended to form a permanent part of the Project, whether provided by Supplier or any Subcontractor. For purposes of clarity, Equipment and Materials does not include Temporary Work.

“**Event of Default**” means either a Contractor Event of Default or an Owner Event of Default, as the context may require.

“**Excusable Event**” shall mean and be limited solely to the following: (a) the discovery of an Excused Site Condition; (b) the occurrence of a Change In Law; or (c) the occurrence of an Owner-Caused Delay, in each case (i.e. clauses (a), (b) and (c)), only if Contractor notifies Owner as required by Section 8.2.

“**Excused Site Condition**” shall mean and be limited solely to the following:

(a) the discovery of archeological artifacts, cultural burial grounds, endangered or threatened species, or religious, historical or archeological resources above or below the surface of the Site;

(b) the discovery of Hazardous Materials in the subsurface of the Site, provided that such Hazardous Materials (i) were not brought onto the Site by Contractor or any Subcontractor; and (ii) such Hazardous Materials (1) are not readily apparent from, or could not reasonably be inferred from, a reasonably diligent visual inspection of the Site; (2) are not disclosed in, or reasonably inferable from, a reasonable review of the No Reliance Site Information; and (3) are not disclosed in any geo-technical study caused by the Contractor to be performed prior to the Execution Date; and

(c) the discovery of man-made objects in the subsurface of the Site, provided that such man-made objects (1) are not readily apparent from, or could not reasonably be inferred from, a reasonably diligent visual inspection of the Site; (2) are not disclosed in, or reasonably inferable from, a reasonable review of the No Reliance Site Information; and (3) are not disclosed in any geo-technical study caused by the Contractor to be performed prior to the Execution Date.

“**Execution Date**” shall have the meaning set forth in the preamble.

“**Executive Officer Negotiations”** has the meaning set forth in Section 31.1.

“**Exhibit**” means an exhibit attached hereto.

“**Final Completion**” means satisfaction by Contractor or waiver by Owner of all of the conditions for Final Completion set forth in Section 14.4.

“**Final Completion Date**” means the date on which the last of the conditions to Final Completion occurs.

“**Final Completion Guaranteed Date**” means the [sixtieth (60th)] day after the Substantial Completion Date.

“**Final Contractor’s Invoice**” means the final Contractor’s Invoice submitted for Final Payment in accordance with Section 6.5(a).

“**Final Payment**” means the final payment made by Owner to Contractor after achieving Final Completion in accordance with Section 6.5(a).

**“Financing Entities**” means (a) any and all lenders providing senior or subordinated construction, interim or long-term debt financing or refinancing to Owner or its Affiliates; (b) any and all equity investors in Owner or its Affiliates providing tax equity investment or leveraged lease-financing or refinancing (or any other equity investor that makes a capital contribution to Owner or its Affiliates in cash or in kind) or (c) any Person providing credit support to Owner or its Affiliates, in each case, in connection with the Project or a portfolio of projects (including the Project) and, in each case, any trustee or agent acting on a Financing Entity’s behalf.

“**Force Majeure Event**” means, subject to clauses (a), (b) and (c) below, only the following events, matters or things: revolution, insurrection, riot, acts of war, acts of terrorism, theft, sabotage, civil disturbance or public disorder or acts of emergency; expropriation, requisition, confiscation or nationalization; export or import restrictions by any Governmental Authority (but not to the extent due to an increase in export or import Taxes); embargoes or sanctions; closing or accidents to harbors, docks, canals, or other assistances to or adjuncts of the shipping or transportation industry; rationing or allocation, at the request or insistence of any Governmental Authority; fire; floods at the Site caused by Abnormally Severe Weather Conditions; earthquake; tornado; dust storms originating off of the Site which pass over the Site; volcano; tide, tidal wave or perils of the sea; Abnormally Severe Weather Conditions at the Site; an epidemic or quarantine at the Site; acts of God;

provided, however, that

(a) any such event, matter or thing shall constitute a Force Majeure Event only if such event, matter or thing and its effects:

(i) was not a result of the failure of Contractor or any of its Subcontractors to perform its obligations hereunder; and

(ii) is unavoidable or could not have been prevented or overcome if Contractor or any Subcontractor had used reasonable care or reasonable efforts and due diligence or acted in compliance with industry standards;

(b) the occurrence of such event, matter or thing as identified in the opening paragraph of this definition of Force Majeure Event” shall constitute a “Force Majeure Event” only if Contractor notifies Owner as required by Section 8.2; and

(c) for purposes of clarity, the following events, matters or things shall not constitute a “Force Majeure Event”:

(i) the absence of sufficient financial means to perform obligations or the failure to make payments in accordance with this Agreement, including, but not limited to, the economic hardship of Contractor or any Subcontractor;

(ii) any Labor Dispute;

(iii) mechanical, electrical or control system or component failures of the Project unless caused by an event specifically set forth in the opening paragraph of this definition of “Force Majeure Event”;

(iv) storms and other climatic or weather conditions other than Abnormally Severe Weather Conditions;

(v) the unavailability or shortages of labor, equipment and materials unless caused by an event specifically set forth in the opening paragraph of this definition of “Force Majeure Event”;

(vi) (1) actions of a Governmental Authority enforcing Contractor’s compliance with any Contractor Acquired Permit or; (2) the failure of Contractor or any Subcontractor to obtain or maintain, or the delay in obtaining, any Contractor Acquired Permit; and

(vii) any risk related to the Work the consequence of which Contractor has otherwise expressly assumed hereunder (for example, the discovery or occurrence of any Site Condition which does not qualify as an Excused Site Condition).

“**Full Notice to Proceed**” means a written Notice signed by a duly authorized representative of Owner to Contractor authorizing Contractor to commence and complete all Work under this Agreement.

“**Full Notice to Proceed Date**” means the first Business Day after Owner provides Contractor with the Full Notice to Proceed.

“**Governmental Authority**” means applicable national, federal, foreign, state, provincial, and local governments and all agencies, authorities, departments, instrumentalities, municipalities, courts, corporations, other authorities lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, or other subdivisions of any of the foregoing having or claiming a regulatory interest in or jurisdiction over the Site, the Project, the Work or the Parties and their respective employees and Subcontractors (and their respective employees).

“**Hazardous Materials**” means any chemical, substance or material regulated or governed by any Applicable Law, or any substance, emission or material now or hereafter deemed by any Governmental Authority to be a regulated substance, hazardous material, hazardous waste, hazardous constituent, hazardous substance, toxic substance, radioactive substance, pesticide or any similar classification that is regulated by Applicable Law, including by reason of deleterious properties, ignitability, corrosivity, reactivity, carcinogenicity or reproductive toxicity.

“**Indemnitee**” means an Owner Indemnitee or a Contractor Indemnitee, as the context may require.

“**Independent Evaluator**” means any Independent Evaluator (as such term is used in CPUC Decision 04-12-048 and any subsequent CPUC rulings or decisions regarding the same topic) used by Owner in connection with the Owner’s request for offers from which this Agreement arose or any subsequent request for offers providing information against which this Agreement may be compared.

“**Industry Standards**” or “**Industry Grade**” means those standards of construction, design, engineering, workmanship, Equipment and Materials and components specified in Exhibit A. If the relevant standard is not so specified or is ambiguous in Exhibit A, then “Industry Standards” shall mean those standards of care and diligence normally practiced by recognized engineering and construction firms in performing services of a similar nature for utility scale energy storage projects in the United States and in accordance with good engineering practices, Applicable Laws and Applicable Permits, in effect at the time the Work is performed.

“**Insured Property**”means property (whether real or personal) that is(a) located at, or in transit to, the Site**,** and (b) covered by the insurance provided by Contractor pursuant to the Builder’s All Risk Insurance Policy Contractor will obtain pursuant to Section 21.5, other than Temporary Work.

“**Intellectual Property Claim**” means a third party claim or legal action for actual or alleged unauthorized disclosure, use, infringement or misappropriation of any license, trade secret, patent, copyright, trademark, proprietary information, service mark or other intellectual property ownership right arising from Contractor’s performance (or that of its Affiliates or Subcontractors) under this Agreement that: (a) concerns any Equipment and Materials or other services or equipment provided by Contractor, any of its Affiliates, or any Subcontractor under this Agreement; (b) is based upon or arises out of the performance of the Work by Contractor, any of its Affiliates, or any Subcontractor, including the use or provision of any tools or other implements of construction by Contractor, any of its Affiliates, or any Subcontractor; or (c) is based upon or arises out of the design or construction of any item by Contractor or any of its Affiliates or Subcontractors under this Agreement or the operation of any item according to directions embodied in Contractor’s final process design, or any revision thereof, prepared or approved by Contractor; provided, that such claim or legal action does not result from Contractor’s or a Subcontractor’s following the written instructions of Owner pursuant to a Change In Work or Owner Directive to use, incorporate, or install the subject matter of the claim or legal action or offending or infringing process or item.

“**Intellectual Property Rights**” means all licenses, trade secrets, copyrights, patents, service marks, trade names, trademarks, franchises, permits, proprietary information and other ownership rights related to the Work or otherwise necessary for the provision of Equipment and Materials or the ownership and maintenance of the Project, including all Project-related documents, models, computer drawings and other electronic expressions, photographs and other expressions.

“**Invention**” shall have the meaning set forth in Section 25.1.

“**JAMS**” means JAMS, The Resolution Experts, a mediation and arbitration service.

“**JAMS Rules**” shall have the meaning set forth in Section 31.3.1.

“**Key Date Items**”means discrete portions of the Work identified in the Key Date Schedule to be completed by the applicable dates set forth in the Key Date Schedule, including the Project Guaranteed Dates.

“**Key Date Schedule**”means the listing of dates prepared by Contractor and attached as part of Exhibit G, describing the dates of completion of each Key Date Item, as such schedule may be modified in accordance with the terms hereof.

“**Key Personnel**” means the natural persons named and assigned to the identified positions set forth on Exhibit P.

“**Labor Agreements**” means (a) any applicable collective bargaining agreement to which Owner is a party as of the Execution Date or as otherwise identified by Owner at any time, and (b) any applicable collective bargaining or union labor agreement as may be entered into by Contractor from time to time. As of the Execution Date, each of such Labor Agreements are identified on Exhibit Q.

“**Labor Dispute**” means work stoppages, slowdowns, strikes, disputes, disruptions, boycotts, walkouts and other labor difficulties.

“**Long-Term Services Agreement**” shall mean the long term services agreement, the form of which is set forth in Exhibit T.

“**Loss**” means any and all liabilities (including liabilities arising out of the application of the doctrine of strict liability), obligations, losses, damages, penalties, claims, actions, suits, judgments, costs, expenses and disbursements and, in the case of third-party claims, whether the foregoing be founded or unfounded (including reasonable legal fees and expenses and costs of investigation), and whether arising in equity, at common law, or by statute, or under the law of contracts, torts or property, of whatsoever kind and nature, including claims for property damage, personal injury (including emotional distress) and third-party economic loss.

“**Major Subcontractor**” means (1) a Subcontractor whose contract or contracts (in the aggregate) with Contractor, or any of its Subcontractors, require payments by Contractor (or Subcontractor) of at least [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Dollars ($\_\_\_\_\_\_\_\_\_\_)] or (2) any of the following: [\_\_\_\_\_\_\_\_\_\_\_].

“**Mandatory Remedial Plan**” means a Remedial Plan prepared by Contractor regarding the corrective actions to be taken by Contractor, and the schedule to take such actions, all to ensure that the Project will achieve the [\_\_\_\_\_\_\_] Guarantee during the Successful Run of the [\_\_\_\_\_\_\_\_\_] Test, as submitted to and approved by Owner pursuant to Section 15.3.2. ***[See notes on title page; update provision accordingly]***

“**Mechanical Completion**”of means the Project is (a) mechanically, electrically and functionally complete and ready for initial operations, adjustment and testing, except for Non-Critical Deficiencies; and (b) Structural Installation has occurred.

“**Milestone**” means a discrete portion of the Work identified as a “Milestone” on the Milestone Payment Schedule.

“**Milestone Payment(s)**” means a discrete portion of the Contract Price payable pursuant to the Milestone Payment Schedule as a progress payment due upon completion of a Milestone in accordance with Section 6.1.

“**Milestone Payment Schedule**” means the Milestone Schedule set forth in Exhibit I.

“**Monthly Progress Report**” means a written monthly progress report prepared by Contractor in form and content generally in accordance with Exhibit J.

“**MW**” means megawatt of AC power.

“**No Reliance Site Information**” means any information (written or oral) provided to Contractor by Owner, any of Owner’s Separate Contractors, or the Owner’s Engineer, prior to the date hereof with respect to, or regarding, any Site Condition.

“**Non**-**Critical Deficiencies**” means each item of Work that: (a) Owner or Contractor identifies as requiring completion or containing Defects; (b) does not impede the safe operation of the Project; (c) does not materially increase the cost of operating the Project; (d) does not affect the capacity, efficiency, reliability, operability, safety or mechanical or electrical integrity of the Project; and (e) does not have a cost or estimated cost to complete as approved or deemed approved by the Parties under Section 14.1.1 in excess of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Dollars ($\_\_\_\_\_\_\_\_\_\_)].

“**Notice**” or “**Notification**” means a written communication between the Parties required or permitted by this Agreement and conforming to the requirements of Article 29.

“**Notice of Substantial Completion**” means a Notice from Contractor to Owner stating that Contractor has satisfied the requirements for Substantial Completion under Section 14.3.

“**Notice of Final Completion**” means a Notice from Contractor to Owner stating that Contractor has satisfied the requirements for Final Completion under Section 14.4.

“**Notify**” means to provide a Notice or Notification.

“**Operating Personnel**” means the personnel hired by Owner, or by an entity providing operating services for Owner, to operate the Project (including all operators, instrument technicians and supervisors and Owner’s contractors).

“**Other Work**” has the meaning set forth in Section 2.5.

“**Owner**” shall have the meaning set forth in the preamble.

“**Owner**-**Acquired Permits**” shall mean those Applicable Permits specifically identified on Exhibit C.

“**Owner**-**Caused Delay**” shall mean and be limited solely to the following: (a) a failure by Owner to perform any material obligation under this Agreement (other than by exercise of its rights under this Agreement); (b) Owner’s failure to provide the Owner-Provided Facilities and Services as and in the manner set forth in Section [\_\_] of Exhibit A by the applicable date set forth in the Key Date Schedule; (c) any unreasonable active interference in the Work by Owner or Owner’s Separate Contractors; or (d) the occurrence of the Full Notice to Proceed Date beyond [\_\_\_\_\_\_\_\_\_\_].

“**Owner Directive**” shall have the meaning set forth in Section 16.7.

“**Owner Event of Default**” shall have the meaning set forth in Section 19.3.

“**Owner Group**” shall have the meaning set forth in Section 23.2.

“**Owner Indemnitee**” shall have the meaning set forth in Section 23.1.

“**Owner**-**Provided Facilities and Services**” means and is strictly limited to the provision of the [\_\_\_\_\_\_\_\_\_] by the date set forth in the Key Date Schedule, as more fully described in Section [\_\_] of Exhibit A.

“**Owner Representative**” means the Owner’s representative designated by Owner pursuant to Section 2.1.

“**Owner’s Certificate of Final Completion**” means a certificate of Owner certifying that Final Completion has occurred.

“**Owner’s Certificate of Substantial Completion**” means a certificate from Owner certifying that Substantial Completion has occurred.

“**Owner’s Engineer**” means any engineering firm or firms or other engineer or engineers selected and designated by Owner.

“**Owner’s Separate Contractors**” means each contractor or other Person that is in direct or indirect contractual privity with Owner and that performs any work in respect of the Project but excluding Contractor and each Person in direct or indirect contractual privity with Contractor, including in such exclusion each Subcontractor (provided that where a Person is performing work in connection with the Owner-Provided Facilities and Services, as a contractor or a subcontractor of a contractor of Owner, such Person shall be considered one of “Owner’s Separate Contractors” with respect to its performance of such work).

“**Party Representative Negotiations”** has the meaning set forth in Section 31.1.

“**Performance Liquidated Damages**” means [\_\_\_\_\_\_\_] Buy Down Amounts and [\_\_\_\_\_\_\_] Liquidated Damages. ***[See notes on title page; update provision accordingly]***

“**Permit Requirement**” means any requirement or condition contained in any Applicable Permit relating to the Work or the performance thereof, including any condition on or with respect to the issuance, maintenance, renewal or transfer of any Applicable Permit or any application therefor.

“**Person**” means any individual, corporation, company, voluntary association, partnership, incorporated organization, trust, limited liability company, or any other entity or organization, including any Governmental Authority. A Person shall include any officer, director, member, manager, employee or agent of such Person.

“**Production Inputs**” means (a) process water for operation, back feed and charging power necessary for the start-up, testing and operation of the Project, and (b) the other inputs (including chemicals necessary for the operation and maintenance of the Project) as referenced in Exhibit A. ***[Conform to final project requirements]***

“**Project**” means the [\_\_\_] MW energy storage system to be designed, engineered, procured, constructed, tested and commissioned under this Agreement, together with (a) the Equipment and Materials and (b) all supporting improvements and interconnections, in each case as described in this Agreement, in each case, all as generally described in, or inferable from, this Agreement.

“**Project Documents**”has the meaning set forth in Section 32.17(a).

“**Project Guaranteed Dates**” means the Substantial Completion Guaranteed Date and the Final Completion Guaranteed Date.

“**Project Schedule**” means a Work schedule prepared by Contractor and meeting the requirements set forth in Exhibit A, setting forth the Critical Path Schedule meeting the requirements of Exhibit G, the matters described in Section 2.4 and the Key Date Items, describing the time of completion by Contractor of the Key Date Items and all of the other Work items, as such schedule may be modified in accordance with Section 7.2.

“**Property Tax**” means any ad valorem tax, including real property and personal property taxes levied or imposed by any Governmental Authority on the Site, the Project or on any Equipment and Materials that will be incorporated therein.

“**Proposed Punchlist**” shall have the meaning set forth in Section 14.1.1.

“**Punchlist**” means a schedule or schedules of Non-Critical Deficiencies developed pursuant to Section 14.1.1.

“**Punchlist Amount**” means the cost or estimated cost to complete any Punchlist item as approved or deemed approved by the Parties under Section 14.1.1.

**“Release”** shall mean the release,“threatened release” (as contemplated by CERCLA)discharge, deposit, injection, dumping, spilling, leaking or placing of any solid or Hazardous Material into the environment so that such solid or Hazardous Material or any constituent thereof may enter the environment, or be emitted into the air or discharged into any waters, including ground waters under Applicable Law.

“**Remedial Plan**” means a plan prepared by Contractor regarding the corrective actions to be taken by Contractor and the schedule to take such corrective actions, all to cause (a) the Project to achieve the [\_\_\_\_\_\_\_\_] Guarantees (with respect to Remedial Plans required to be undertaken pursuant to Section 13.4.2); or (b) with respect to all other Remedial Plans, the applicable Project to achieve the [\_\_\_\_\_\_\_] Guarantee during the Successful Run of the [\_\_\_\_\_\_\_\_\_] Test, as submitted to and approved by Owner pursuant to Section 15.3.1. ***[See notes on title page; update provision accordingly]***

“**Required Manuals**” means operation and maintenance manuals which are reasonably necessary to safely and efficiently operate, maintain and shut down the Project.

“**Retainage**” has the meaning set forth in Section 6.4.1.

“**Site**” means the real property described in Exhibit K.

“**Site Conditions**” means the physical and other conditions at the Site and the surrounding area as a whole, including conditions relating to the environment, transportation, access, waste disposal, handling and storage of materials, the availability and quality of electric power, the availability and quality of water, the availability and quality of roads, the availability and quality of labor personnel and local work and labor rules, climatic conditions and seasons, topography, air and water (including raw water) quality conditions, ground surface conditions, surface soil conditions, sound attenuation, subsurface geology, nature and quantity of surface and subsurface materials to be encountered (including Hazardous Materials), the geological and subsurface conditions of the Site, all other local and other conditions which may be material to Contractor’s performance of its obligations under this Agreement, and the location of underground utilities, obstructions and equipment and facilities needed before and during performance of Contractor’s obligations under this Agreement.

“**Statement of Work**” means the requirements regarding the Work set forth in this Agreement, including the specifications and other requirements included in the Exhibits attached hereto.

“**Structural Installation**” means (a) the installation of structural components, including [\_\_\_\_\_\_\_\_\_], (b) the installation of all associated hardware and [\_\_\_\_\_\_\_\_\_] for all such structural components installed and (c) the installation of the Communications Components.

“**Subcontractor**” means any Person, including any Supplier, other than Contractor, that performs any portion of the Work (of whatever tier) in furtherance of Contractor’s obligations under this Agreement.

“**Substantial Completion**” means the satisfaction (or waiver in writing by Owner) of the requirements set forth in Section 14.2.1.

“**Substantial Completion Date**” means the date on which the Project actually achieves Substantial Completion.

“**Substantial Completion Guaranteed Date**” means [\_\_\_\_\_\_\_\_\_\_\_].

“**Successfully Run**” or “**Successful Run**” means, with respect to each Acceptance Test, that the most recent attempt at the applicable Acceptance Test was completed in accordance with the approved Acceptance Test Procedures and the other conditions and requirements for the proper performance of such test set forth in Exhibit H and the other provisions of this Agreement applicable to such test. ***[See notes on title page; update provision accordingly]***

“**Supplier**” means persons that supply Equipment and Materials to Contractor or any Subcontractor in connection with the performance of the Work.

“**Suspension for Cause**” shall have the meaning set forth in Section 20.5.2(a).

“**Taxes**” means all taxes, assessments, customs, charges, tariffs, imposts, duties, fees, levies and other governmental charges effective or enacted (whether in the United States or elsewhere and including, without limitation, any of the foregoing related to the importation of any items into the United States) as of the Execution Date of this Agreement or thereafter, including, without limitation, income, franchise, capital stock, Property Tax, utility, tangible, withholding, employment, payroll, social security, social contribution, unemployment compensation, disability, transfer, sales, use, fuel, excise, gross receipts, net worth, value-added and all other taxes of any kind and any charges, interest, additions to tax, penalties, or any other amounts imposed by any Governmental Authority, whether such amounts are normally included in the purchase price of an item or service, or is normally stated separately.

“**Temporary Work**” has the meaning set forth in Section 3.5.3.

“**Unconditional Waiver and Release Upon Final Payment**” means a written statement in the form prescribed by California Civil Code §8138, as such form may be amended from time to time, the current form of which is attached hereto as to Exhibit F-2.

“**Unconditional Waiver and Release Upon Progress Payment**” means a written statement in the form prescribed by California Civil Code §8134, as such form may be amended from time to time, the current form of which is attached hereto as to Exhibit F-4.

“**Warranty Work**” means remedial Work undertaken to cause the Project and the Work to conform to the Defect Warranty as more fully set forth in Section 17.5.1.

“**Work**”means all of Contractor’s obligations, duties, and responsibilities assigned to or undertaken by Contractor under this Agreement with respect to the Project, including the engineering, design and construction of the Project, all procurement and provision of Equipment and Materials, all erection and installation of Equipment and Materials, all related Site improvements such as landscaping, grading, roads, fencing and Site finishing, provision of all Temporary Work, and all training, start up (including calibration, inspection, and startup operation), and testing included in or required for the Project on a fixed price basis, all as set forth in, or reasonably inferable from Exhibit A and the rest of this Agreement. Where Exhibit A describes a the Work (or a portion thereof) in general, but not in complete detail, the Parties acknowledge and agree that the Work includes any work and provision of Equipment and Materials required: (a) for the design and construction of the Project in accordance with Industry Standards; and (b) for the Project to be capable of being operated in accordance with Industry Standards while meeting the [\_\_\_\_\_\_\_] Guarantee. ***[See notes on title page; update provision accordingly]***

“**Working Outstanding Items List**” has the meaning set forth in Section 14.1.1. For purposes of clarity, any Working Outstanding Items List is not a Proposed Punchlist or a Punchlist (unless updated to become a Proposed Punchlist or Punchlist in accordance with Section 14.1.1).

## Exhibits.

This Agreement includes the Exhibits annexed hereto and any reference in this Agreement to an “Exhibit” by letter designation or title shall mean one of the Exhibits identified in the table of contents and such reference shall indicate such Exhibit herein. Each Exhibit attached hereto is incorporated herein in its entirety by this reference.

## Interpretation.

### Terms defined in a given number, tense or form shall have the corresponding meaning when used in this Agreement with initial capitals in another number, tense or form. The meaning assigned to each term defined herein shall be equally applicable to both the singular and the plural forms of such term and vice versa, and words denoting either gender shall include both genders as the context requires. Where a word or phrase is defined herein, each of its other grammatical forms shall have a corresponding meaning.

### The terms such as “hereof,” “herein,” “hereto,” “hereinafter” and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to this Agreement taken as a whole.

### When a reference is made in this Agreement to an Article, Section, subsection or Exhibit, such reference is to an Article, Section, subsection or Exhibit to this Agreement unless otherwise specified.

### The word “include,” “includes,” and “including” when used in this Agreement shall be deemed to be followed by the words “without limitation,” and unless otherwise specified shall not be deemed limited by the specific enumeration of items, but shall be deemed without limitation. The term “or” is not exclusive.

### A reference to any Party to this Agreement or any other agreement or document shall include such Party’s successors and permitted assigns.

### Without adversely impacting Contractor’s remedies with respect to a Change In Law, reference to any Applicable Law means such Applicable Law as amended, modified, codified, replaced or reenacted, and all rules and regulations promulgated thereunder.

### The Parties have participated jointly in the negotiation and drafting of this Agreement. Any rule of construction or interpretation otherwise requiring this Agreement to be construed or interpreted against any Party by virtue of the authorship of this Agreement shall not apply to the construction and interpretation hereof.

## Headings.

All headings or captions contained in this Agreement are for convenience of reference only, do not form a part of this Agreement and shall not affect in any way the meaning or interpretation of this Agreement.

## Conflicts in Documentation.

This Agreement, including the Exhibits hereto shall be taken as mutually explanatory. If Contractor becomes aware of an express conflict between the provisions of this Agreement or any Exhibit hereto, Contractor shall immediately Notify Owner of such conflict. In the event of a conflict between any provision within Articles 1 through 32 of this Agreement and an Exhibit, the provisions of Articles 1 through 32 of this Agreement shall take precedence over any such Exhibit. In the event of a conflict between the Exhibits, the Parties shall work together in good faith to resolve such conflict. However, the Parties have agreed that with respect to conflicts arising between the following Exhibits, the order of priority in resolving such conflict shall be as follows C, Q, H, R, P, O, D, B, E, G, L-2, L-1, M, T, A, I, N, J, K, F, S. In the event of a conflict between the Exhibits and any Contractor Deliverable, the Exhibits shall take precedence over any Contractor Deliverable.

## Documentation Format.

This Agreement and all documentation to be supplied hereunder shall be in the English language and all units of measurement in the design process, specifications, drawings and other documents shall be specified in dimensions as customarily used in the United States.

# RESPONSIBILITIES OF OWNER

Owner shall, at Owner’s cost and expense:

## Owner Representative.

Designate (by a Notice delivered to Contractor) an Owner Representative, who shall act as the single point of contact on behalf of Owner with respect to the prosecution and scheduling of the Work and any issues relating to this Agreement. Owner may designate a new Owner Representative from time to time by a Notice delivered to Contractor. Owner’s Representative shall have the authority to execute Changes In Work on behalf of Owner.

## Operating Personnel.

Provide Operating Personnel to provide ordinary operating support to Contractor for testing, start-up and commissioning of the Project in accordance with Section 3.15. Such Operating Personnel shall not be deemed employees of Subcontractors or Contractor.

## Applicable Permits.

Obtain all Owner Acquired Permits. Owner shall provide support to Contractor free of charge by way of reasonable ministerial assistance, providing information, providing drawings, and attending meetings with permitting boards as reasonably requested by Contractor and necessary in connection with the Contractor’s obligations under Section 3.8 to obtain the Contractor Acquired Permits.

## Owner-Provided Facilities and Services.

Owner shall provide the Owner-Provided Facilities and Services for Contractor’s use in performing the Work by the set forth in the Key Day Schedule for the provision of such facilities.

## Owner Separate Contractors.

Contractor acknowledges that Owner may, from time to time, retain, at Owner’s sole cost and responsibility, Owner’s Separate Contractors in connection with Owner’s responsibilities under this Agreement (other than in respect of Owner’s payment obligations under this Agreement). Owner reserves the right to contract with Owner’s Separate Contractors for the performance of other services in or about the Site (“**Other Work**”) during the Work. Contractor shall provide Owner and any of its Owner’s Separate Contractors reasonable access to the Site for the performance of Other Work. Without limiting Contractor’s remedies for the occurrence of an Owner-Caused Delay, Contractor shall coordinate the Work with the performance of Other Work and Owner shall be responsible for delivering the schedules for Other Work to Contractor. Contractor shall be responsible for being familiar with the scope and substance of Other Work. If any part of the Contractor’s Work depends upon Other Work or the work of employees of Owner, Contractor shall review such Other Work and promptly notify Owner Representative of any Defect discovered. Contractor’s failure to notify Owner Representative of any work containing a Defect shall not constitute an acceptance of the same by Contractor. Contractor shall otherwise reasonably cooperate with Owner’s Separate Contractors. Owner shall cooperate and cause Owner’s Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site. ***[To be conformed for arrangements with contractors and O&M providers for interconnection facilities and substation]***

## Access to Site.

Beginning on the Full Notice to Proceed Date, Owner shall make the Site available to Contractor to perform the Work as required under the Scope of Work, subject to all Applicable Laws and Applicable Permits. Contractor shall coordinate and cooperate with Owner regarding entry onto the Site and with the Owner approved Contractor’s Safety and Site Security Procedures and reasonable security procedures (if any) to the extent Owner has provided such security procedures to Contractor. Contractor acknowledges and agrees that Owner has no obligation under this Agreement to make available to Contractor any additional land to perform the Work (including any additional land for access, storage or staging areas, etc). ***[To be conformed for any requirements relating to substation site]***

## Remedies For Owner’s Failures Under This Article 2.

Any failure of Owner to perform any obligation or covenant in accordance with this Article 2 shall not be considered a breach of any covenant, condition, representation or warranty of Owner, and shall not be construed as an Owner Event of Default, it being understood that any such failure shall constitute an Owner-Caused Delay, the sole and exclusive remedy for which is set forth in Article 8.

# RESPONSIBILITIES OF CONTRACTOR

Contractor shall:

## General.

Perform, furnish and be responsible for all of the Work. Contractor acknowledges and agrees that this Agreement constitutes a fixed price (subject to the terms hereof) obligation to engineer, design, procure, expedite, inventory, construct, test, and start-up a Project within the time and for the purpose designated herein.

## Performance of Work.

Perform and complete all of the Work, and cause each Subcontractor to perform and complete each such Subcontractor’s portion of the Work, in accordance with the terms of this Agreement and Industry Standards, all without Defect. Without limiting the generality of the foregoing, during and in connection with the Work, Contractor shall comply, and cause its Subcontractors to comply, with (a) all Applicable Laws relating to the performance of the Work; and (b) each Labor Agreement. The obligations set forth in this Section 3.2 shall apply to all aspects of the Work, and regardless of whether such Work will form a permanent part of the completed Project.

## Design and Construction of Project.

Design, engineer and construct the Project so that, upon Substantial Completion, the Project meets the requirements of this Agreement, and the applicable Contractor Deliverables, and is capable of operation at the design levels specified in Exhibit A while in compliance with Industry Standards and Applicable Laws in effect at the time of Substantial Completion. Contractor shall provide all engineering and design services necessary to set forth in detail the specifications, drawings and requirements for the procurement of Equipment and Materials and for the construction of the Project in a manner which satisfies the requirements of this Agreement. Contractor shall preserve all permanent survey construction monuments and benchmarks during its performance of the Work. Prior to the Execution Date, Owner performed or caused to be performed engineering, cost estimating and developed and supplied information that was used by the Parties in the preparation of the Statement of Work and the basis of design set forth in Exhibit A. Notwithstanding the performance of such services and the furnishing of such information by such other Persons, Contractor is fully responsible for the contents of Exhibit A as if furnished by Contractor under this Agreement, including for all purposes of the warranties provided under Article 17. Contractor affirms that it has the skills and experience necessary to review the engineering, cost estimating and other information used in the preparation of the Statement of Work and basis of design and Exhibit A, and that it has reviewed and participated in the drafting and preparation of the Statement of Work and basis of design with care and hereby acknowledges and agrees that the attached Statement of Work in Exhibit A is accurate, adequate and complete for Contractor to conduct the Work for the Contract Price, within the required times set forth in the Project Schedule, and in accordance with all requirements of this Agreement, including Applicable Laws and Industry Standards, and the [\_\_\_\_\_\_\_\_] Guarantee. Contractor further affirms that it is entering into this Agreement based on such review and that notwithstanding the actual review undertaken by Contractor, Contractor shall be deemed to have reviewed and verified the information provided by Owner with respect to Exhibit A and all attachments thereto.

## Contractor’s Construction Manager.

Designate a Contractor’s Construction Manager who shall have full responsibility for the prosecution of the Work and shall act as a single point of contact in all matters on behalf of Contractor. Any change to the person appointed as the Contractor’s Construction Manager by Contractor shall be subject to Owner’s prior written approval (not to be unreasonably withheld or delayed). Construction Manager shall have the authority to execute Changes In Work on behalf of Contractor.

## Utilities and Services.

### Provision of Services. [Install, connect and maintain at its own expense during its performance under this Agreement, all utilities, facilities and services (other than Owner-Provided Facilities and Services) set forth in Exhibit A required for the performance of the Work. Contractor shall be responsible to perform all construction activities and services, including, but not limited to, all necessary Site preparation.] ***[To be updated after finalizing Exhibit A / Scope of Work]***

### Payment. Pay when due all construction utility usage charges and arrange with local authorities and utility companies having jurisdiction over the Site for the provision of utilities other than or in excess of the utilities provided as part of the Owner-Provided Facilities and Services.

### Production Inputs. Provide the Production Inputs as more fully set forth in Exhibit A. ***[To be discussed and updated for project requirements, including for arrangements for construction power, temporary facilities, etc.]***

### Supply of Temporary Work. Other than the Owner-Provided Facilities and Services, provide all supplies, labor, materials, consumables, construction equipment, construction utilities, offices and warehouses, tools, construction vehicles, other necessary equipment, or services, protection for workers, erection structures, all sanitary, safety, first aid, fire prevention facilities, in each case, of whatever kind or nature, required for the performance of the Work but which do not form a permanent part of the completed Work (the “**Temporary Work**”).

## Inspection.

Perform all inspection, expediting, quality surveillance and other like services required for performance of the Work, including inspecting all Temporary Work and all Equipment and Materials that are to be used in the performance of the Work.

## Organization.

Maintain staff that are dedicated to the furnishing and completion of the Work, and that have the technical and managerial expertise to control and execute the Work in accordance with the requirements of this Agreement and Applicable Laws. Contractor shall maintain a qualified and competent organization at the Site with adequate capacity and numbers of construction and startup personnel, equipment, and facilities to execute the Work in a safe, efficient, environmentally sound, and professional manner at a rate of progress in accordance with the Project Schedule.

## Contractor Acquired Permits.

Contractor shall obtain and pay for all Contractor Acquired Permits. Contractor shall provide support to Owner free of charge by way of reasonable ministerial assistance, providing information, providing drawings, and attending meetings with permitting boards as reasonably requested by Owner and necessary in connection with the Owner’s obligations under Section 2.3 to obtain the Owner Acquired Permits. Contractor shall perform the Work so that, upon Substantial Completion, the Project shall meet, and will be capable of being operated in accordance with, all requirements of Applicable Laws and Applicable Permits using methods and Equipment and Materials that satisfy Industry Standards. Without limiting Owner’s rights to assert that a Change In Law in fact has not occurred, Contractor shall Notify Owner as soon as reasonably practicable of any reasonably likely Change In Law which, if enacted, would materially affect the Work. Such Notice shall reasonably describe the potential Change In Law, its potential impact on the Work, and when Contractor reasonably believes such Change In Law may come into effect.

## Maintenance of Site.

Maintain the Site clear of debris, waste material and rubbish generated by Contractor or its Subcontractors in performance of the Work. Contractor shall dispose of such debris, waste material and rubbish in accordance with Applicable Law. Prior to Final Completion, Contractor shall remove from the Site all of its waste materials and Temporary Work.

## Site Security and Safety.

Contractor shall, and shall cause its Subcontractors to, comply with Contractor’s Safety and Site Security Procedures and “Hot Work Requirements” set forth in Exhibit D. Without limitation of Section 3.2, Contractor is solely responsible for ensuring that the Work is performed in a safe manner and in compliance with all provisions of this Agreement, and Applicable Laws and Industry Standards, regarding worker health and safety, including the Occupational Safety and Health Act of 1970 (84 U.S. §§ 1590 et seq.) and any state plans approved thereunder, and regulations thereunder, to the extent applicable. Within thirty (30) days after the Full Notice to Proceed Date, Contractor shall provide draft Site specific environmental, health and safety plan for Owner review. Within sixty (60) days after the Full Notice to Proceed Date, Contractor and Owner shall agree on a Site specific environmental, health and safety plan to be used by Contractor in the performance of the Work. Contractor shall perform all Work in accordance with the approved Site specific environmental, health and safety plan. Contractor shall appoint one (1) or more (as appropriate) safety and environmental representative(s) acceptable to Owner who shall be stationed at the Site during any period in which Work is being performed at the Site, and shall have responsibility to immediately correct unsafe conditions or unsafe acts associated with the Work, act on behalf of Contractor on safety, health and environmental matters, and participate in periodic health, safety and environmental meetings with Owner after Work has commenced at the Site. Contractor further agrees to provide or cause to be provided necessary training and safety equipment to its employees and Subcontractors, and to the employees and subcontractors of Owner or the Other Contractors entering the Site, to ensure their compliance with the foregoing health, safety and environmental rules and standards and enforce the use of such training and equipment. Contractor shall maintain all accident, injury and any other documents and records required by Applicable Laws or reasonably required by Owner.

## Provision of all Equipment and Materials, Shipping.

Contractor shall be responsible for the procurement, supply and installation of all Equipment and Materials necessary to perform the Work. Contractor shall arrange for complete handling of all Equipment and Materials and Temporary Work, including inspections, expediting, quality assurance, shipping, loading, unloading, customs clearance, receiving, storage and claims. All Equipment and Materials and Temporary Work shall be stored and maintained in storage in strict accordance with the applicable manufacturer’s recommendations.

## Quality Assurance Programs.

Use effective quality assurance programs throughout the performance of the Work. Within [forty-five (45)] days after the Full Notice to Proceed Date, Contractor shall provide draft quality assurance program for Owner review. Within [sixty (60)] days after the Full Notice to Proceed Date, Contractor and Owner shall agree on a quality assurance program to be used by Contractor in the performance of the Work. Contractor shall perform the Work in accordance with the approved quality assurance program.

## Access.

Use only the entrance to the Site agreed to by the Parties for ingress and egress of all personnel, Equipment and Materials and Temporary Work.

## Contractor Deliverables.

Issue Contractor Deliverables for Owner review and/or approval (as applicable) in accordance with Exhibit B. If Owner identifies within the period of review set forth in Exhibit B any errors or omissions in the design with respect to any Contractor Deliverable submitted for review, then Contractor shall incorporate changes into such Contractor Deliverable addressing and remedying the errors and omissions and resubmit the same to Owner, and such incorporation of changes to address Owner’s comments shall not be considered a Change In Work.

## Training of Operating Personnel.

Commencing [three (3)] months prior to the then anticipated Substantial Completion Date, Contractor shall, or where applicable shall cause the Subcontractors to, train the designated Operating Personnel in the requirements for the start-up, shut-down and operation of, and safety, general process understanding and emergency procedures for, the Project and all of its sub-systems, in accordance with the requirements set forth in Exhibit E.

## Start-up Personnel.

Provide or cause to be provided, appropriate installation and start-up representatives from Contractor and from Subcontractors of major equipment and control systems, all necessary supervising personnel, and all Temporary Work necessary for all of the Work to complete commissioning and start-up and to Successfully Run each Acceptance Test.

## Contractor Performance Security.

### Contractor shall cause the Contractor Parent Guaranty to be provided to Owner as of the Execution Date and to be maintained in full force and effect in accordance with the terms thereof. In lieu of the Contractor Parent Guaranty, Contractor may provide a letter of credit in an amount equal to the greater of (a) the then unpaid portion of the Contract Price; and (b) [\_\_\_\_\_\_\_\_\_\_\_ Dollars], which letter of credit shall be issued by a commercially reasonable financial institution and contain terms and conditions otherwise reasonably acceptable to Owner.

***[Note to bidders, if the Contractor Parent Guarantor is not rated BBB- or better, Owner will insist, and Contractor’s bid should be based on, providing an L/C at an amount to be determined]***

## [\_\_\_\_\_\_\_] Model.

***[To be determined based on project details. Discuss details regarding system performance model, etc.]***

## Price Allocation Schedule.

If requested in writing by Owner, assist Owner in completing a price allocation schedule in a form reasonably agreed to by the Parties, all as reasonably necessary for Owner to maintain segregated accounts for its tax records and fixed asset records.

## Alternate Supplier Plan.

Within thirty (30) days after the Full Notice to Proceed Date, Contractor shall deliver to Owner a back-up supply plan wherein, should the [\_\_\_\_\_\_] Supplier[s] fail (including, but not limited to, as a result of the bankruptcy or other financial instability of the [\_\_\_\_\_\_] Supplier[s]) to perform its obligations to the Contractor under the applicable Subcontract, Contractor will describe its plan to secure an alternate [\_\_\_\_\_\_] supplier for the Work. Contractor shall incorporate any reasonable comments to such plan proposed by Owner. Such back-up plan shall include a reasonable description of (i) the identity of at least two possible back-up [\_\_\_\_\_\_] suppliers; (ii) the likely schedule to secure back-up [\_\_\_\_\_\_] supply; (iii) likely impacts to the Project Schedule should Contractor have to secure an alternate [\_\_\_\_\_\_] supply; (iv) likely impacts to the design of the Project resulting from any such changes; and (v) how Contractor would assess the impact, if any, of integrating alternative [\_\_\_\_\_\_\_\_] into those aspects of the Project. In the event [\_\_\_\_\_\_] Supplier[s] fails to perform its obligations to the Contractor under the applicable Subcontract such that Contractor is forced to terminate its Subcontract(s) for the supply of all or any material portion of the [\_\_\_\_\_\_\_\_\_] for the Project with the [\_\_\_\_\_\_] Supplier[s], Contractor shall perform the Work in accordance with the approved final back-up [\_\_\_\_\_\_] supply plan. For purposes of clarity, nothing in the back-up supply plan shall be deemed to require Owner to agree to a change to (1) the [\_\_\_\_\_\_\_\_] Guarantees; or (2) the warranties under Article 17, or (3) any Project Guarantee Date; or (4) the Contract Price. ***[Conform to project details and supply plan]***

# COVENANTS, WARRANTIES AND REPRESENTATIONS

## Contractor.

### Organization, Standing and Qualification. Contractor warrants and represents that it is a [ ], duly organized, validly existing and in good standing under the laws of the State of [ ], and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business it presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing under the laws of California and each other jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

***[Conform and coordinate following representations of this Article 4 and warranties throughout EPC Agreement to final agreed deal terms and terms of Long Term Service Agreement]***

### Due Authorization; Enforceability. Contractor represents and warrants that this Agreement has been duly authorized, executed and delivered by or on behalf of Contractor and is, upon execution and delivery, the legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors’ rights generally and by general equitable principles.

### No Conflict. Contractor represents and warrants that the execution, delivery and performance by Contractor of this Agreement will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other agreement or instrument to which Contractor is a party or by which it or its properties may be bound or affected; or (c) as of the date hereof, any Applicable Laws.

### Government Approvals. Contractor covenants that the Contractor Acquired Permits either have been obtained by Contractor and are in full force and effect on the Execution Date or will be obtained and will be in full force and effect on or prior to the date on which they are required, under this Agreement and Applicable Law, to be in full force and effect, so as to permit Contractor to commence and prosecute the Work to completion in accordance with the Project Schedule. Other than with respect to the Contractor Acquired Permits, neither the execution nor delivery by Contractor of this Agreement requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority.

### No Suits, Proceedings; Solvency. Contractor represents and warrants that, as of the Execution Date, there are no actions, suits, proceedings, patent or license infringements, or investigations pending or, to Contractor’s knowledge, threatened against it at law or in equity before any court (United States or otherwise) or before any other Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on the business, properties, or assets or the condition, financial or otherwise, of Contractor or in any impairment of Contractor’s ability to perform its obligations under this Agreement. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment. Contractor represents and warrants that Contractor is financially solvent, able to pay its debts as they mature, and possesses sufficient working capital to complete its obligations under this Agreement.

### Business Practices. Contractor represents and warrants that, as of the Execution Date, none of it or its representatives have made any payment or given anything of value, and Contractor covenants that it will not, and Contractor will direct its employees, agents, and Subcontractors, and their employees or agents to not, make any payment or give anything of value, in either case to any government official (including any officer or employee of any Governmental Authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. None of Contractor, its Subcontractors, nor any of their employees or agents shall intentionally take any action with respect to this Agreement or any of the Work that in any way violates the United States Foreign Corrupt Practices Act or any similar Applicable Law. Contractor shall immediately Notify Owner of any violation of this covenant.

### No Reliance Site Information. Contractor acknowledges that Owner does not make any representation or warranty with respect to the accuracy or completeness of documents or information (including oral statements) or opinions expressed in the No Reliance Site Information or any other information provided by Owner as part of the contractor solicitation process. Without limiting Contractor’s rights under Article 12, Contractor represents and warrants that it is not, and will instruct its Subcontractors to not, rely on Owner for any information, data, inferences or conclusions, or other information with respect to Site Conditions, including the surface conditions of the Site and the surrounding areas.

### Legal Requirements. Contractor represents and warrants that it has knowledge of all of the Applicable Laws that must be followed in performing the Work, and that the construction of the Project and the performance of Contractor’s other obligations hereunder can and shall be performed in conformity with all Applicable Laws.

### Licenses and Professional Skills. Contractor covenants that all Persons who will perform any portion of the Work have and will have all business and professional certifications and registrations, and contracting licenses, including those required by the California Contractor’s State License Board, and such other certifications, registrations and licenses if and as required by Applicable Law to perform the Work. Contractor has all the required authority, ability, skills, experience and capacity necessary to perform the Work in a timely and professional manner, utilizing sound engineering principles, project management procedures, construction procedures and supervisory procedures, all in accordance with Industry Standards. Contractor is licensed and regulated by the Contractor’s State License Board.

### Intellectual Property Rights. Without limiting Contractor’s obligations pursuant to Section 23.3, Contractor represents and warrants that it owns or has the right to use or will own or have the right to use on or prior to the date on which they are required for Contractor to perform its obligations hereunder all Intellectual Property Rights necessary to provide the Equipment and Materials and to otherwise perform the Work without conflicting with the rights of others.

### Project Schedule. Contractor represents and warrants that it has the experience and skills necessary to determine, and Contractor has reasonably determined, that Contractor can perform the Work for the Contract Price and can achieve Substantial Completion by the Substantial Completion Guaranteed Date.

### Turnkey Project. Contractor represents and warrants that it has reasonably determined that the Project can be built within the Site boundaries, and that the Site is large enough to permit Contractor to satisfy each [\_\_\_\_\_\_\_\_\_\_] Guarantee within such Site boundaries, as contemplated herein. Contractor acknowledges that this Agreement constitutes a fixed price obligation to engineer, design, procure, construct, test, and start-up a turnkey project (including the training of the Operating Personnel), complete in every detail, within the time and for the purpose designated herein. References to the obligations of Contractor under this Agreement as being “turnkey” and performing the Work on a “turnkey basis” means that Contractor is obligated to supply all of the Equipment, labor and design services and to supply and perform all of the Work, in each case as may reasonably be required, necessary, incidental, or appropriate to complete the Work such that the [\_\_\_\_\_\_\_] Tests are Successfully Run and demonstrate that the [\_\_\_\_\_\_\_\_\_\_] Guarantees are met and the Project otherwise satisfies the applicable terms, conditions and other requirements set forth in this Agreement, all for the Contract Price. Where the scope of the Work is ambiguous and is not specifically set forth in this Agreement, references to performance of the Work on a “turnkey basis” means that Contractor shall complete the Work in accordance with Industry Standards. Contractor further acknowledges that it may have miscalculated its and its Suppliers’ costs to perform the Work, and that the performance of the Work in accordance with this Agreement may result in Contractor (or its Suppliers) expending more resources than it or they estimated or budgeted or otherwise intend to expend. Similarly, Owner acknowledges that Contractor may have been conservative in its assumptions regarding the overall cost of the Work, and that the actual cost to Contractor to perform the Work may in fact be significantly less than the Contract Price. The fact that either Party may have so miscalculated the costs to perform the Work hereunder, or that either Party expended extra resources that it did not intend to spend as a result of such miscalculation, shall not form the basis for any Claim of relief hereunder, whether such Claim arises in contract or tort.]

### Project Labor. Contractor represents and warrants that it will use union labor in the performance of the Work. The Project can and shall be built in conformity with, and the Work and Contractor’s warranty obligations herein will be performed in conformity with, each Labor Agreement. Contractor has conducted a detailed review of the commercial and technical terms, conditions and requirements contained in each Labor Agreement and is completely satisfied that such terms, conditions and requirements are in no way whatsoever inconsistent or in conflict with Contractor’s obligations and responsibilities under this Agreement.

## Owner.

### Organization, Standing and Qualification. Owner represents and warrants that Owner is a limited liability company duly formed, validly existing, and in good standing under the laws of the State of California, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business Owner presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing in each jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

### Due Authorization; Enforceability. Owner represents and warrants that this Agreement has been duly authorized, executed and delivered by or on behalf of Owner and is, upon execution and delivery, the legal, valid, and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors’ rights generally and by general equitable principles.

### No Conflict. Owner represents and warrants that the execution, delivery and performance by Owner of this Agreement will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other agreement or instrument to which Owner is a Party or by which it or its properties may be bound or affected; or (c) as of the date hereof, any Applicable Laws.

### Governmental Approvals. Owner represents and warrants that all Owner Acquired Permits will be obtained prior to the Full Notice to Proceed Date and will be in full force and effect on or prior to the date on which they are required, under this Agreement and Applicable Law, so as to permit Contractor to commence and prosecute the Work to completion in accordance with the Project Schedule. Other than with respect to the Owner Acquired Permits, neither the execution nor delivery by Owner of this Agreement requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority. ***[See notes on title page; update provision accordingly]***

### No Suits, Proceedings. Owner represents and warrants that, as of the Execution Date hereof, other than as may be set forth in Owner’s reports filed with the U.S. Securities and Exchange Commission, (a) there are no actions, suits, proceedings, or investigations pending or, to Owner’s knowledge, threatened against it at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on the business, properties, or assets or the condition, financial or otherwise, of Owner or in any impairment of its ability to perform Owner’s obligations under this Agreement, and (b) Owner has no knowledge of any violation or default with respect to any order, writ, injunction, or any decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.

# COST OF WORK

## Contract Price.

Contractor hereby agrees to accept as full compensation for the performance of the Work in U.S. Dollars [ ] ($[ ]) (the “Contract Price”). Neither shall the Contract Price be changed nor shall Contractor be entitled to any other compensation, reimbursement of expenses or additional payment of any kind without prior written authorization of Owner or as otherwise specifically set forth herein. Payments shall be made at the times and in the manner provided in Article 6.

## All Items of Work Included.

The Contract Price includes all amounts necessary to compensate Contractor for: (a) all costs of engineering, design, procurement of Equipment and Materials, construction of the Site and the Project, training of all personnel, provision, erection and removing all Temporary Work, provision of all labor, Applicable Permit compliance, acquisition of all necessary intellectual property rights required, Contractor Acquired Permit fees and expenses, transportation, and all other labor, procurement, services, and expenses of whatever nature relating to the performance of Contractor’s obligations under this Agreement; and (b) except with respect to the Property Taxes identified in this Section 5.2, any and all Taxes (including any increase of such Taxes that may occur during the term of this Agreement) arising out of Contractor’s or any Subcontractor’s performance of the Work or otherwise imposed on Contractor or its Subcontractors (including, with respect to any Equipment and Materials, Temporary Work, labor, or services provided under this Agreement, and Property Tax related to Temporary Work, import duties, customs duties and harbor and other taxes for imported items as specified by Incoterms 2000 (in an amount based upon delivery in the United States); Taxes imposed on Contractor as a result of Contractor’s connection with any taxing jurisdiction (other than as necessary to perform its obligations under this Agreement); and franchise, income, corporate, doing business or similar taxes imposed upon Contractor or measured by its income or receipt.) For purposes of employment taxes, Contractor agrees to treat all individuals performing services under the Agreement on the behalf of Contractor who are not employed by Subcontractors as employees of Contractor, and cause all Subcontractors to treat all individuals performing Work for such Subcontractors as employees of such entities. Notwithstanding the foregoing, Contractor shall not be liable for, and the Contract Price shall exclude, Property Taxes levied on the real and personal property of Owner or on any real and personal property that shall be incorporated into and become part of the Site or the Project.

## Other Tax Matters.

Contractor and Owner shall cooperate with each other to minimize the Tax liability of both Parties to the extent legally permissible (and with no duty to increase either Party’s Tax liability), and to secure Tax credits and incentives the Owner may obtain for the Project, including separately stating the costs of exempt machinery and equipment, supplying resale and exemption certificates, if applicable, and other information as reasonably requested by Governmental Authorities or Owner. Contractor shall timely pay all Taxes, other than those for which Owner is responsible under this Section 5.2, due in connection with Work under this Agreement; shall make any and all payroll deductions required by Applicable Law; and hereby indemnifies and holds harmless the Owner and its Affiliates from any Losses incurred on account of any and all Taxes, levies, duties, assessments, and deductions other than the Property Taxes which are the responsibility of Owner under Section 5.2.

## Fixed Price Nature of Agreement.

Without limiting either Contractor’s or Owner’s rights pursuant to Article 8, Contractor and Owner acknowledge and agree there are cost risks inherent in the execution of a fixed price contract for construction. Contractor acknowledges that it may have miscalculated its and its Subcontractor’s costs to perform the Work, and that the performance of the Work in accordance with this Agreement may result in Contractor (or its Subcontractors) expending more resources than it estimated or planned and which it did not account for or otherwise intend to expend. Similarly, Owner acknowledges that Contractor may have been conservative in its assumptions regarding the overall cost of the Work, and that the actual cost to Contractor to perform the Work may in fact be significantly less than the Contract Price. The fact that either Party may have so miscalculated the costs to perform the Work hereunder, or that either Party expended extra resources that it did not intend to spend as a result of such miscalculation, shall not form the basis for any claim of relief hereunder, whether such claim arises in contract or tort.]

# TERMS OF PAYMENT

Payments to Contractor shall be made as follows:

## Milestone Payment Schedule.

Subject to the provisions of this Article 6, Owner shall make monthly payments to Contractor in accordance with Section 6.2 on account of the Contract Price in an amount equal to the Milestone Payment for those Milestones that Contractor has completed through the end of the previous month and for which Contractor has not previously been paid; provided, however, Contractor’s payments shall be subject to adjustment for holdbacks under Section 6.6. Each Milestone Payment shall be due and payable only to the extent it is supported by the completion of the corresponding individual Milestones. No Milestone Payment shall be made for any partially or improperly completed individual Milestones or for Work that remains subject to Owner’s review and approval in accordance with Section 11.2. Notwithstanding the foregoing, in no event shall the cumulative amount paid for any month exceed one hundred ten percent (110%) of the cumulative amounts of payments payable for such month set forth in the column labeled “Expected Milestone Value” on the Milestone Payment Schedule. Each Milestone does not represent the cost of the Work included in such Milestone; accordingly, the Milestone Payments do not represent an actual measure of the progress of the Work.

## Contractor’s Invoices.

### On or about the first (1st) day of each calendar month after Contractor receives the Full Notice to Proceed, Contractor shall submit a Contractor’s Invoice in the form of Exhibit F, and prepared in accordance with this Section 6.2, for those Milestones completed under this Agreement in the then immediately preceding month. Contractor shall submit such invoice each month even if Contractor did not complete any Milestones under the Agreement in the then immediately preceding month. Contractor specifically agrees that it shall not request in any Contractor’s Invoice the payment of any sum attributable to Work:

#### for which Contractor has already been paid; or

#### which has been rejected by Contractor or in good faith by Owner; or

#### which otherwise constitutes or relates to a Subcontractor’s application for payment, billings or invoices which Contractor disputes or for any other reason does not intend to pay.

### Each Contractor’s Invoice:

#### shall describe: (i) the completion of the applicable Milestones as described in the Milestone Payment Schedule; (ii) the related Milestone Payments set forth on the Milestone Payment Schedule that are then due as of the end of the immediately preceding calendar month; (iii) any other amounts then payable by Owner to Contractor under Article 16 or any other provision hereof (without limiting Owner’s or Contractor’s right to dispute any amounts requested for payment); (iv) a summary of all Milestones previously invoiced by Contractor, including the identification number and date of each such invoice; and (v) a summary of all Milestones previously paid by Owner and the date such payment was received;

#### shall include documentary evidence of the completion of each Milestone described in such Contractor’s Invoice sufficient for Owner to reasonably verify that such Milestone has been completed unless the completion of such Milestone is readily discernible without such documentary evidence;

#### shall include a Conditional Waiver and Release Upon Progress Payment of Contractor; and

#### shall include from each Major Subcontractor who performed Work with respect to such Milestone a Conditional Waiver and Release Upon Progress Payment (unless the applicable Major Subcontractor has completed all its Work under the applicable Subcontract, in which case Contractor shall submit a Conditional Waiver and Release Upon Final Payment for such Subcontractor).

### Contractor covenants that it shall deliver to Owner an Unconditional Waiver and Release Upon Progress Payment on behalf of Contractor no later than thirty (30) days after Contractor’s receipt of the applicable payment by Owner of a Contractor’s Invoice.

### Contractor understands and agrees that any Contractor’s Invoice that is inaccurate or incomplete in any material respect or that lacks reasonable detail, specificity, or supporting documentation required by this Section 6.2, and, with respect to Contractor’s Invoice requesting Final Payment, Section 6.5, shall not, to the extent of such deficiency, constitute a valid request for payment.

## Owner Review and Payments.

Within ten (10) days after Owner receives a Contractor’s Invoice and all accompanying documentation required by Section 6.2, including Contractor’s Monthly Progress Report, Owner shall; (a) determine whether the Work covered thereby has been completed as described by this Agreement: (b) determine whether the Work performed conforms with the requirements of this Agreement; (c) determine whether the Contractor’s Invoice has been properly submitted; and (d) determine and Notify Contractor concerning any invoiced amount that is in dispute and the basis for such dispute in reasonable detail. All payments to be made to either Party under this Agreement shall be paid in Dollars and shall be paid electronically (by means of ACH or wire) in immediately available funds on the date due or, if such date is not a Business Day, on the immediately succeeding Business Day, to such account as may be designated by such Party from time to time by Notice to the other Party in accordance with Article 29; provided, however, that banking transfer instructions are provided by such Party to the paying Party at least five (5) Business Days before the first payment of the paying Party under this Agreement is due and payable. Payment of undisputed amounts shall be due within twenty-five (25) calendar days of the paying Party’s receipt of the other Party’s invoice. Any delinquent payment hereunder by either Party shall incur interest at the Contract Interest Rate. Contractor shall be responsible for paying all Subcontractors in connection with the Work performed by such Subcontractor. Owner shall not have any obligation to pay any Subcontractor with respect to the Work performed by such Subcontractor.

## Retainage as Security for Final Completion; Completion of a Punchlist.

### Retainage. Owner shall retain an amount equal to ten percent (10%) of each Milestone Payment[[1]](#footnote-1) made pursuant to a Contractor’s Invoice (the “**Retainage**”) as performance security for Contractor’s obligation to perform under this Agreement (including, but not limited to, Contractor’s obligation to complete the items on the Punchlist, to achieve Substantial Completion, and to achieve Final Completion). Retainage shall be released only as described in Section 6.4.2.

### Release of Retainage. Subject to Owner’s rights pursuant to Section 14.1.3, Owner shall release the Retainage as follows:

#### At Substantial Completion, Owner shall release to Contractor an amount equal to (w) the entire amount of the Retainage held but not otherwise paid to Contractor pursuant to clause (a) of this Section 6.4.2; *less* the sum of the following (clause (x) plus clause (y)): (x) an amount equal to one hundred and fifty percent (150%) of the Punchlist Amount for all of the Punchlist items for the Work that have not been completed at such time pursuant to the terms hereof on any Punchlist as of the Substantial Completion Date plus (y) three hundred thousand $300,000; and

#### Concurrent with the Final Payment, Owner shall release to Contractor all remaining Retainage withheld pursuant to Section 6.4.2(b). Except as may be specifically required pursuant to Applicable Law, any interest accruing on the Retainage shall accrue for the account of Owner and not Contractor.

## Final Payment.

On or after the date on which Contractor delivers to Owner a Notice of the occurrence of Final Completion, Contractor shall submit to Owner:

#### a final Contractor’s Invoice (the “**Final Contractor’s Invoice**”) which invoice shall set forth all amounts due to Contractor that remain unpaid in connection with the Work (including any remaining Retainage. Owner shall pay to Contractor the amount due under such Final Contractor’s Invoice (“**Final Payment**”) in accordance with this Section 6.5;

#### with respect to each Major Subcontractor, a Conditional Waiver and Release Upon Final Payment of Subcontractor or Unconditional Waiver and Release Upon Final Payment; and

#### with respect to Contractor, a Conditional Waiver and Release Upon Final Payment.

Provided Contractor has achieved Final Completion, delivered all of the foregoing, and otherwise satisfied all of its obligations hereunder, Owner shall pay to Contractor the amount due under such Final Contractor’s Invoice within thirty (30) days of the date Owner approves and certifies all Work hereunder. Further, Contractor covenants that it shall deliver to Owner an Unconditional Waiver and Release Upon Final Payment on behalf of Contractor and, to the extent not already provided, from each Major Subcontractor (unless otherwise bonded over pursuant to the terms of this Article 6) no later than fifteen (15) days after Contractor’s receipt of Final Payment.

## Holdbacks.

### Owner Holdbacks. Any provision hereof to the contrary notwithstanding, in addition to the Retainage, and provided the following is permitted under Applicable Law, upon the occurrence and continuance of any of the following events, Owner, upon Notice to Contractor upon the occurrence of any of the following events and until the cure thereof, Owner, upon Notice to Contractor, may withhold or retain such portion (including all) of any payment due to Contractor under this Agreement as reasonably necessary to ensure the performance of the Work or to protect fully the rights of Owner hereunder:

#### A Contractor Event of Default shall have occurred hereunder;

#### Contractor shall have improperly failed to make prompt payments to any Subcontractor for material or labor used in the Work or any claim shall be made by any Subcontractor to such effect, including a lien claim;

#### Owner in good faith shall have determined that Contractor cannot with prompt and reasonable acceleration of the Work achieve Substantial Completion before the Substantial Completion Guaranteed Date; provided, however, the amount withheld or retained on account of this Section 6.6.1 shall not exceed the amount of Delay Liquidated Damages which would be payable under Section 15.1 on account of the then estimated delay;

#### Contractor shall have failed to deliver an Acceleration Plan acceptable to Owner as set forth in Section 7.5, or Contractor shall have failed to cause the prosecution of the Work to conform to the Acceleration Plan approved by Owner;

#### Contractor shall have failed to provide or maintain the insurance it is obligated to provide and maintain as required by the terms of this Agreement;

#### Owner in good faith shall have determined that any portion of the Work for which payment has already been made pursuant to a previous Contractor’s Invoice shall contain one or more Defect which Defect would not qualify as a Non-Critical Deficiency; provided that the amount so withheld shall not exceed the amount reasonably expected to correct such Defect;

#### Owner in good faith has made a warranty claim pursuant to Article 17 and Contractor has failed to perform its obligations to correct any such Defect or Deficiency within a reasonable period of time; or

#### there has occurred the filing of a third party claim for which Contractor is obligated to indemnify Owner pursuant to any of the provisions of Article 23.

### Limitation on Contractor’s Rights. Notwithstanding the provisions of Section 19.4, Contractor shall not have any rights of termination or suspension under Section 19.4 as a result of Owner’s good faith exercise or attempted exercise of its rights under Section 6.6.1.

## Disputes Regarding Payments.

Subject to Contractor’s rights and remedies under Article 31, failure by Owner to pay any amount disputed in good faith until resolution of such dispute in accordance with this Agreement shall not alleviate, diminish, modify nor excuse the performance of, Contractor’s obligations to perform hereunder. Without limiting the provisions of the last paragraph of Section 6.5, Contractor’s acceptance of any payment (including Final Payment) shall not be deemed to constitute a waiver of amounts that are then in dispute. Contractor and Owner shall use reasonable efforts to resolve all disputed amounts reasonably expeditiously and in accordance with the provisions of Article 31. No payment made hereunder shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder.

## Delinquent Payments.

Any delinquent payment hereunder by either Party shall incur interest at the Contract Interest Rate from the date on which the payment was originally due until the payment is made.

## Final Completion Payment.

Acceptance by Contractor of the payment for Final Completion shall constitute a release of the Owner from all claims except for those claims delivered in writing and presented with the Final Contractor’s Invoice for additional compensation of any kind hereunder with respect to any Work performed or furnished in connection with this Agreement (whether as a result of an Excusable Event, a Force Majeure Event, or otherwise).

# COMMENCEMENT AND SCHEDULE OF THE WORK

## Full Notice to Proceed.

On the Full Notice to Proceed Date, Contractor shall commence performance of the Work as required by this Agreement.

***[Schedule provisions to be conformed to final deal arrangements and project details. See also notes to title page.]***

### Condition Precedent. The issuance of a Full Notice to Proceed by Owner shall be a condition precedent to the commencement of the Work under this Agreement. Until such time as Owner issues a Full Notice to Proceed, Contractor shall not, and is not authorized to, perform any Work hereunder.

### Right to Terminate. If the Full Notice to Proceed has not been issued on or before [\_\_\_\_\_\_], Contractor and Owner each shall have the right, after such date, to terminate this Agreement upon Notice to the other Party (which termination right shall terminate upon the issuance of the Full Notice to Proceed). If this Agreement is terminated pursuant to this Section 7.1.2, then neither Party shall have any further rights or obligations under this Agreement (other than such rights and obligations that by the express terms of this Agreement survive the expiration or earlier termination of this Agreement).

## Prosecution of Work.

Upon the issuance of the Full Notice to Proceed and subject to Article 8, Contractor shall prosecute the Work in accordance with the Project Schedule. Contractor shall achieve Substantial Completion on or before the Substantial Completion Guaranteed Date, and Final Completion on or before the Final Completion Guaranteed Date.

## Project Schedule.

Within fourteen (14) days after the Full Notice to Proceed Date, Contractor shall provide Owner with an electronic (native file) and hard copy of the Critical Path Schedule. Until Final Completion, Contractor shall update the Project Schedule to reflect the current status of the Work, provided however, that the Key Date Schedule and the Project Guaranteed Dates may not be modified except as set forth in Article 8. The updates to the Project Schedule shall be performed and provided to Owner (in electronic (native file) and hard-copy form) on a monthly basis as part of the Monthly Progress Report. Utilizing the critical path method, Contractor shall continually be aware of factors that are delaying or that could delay completion of Key Date Items by the applicable date on the Key Date Schedule. Contractor shall promptly advise Owner of any changes in the scheduled completion of Key Date Items of more than thirty (30) days and the reasons therefore. Contractor shall employ a project management system capable of providing schedule monitoring and analysis which shall include a comparison of the Critical Path Schedule with the actual progress for each time period with all variances noted.

## Progress Reporting.

From and after the date hereof, Contractor shall prepare a Monthly Progress Report and submit it to Owner within ten (10) days after the end of each calendar month. Contractor consents to the disclosure of the Monthly Progress Report to the Financing Entities. In addition, Contractor shall keep, and furnish to Owner at Owner’s request, such information as Owner may reasonably request to determine that the Work is progressing according to the Project Schedule, including completion of Key Date Items by the applicable date set forth in the Key Date Schedule. Contractor shall keep daily logs at the Site and shall provide to Owner weekly reports of actual construction progress as compared with the scheduled progress.

## Acceleration Plans.

If Contractor fails to complete any of the Key Date Items set forth in the Key Date Schedule (identified as Contractor’s responsibility in such schedule) within thirty (30) days after the date set forth on the Key Date Schedule for completion of such item, then Contractor shall, within ten (10) days after Contractor becomes aware of such delay, submit for approval by Owner a written plan (the “**Acceleration Plan**”) describing the actions (including acceleration of the Work, for example, by using additional shifts, overtime, additional crews or resequencing of the Work, as applicable) that Contractor will take so that it will be reasonably likely that Substantial Completion will occur by the Substantial Completion Guaranteed Date. Within fifteen (15) days after receipt of the Acceleration Plan, Owner shall deliver written approval or disapproval of the Acceleration Plan to Contractor, the approval thereof not to be unreasonably withheld or delayed. If Owner disapproves all or any portion of the Acceleration Plan, Owner shall approve those portions of the Acceleration Plan that are acceptable and provide comments to those portions of the Acceleration Plan that have been disapproved. Contractor shall then revise the Acceleration Plan to address such comments as shall have been provided by Owner and resubmit the revised Acceleration Plan for Owner’s further comments within five (5) additional days. Upon approval by Owner, Contractor shall promptly proceed with completing the Work in the manner specified by the Acceleration Plan and with any additional work as may be required under the Acceleration Plan. Contractor shall be responsible for all costs and expenses of implementing the Acceleration Plan without any increase to the Contract Price. Approval by Owner of an Acceleration Plan shall not be deemed in any way to relieve Contractor of its obligations under this Agreement relating to the failure to achieve Substantial Completion by the Substantial Completion Guaranteed Date, shall not be a basis for an increase in the Contract Price, and shall not limit the rights of Owner under Section 15.1.

## Acceleration Where Work Is Not Delayed.

Owner shall also have the right to issue a Notice to Contractor directing that the Work be accelerated by means of overtime, additional crews or additional shifts or resequencing of the Work notwithstanding that the Work is progressing without delay in accordance with the established Project Schedules. Contractor shall accelerate the Work on the basis of: (a) reimbursement of direct cost (i.e., premium portion of overtime pay, additional crew, shift or Equipment and Material cost and such other items of cost requested in advance by Contractor and approved by Owner, which approval will not be unreasonably withheld) less savings or costs not incurred due to such acceleration; plus, (b) an allowance for profit, overhead and contingency, in each case (items (a) and (b) of this Section 7.6), as calculated pursuant to the procedures set forth in Section 16.4.1. Contractor expressly waives any other compensation therefor unless otherwise agreed by Owner in writing in advance of performing the accelerated Work. Any acceleration of the Work not specifically requested by Owner pursuant to this Section 7.6 in writing shall be at Contractor’s sole cost and expense. CONTRACTOR SHALL RECEIVE NO SUCH REIMBURSEMENT FOR COSTS ARISING OUT OF, AND CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR ANY COSTS INCURRED BY CONTRACTOR AS A RESULT OF, ANY ACCELERATION UNDERTAKEN BY CONTRACTOR OTHER THAN AN ACCELERATION ORDERED BY OWNER UNDER THIS SECTION 7.6. Owner shall have the right to reasonably audit Contractor’s calculated savings or costs not incurred due to Owner’s acceleration pursuant to this Section 7.6 pursuant to the provisions of Section 32.17. In the event of any acceleration requested pursuant to this Section 7.6, Contractor shall promptly provide a plan for such acceleration, including Contractor’s recommendations for the most effective and economical acceleration.

## Meetings.

Contractor shall schedule and conduct monthly meetings with Owner at Contractor’s office or such other location as the Parties may agree, and after mobilization, at the Site, or such other location as the Parties may agree, for the purpose of reviewing the progress of the Work and adherence to the Project Schedule. The frequency of such meetings shall be established and modified, from time to time, by mutual agreement of the Parties; provided, however, such meetings shall occur no less frequently than monthly; provided, further, if Owner reasonably believes that Contractor will complete fewer than all of the Key Date Items within ten (10) days after the date scheduled on the Key Date Schedule for such Key Date Items to be achieved, then Owner shall be entitled to require that meetings occur as frequently as weekly. If Owner so requests, Contractor shall cause a representative of any Subcontractor to attend such meeting. After commencement of the on-site Work, Owner, Contractor, and any Major Subcontractor then performing Work on the Siteshall each designate a representative to attend weekly meetings to review and discuss the progress of the Work. Contractor’s representative at such weekly meeting shall provide a rolling three-week look ahead schedule outlining the Work to be performed at the Site during the three calendar weeks following such meeting.

# FORCE MAJEURE; EXCUSABLE EVENT

## Certain Events.

No failure or omission to carry out or observe any of the terms, provisions, or conditions of this Agreement shall give rise to any claim by a Party hereunder against the other Party, or be deemed to be a breach or a Contractor Event of Default or Owner Event of Default (as applicable) under this Agreement if such failure or omission shall be caused by or arise out of a Force Majeure Event. No obligations of a Party that matured before the occurrence of a Force Majeure Event causing the suspension of performance shall be excused as a result of such occurrence. Notwithstanding anything to the contrary in the foregoing, neither Party’s obligation to pay money in a timely manner shall not be subject to the Force Majeure Event or Excusable Event provisions.

## Force Majeure Event, Excusable Event, Notice.

Force Majeure Event and Excusable Event, Notice. If Contractor’s ability to perform its obligations under this Agreement is affected by a Force Majeure Event or an Excusable Event, Contractor shall, within ten (10) Business Days after Contractor becomes aware of the occurrence of the event or such event is in the public knowledge, provide Notice to Owner (a “**Delay Notice**”) of the occurrence of such event, including what date Contractor became aware of the occurrence of such event and an estimate of the event’s anticipated duration and effect upon the performance of Contractor’s obligations, and any action being taken to avoid or minimize its effect. To the extent permitted by Applicable Law, failure to provide such ten (10) day Notice shall be deemed conclusive evidence that the claimed event of Force Majeure or Excusable Event either did not occur or did not impact Contractor’s ability to perform the Work hereunder in any fashion and thus Contractor shall not be entitled to a Change In Work or any other relief hereunder as a result of such event. Contractor shall have a continuing obligation to deliver to Owner regular updated reports and any additional documentation and analysis supporting its claim regarding a Force Majeure Event or an Excusable Event promptly after such information is available to Contractor. The burden of proof shall be on Contractor regarding the occurrence of the Force Majeure Event or Excusable Event, Contractor’s claimed impacts on the Project Schedule and Contract Price (including the items set forth in clauses (w) through (z) below) (if any), and the causal connection (if any) between the occurrence of the Force Majeure Event or Excusable Event and the claimed adjustment to the Contract Price or Project Schedule. Within sixty (60) Business Days after the later to occur of (the “**Allowable Claim Period**”): (a) the date the Force Majeure Event or an Excusable Event has ended; or (b) the expiration of the ten (10) day period in which Contractor is entitled to deliver a Delay Notice as set forth above, Contractor shall give Notice to Owner of: (w) the length of time such Force Majeure Event or Excusable Event was in effect; (x) which portions of the Project were affected by such Force Majeure Event or Excusable Event; (y) the effect Contractor claims such Force Majeure Event or Excusable Event had on the Project Schedule, including the applicable Key Date Items or Project Guaranteed Dates; and (z) in the case of an Excusable Event, the effect Contractor claims the Excusable Event had on the Contract Price (including the value of the increase of such Contract Price, if any). In the event that the Parties cannot come to an agreement on such cost or schedule extension claim, (without limiting the ability of the Parties to avail themselves of the dispute resolution procedures set forth in Article 31), Owner shall be able to audit all claims made on the basis of a Force Majeure Event or Excusable Event in accordance with Section 32.17. All costs incurred by Contractor to document the existence of a Force Majeure Event or an Excusable Event (including such costs necessary to document the impact (whether cost or schedule related) of such events) shall be borne by Contractor and shall not be subject to reimbursement hereunder. Because a delay in issuing a claim beyond the Allowable Claim Period will, among other harms to Owner, prejudice Owner’s ability to reasonably determine whether the cost increase or schedule extension claimed by Contractor were actually and demonstrably incurred by Contractor as a result of such Force Majeure Event or Excusable Event, Contractor and Owner have agreed that a failure to deliver such Notice within the Allowable Claim Period (with such claim, if any) shall be a reasonable and enforceable basis for Owner to deny relief hereunder (whether such relief is Contract Price related, Project Schedule related, or both).

## Scope of Suspension; Duty to Mitigate.

The suspension of, or impact on, performance due to a Force Majeure Event or an Excusable Event shall be of no greater scope and no longer duration than is required by such event. Contractor shall have a duty:

#### to mitigate the duration, costs and Project Schedule impacts, in each case, arising from the occurrence and effects of such event of Force Majeure or Excusable Event and to mitigate the duration of, and costs arising from (including, as reasonably practicable given the circumstances, adopting measures in anticipation of the occurrence of a Force Majeure Event and/or Excusable Event in an effort to mitigate potential damage to Equipment and Materials or other property), any impact in the Work resulting therefrom, or other impact to the performance of its obligations under this Agreement;

#### to continue to perform its obligations hereunder not affected by such event; and

#### to remedy its inability to perform, as applicable.

When Contractor is able to resume performance of its obligations under this Agreement, Contractor shall give Owner Notice to that effect.

## Removal of Force Majeure, Excusable Event.

If, within a reasonable time after the occurrence of a Force Majeure Event or Excusable Event, Owner has identified and recommended to Contractor commercially reasonable action to be undertaken, and Contractor has failed within fifteen (15) days after receipt of Notice from Owner thereof to take such action as Contractor could lawfully and reasonably initiate to remove or relieve either the event which caused such a Force Majeure Event or Excusable Event or its direct or indirect effects, Owner may, in its sole discretion and after Notice to Contractor, initiate such reasonable measures as will be designed to remove or relieve such a Force Majeure Event, Excusable Event or its direct or indirect effects. To the extent Contractor’s failure to take such measures as set forth in this Section 8.4 results in Owner incurring expenses in addition to what Owner would have had to pay had Contractor taken such measures, such additional expenses shall be to Contractor’s account.

## Responsibility of Contractor.

Subject to the limitations on liability contained in this Agreement, damages or injuries to persons or properties resulting from a Force Majeure Event during the performance of the obligations provided for in this Agreement shall not relieve Contractor of any responsibility it may have pursuant to the terms of this Agreement to bear the cost of the damage or injuries as provided herein.

## Contractor’s Remedies.

The Parties acknowledge that the occurrence of an Excusable Event or Force Majeure Event does not necessarily entitle Contractor to a remedy hereunder. Contractor is entitled to relief for such events only to the extent specifically set forth in Section 8.6.1 (with respect to Force Majeure) and Section 8.6.2 (with respect to Excusable Events).

### Force Majeure. Subject to Section 8.6.3, Section 8.7 and Section 8.8, as Contractor’s sole remedy for the occurrence of a Force Majeure Event, and provided that Contractor has otherwise complied with its obligations under Section 8.2 and Section 8.3, if a Force Majeure Event occurs: (a) the Project Schedule, applicable Key Date Items, and the applicable Project Guaranteed Dates shall be correspondingly adjusted by the period of time (if any) that Contractor is actually and demonstrably delayed in the performance of the Critical Path Item(s) as a result of such Force Majeure Event, less any extensions of such Force Majeure Event that occur due to Contractor’s failure to take action required by Section 8.3 or as reasonably requested by Owner pursuant to Section 8.4; and (b) Owner shall compensate Contractor for (x) the mitigation measures implemented at the written direction of Owner as and to the extent set forth in Section 8.4 and (y) to the extent such Force Majeure Event caused any loss or damage to the Insured Property for which the Builder’s All Risk policy provides coverage, the amount set forth in Section 16.4.3. Contractor expressly waives any other compensation (whether Contract Price related or Project Schedule related) as a result of such event of Force Majeure Event.

### Excusable Event. Subject to Section 8.6.3, Section 8.6.4, Section 8.7 and Section 8.8, as Contractor’s sole remedy for the occurrence of an Excusable Event, and provided that Contractor has otherwise complied with any applicable obligations under Section 8.2, and Section 8.3, if an Excusable Event occurs: (a) the Project Schedule, applicable Key Date Items, and the applicable Project Guaranteed Dates shall be correspondingly adjusted by the period of time (if any) that Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s) as a result of such Excusable Event, less any extensions of such Excusable Event that occur due to Contractor’s failure to take action required by Section 8.3 or as reasonably requested by Owner pursuant to Section 8.4; (b) Owner shall compensate Contractor for (x) the mitigation measures implemented at the written direction of Owner as and to the extent set forth in Section 8.4 and (y) to the extent such Excusable Event caused any damage to the Insured Property for which the Builder’s All Risk policy provides coverage, the amount set forth in Section 16.4.3; and (c) without duplication of the amounts in (b), if Contractor’s direct costs actually and demonstrably increase despite Contractor’s commercially reasonable efforts to mitigate any such increases in accordance with Section 8.3 (but excluding therefrom all such increased costs resulting from the damage to the Insured Property, as Contractor’s sole compensation for such increased costs is the proceeds identified in clause (b)(y) above), the Contract Price shall be adjusted by the sum of: (i) the difference of (1) the direct costs (including supervisor and temporary facility costs, but excluding home office overhead, profit and contingency) actually and demonstrably incurred by Contractor directly attributable such Excusable Event; less any (2) savings incurred and costs not incurred in respect of such Excusable Event, less (3) amounts due to the failure to comply with the provisions of Section 8.3 or Section 8.4; *plus* (ii)  (A) ten percent (10%) of such difference as an allowance for profit and home office overhead and (B) a reasonable amount, not to exceed five percent (5%), of such difference as an allowance for contingency. The build-up of such costs to be included in the applicable Change In Work shall be in accordance with Section 16.4.2. Contractor expressly waives any other compensation (whether Contract Price related or Project Schedule related) as a result of such Excusable Event.

### Concurrent Delay. Notwithstanding the provisions of Section 8.6.1 and Section 8.6.2, Contractor shall not be entitled to relief under Section 8.6.1 or Section 8.6.2 for any Force Majeure Event and/or Excusable Event (except to the extent of recovery of insurance proceeds under the Builder’s All Risk Insurance) to the extent the Work experienced any mutually occurring or concurrent delays, disruptions, interferences and/or accelerations resulting from causes, events, conditions, and/or circumstances which constitute neither an Excusable Event nor a Force Majeure Event.

### Failure to Issue Notice to Proceed. Notwithstanding Section 8.6.2, if an Excusable Event occurs of the type identified in clause (d) of the definition of Owner-Caused Delay, then the remedies of this Section 8.6.4 shall apply in lieu of Section 8.6.2. If an Excusable Event occurs of the type identified in clause (d) of the definition of Owner-Caused Delay, as Contractor’s sole remedy for the occurrence of such Excusable Event:

#### for the first one-hundred twenty (120) days of such Excusable Event; (i) the Project Schedule, Key Date Schedule and the Project Guaranteed Dates shall be extended on a day for day basis until the date on which Owner issues the Full Notice to Proceed (and Section 8.6.3 shall not apply); and (ii) the Contract Price shall not be adjusted; and

#### if such Excusable Event continues beyond such one hundred twenty (120) days, (and this Agreement has not otherwise been terminated pursuant to Section 7.1.2), and if Owner issues the Full Notice to Proceed then the Parties shall, commencing on the Full Notice to Proceed Date (or such later date as mutually agreed upon by the Parties), negotiate in good faith the cost and time impact to Contractor due to such delay.

### Changes In Work. Upon the occurrence of a Force Majeure Event or an Excusable Event to which Contractor is entitled to a change in the Contract Price or the Project Schedule, Contractor and Owner shall prepare a Change In Work Form in accordance with the applicable provisions of Article 16.

## Contractor’s Right to Terminate.

If the Work is suspended, prevented or delayed for more than three hundred and sixty-five (365) days by reason of a single Force Majeure Event, Contractor may terminate this Agreement by Notice to Owner. Upon any such termination, Contractor shall be entitled to receive the payments as set forth in Section 20.2.2.

## Other Limitations.

Notwithstanding the provisions of Section 8.6.1 and Section 8.6.2, the Parties understand and agree that regardless of how, if at all, Contractor compensates its Subcontractors with respect to the occurrence of an Excusable Event or a Force Majeure Event (whether by lump sum, direct cost, extension of project schedule, or otherwise), Contractor’s entitlement from Owner hereunder for Project Schedule relief and/or changes to the Contract Price shall only be as set forth in the applicable provisions of Section 8.6, and thus Contractor bears the risk hereunder that the relief Contractor grants any such Subcontractor’s with respect to project schedule and/or contract price as a result of the occurrence of an Excusable Event and/or a Force Majeure Event, if any, shall be different than the amount Contractor is entitled to under the applicable provisions of Section 8.6.

# SUBCONTRACTORS

## Use of Major Subcontractors.

Set forth in Exhibit N is a schedule of certain Equipment and Materials, Temporary Work or other services and the approved Subcontractors for such equipment, materials or services with whom Contractor may subcontract to provide such equipment, materials or services. Contractor shall not purchase or otherwise acquire any equipment, materials or services listed in Exhibit N from a Person who is not an approved Subcontractor for such equipment and materials or service without Owner’s prior written consent (not to be unreasonably withheld or delayed). Contractor shall Notify Owner of any additional subcontractors, suppliers or vendors with whom Contractor anticipates engaging that, if engaged, would be deemed a Major Subcontractor. Owner shall have the right to review and approve such proposed engagement, such approval not to be unreasonably withheld or delayed, and following such Owner approval, Exhibit N shall be, and shall be deemed to be, amended to reflect such additional approved Major Subcontractor. For purposes of clarity, Contractor shall not have the right to (a) replace the ***[insert applicable significant supplier]***; and (b) once Contractor has selected a Major Subcontractor from Exhibit N, such Major Subcontractor, in each case, without Owner’s prior written consent.[[2]](#footnote-2) The review and approval by Owner of any Subcontractor shall not (a) constitute any approval of the Work undertaken by any such Person; (b) cause Owner to have any responsibility for the actions, the Work, or payment of such Person or to be deemed to be in an employer employee relationship with any such Subcontractor; or (c) in any way relieve Contractor of its responsibilities and obligations under this Agreement. Notwithstanding anything to the contrary herein, Contractor shall obtain the prior written consent of Owner prior to engaging any Affiliate of Contractor as a Subcontractor hereunder. ***[Conform this section 9.1 and related provisions for any affiliate relationship between Contractor and the battery manufacturer or other key vendor]***

## Assignment.

No subcontract or purchase order shall bind or purport to bind Owner, but each subcontract and purchase order with a Major Subcontractor shall provide for assignment of such subcontract to Owner or at Owner’s request, to the Financing Entities, if any, upon the termination or expiration of this Agreement in accordance with its terms, upon notice to such Major Subcontractor. Contractor hereby assigns to Owner all its interest in all subcontract agreements and purchase orders now existing or hereafter entered into by Contractor for performance of any part of the Work, which assignment will be effective only upon acceptance by Owner in writing (after a termination of this Agreement by Owner) and only as to those subcontract agreements and purchase orders that Owner designates in said writing. Such assignment may not be withdrawn by Contractor prior to expiration of the Defect Warranty Period, and Owner may accept said assignment at any time during the course of construction prior to expiration of the Defect Warranty Period. Upon such acceptance by Owner: (a) Contractor shall promptly furnish to Owner the originals or copies of the designated subcontract agreements and purchase orders, and (b) Owner shall only be required to compensate the designated Subcontractor(s) for compensation accruing to same for Work done or materials delivered from and after the date as of which Owner accepts assignment of the subcontract agreement(s) or purchase order(s) in writing. All sums due and owing by Contractor to the designated Subcontractor(s) for Work performed or material supplied prior to the date as of which Owner accepts in writing the subcontract agreement(s) or purchase order(s), and all other obligations of Contractor accruing prior to Owner’s written acceptance of such assignment, shall constitute a debt and an obligation solely between such Subcontractor(s) and Contractor, and Owner shall have no liability with respect to such sums or any other obligations of Contractor.

## Terms in Subcontracts.

All subcontracts between Contractor and any of its Affiliates and its or their direct (i.e., first tier) Subcontractors, as well as Subcontractors which have contract values in excess of [Two Hundred and Fifty Thousand Dollars ($250,000)] or provide critical parts or components, shall be consistent with the requirements of this Agreement, insofar as applicable. In addition to the requirements of Section 9.2, all Work performed for Contractor and any of its Affiliates by direct (i.e., first tier) subcontractors shall be pursuant to an appropriate written agreement between Contractor and the Subcontractor that contains provisions that:

#### reasonably preserve and protect all the rights of Owner under this Agreement and to the Work to be performed under the subcontract, so that the subcontracting thereof will not prejudice such rights;

#### require that such Work be performed in accordance with the applicable requirements of this Agreement (including, but not limited to, abiding by the confidentiality obligations hereunder);

#### require such subcontractor to make available a representative with whom Owner may, subject to Contractor’s coordination and participation, discuss questions regarding the Work being performed by the Subcontractor;

#### state explicitly that Owner makes no representation or warranty as to the accuracy or completeness of any information contained in the No Reliance Site Information, and that Owner does not intend for such Subcontractor to rely on the information contained therein;

#### for subcontracts for amounts in excess of [Two Hundred Fifty Thousand Dollars ($250,000)], permit the assignment of such subcontract to Owner without Subcontractor consent and name Owner as an intended third party beneficiary;

#### require such Subcontractor to abide by Contractor’s confidentiality obligations hereunder with respect to Owner’s Confidential Information;

#### [require such Subcontractor to execute an “Agreement to be Bound” under the applicable Labor Agreement, the form of which is attached as Appendix A to the applicable Labor Agreement, unless such Subcontractor performs no “Covered Work” under either Labor Agreement (as such term is defined in the applicable Labor Agreement);]

#### for subcontracts for amounts in excess of [Two Hundred Fifty Thousand Dollars ($250,000)], contain audit provisions of similar scope and nature as set forth in Section 32.17 so as to permit Contractor or Owner to audit any claims for schedule extension or extra compensation for which Contractor intends to pass through to Owner.

## Contractor Responsible for Acts of Subcontractor.

Contractor shall at all times be responsible for the acts and omissions of Subcontractors whether employed directly or indirectly by Contractor. Contractor shall be responsible for performance of all the Work, whether performed by Contractor or its Subcontractors. Owner shall not be responsible for the performance of any Work by any Subcontractor. This Agreement shall not give rise to any contractual relationship between Owner and any of Contractor’s Subcontractors. Owner does not and shall not undertake any obligation to pay, or to be responsible for the payment of any sums to any Subcontractor.

## Information and Access.

Contractor shall furnish such information and access relative to the identity of and scope of services or supply of its Subcontractors as Owner may reasonably request; provided that Owner shall be entitled to such information as reasonably necessary to enable Owner to verify compliance of the provisions of Section 9.3.

## Owner’s Separate Contractors.

Contractor shall cooperate and cause its Subcontractors to cooperate with Owner and other Owner’s Separate Contractors who may be working at or near the Site in order to assure that neither Contractor, nor any of its Subcontractors unreasonably hinders or increases, or makes more difficult than necessary the work being performed by Owner or Owner’s Separate Contractors. Owner shall cooperate and cause Owner’s Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site in order to assure that neither Owner, nor any of Owner’s Separate Contractors, unreasonably hinders or increases, or makes more difficult than necessary the work being performed by Contractor and the Subcontractors. Without limiting the foregoing, Contractor acknowledges that Owner’s Separate Contractors will be constructing, installing and completing the Owner-Provided Facilities and Services and Services and Services at the Site while Contractor is performing the Work, and Contractor covenants to cooperate with, and provide access to the Site, to such separate contractors.

## Substation and Interconnection Coordination.

***[Insert provisions for coordination with interconnection facilities and substation.]***

# LABOR RELATIONS; MEANS AND METHODS OF CONTRACTOR

## General Management of Employees.

Subject to Section 10.2 and Section 10.4, Contractor shall preserve its rights to exercise and shall exercise its management rights in performing the Work. Such management rights shall include the rights to hire, discharge, promote and transfer employees; to select and remove foremen or other persons at other levels of supervision; to establish and enforce reasonable standards of production; to introduce, to the extent feasible, labor saving service or Equipment and Materials; to determine the number of craftsmen necessary to perform a task, job or project; and to establish, maintain and enforce rules and regulations conducive to efficient and productive operations.

## Labor Disputes.

Contractor shall use reasonable efforts to adopt policies and practices designed to avoid Labor Disputes, and to minimize the risk of labor-related delays or disruption of the progress of the Work. Contractor shall advise Owner promptly, in writing, of any actual or threatened Labor Dispute of which Contractor has knowledge that might materially affect the performance of the Work by Contractor or by any of its Subcontractors. Notwithstanding the foregoing, the settlement of Labor Disputes shall be at the discretion of the Party having the difficulty.

## Personnel Documents.

Contractor shall ensure (with respect to its employees), and shall cause its Subcontractors to ensure (with respect to their respective employees), that at the time of hiring, all personnel performing the Work are in possession of all such documents (including visas, driver’s licenses and work permits) as may be required by any and all Applicable Laws. Contractor shall provide any such documentation to Owner in a timely fashion in order for Owner to comply with any request or requirement of any Governmental Authority.

## Replacement of Employees and Other Persons at Owner’s Request.

Contractor shall remove, and cause its Subcontractors to remove, any employee, agent or other Person engaged in the performance of the Work for Contractor or such Subcontractor, as the case may be, whose conduct Owner reasonably demonstrates is harming or having a negative effect on the Work, or the perception of the Project, or Owner’s relationship with the surrounding community, the City of [\_\_\_\_\_\_\_\_], or San Diego County.

## Means and Methods.

Unless this Agreement otherwise provides specific instructions concerning a means and/or method, Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work consistent with the terms of this Agreement, including the timely performance or delivery of work by its Subcontractors and agents.

## Key Personnel.

The Key Personnel shall at all times hold the positions and be dedicated to the performance of the duties described in Exhibit P. Any replacement or substantial reduction or change in responsibility of any of the Key Personnel shall be subject to the prior written consent of Owner, which consent shall not be unreasonably withheld. If Owner fails to respond to a request for consent within five (5) Business Days after Contractor’s request, Owner shall be deemed to have consented to the proposed individual. Contractor’s Construction Manager designated here in Exhibit P has full responsibility for the prosecution of the Work and shall act as a single point of contact in all matters on behalf of Contractor.

## Union Labor.

Contractor shall be responsible for all labor relations matters relating to the Work. Contractor acknowledges that Owner has agreed that certain items of the Work shall be performed by certain unions. Contractor has conducted a detailed review of the commercial and technical terms, conditions and requirements contained in each Labor Agreement and is completely satisfied that such terms, conditions and requirements are in no way whatsoever inconsistent or in conflict with Contractor’s obligations and responsibilities under this Agreement. [Simultaneously with the execution of this Contract, Contractor shall execute an “Agreement to be Bound” with respect to each Labor Agreement for the applicable Covered Work, the form of which is attached as Appendix A to the applicable Labor Agreement.] Contractor shall perform all of the Work under this Agreement in accordance with the terms and conditions of the applicable Labor Agreement. Contractor shall also cause all of its Subcontractors who perform Covered Work (as such term is defined in the applicable Labor Agreement) under either Labor Agreement to [execute an “Agreement to be Bound” for the applicable Labor Agreement, and to otherwise] perform all work under any such Subcontract in accordance with the terms and conditions of the applicable Labor Agreements.

# INSPECTION

## Right to Reject Work.

Without limiting Owner’s right to make a warranty claim hereunder for Defective Work (or other uncompleted Work) discovered after Substantial Completion, regardless of whether payment has been made therefor, Owner shall have the right to reject any portion of the Work that contains any Defect unless the same constitutes a Non-Critical Deficiency at the time of Substantial Completion. Upon such rejection, Contractor shall remedy, at its sole cost and expense, any such Defect that is identified by Owner as giving rise to such rejection.

## Inspection.

Owner and its representatives shall have access to and the right to reasonably observe and inspect the Work at the Site. Owner shall also have the right to inspect the functional tests of the [\_\_\_\_\_\_\_\_\_\_\_\_\_] to be installed at the Project at the applicable Supplier facility in the presence of the Contractor. If requested by Owner, Contractor shall use commercially reasonable efforts to arrange for Owner to inspect the facilities of other Suppliers or to witness the functional tests of other Equipment and Materials, such inspections to be arranged at reasonable times and with reasonable advance notice. Contractor shall furnish to Owner such information concerning its operations or the performance of the Work as Owner shall reasonably request. It is Contractor’s responsibility to advise Owner of inspections in a manner that enables completion of related and subsequent Work in accordance with the Project Schedule and to identify and make easily accessible for inspection, any Work covered. Notwithstanding anything to the contrary herein, in no case shall Contractor or any Subcontractor be obligated to disclose any of its know-how, trade secrets or other proprietary information. Inspection, review, approval or comment by Owner with respect to any Subcontract or any Contractor Deliverable, samples, and other documents, or any other work or services performed by Contractor or any Subcontractor, is solely at the discretion of Owner and shall neither in any way affect or reduce Contractor’s obligations to complete the Work in accordance with the provisions of this Agreement nor be deemed to be a warranty or acceptance by Owner with respect thereto. Nothing in this Section 11.2 shall act as a limitation on the rights and responsibilities of the Parties under Exhibit W.

# SITE CONDITIONS; NO RELIANCE SITE INFORMATION

Prior to the Full Notice to Proceed Date, Contractor obtained the No Reliance Site Information from Owner, Affiliates of Owner and third parties. Owner makes no representation or warranty as to the correctness or completeness of the information in the No Reliance Site Information. Contractor represents and warrants (as of the Full Notice to Proceed Date) that Contractor has investigated the Site and each other location where any portion of the Work shall be performed and surrounding locations to the full extent Contractor deems necessary in order for Contractor to execute this Agreement given its terms and conditions, and that Contractor is familiar with, and has satisfied itself with respect to, the nature and location of the Work and Site Conditions. With the sole exception of the discovery of an Excused Site Condition (THE SOLE RELIEF FOR WHICH, PROVIDED CONTRACTOR HAS COMPLIED WITH the PROVISIONS OF SECTION 8.2, IS SET FORTH IN SECTION 8.6.2), Contractor expressly acknowledges and agrees that it has agreed to take all risks with respect to the Site Conditions, including the discovery of Site Conditions which are not disclosed in the No Reliance site information, or the discovery of site conditions of a different kind or nature than what Contractor anticipated to occur or exist, in each case, at, above or beneath the Site, and that the Contract Price contains amounts which Contractor believes will compensate it for agreeing to assume such risks.

# ACCEPTANCE TESTS; [\_\_\_\_\_\_\_] GUARANTEES

***[This Article 13 and other provisions relating to testing and performance guarantees to be conformed to final deal arrangements and project details. See also notes to title page.]***

## Successful Run of Acceptance Tests.

In accordance with the remaining provisions of this Article 13, Contractor shall Successfully Run the [\_\_\_\_\_\_\_\_\_] Tests.

## Commissioning Procedures.

Contractor shall provide for Owner’s review and approval a Commissioning Plan no more than thirty (30) days after the Full Notice to Proceed Date, in each case, which plan shall be in accordance with the requirements of Exhibit O. Owner and Contractor shall work together to reasonably agree upon the Commissioning Plan. Contractor shall perform all commissioning of the Project in accordance with the applicable provisions of Exhibit O and the approved Commissioning Plan. Representatives of Owner, including Owner’s Engineer, shall have the right to be present during the commissioning of the Project and Contractor shall keep Owner reasonably informed of the schedules to conduct such tests.

## Acceptance Test Procedures.

Contractor shall provide for Owner’s review and approval proposed Acceptance Test Procedures no more than thirty (30) days after the Full Notice to Proceed Date which procedures shall be in accordance with the requirements of Exhibit H. Owner and Contractor shall work together to reasonably agree upon the Acceptance Test Procedures. Contractor shall perform all Acceptance Tests in accordance with the applicable provisions of Exhibit H and the approved Acceptance Test Procedures.

## Acceptance Tests.

### Prerequisite to Performing Certain Tests. Contractor shall achieve Mechanical Completion of the Project, successfully complete all startup and commissioning procedures as set forth in the Commissioning Plan and Exhibit O, shall ensure that all components have been properly adjusted and tested, and shall Successfully Run all [\_\_\_\_\_\_\_\_] Tests [***insert applicable Acceptance Tests***]. [Contractor shall not commence the [\_\_\_\_\_\_\_\_\_] Test unless Contractor has achieved Substantial Completion.]

### [\_\_\_\_\_\_\_\_\_\_] Test. Contractor shall Successfully Run the [\_\_\_\_\_\_\_\_] Tests in accordance with the approved Acceptance Test Procedures for such tests. For purposes of clarity, Contractor shall not be eligible to achieve Substantial Completion unless the Project satisfies the [\_\_\_\_\_\_\_\_] Guarantee ***[insert applicable guarantees]*** based on the results of the [\_\_\_\_\_\_] Test (as calculated in accordance with Exhibit H). If the results of the [\_\_\_\_\_\_] [\_\_\_\_\_\_\_\_] Test indicate that the Project did not achieve the [\_\_\_\_\_\_\_\_] Guarantee ***[insert applicable guarantees]*** then the Owner and Contractor shall meet and confer, and Contractor shall implement a Remedial Plan to implement corrective actions as set forth in Section 15.3.3. ***[Confirm applicable Acceptance Tests and performance guarantees, and whether this section is applicable]***

### [\_\_\_\_\_\_\_\_\_] Tests Schedules. Representatives of Owner, including Owner’s Engineer, shall have the right to be present during any [\_\_\_\_\_\_] Test. Contractor shall agree on [\_\_\_\_\_\_] Test schedules with Owner and shall give Notice (which Notice may be by email to the Owner Representative) to Owner at least five (5) days prior to commencing any [\_\_\_\_\_\_] Test. Contractor shall keep Owner Representative continuously apprised of the schedule for all [\_\_\_\_\_\_] Tests and changes in the schedule, the commencement and performance of all such tests, and shall give Owner Representative at least two (2) Business Days advanced Notice of the re-performance of any [\_\_\_\_\_\_] Test; provided, however, that such period of advanced Notice may be reduced if Owner Representative is at the Site and receives reasonable advanced Notice of re-performance of any [\_\_\_\_\_\_] Test.

## Certificate of Completion of Testing, Test Reports.

Upon the Successful Run of an Acceptance Test as demonstrated by a test report delivered to Owner by Contractor as set forth below, Owner shall issue a Notice that such test has been Successfully Run. Contractor shall cause all reports to be delivered pursuant to this Section 13.5 to contain sufficient results of testing to allow Owner to reasonably verify the conclusions of such report.

## [\_\_\_\_\_\_] Testing.

Contractor shall submit a test report for each [\_\_\_\_\_\_] Test within five (5) days after the completion of such [\_\_\_\_\_\_] Test providing a summary of the [\_\_\_\_\_\_] Test results with comparison to the applicable testing requirements and criteria set forth in Exhibit O.

## Non-Conforming Work.

At any time during and promptly after completion (whether or not successful) of a [\_\_\_\_\_\_] Test, Owner shall advise Contractor in writing of any Defect that was discovered during a [\_\_\_\_\_\_] Test. Contractor shall, at Contractor’s sole cost and expense, correct any Defect (except if such Defect is a Non-Critical Deficiency, in which case it shall be included on the Punchlist) and promptly provide Notice to Owner that such corrective measures have been completed. Any dispute regarding the existence or correction of any such Defect shall be resolved pursuant to Article 31.

## Post Test Modifications.

If prior to Substantial Completion:

#### a [\_\_\_\_\_\_\_\_\_] Test has been completed ;

#### a certificate of completion of such [\_\_\_\_\_\_\_\_\_] Test has been issued pursuant to Section 13.5;

#### Contractor or any Subcontractor makes any modification to the Project; and

#### such modification could have had a material effect on the outcome of such [\_\_\_\_\_\_\_\_\_] Test, if it had been made before the completion of such [\_\_\_\_\_\_\_\_\_] Test,

then the [\_\_\_\_\_\_\_\_\_] Tests shall be re-Successfully Run as a condition to the Project achieving Substantial Completion.

## Test Costs and Revenues.

***[Applicable provisions to be inserted. Owner will act as scheduling coordinator and will schedule the Project into the CAISO markets (as both a load source and generation source). Contractor will be responsible to pay for charging energy (and will receive any CAISO revenues) until achievement of the Acceptance Tests, after which point Owner will bear charging responsibility and rights to revenues.]***

# SUBSTANTIAL COMPLETION AND FINAL COMPLETION

***[This Article 14 and other schedule provisions to be conformed to final deal arrangements and project details. See also notes to title page.]***

## Punchlist.

### Creation of Punchlist. When Contractor believes that the Project is ready for Mechanical Completion, Contractor may prepare and submit to Owner a working outstanding items list, which list (a “**Working Outstanding Items List**”), may include those items of Work remaining to be completed. Each Party acknowledges that any such Working Outstanding Items List is not a Punchlist, regardless of any title or moniker written thereon. Initially, such Working Outstanding Items List may serve as a working tool for the Contractor to track all outstanding Work , and such Working Outstanding Items List may include not only Non-Critical Deficiencies but other uncompleted or Defective Work which would not otherwise qualify as a Non-Critical Deficiency; provided, however, that any such inclusion shall be solely to accommodate Contractor and shall act neither as an agreement by Owner that such item qualifies as a Non-Critical Deficiency nor waive Owner’s right to require all Defective Work or otherwise uncompleted Work which would not qualify as a Non-Critical Deficiency to be completed as a requirement to achieving Substantial Completion. Once Contractor believes that a finalized punchlist containing only Non-Critical Deficiencies is ready for Owner review and approval, Contractor and Owner shall jointly walk-down the Project and confer together as to the items which should be included on the finalized punchlist. Contractor shall then update the Working Outstanding Items List or create a new list to reflect the result of such joint walk down and deliver the same to Owner for its review and approval, which submitted list shall be explicitly designated as the “**Proposed Punchlist**”. Such Proposed Punchlist shall include only Non-Critical Deficiencies , and shall include a Punchlist Amount for the completion or repair of such Non-Critical Deficiency. The Proposed Punchlist that is approved by Owner shall be referred to as the “**Punchlist**” . If, subsequent to the approval of the Punchlist, Non-Critical Deficiencies are discovered in the Project which are not reflected on the Punchlist, then such Non-Critical Deficiencies shall be added (and priced) to the Punchlist. Prior to the Substantial Completion Date, any Non-Critical Deficiencies discovered by Contractor or identified by Owner after the initial inspection of each system of the Project by Owner (or after approval of the Punchlist by Owner) and Contractor or during the testing of the Project shall be added to the Punchlist. Failure to include an item on the Punchlist does not alter Contractor’s responsibility to complete all Work in accordance with this Agreement.

### Completion of Punchlist. Contractor shall proceed promptly to complete and correct all items on the Punchlist. On a weekly basis after Substantial Completion, Contractor shall revise and update the Punchlist to include the date(s) that items listed on such Punchlist are completed by Contractor and accepted by Owner. Notwithstanding any of the foregoing, the items listed on such Punchlist shall not be considered complete until Owner shall have inspected such Non-Critical Deficiencies and acknowledged, by notation on the updated Punchlist, that such item of Work is complete. If Owner does not so inspect and deliver such notations on the updated Punchlist to Contractor within ten (10) Business Days after Contractor submits the updated Punchlist, and Contractor has actually completed and corrected any Punchlist item listed on such Punchlist, such Punchlist item shall be deemed completed on the date that is ten (10) days after Contractor submits the updated Punchlist containing such Punchlist item to Owner.

### Owner’s Punchlist Option. At any time after the [ninetieth (90th)] day after the Substantial Completion Date, Owner may elect, by Notice to Contractor to deduct and keep from the Retainage an amount equal to the estimated cost, as set forth on the Punchlist, to complete the uncompleted items on the Punchlist in lieu of requiring Contractor to complete such items. Following Contractor’s receipt of such Notice, Owner shall determine which items on the Punchlist have not been completed and the cost to complete such items. Owner shall then be permitted to deduct and keep from the Retainage such amount in satisfaction of Contractor’s obligation to complete such items.

## Substantial Completion.

### Requirements for Substantial Completion. The following are the conditions precedent for the Project to achieve Substantial Completion:

#### the Project is Mechanically Complete;

#### the [\_\_\_\_\_\_\_\_\_] Tests have been Successfully Run;

#### Contractor shall have paid all Delay Liquidated Damages calculated pursuant to Section 15.1.1;

#### Owner has received all Contractor Deliverables which are either necessary for the operation of the Project or are required to be delivered by the applicable Substantial Completion Date as set forth in the Contractor Deliverables Table;

#### (i) except with respect to Non-Critical Deficiencies listed on the Punchlist, all Work, including all Common Infrastructure necessary to operate the Project, has been complete without Defect; and (ii) the Punchlist shall be in final form and approved by Owner as provided for in Section 14.1.1 and only Non-Critical Deficiencies remain on the approved Punchlist;

#### Contractor has delivered a Conditional Waiver and Release Upon Progress Payment dated no later than the proposed Substantial Completion Date;

#### Contractor shall have licensed or granted, in accordance with this Agreement, all Intellectual Property Rights necessary for the Project to be operated by Owner without violating any of Contractor’s, any Subcontractor’s or any third party’s rights to such Intellectual Property Rights;

#### Contractor has obtained, and Owner has received copies of, all Contractor Acquired Permits necessary for the on-going operation of the Project in a safe, efficient, and reliable manner and otherwise in accordance with Applicable Law; and

#### all training of Operating Personnel is complete.

#### [the Long Term Service Agreement is in full force and effect.] ***[Add based on final project details]***

## Notice of Substantial Completion.

When Contractor believes that it has satisfied the provisions of Section 14.2.1, Contractor shall deliver to Owner a Notice of Substantial Completion. Owner shall, within five (5) Business Days after receipt of such Notice, issue an Owner’s Certificate of Substantial Completion, dated to reflect the Substantial Completion Date, or if Owner rejects Contractor’s Notice, respond in writing giving its reasons, in reasonable detail, for such rejection and Contractor shall take the appropriate corrective action. Upon completion of such corrective action, Contractor shall provide to Owner a new Notice for approval. This process shall be repeated on an iterative basis until Owner accepts the Notice of Substantial Completion and issues an Owner’s Certificate of Substantial Completion. The “**Substantial Completion Date**” shall be the day after the date on which the last of the conditions of Section 14.2.1 was satisfied or, in the discretion of Owner, waived.

## Final Completion.

Final Completion shall be deemed to have occurred only if all of the following have occurred:

#### Substantial Completion has been achieved;

#### Contractor shall have completed all items on the Punchlist;

#### all Contractor’s and Subcontractors’ personnel shall have left the Site, and all surplus materials, waste materials, rubbish and Temporary Work other than those to which Owner holds title or which were brought onto the Site by Owner or Owner’s Separate Contractors shall have been removed from the Site, and any permanent facilities used by Contractor and the Site shall have been restored to the same condition that such permanent facilities and the Site were in on the Full Notice to Proceed Date, ordinary wear and tear excepted;

#### Contractor shall have assigned to Owner, or provided Owner with, all warranties or guarantees with respect to the Project that Contractor received from Subcontractors to the extent Contractor is obligated to do so pursuant to Article 17;

#### Owner shall have received all Contractor Deliverables, copies of final record drawings, and electronically prepared computer drawing file(s), as prepared by Contractor;

#### Contractor has delivered either a Conditional Waiver and Release Upon Final Payment or an Unconditional Waiver and Release Upon Final Payment from itself and, unless otherwise bonded over in accordance with the terms hereof, from each Major Subcontractor dated no later than the proposed Final Completion Date; and

#### to the extent any Contractor Acquired Permit is required to be “closed out” or similar process (e.g., a certificate of occupancy or completion) by the applicable Governmental Authority, Contractor has satisfied all such requirements for each Contractor Acquired Permit.

## Notice of Final Completion.

Contractor shall deliver to Owner a Notice of Final Completion stating that Contractor believes it has satisfied the provisions of Section 14.4. Within five (5) Business Days after receipt of the Notice of Final Completion, Owner shall issue an Owner’s Certificate of Final Completion, or if Owner rejects Contractor’s Notice of Final Completion, respond in writing giving Owner’s reasons, in reasonable detail, for such rejection and Contractor shall promptly take the appropriate corrective action. Upon completion of such corrective action, Contractor shall provide a new Notice of Final Completion to Owner for approval. This process shall be repeated on an iterative basis until Owner accepts the Notice of Final Completion and issues an Owner’s Certificate of Final Completion. The “**Final Completion Date**” for the Project shall be the day after the date on which the last of the conditions of Section 14.4 was satisfied or, in the discretion of Owner, waived.

## Contractor’s Access After Substantial Completion and Final Completion.

#### Subject to the remaining provisions of this Section 14.6, following Substantial Completion until Final Completion, Owner shall provide Contractor with reasonable and timely access to the Project: (a) to complete all items on the Punchlist; (b) to Successfully Run the [\_\_\_\_\_\_\_\_] Tests; (c) to conduct corrective actions pursuant to a Remedial Plan and/or a Mandatory Remedial Plan; and (e) to satisfy the other requirements for Final Completion.

#### From and after the Substantial Completion Date, Owner shall have the right to operate the Project, including the right to maximize the economic benefits of the Project. The Parties expect that Contractor shall accomplish (i) the completion of the items on the Punchlist; (ii) any necessary modification, repairs, Warranty Work, or additional work; and (iii) the corrective actions undertaken pursuant to any approved Remedial Plan or Mandatory Remedial Plan, in each case, with minimal interference with commercial operation of the Project and that reductions in and shut-downs of the Project, any part thereof, or any other portion of the Project’s operations, will be required only when necessary, taking into consideration the length of the proposed reduction or shut-down, and Owner’s obligations and liabilities to customers or others. Provided that the correction of Non-Critical Deficiencies on the applicable Punchlist, the performance of such Warranty Work or other additional Work, or the performance of the corrective actions in the applicable Remedial Plan or Mandatory Remedial Plan, in each case, does not require a shut-down of the Project or other portion of the Project, Owner agrees to permit Contractor unrestricted access to the applicable portion of the Project to perform such activities at times reasonably convenient to Owner when the Project is not expected to be continually operated. Notwithstanding the foregoing, should a reduction in or shut-down of any portion of the Project’s operations be required to perform any such additional Work, Warranty Work, or corrective actions, then such reduction or shut-down shall be scheduled at the sole discretion of Owner, and Contractor shall complete such corrective actions during such Owner scheduled reduction or shut-down. Contractor acknowledges that Owner may schedule such reduction or shut-down at any time including off peak hours, nights, weekends and holidays. To the extent Contractor requires Owner to schedule a reduction or shut-down of any portion of the Project in order to perform any such additional Work, Warranty Work, or corrective actions, if such portion of the Project is not fully back on-line by the immediately following sunrise after the period scheduled for such shut-down, then Contractor shall be liable for Delay Liquidated Damages per day (or portion thereof) at the amount set forth in Section 15.1.2 until the day that each such portion is fully back on-line.

#### Any failure by Owner to provide Contractor with access to the Project, or portion thereof, as set forth in this Section 14.6 shall not be considered a breach of any covenant, condition, representation or warranty of Owner, and shall not be construed as an Owner Event of Default. Contractor’s only remedy for a failure by Owner to provide Contractor with access to the Project as set forth in this Section 14.6 shall be (i) an extension of the time to achieve Final Completion (in the case where Contractor is prevented from correcting Non-Critical Deficiencies on the Punchlist or performing other Work required to achieve Final Completion); or (ii) an extension of the time set forth in the Remedial Plan or Mandatory Remedial Plan, as the case may be.

# LIQUIDATED DAMAGES

***[This Article 15 and other provisions relating to schedule, performance, delay liquidated damages and performance liquidated damages to be conformed to final deal arrangements and project details. See also notes to title page.]***

## Delay Liquidated Damages.

### Delay Liquidated Damages. Contractor agrees that if Substantial Completion is not achieved by the Substantial Completion Guaranteed Date then Contractor shall pay Delay Liquidated Damages to Owner in the amount calculated pursuant to Exhibit R for each day or partial day that the Project fails to achieve Substantial Completion after the Substantial Completion Guaranteed Date. Contractor also agrees that, if after Substantial Completion, the Project is materially damaged due to any act of Contractor or any Subcontractor or otherwise materially altered by Contractor or any Subcontractor, then Contractor shall Successfully Run each [\_\_\_\_\_\_\_\_] Test again. If the results of such [Performance] Tests demonstrate that the damage caused by Contractor or any of its Subcontractors or alteration resulted in the Project no longer achieving the [\_\_\_\_\_\_\_\_] Guarantee, then Contractor shall pay Delay Liquidated Damages to Owner in the amount calculated pursuant to Exhibit R for each day that the Project fails to achieve such [\_\_\_\_\_\_\_\_] Guarantee. Any Delay Liquidated Damages Contractor is obligated to pay to Owner under this Section 15.1.1 shall be subject to the limitations set forth in Section 30.2.2 and all amounts Contractor is obligated to pay Owner under this Section 15.1.1 shall be due and payable within five (5) calendar days after Owner has invoiced Contractor for such amounts. Owner shall bill (or set-off) for such amounts on a monthly basis. Such amounts may be set off by Owner against unpaid portions of the Contract Price (including against the Retainage).

## Performance Liquidated Damages.

### [\_\_\_\_\_\_\_] Liquidated Damages. Contractor agrees that if the Project shall have failed to satisfy the [\_\_\_\_\_\_\_\_] Guarantee based on the results of the [\_\_\_\_\_\_\_\_\_] Test (as calculated in accordance with Exhibit H), then Contractor shall pay [\_\_\_\_\_\_\_] Liquidated Damages as a result of such failure, as such liquidated damages are calculated in accordance with Exhibit R.

### [\_\_\_\_\_\_\_] Buy Down Amounts. In addition to any [\_\_\_\_\_\_\_] Liquidated Damages paid pursuant to Section 15.2.1, and Section 15.2.2, if Contractor is obligated to Successfully Run the [\_\_\_\_\_\_\_\_\_] Test, Contractor also further agrees that if the Project shall have failed to satisfy the [\_\_\_\_\_\_\_\_\_] Guarantee based on the results of the [\_\_\_\_\_\_\_\_\_] Test (as calculated in accordance with Exhibit H), then Contractor shall pay the [\_\_\_\_\_\_\_] Buy Down Amounts as a result of such failure, as such liquidated damages are calculated in accordance with Exhibit R. ***[SDG&E anticipates that the buy down amount will be applied to the efficiency of the Project, based on difference between the guaranteed efficiency and measured efficiency, and the market price]***

### Payment of [\_\_\_\_\_\_\_] Liquidated Damages, [\_\_\_\_\_\_\_] Buy Down Amounts. Any amount Contractor is obligated to pay to Owner under Section 15.2.1, Section 15.2.2 or Section 15.2.3 shall be subject to the applicable limitations set forth in Section 30.2.2 and shall be due and payable within five (5) calendar days after Owner has invoiced Contractor for such amounts. To the extent Contractor does not make such payment within such five (5) calendar day period, Owner may draw such amounts on the [[\_\_\_\_\_\_\_\_\_] Test [\_\_\_\_\_\_\_\_] Letter of Credit].

## Corrective Action Periods.

### Corrective Actions. Without limiting Contractor’s obligation to correct Defects and Deficiencies in accordance with Article 17, and except as set forth in Section 15.3.2, at any time during [\_\_\_\_\_\_\_\_\_\_\_], Contractor, at its option and subject to the requirements and restrictions set forth in Section 14.6 and this Section 15.3, may attempt to implement corrective actions in an effort to ensure that the Project will satisfy the [\_\_\_\_\_\_\_] Guarantee during the Successful Runs of the corresponding [\_\_\_\_\_\_\_\_\_] Test. Contractor shall be responsible, at its own cost and expense and at its own risk, to provide all equipment, materials, labor, Temporary Work, in each case, of whatever kind or nature, that Contractor believes is necessary or desirable to perform the corrective actions contemplated pursuant to any Remedial Plan. Contractor expressly acknowledges that it bears the risk that the [\_\_\_\_\_\_\_] of the Project may be significantly affected as a result of the implementation of a Remedial Plan, and the [\_\_\_\_\_\_\_] Guarantee shall not be adjusted as a result of outages or other down-time which result from Contractor’s implementation of its Remedial Plan.

### Mandatory Remedial Plan. Notwithstanding the provisions of Section 15.3.1, if, after Successfully Running the [\_\_\_\_\_\_\_\_\_] Test, the Project has failed to satisfy the [\_\_\_\_\_\_\_\_\_\_\_] Guarantee during such test, then, without limiting Contractor’s warranty obligations as set forth in Article 17, Contractor shall, subject to the requirements and restrictions set forth in Section 14.6 and this Section 15.3, implement corrective actions (a “**Mandatory Remedial Plan**”) in an effort to cause the Project to satisfy the [\_\_\_\_\_\_\_] Guarantee during the [\_\_\_\_\_\_\_\_\_] Test. Contractor shall be responsible, at its own cost and expense and at its own risk, to provide all equipment, materials, labor, and Temporary Work, in each case, of whatever kind or nature, that Contractor believes is necessary or desirable to perform the corrective actions contemplated pursuant to the approved Mandatory Remedial Plan. Contractor expressly acknowledges that it bears the risk that the [\_\_\_\_\_\_\_\_\_\_] may be significantly affected as a result of the implementation of a Remedial Plan, and the [\_\_\_\_\_\_\_] Guarantee shall not be adjusted as a result of outages or other down-time which result from Contractor’s implementation of its Remedial Plan.

### Remedial Plans. If Contractor elects to implement such corrective actions pursuant to Section 15.3.1, or if Contractor is obligated to implement a Remedial Plan pursuant to Section 13.4.2 or Section 13.4.4, or if Contractor is obligated to implement a Mandatory Remedial Plan pursuant to Section 15.3.2, then Contractor shall submit a Remedial Plan to Owner for Owner’s approval reasonably describing such proposed corrective actions. Contractor shall not implement corrective actions without Owner’s prior approval of the proposed Remedial Plan or Mandatory Remedial Plan, as applicable. Owner shall provide such comments to the proposed plan within ten (10) Business Days after receipt of such proposed plan. Owner’s approval of such plan shall not be unreasonably withheld or conditioned. The corrective actions described in the Remedial Plan or Mandatory Remedial Plan, as the case may be, must be designed and intended to improve, with a reasonable probability of success, (a) with respect to Remedial Plans contemplated pursuant to Section 13.4.2, the [\_\_\_\_\_\_\_\_\_] so as to cause the Project to satisfy its corresponding [\_\_\_\_\_\_\_\_] Guarantees; and (b) with respect to all other Remedial Plans and all Mandatory Remedial Plans, the [\_\_\_\_\_\_\_\_\_] so as to cause the Project to satisfy the [\_\_\_\_\_\_\_] Guarantees. Each Remedial Plan and Mandatory Remedial Plan (x) shall specify the corrective actions Contractor will take and the commencement date and contemplated completion date of such corrective actions; and (y) shall not involve a material risk of damaging or diminishing the performance of any portion of the Project. All Remedial Plans must be completed within the time frame identified in the Remedial Plan approved by Owner. All Mandatory Remedial Plans must be completed within the time frame identified in the Mandatory Remedial Plan approved by Owner, but in all cases must be completed by the [second] anniversary of the Substantial Completion Date.

### Prosecution of Remedial Plan. In the event Contractor elects to proceed with a Remedial Plan, is obligated to proceed with a Remedial Plan pursuant to Section 13.4.2 or Section 13.4.4, or with respect to a Mandatory Remedial Plan, Contractor shall:

#### promptly and diligently pursue completion of the Remedial Plan or the Mandatory Remedial Plan, as the case may be; and

#### in performing the corrective actions described in the Remedial Plan or Mandatory Remedial Plan, as the case may be, not cause damage to the Project nor cause the Project to be unable to comply with Applicable Laws.

### Additional Remedial Plans. After the completion of the corrective actions identified in previously approved Remedial Plans undertaken pursuant to Section 15.3.1 or a Mandatory Remedial Plan, Contractor may submit additional Remedial Plans in accordance with Section 15.3.1.

### Access To Project During Implementation of a Remedial Plan. Upon approval of a Remedial Plan or Mandatory Remedial Plan, Owner shall provide Contractor with reasonable access to the Project subject to Section 14.6 upon Owner’s approval of the Remedial Plan or Mandatory Remedial Plan, as the case may be.

## Sole Remedy; Liquidated Damages Not a Penalty.

#### Except (as limited by Section 30.2) to the extent Contractor’s failure to perform hereunder contributes to a Contractor Event of Default for failure to meet the [\_\_\_\_\_\_\_\_\_\_\_] Standard, Owner’s sole and exclusive remedy for the failure of the Project to achieve the [\_\_\_\_\_\_\_] Guarantee shall be the payment of [\_\_\_\_\_\_\_] Liquidated Damages and [\_\_\_\_\_\_\_] Buy Down Amounts as set forth in Article 15.

#### Except (as limited by Section 30.2) to the extent Contractor’s failure to perform hereunder contributes to a Contractor Event of Default, and except as set forth in Section 23.1(j), Owner’s sole and exclusive remedies for Contractor’s failure to achieve Substantial Completion and Final Completion, in each case, by the applicable Project Guaranteed Date, shall be the payment of Delay Liquidated Damages, as set forth in Section 15.1.

#### The Parties agree that Owner’s actual damages in the event of such delays or failures would be extremely difficult or impracticable to determine and that Owner’s estimate of its costs and lost revenues in the event of such delays or failure may significantly exceed the amount of the liquidated damages provided herein. After negotiation, the Parties have agreed that the Delay Liquidated Damages, [\_\_\_\_\_\_\_] Liquidated Damages and [\_\_\_\_\_\_\_] Buy Down Amounts are in the nature of liquidated damages and are a reasonable and appropriate measure of the damages that Owner would incur as a result of such delays or failures, and do not represent a penalty. Nothing herein shall be deemed to modify Contractor’s absolute obligation (subject to Article 30) to successfully achieve Mechanical Completion.

## Enforceability.

The Parties explicitly agree and intend that the provisions of this Article 15 shall be fully enforceable by any court or arbitrator exercising jurisdiction over any dispute between the Parties arising under this Agreement. Each Party hereby irrevocably waives any defenses available to it under law or equity relating to the enforceability of the liquidated damages set forth in this Article 15. To the extent Contractor attempts to obviate the application of the remedies relating to the Delay Liquidated Damages and/or Performance Liquidated Damages in this Article 15 in any dispute between the Parties, and it is then determined by any court or arbitrator that Contractor’s obligation to pay the applicable Delay Liquidated Damages and/or Performance Liquidated Damages is unenforceable, the Parties agree that Owner shall have the right to avail itself of any right or remedy available to it in law or equity for the failure of Contractor to achieve Substantial Completion by the Substantial Completion Guaranteed Date, and the failure of the Project to achieve the [\_\_\_\_\_\_\_] Guarantees.

# CHANGES IN THE WORK

## Change In Work.

Changes to this Agreement and to the Work shall only be valid if accomplished pursuant to a written amendment to this Agreement executed by both Parties, or pursuant to a “Change In Work” executed pursuant to this Article 16. A “**Change In Work**” under this Agreement shall only result from one of the following:

#### changes in the Work required by Owner pursuant to Section 16.2;

#### as agreed by the Parties, the addition to, modification of, or deletion from the Work (performed or yet to be performed) during the performance of the Work;

#### the occurrence of an Excusable Event or a Force Majeure Event (as and only to the extent permitted by Section 8.6.1 or Section 8.6.2, as applicable);

#### an Owner Directive, in accordance with Section 16.7;

#### an Owner requested acceleration pursuant to Section 7.6 or an Owner suspension in the Work pursuant to Section 20.5.1; and

#### to the extent there has been any damage to the Insured Property covered by the Builders’ All Risk Property Insurance, as set forth in Section 16.4.3.

## By Owner.

Subject to Section 16.4, Owner shall have the right to make changes in the Work, within the general scope thereof, whether such changes are modifications, accelerations, alterations, additions, or deletions. All such changes shall be made in accordance with this Article 16, shall be documented in accordance with Section 16.4.1 and shall be considered, for all purposes of this Agreement, as part of the Work.

## Adjustment Due to Force Majeure Events and Excusable Events.

If an Excusable Event or an Force Majeure Event occurs, the Project Schedule, the applicable Project Guaranteed Dates, the Key Date Schedule and the Contract Price shall be modified as and only to the extent provided in Section 8.6.1 or 8.6.2, as applicable, and shall be documented in accordance with Section 16.4.2.

## Preparation of Change In Work Form.

### Due to Owner Initiated Change In Work. Upon the occurrence of any of the events set forth in Section 16.1 (a), (b) or (e), Owner or Contractor, as applicable, shall provide the other Party with a Notice of the occurrence of such event, and Contractor shall, as soon as practicable, prepare and submit to Owner a preliminary written estimate relating to the proposed Change In Work, including (a) any projected change in the cost of the performance of the Work and any projected modification of the Contract Price occasioned by such Change In Work and (b) the effect such Change In Work could be expected to have on the Project Schedule, Key Date Schedule and the Project Guaranteed Dates. If Owner elects to proceed with a more detailed examination of such proposed Change In Work, within such period as shall be agreed upon by the Parties, Contractor shall submit to Owner a detailed estimate relating to the contemplated change on a written Change In Work Form. If Owner elects to proceed with the proposed Change In Work, Owner and Contractor shall agree upon a Change In Work Form. Contractor’s cost of any Change In Work shall include and identify all elements of cost and a total lump sum cost using the following guidelines: labor to include category, unit rate, total rate, and hours, travel and other related expenses; materials to include category, unit rate, total rate, and quantity; and an amount equal to (x) ten percent (10%) of all costs as an allowance for profit and home office overhead and (y) a reasonable amount not to exceed five percent (5%) of all costs as an allowance for contingency. All Subcontractors and Suppliers who are affiliates of Contractor shall identify such costs by quotation (with reasonable back-up provided). Contractor shall also supply signed quotations for all Subcontractors who are non-affiliates of Contractor at the “first tier” level (with reasonable back-up provided) (and with respect to all other Subcontractors and Suppliers, of whatever tier, a reasonable amount of back-up material to justify the amount claimed with respect to such Subcontractor). Subject to Section 16.11, the buildup of such costs shall use the rates and take-offs set forth in Exhibit L-1. The adjustment in the Contract Price specified in this Section 16.4.1 and the Project Schedule shall be the sole adjustment related to such specific Change In Work (to the exclusion of other theories of recovery such as cumulative impact) unless stated otherwise. If the Parties cannot agree to a lump sum adjustment for such acceleration, then Owner may direct Contractor to perform such Work in accordance with Section 16.7 and Contractor shall have no obligation to perform such Work absent receipt of such direction from Owner.

### Due to Excusable Event or a Force Majeure Event. If an Excusable Event or a Force Majeure Event occurs for which Contractor is entitled to an adjustment to either the Project Schedule or the Contract Price pursuant to Section 8.6.1 or Section 8.6.2, as applicable, then Contractor shall, as soon as practicable, prepare and submit to Owner in accordance with Section 8.2 a proposed Change In Work, which shall include (i) in the case of an Excusable Event only, the change in the cost of the performance of the Work and any modification of the Contract Price, occasioned by such Change In Work and (ii) the effect such Change In Work will have on the Project Schedule, Key Date Schedule and the Project Guaranteed Dates, or any other schedule or dates for performance by Contractor hereunder, in each case all as and to the extent provided in Section 8.6.1 (with respect to a Force Majeure Event) and Section 8.6.2 (with respect to an Excusable Event) and as set forth in the Change In Work Form accepted by Owner. In the case of an Excusable Event, Contractor’s buildup of the cost of such Change In Work shall include and identify all elements of cost and a total lump sum using the following guidelines: labor to include category, unit rate, total rate and hours, travel and other related expenses; materials to include category, unit rate, total rate and quantity. All Subcontractors and Suppliers who are affiliates of Contractor shall identify such costs by quotation (with reasonable back-up provided). Contractor shall also supply signed quotations for all Subcontractors who are non-affiliates of Contractor at the “first tier” level (with reasonable back-up provided) (and with respect to all other Subcontractors and Suppliers, of whatever tier, a reasonable amount of back-up material to justify the amount claimed with respect to such Subcontractor). Subject to Section 16.11, the buildup of such costs shall use the rates and take-offs set forth in Exhibit L-1. With respect to the occurrence of the Excusable Event, the calculation of the adjustment to the Contract Price shall be as set forth in Section 8.6.2, as applicable. While it is anticipated that Contractor will have calculated by the expiration of the Allowable Claim Period all direct costs actually and demonstrably incurred, if any, as a result of an Excusable Event, and/or the extent of the actual and demonstrable delay in the performance of the Critical Path Item(s), if any, as a result of a Force Majeure Event or Excusable Event, if Contractor must nevertheless estimate such costs or effects, Contractor agrees to do so in good faith. Notwithstanding the foregoing sentence, the adjustment in the Contract Price (with respect to an Excusable Event) and the Project Schedule specified in this Section 16.4.2 shall be the sole adjustment related to such specific Change In Work and the applicable Force Majeure Event or Excusable Event (to the exclusion of other theories of recovery such as cumulative impact or loss of productivity) unless stated otherwise. If the Parties cannot reach agreement on the matters listed in the Change In Work Form submitted pursuant to this Section 16.4.2, then such matter shall be referred to dispute resolution under Article 31. For purposes of clarity, to the extent the Force Majeure Event or Excusable Event results in any damage or destruction to the Insured Property, including all other direct costs actually and demonstrably incurred as a result of such damage, then Contractor’s sole Contract Price relief to repair or replace such Insured Property shall be as set forth in Section 16.4.3, and not this Section 16.4.2.

### Damage to Work. If a Change In Work is required pursuant to Section 16.1(f), then Contractor shall, as soon as practicable, prepare and submit to Owner a proposed Change In Work, which shall include the change in the cost of the performance of the Work and any projected modification of the Contract Price, occasioned by such Change In Work. Unless Owner does not require Contractor to repair such damaged Work, Contractor shall be entitled to a Change In Work (which, for purposes of clarity, will not be deemed an increase to the Contract Price, or a payment on account of the Contract Price (including for purposes of Section 20.2.2)) equal to the amount of insurance proceeds distributed by the applicable insurers as verified by Contractor in the applicable “proof of loss” or other form that must be executed in order to receive such proceeds; there shall be no additional monetary compensation due from Owner, and the Project Schedule shall be adjusted only if Contractor is entitled to an adjustment under Section 16.4.2. Except as set forth in the next sentence, all deductibles under the Builder’s All Risk Insurance shall be borne by the Contractor, regardless of cause. If Owner caused the loss or damage to the Insured Property, or if such loss or damage is caused by a Force Majeure Event, then Owner shall be responsible for the applicable deductible under the Builder’s All Risk Policy. If the damage to the Insured Property was caused by a Force Majeure Event which is also not a covered peril by the Builder’s All Risk Insurance, then Owner shall be responsible to pay the costs to repair such damage pursuant to the provisions of Section 16.4.2 (without markup for profit by Contractor or any of its Subcontractors (of any tier)). With the sole exception of the foregoing two sentences, Contractor acknowledges and agrees that its sole compensation for loss or damage to the Insured Property, and all increases in Contractor’s costs necessary to repair the Work resulting from such Damage and to recover from all effects to the Work resulting from such damage, shall be those proceeds obtained from the applicable insurers, and Contractor bears the risk that its coverage is reduced or denied due to the failure to abide by the terms and conditions of the policy (such as a failure to abide by the “sue and labor” requirements), or a determination is made that the loss or destruction of the Insured Property was caused by an excluded peril which would not constitute a Force Majeure Event (such as a defect or deficiency, mysterious loss or disappearance, etc). Without obligating the Owner to do so, if the Owner makes a payment to Contractor in advance of receiving insurance proceeds from the applicable Builder’s All Risk Insurance underwriters on account of any loss or damage to the Insured Property, to the extent such advance payment exceeds the actual amount of insurance proceeds distributed by the underwriters on account of such loss or damage (after taking into account the responsibility for deductibles as set forth above), then Contractor shall refund such difference to Owner.

For the avoidance of doubt, this Section 16.4.3 shall apply to the costs incurred by Contractor resulting from loss or damage to the Insured Property. Contractor may be entitled to an extension to the Project Schedule and Project Guaranteed Dates as a result of any loss or damage to the Insured Property, if at all, only to the extent provided in Section 16.4.2, and, for further purposes of clarity, Contractor shall not be entitled to any such extension if the damage or destruction to the Insured Property is not caused by and Excusable Event and/or a Force Majeure Event. Contractor expressly waives any other compensation as a result of any loss or damage to the Insured Property (to the exclusion of other theories of recovery such as cumulative impact or loss of productivity).

### Delay In Issuance of the Full Notice to Proceed. If an Excusable Event occurs of the type identified in clause (c) of the definition of Owner-Caused Delay and Contractor is entitled to a Change In Work pursuant to Section 8.6.4, then Contractor shall prepare and submit a Change In Work to document the extension in the Project Schedule allowed pursuant to Section 8.6.4. There shall be no adjustment to the Contract Price as a result of such Change In Work.

## Execution of Change In Work Form.

Subject to the provisions of Section 16.7 and Section 16.9, within thirty (30) days after the date that a written request for a Change In Work is submitted by Contractor to Owner, the Parties shall execute a Change In Work Form if Contractor and Owner reach agreement on the matters that constitute the applicable Change In Work; provided, however, that if the Parties cannot reach agreement on the matters listed in the Change In Work Form submitted pursuant to the applicable provision of Section 16.4 within thirty (30) days of such submission, then nothing herein shall act to prevent a Party from initiating the procedures set forth in Article 31.

## No Obligation or Payment Without Executed Change In Work Form.

Contractor shall not be entitled to undertake or be obligated to undertake a Change In Work until Contractor has received a Change In Work Form submitted by Contractor and accepted by Owner, except as set forth in Section 16.7, or in the event immediate action is reasonably required to address an emergency which endangers human health or property. In the absence of such executed Change In Work Form, except as set forth in Section 16.7, if Contractor undertakes any changes in the Work, Contractor shall make any such changes at Contractor’s risk and expense and shall not be entitled to any schedule modification or payment hereunder for undertaking such changes (without limiting Contractor’s right to a Change In Work in the circumstances specified in Article 8). Nothing in this Section 16.6 shall be deemed to waive Contractor’s or Owner’s right to avail itself of the dispute resolution procedures pursuant to Article 31 with respect to disputed Change In Work Forms.

## Owner Directives.

If Contractor and Owner are unable to agree on whether a Change In Work has occurred or on the matters described in a Change In Work Form, regardless of whether such Change In Work Form was initiated by Contractor or by Owner, Contractor shall perform the Work as modified by the contemplated change as submitted by Owner if Owner so directs in writing; provided, that such work is within the general scope of Work being undertaken by Contractor in accordance with this Agreement (an “**Owner Directive**”). In such event (a) the Contract Price shall be increased on a time and materials basis by (i) the difference of (1) the direct costs (including supervisor and temporary facility costs) actually and demonstrably incurred by Contractor because of such Owner Directive; less any (2) savings or (3) costs not incurred, in each case, as a result of such Owner Directive; *plus* (ii) fifteen percent (15%) of such difference as an allowance for profit, home office overhead and contingency, and (b) the Project Schedule, the Key Date Item(s) and the Project Guaranteed Dates shall be equitably adjusted. Subject to Section 16.11, the buildup of such costs shall use the rates and take-offs set forth in Exhibit L-1. Owner shall assign a “Pending Item Claim Number” to the Work in question and shall issue Contractor a separate Notice to proceed. Contractor shall proceed to perform the Work identified therein. Using the “Pending Item Claim Number” to identify the Work identified in the Owner Directive, and without limiting the Parties’ rights to proceed under Article 31 to resolve such dispute, Contractor shall submit a Contractor’s Invoice to Owner for payment for such time and material costs, in accordance with the provisions of Section 6.2 on a monthly basis during the performance of such Work.

## Disputed Changes In Work.

Any disputes regarding a Change In Work Form or whether a Change In Work has occurred or that are otherwise related to a Change In Work shall be subject to the dispute resolution provisions of Article 31.

## No Suspension.

Notwithstanding any dispute between Owner and Contractor regarding a proposed Change In Work, an Owner Directive, a Contractor’s claim regarding the impact of a change upon the Contract Price or the Project Schedule or whether a Change In Work has in fact occurred, and provided Owner has provided the notice required by Section 16.5, Contractor shall not suspend the Work unless directed by Owner in writing in accordance with Section 20.5 and Owner shall continue to make payments to Contractor based on the Milestone Payment Schedule then in effect, pending resolution of such dispute.

## Executed Change In Work Form Final.

Except as may be expressly set forth in Section 16.7, Contractor expressly waives any compensation for any Change In Work executed pursuant to the provisions of this Article 16, including any other change in the Project Schedule, the Project Guaranteed Dates and the Contract Price. The total change to the Contract Price of any Change In Work shall be that indicated on the approved Change In Work Form, and such change to the Contract Price arising out of such Change In Work shall not be subject to escalation or increase at any time or based upon any theory such as loss of productivity, constructive acceleration, efficiency, or cumulative impact.

## Subcontractor Rates.

To the extent Exhibit L-1 does not contain the rates, take-offs and other pricing information from an applicable Subcontractor, in calculating the value of any Change In Work with respect to such Subcontractor, if Subcontractor’s rates (or the rates charged to Contractor under its corresponding change order with its Subcontractor) under such Subcontract are less than the rates set forth on Exhibit L-1, then Contractor shall use such lesser rates to calculate the build-up of the applicable Change In Work.

# WARRANTIES CONCERNING THE WORK

## General.

### Defect Warranty. Contractor warrants to Owner (such warranty, the “**Defect Warranty**”) that all Work, including the design of the Project and including the Equipment and Materials furnished, installed or otherwise performed by Contractor or any Subcontractors hereunder:

#### shall be in compliance with the Statement of Work;

#### shall be free from (x) any Defects including Defects in design, materials or fabrication or workmanship and (y) excessive wear and tear;

#### shall be new and of good and suitable quality when installed;

#### shall conform to all applicable requirements of this Agreement, the Contractor Deliverables, Applicable Laws and the Applicable Permits;

#### shall conform to the manufacturer’s requirements; and

#### shall generally be fit for the purpose of storing and discharging electrical power when operated in accordance with prudent operating practices;

### Long-Term Services Agreement. Concurrently with the execution of this Agreement, Contractor shall deliver the fully executed Long-Term Services Agreement. **[*Long term degradation warranty to be coordinated with the requirements of the LTSA (Exhibit T)]***

## Defect Warranty Period.

Contractor shall have no liability with respect to the Defect Warranty from and after: (a) the third (3rd) anniversaryof the Substantial Completion Date (such period, the “**Defect Warranty Period**”); provided, however, that the warranty period for any Work, Equipment and Materials, item or part required to be re-performed, repaired, corrected or replaced following discovery of a Defect or other non-compliance with the Defect Warranty during the Defect Warranty Period, and all Work, Equipment and Materials, items or parts, performed or re-performed, repaired, corrected or replaced as part of any Remedial Plan or Mandatory Remedial Plan, in each case, shall continue until the end of the later of (a) the expiration of such Defect Warranty Period and (b) one (1) year from the date of completion of such repair or replacement. Notwithstanding any other provision of this Section 17.2, the Defect Warranty Period (as the same may be extended pursuant to clause (b) of this Section 17.2) shall end no later than sixty (60) months after the Substantial Completion Date. Contractor shall perform all Defect Warranty re-work so that the respective repair or replacement parts are complete and reasonably expected to perform satisfactorily for the expected service life of the item repaired or replaced.

## Exclusions.

### Warranty. The Defect Warranty shall not apply to:

#### damage to or failure of any Equipment and Materials to the extent such damage or failure is caused by:

##### a failure by Owner or its representatives, agents or contractors (other than the Contractor or its Subcontractors or Affiliates) to operate and maintain such Equipment and Materials in material accordance with Industry Standards or in material accordance with the recommendations set forth in the Required Manuals but only if such failure occurs after care, custody and control related to such Equipment and Materials has transferred from Contractor to Owner (in accordance with Section 18.3); or

##### operation of such Equipment and Materials by Owner or its representatives, agents or contractors (other than the Contractor or its Subcontractors or Affiliates) materially in excess of or outside of the operating parameters or specifications for such Equipment and Materials as set forth in the Required Manuals but only if such failure occurs after care, custody and control related to such Equipment and Materials has transferred from Contractor to Owner (in accordance with Section 18.3);

#### items that require replacement due to normal wear and tear, normal erosion or corrosion or casualty loss (other than as a result of any failure of the Defect Warranty).

### Operating Personnel. Notwithstanding the foregoing, prior to Final Completion, any adverse stress or damage to the Equipment and Materials caused by Operating Personnel acting pursuant to the direction of Contractor shall be the responsibility of Contractor, except to the extent such Operating Personnel’s acts or omissions constitute gross negligence or willful misconduct.

## Enforcement by Owner; Subcontractor Warranties.

#### Commencing on the expiration of the Defect Warranty Period, Owner shall be entitled to enforce all unexpired representations, warranties, guarantees and obligations from all Subcontractors, and Contractor shall provide reasonable assistance to Owner, at no additional cost, in enforcing such representations, warranties, guarantees and obligations, when and as reasonably requested by Owner. In addition, prior to the expiration of the Defect Warranty Period, Owner, at its option and upon prior Notice to Contractor, may enforce the Defect Warranty against any Subcontractor if a Contractor Event of Default exists. Contractor shall assign all unexpired representations, warranties, guarantees and obligations of all Subcontractors, at the request and direction of Owner, to Owner upon the expiration of the earlier to occur of the Defect Warranty Period and termination or expiration of this Agreement in accordance with its terms, subject to the terms and conditions of any such remaining representations, warranties, guarantees and obligations of such Subcontractors; provided, however, that, notwithstanding such assignment, Contractor shall be entitled to enforce each such warranty through the end of the Defect Warranty Period. Notwithstanding the foregoing, Contractor shall not be obligated to assign any claims of Contractor with respect to such subcontract or Subcontractor then existing. Contractor shall cause Owner to be an express third-party beneficiary of all such representations, warranties, guarantees and obligations. Contractor shall deliver to Owner, at the end of the Defect Warranty Period, duly-executed copies of all subcontracts remaining in effect containing such representations, defect warranties, guarantees and obligations (with reasonable redactions to keep commercial and economic terms confidential).

#### Contractor shall use its commercially reasonable efforts to obtain defect warranties for all Work performed or Equipment and Materials supplied by each Subcontractor on terms not materially less favorable than the applicable warranty set forth in this Article 17.

## Correction of Defects.

### Notice of Defect Warranty Claim. Subject to Section 17.5.2 and Section 17.5.3, if Owner provides Notice to Contractor within a reasonable period after discovery that the applicable portion of any of the Work fails to satisfy the Defect Warranty, during the Defect Warranty Period, then Contractor shall have a reasonable opportunity to inspect such claimed Defect, and at Contractor’s own cost and expense refinish, re-design, re-purchase, repair or replace, at its option and as applicable, such non-conforming or defective part of the Work (“**Warranty Work**”). Additionally, Contractor shall pay the cost of removing any Defect and the cost of re-performing, repairing, replacing or testing such part of the Work as shall be necessary to cause the applicable portion of the Work to conform to the Defect Warranty. Such Defect shall not be deemed to have been corrected until the Project performs at a level consistent with the Project’s performance immediately prior to the occurrence of the Defect. Within five (5) Business Days after receipt by Contractor of a Notice from Owner delivered during the Defect Warranty Period specifying a failure of any of the Work to satisfy the Defect Warranty, as the case may be, and requesting Contractor to correct the failure, Contractor and Owner shall mutually agree (such agreement not to be unreasonably withheld or delayed) when and how Contractor shall remedy such failure. No such remediation or repair shall be considered complete until Owner shall have reviewed and approved such completed remedial work, such approval not to be unreasonably withheld or delayed. Notwithstanding the foregoing and subject to Section 17.5.3, if any applicable portion of the Work shall fail to satisfy the Defect Warranty during the Defect Warranty Period, and such failure endangers human health or property or materially and adversely affects the operation of the Project, Contractor shall correct the failure as soon as is practicable.

### Upon Contractor’s Request. Notwithstanding the foregoing, Contractor may request Owner to perform all or any portion of Contractor’s obligations with respect to any Defect Warranty claim. Upon such request, Owner may elect to perform such obligations in Owner’s sole discretion, and if Owner elects not to perform such obligations, Contractor shall remain obligated to and shall perform such obligations. Contractor shall, within ten (10) Business Days of receiving Owner’s request for payment of such costs, reimburse Owner for all reasonable and documented costs and expenses actually incurred by Owner and its Affiliates (including costs of Owner’s personnel) plus, to compensate Owner for its overhead, corporate burdens and profit, ten percent (10%) of such costs to perform Contractor’s obligations with respect to such Defect Warranty claim.

### Failure of Contractor to Perform Warranty Work. If Contractor does not use its reasonable efforts to proceed to complete the Warranty Work, or cause any relevant Subcontractor to proceed to complete the Warranty Work, required to satisfy any warranty claim properly asserted under the terms of this Article 17 within the agreed time, or if Contractor and Owner fail to reach an agreement within such five (5) Business Day period set forth in Section 17.5.1, Owner shall, after giving Contractor at least ten (10) days’ prior Notice of Owner’s intent to perform the remedy itself, have the right to perform the necessary Warranty Work to remedy the warranty claim, or have third parties perform the necessary warranty work and Contractor shall bear the reasonable costs thereof as set forth in Section 17.5.2. If Contractor (or the relevant Subcontractor) begins to perform the Warranty Work to satisfy such warranty claim during such ten (10) day period and diligently continues to perform such Warranty Work, Owner shall not perform, or cause any third party to perform, such Warranty Work. In the event any of the Work fails to satisfy the Defect Warranty during the Defect Warranty Period, and any such failure occurs under circumstances where there is an immediate need for repairs, Owner may perform such Warranty Work for Contractor’s account; provided, that Owner provides reasonably prompt Notice to Contractor of such immediate need prior to performing such Warranty Work. If Contractor is unable to adequately correct any Defect in the Work, or if the nature of any Defect in the Work is such that Owner will not be fully compensated by virtue of the repair or replacement of such Defective Work, then in each case, Contractor shall be liable to Owner for all amounts as are reasonably necessary to compensate Owner for the difference in value of the Work actually furnished by Contractor from the value of the Work specified herein.

### Replaced Components Demonstrations; Acceptance Tests. If, during the Defect Warranty Period, Contractor changes, repairs or replaces any Equipment and Materials (any such item changed, repaired or replaced, a “**Component**”) with a Component that was not specified or otherwise contemplated in this Agreement for use on the Project, Contractor and Owner shall mutually agree on how to demonstrate to Owner, taking into consideration Owner’s reasonable requirements, that such Component meets the intent of the Project design. If, during the Defect Warranty Period, Contractor shall change, repair or replace any Equipment and Materials item or component, Owner, in its reasonable discretion, may require the re-Successful Run of the [\_\_\_\_\_\_\_\_] Test; provided, however, in connection with any re-performance of a [\_\_\_\_\_\_\_\_] Test pursuant to this Section 17.5.4, appropriate allowance with respect to the performance of such Equipment and Materials shall be made for the fact that such Equipment and Materials may have operated prior thereto. If after running the [\_\_\_\_\_\_\_\_] Test pursuant to this Section, the results of such [\_\_\_\_\_\_\_\_] Test indicate a degradation in the performance of the Project (as measured against the test results used to satisfy the [\_\_\_\_\_\_\_\_] Guarantee prior to Substantial Completion), then Contractor shall repair, correct or replace such affected Equipment and Materials and such [\_\_\_\_\_\_\_\_] Test shall be re-run until the Project performs at a level consistent with the performance of the Project on the Substantial Completion Date.

### Serial Defect Warranty. If during the Defect Warranty Period an event of non-compliance of the Defect Warranty has occurred with respect to one percent (1%) or more of an applicable item of Equipment and Materials, and such non-compliance with the Defect Warranty could reasonably be expected to result from the same cause, then Owner shall provide Notice to Contractor of such failure or, if Contractor becomes aware of any such occurrence, Contractor shall provide written notice of the same to Owner. Contractor shall determine what changes, repairs or replacements to such items of Equipment and Materials are necessary to correct such non-compliance of the Defect Warranty and to avoid further failures of the Equipment and Materials at the Project which may not have yet experienced such failures, and Contractor shall make such necessary changes, repairs or replacements to all the Equipment and Materials installed at the Project (whether or not such Equipment and Materials have experienced such failures) all at its own cost and expense. Without limiting the above, in each case during the Defect Warranty Period, Contractor shall repeat such process on an iterative basis until such non-compliance with the Defect Warranty and the underlying cause thereof is corrected.

# EQUIPMENT IMPORTATION; TITLE

## Importation of Equipment and Materials.

Contractor, at its own cost and expense, and without limiting Contractor’s liability for any and all Taxes for which it is responsible, as specified in Section 5.2, shall make all arrangements, including the processing of all documentation, necessary to import into the United States all Equipment and Materials to be incorporated into the Project and any other Temporary Work necessary to perform the Work and shall coordinate with the applicable Governmental Authorities in achieving clearance of United States customs for all such Equipment and Materials and other items. In no event shall Owner be responsible for any delays in customs clearance or any resulting delays in performance of the Work (other than to the extent Contractor may be relieved therefor pursuant to Force Majeure Event relief).

## Title.

### Condition. To the extent Owner’s payments to Contractor are made in accordance with this Agreement Contractor warrants good title, free and clear of all liens, claims, charges, security interests, and encumbrances whatsoever (other than those created by Owner in favor of third parties or that result from Owner’s failure to pay Taxes for which it is responsible hereunder), to all Work, Equipment and Materials and other items furnished by it or any of its Subcontractors that become part of the Project or that are to be used for the operation, maintenance, or repair thereof.

### Transfer. Title to all Equipment and Materials shall pass in accordance with Section 18.2.1 to Owner upon the earlier of shipment of such Equipment and Materials to the Site or incorporation of such Equipment and Materials into the Project. Title to all other Work performed hereunder which is intended to form a permanent part of the Project shall pass to Owner upon the performance of such Work.

### Custody During Performance. The transfer of title shall in no way affect Owner’s rights as set forth in any other provision of this Agreement. Without limiting Contractor’s obligations under Section 13.7, Contractor shall have care, custody, and control of all Equipment and Materials and Temporary Work with respect to the Project and exercise due care with respect thereto until the earlier of the Substantial Completion Date or the termination of this Agreement.

## Transfer of Care, Custody and Control

. On and after the earlier to occur of the Substantial Completion Date or the termination of this Agreement, Owner shall take complete possession and control and assume responsibility for the daily operation and maintenance of the Project.

# DEFAULTS AND REMEDIES

## Contractor Events of Default.

Contractor shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, a “**Contractor Event of Default**”):

#### Contractor or Contractor Parent becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes a general assignment for the benefit of creditors, or Contractor or Contractor Parent commences any case, proceeding or other action seeking reorganization or receivership, or adopts an arrangement with creditors, under any bankruptcy, insolvency, reorganization or similar law of the United States or any state thereof for the relief of creditors or affecting the rights or remedies of creditors generally;

#### insolvency, receivership, reorganization, or bankruptcy or similar proceedings are commenced against Contractor or Contractor Parent or the counter-party to Owner under the Long-Term Services Agreement and such proceeding shall remain undismissed or unstayed for a period of thirty (30) days;

#### any material representation or warranty made by Contractor herein or by Contractor Parent (with respect to the Contractor Parent Guaranty) was materially false or misleading when made, Contractor (or Contractor Parent) fails to remedy such materially false or misleading representation or warranty and to make Owner whole for any consequences thereof within thirty (30) days after Contractor receives a Notice from Owner with respect thereto, except such thirty (30) day limit shall be extended if: (i) curing such failure reasonably requires more than thirty (30) days; (ii) Contractor (or Contractor Parent) commences such cure within such thirty (30) day period and diligently prosecutes such cure; and (iii) such cure is accomplished within sixty (60) days after the date on which Contractor receives a Notice from Owner with respect thereto;

#### Contractor assigns or transfers this Agreement or any right or interest herein except in accordance with Section 26.1;

#### Contractor fails to maintain any insurance coverages required of it in accordance with Article 21 and Contractor fails to remedy such breach within thirty (30) days after the earlier of the date on which Contractor first knew of such breach or the date on which Contractor first receives a Notice from Owner with respect thereto;

#### Contractor fails to perform or observe any provision of this Agreement providing for the payment of money to Owner, except for any disputed amounts, and such failure continues for ten (10) days after Contractor has received a Notice from Owner with respect thereto; or Contractor fails to perform any material provision of this Agreement not otherwise addressed in this Section 19.1, and such failure continues for thirty (30) days, except such thirty (30) day limit shall be extended if: (i) curing such failure reasonably requires more than thirty (30) days; (ii) Contractor commences such cure within such thirty (30) day period and diligently prosecutes such cure; and (iii) such cure is accomplished within sixty (60) days, in each case after the date on which Contractor first receives a Notice from Owner with respect thereto;

#### Contractor fails to timely deliver an Acceleration Plan pursuant to Section 7.5 or following approval of an Acceleration Plan pursuant to Section 7.5, Contractor fails, other than for Excusable Event or a Force Majeure Event, to meet the schedule set forth in the Acceleration Plan (as determined from the revised Critical Path Schedule established by the Acceleration Plan);

#### the Substantial Completion Date has not occurred by (i) the sixtieth (60th) day after the Substantial Completion Guaranteed Date; or (ii) the Final Completion Date has not occurred by the ninetieth (90th) day after the Final Completion Guaranteed Date, in each case, as such date may be extended pursuant to the provisions of this Agreement;

#### Contractor Abandons the Work;

#### Contractor Parent fails to perform or observe in any respect any provision of the Contractor Parent Guaranty providing for the payment of money to Owner or any other material provision of the Contractor Parent Guaranty, and such failure continues for ten (10) days in the case of a payment obligation, and thirty (30) days in the case of any other obligation, except such thirty (30) day limit shall be extended if: (i) curing such failure reasonably requires more than thirty (30) days, (ii) Contractor Parent commences such cure within such thirty (30) day period and diligently prosecutes such cure and (iii) such cure is accomplished within sixty (60) days after the date on which Contractor Parent receives a Notice from Owner with respect thereto, or the Contractor Parent Guaranty is invalid, no longer in effect or unenforceable for any reason;

#### Contractor incurs the maximum amount of Delay Liquidated Damages or Performance Liquidated Damages, as set forth in Section 30.2.2; or

#### The Long-Term Services Agreement has been terminated, or is no longer of full force and effect, other than by reason of Owner default thereunder.

## Owner’s Rights and Remedies.

In the event of a Contractor Event of Default, and subject to Article 30, Owner (or its successor in interest) shall have the following rights and remedies and may elect to pursue any or all of them without prejudice to and in addition to any other rights and remedies that may be available to Owner at law or in equity as a result of such Contractor Event of Default, and Contractor shall have the following obligations:

#### Owner may terminate this Agreement by giving Notice of such termination to Contractor, and all amounts owing by Contractor to Owner hereunder shall immediately become due and payable and provided, however, that in the event of a Contractor Event of Default pursuant to Section 19.1(i), Owner shall first provide Contractor with fifteen (15) days prior written notice of Owner’s intent to terminate this Agreement;

#### Owner may proceed against any security given by Contractor or for the benefit of Owner for Contractor’s performance under this Agreement, including the Retainage and the Contractor Parent Guaranty;

#### in the event Owner terminates this Agreement in accordance with the provisions hereof, Contractor shall withdraw from the Site, shall assign (to the extent such subcontract may be assigned) to Owner (without recourse to Contractor) such of Contractor’s subcontracts as Owner may request, and shall deliver and make available to Owner all Intellectual Property Rights of Contractor related to the Work reasonably necessary to permit Owner to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner may direct, and Owner may take possession of any or all Contractor Deliverables and Site facilities of Contractor related to the Work necessary for completion of the Work (whether or not such Contractor Deliverables and Site facilities are complete);

#### Owner shall have the right to have the Work finished whether by enforcing any security given by or for the benefit of Contractor for its performance under this Agreement or otherwise;

#### Owner may seek equitable relief to cause Contractor to take action, or to refrain from taking action pursuant to this Agreement, or to make restitution of amounts improperly received under this Agreement;

#### Owner may pursue the dispute resolution procedures set forth in Article 31 to enforce the provisions of this Agreement;

#### Owner may make such payments or perform such obligations as are reasonably required to cure any Contractor Event of Default and offset the cost of such payment or performance against payments otherwise due to Contractor under this Agreement;

#### in the event Owner terminates this Agreement, Owner may seek damages as provided in Section 20.1; or

#### Owner may suspend the Work by giving Notice of such suspension to Contractor.

## Owner Event of Default.

Owner shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, an “**Owner Event of Default**”):

#### Owner becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes a general assignment for the benefit of creditors, or Owner commences any case, proceeding or other action seeking reorganization or receivership, or adopts an arrangement with creditors, under any bankruptcy, insolvency, reorganization or similar law of the United States or any state thereof for the relief of creditors or affecting the rights or remedies of creditors generally;

#### insolvency, receivership, reorganization, or bankruptcy or similar proceedings are commenced against Owner and such proceeding shall remain undismissed or unstayed for a period of thirty (30) days;

#### any material representation or warranty made by Owner herein was materially false or misleading when made, Owner fails to remedy such materially false or misleading representation or warranty and to make Contractor whole for any consequences thereof within thirty (30) days after Owner receives a Notice from Contractor with respect thereto, except such thirty (30) day limit shall be extended if: (i) curing such failure reasonably requires more than thirty (30) days; (ii) Owner commences such cure within such thirty (30) day period and diligently prosecutes such cure; and (iii) such cure is accomplished within sixty (60) days after the date on which Owner receives a Notice from Contractor with respect thereto;

#### Owner fails to perform or observe any provision of this Agreement providing for the payment of money to Contractor, except for any disputed amounts, and such failure continues for ten (10) days after Owner has received a Notice from Contractor; or Owner fails to perform any material provision of this Agreement not otherwise addressed in this Section 19.3, and such failure continues for (30) days, except such thirty (30) day limit shall be extended if: (i) curing such failure reasonably requires more than thirty (30) days; (ii) Owner commences such cure within such thirty (30) day period and diligently prosecutes such cure; and (iii) such cure is accomplished within sixty (60) days, in each case after the date on which Owner first receives a Notice from Contractor with respect thereto;

#### Owner fails to maintain any insurance coverages required of it in accordance with Article 21 and Owner fails to remedy such breach within thirty (30) days after the earlier of the date on which Owner first knew of such breach or the date on which Owner first receives a Notice from Contractor with respect thereto.

## Contractor’s Remedies.

In the event of an Owner Event of Default and subject to Article 30, Contractor (or its successor in interest) shall have the following rights and remedies and may elect to pursue any or all of them, without prejudice to and, in addition to any other rights and remedies that may be available to Contractor at law or in equity as a result of such Owner Event of Default, and Contractor shall have the following remedies:

#### Contractor may terminate this Agreement upon providing Notice of such termination to Owner (in which event Contractor shall be compensated in the manner described in Section 20.2.2), and all amounts owing by Owner to Contractor hereunder shall immediately become due and payable;

#### Contractor may seek equitable relief to enforce the provisions of this Agreement; or

#### Contractor may pursue the dispute resolution procedures set forth in Article 31 to enforce the provisions of this Agreement.

# TERMINATION

## Termination and Damages for Contractor Event of Default.

In the event of a Contractor Event of Default, Owner may terminate this Agreement by delivery of Notice to Contractor. Subject to Article 30, Contractor shall be liable to Owner for all Losses to Owner as a result of such Contractor Event of Default, it being understood that to the extent the actual costs of completing the Work, including compensation for obtaining a replacement contractor or for obtaining additional professional services required as a consequence of such Contractor Event of Default (including amounts paid to induce any replacement contractor to keep completion deadlines, [\_\_\_\_\_\_\_\_\_] guarantees and liquidated damages as provided for in this Agreement and/or warrant any Work performed by Contractor prior to the termination of this Agreement), exceed those costs that would have been payable to Contractor but for such Contractor Event of Default, that Contractor shall be obligated to pay the difference to Owner (and, to the extent applicable, Contractor shall remain liable for the satisfaction of all liabilities incurred prior to Owner’s termination, including Contractor’s indemnification obligations incurred prior to such termination hereunder and payment of any incurred Delay Liquidated Damages and Performance Liquidated Damages). In addition, whether or not Owner terminates this Agreement, in the event of a Contractor Event of Default, Owner shall be entitled to withhold further payments to Contractor for the Work performed prior to termination of this Agreement until Owner reasonably determines the liability of Contractor, if any, under this Section 20.1, and in any event no later than the date a court or arbitrator of competent jurisdiction finally determines Contractor’s liability hereunder. Upon determination of the total cost of the Work, Owner shall Notify Contractor the amount, if any, that Contractor shall pay Owner or Owner shall pay Contractor. If it is determined by the arbitrators or any court that there was not a Contractor Event of Default, the termination will be deemed to be a termination for convenience as of the date of such termination and Contractor shall be compensated for such termination pursuant to Section 20.2.2. Contractor acknowledges that in the event of a termination of this Agreement pursuant to this Section 20.1, Owner may enter into a fixed price, turnkey, cost plus, or other type of contract for the completion of the Project with substantially similar or more favorable [\_\_\_\_\_\_\_\_\_\_\_] guarantees, completion deadlines and liquidated damages as are provided for in this Agreement, that such contract may require the replacement contractor to perform all such work on an accelerated basis using multiple shifts and overtime, that such contract may require such contractor to warrant any Work performed by Contractor prior to termination of this Agreement, and that, as a result thereof, the cost to complete the Project may greatly exceed the cost hereunder.

## Owner’s Termination Right for Sole Convenience; Payment to Contractor in the Event of Owner Termination for Convenience or Contractor’s Termination for Owner Event of Default.

### Prior to Issuance of Full Notice to Proceed. Prior to the issuance of the Full Notice to Proceed, Owner may terminate this Agreement in its sole discretion by giving Notice of termination to Contractor identifying this Section 20.2.1, to be effective upon the receipt of such Notice by Contractor or upon such other termination date specifically identified by Owner therein provided. Upon any such termination pursuant to this Section 20.2.1, Owner shall have no liability to Contractor for any costs or expenses of whatever nature arising out of such termination.

### After the Issuance of the Full Notice to Proceed. On and after the issuance of the Full Notice to Proceed, Owner may in its sole discretion terminate the Work without cause at any time by giving Notice of termination to Contractor identifying this Section 20.2.2, to be effective upon the receipt of such Notice by Contractor or upon such other termination date specifically identified by Owner therein. If, on and after the issuance of the Full Notice to Proceed, Owner terminates the Work without cause or for any cause pursuant to this Section 20.2.2 other than a Contractor Event of Default, or if Contractor terminates this Agreement due to an Owner Event of Default, as the sole compensation for the Work performed through the effective date of termination, Owner shall pay to Contractor only an amount equal to:

#### Subject to Section 16.11, and employing the rates and take-offs set forth in Exhibit L-1, Contractor’s actual, demonstrable and reasonable direct costs (exclusive of overhead, and profit) incurred in performing the Work prior to such termination and not otherwise covered in clause (b), (c), or (d) below; provided that Contractor takes reasonable steps to mitigate such costs to the extent reasonably practicable following such termination; plus

#### any and all reasonable demobilization costs incurred by Contractor or any Subcontractor in connection with such termination provided that Contractor takes reasonable steps to mitigate such costs to the extent reasonably practicable following such termination; plus

#### ten percent (10%) of the costs identified in paragraphs (a) and (b) of this Section 20.2.2 as an allowance for profit and overhead; plus

#### Subcontractors’ reasonable cancellation charges in connection with such termination (including for non-cancellable Equipment and Materials);

all, (the sum of (a), (b), (c), and (d)) up to, but not to exceed, the Contract Price; *less* the amount of all payments previously paid by Owner hereunder on account of the Contract Price.

Except as provided in this Section 20.2.2, Contractor shall not be entitled to any additional profit or overhead upon termination of this Agreement. Contractor shall promptly notify its Subcontractors of such termination. The amount owed pursuant to this Section 20.2.2 shall be subject to adjustment to the extent any Work contains Defects for which Contractor has had adequate time to remedy.

The Contractor shall submit an invoice (the “**Contractor’s Termination Invoice**”) to the Owner within fifteen (15) days after any termination pursuant to this Section 20.2.2 which shall set forth all amounts due to Contractor that remain unpaid in connection with this Agreement. The payments described in Section 20.2.2 include payment for: (a) all costs whatsoever of Equipment and Materials, Temporary Work, engineering, design and other services relating to Contractor’s performance of its obligations under this Agreement and the Work (including any Intellectual Property Rights licensed under this Agreement, expressly or by implication) provided by Contractor or such Subcontractors; and (b) all Taxes arising out of Contractor’s or any Subcontractor’s performance of the Work other than those Taxes which Owner assumes responsibility hereunder. The above-described payments shall not be increased with respect to any of the foregoing or with respect to any withholdings in respect of any of the foregoing items that Owner may be required to make under Applicable Law.

## Owner’s Right to Elect to Assume Obligations with Subcontractors.

Upon a termination of this Agreement, Owner shall have the right, at its option, to assume any subcontract or purchase order that Contractor has entered into with a Subcontractor in connection with the Work. If Owner elects to assume any subcontract or purchase order as described in this Section 20.3, then (a) the amounts paid pursuant to Section 20.2.2 shall be reduced by the amount of such obligations and commitments (unless they relate to termination or demobilization costs or to payments due for work already completed for which Contractor remains obligated to pay); (b) Contractor shall execute all assignments or other documents and take all other reasonable steps requested by Owner which may be required to vest in Owner all rights, set-offs, benefits and titles necessary to affect such assumption by Owner; and (c) Owner shall simultaneously agree to indemnify Contractor against payments owing the Subcontractor thereafter under the assumed subcontract or purchase order.

## Contractor Conduct.

Upon receipt of Notice from Owner of termination pursuant to Section 20.2.2, Contractor shall: (a) cease operations as directed by Owner in the Notice; (b) take action necessary, or that Owner may reasonably direct, for the protection and preservation of the Work; and (c) except for Work directed to be performed prior to the effective date of termination stated in Notice, or except as expressly requested by Owner in writing or under Section 20.3, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders with respect to the Work or the Project.

## Suspension by Owner.

### Suspension Without Cause. Owner may suspend performance of the Work at any time for its convenience by giving five (5) Business Days’ advance Notice thereof to Contractor. Such suspension shall continue for the period specified in the suspension Notice. The Project Schedule and the Contract Price shall be adjusted as provided in Section 20.5.4 to reflect any additional increased costs of Contractor directly resulting from any such suspension, as demonstrated by Contractor to Owner’s reasonable satisfaction. No such adjustment shall be made as a result of a Suspension for Cause. At any time after the effective date of the suspension, Owner may require Contractor to resume performance of the Work on ten (10) Business Days’ Notice. If Owner suspends performance of the Work, Contractor shall, at Owner’s request, promptly meet and confer with Owner with respect to the most efficient manner to affect the suspension and whether and to what extent demobilization is efficient and cost effective. Subject to Contractor’s termination rights under Section 20.5.3 (in which case Contractor may demobilize immediately upon issuing Owner a Notice of termination pursuant to such section), Contractor shall demobilize only to the extent instructed by Owner.

### Suspension for Cause.

#### Stop Work Suspension for Cause. Owner may also order Contractor to suspend performance (a) of that portion of the Work that reasonably appears to Owner to cause or threaten to cause an imminent danger to life or damage to property; (b) of that portion of the Work to the extent necessary if Contractor or its Subcontractors are performing such Work in violation of Applicable Law; (c) the Work as a whole if Contractor fails to maintain any insurance coverages required of it in accordance with Article 21 or (d) by giving five (5) Business Days’ advance Notice thereof to Contractor, suspend performance of the Work due to a Contractor Event of Default (in each case, a “Suspension for Cause”). If the Work is suspended as a result of a Suspension for Cause, then Contractor shall not be entitled to any adjustment to the Project Schedule or any adjustment to the Contract Price, for the associated impact of such Suspension for Cause. Owner’s right to suspend performance of the Work under this Section 20.5.2(a) shall be without prejudice to any other right or remedy Owner may have under this Agreement.

#### Resumption of Work. In the case of a Suspension for Cause pursuant to Section (a), once the cause of such Suspension for Cause has been resolved by Contractor and if this Agreement is still in effect, then if Owner does not re-order the resumption of the Work after two (2) Business Days’ Notice, then any further delay to the resumption of the Work shall be considered an Owner-Caused Delay. In the event that any such Suspension for Cause is subsequently determined not to have been properly issued in accordance with the provisions of Section 20.5.2(a), then such suspension shall be deemed to have been a suspension without cause ordered pursuant to Section 20.5.1.

### Contractor’s Termination Right. Subject to Applicable Law, if, at the end of the suspension period specified pursuant to Section 20.5.1, Owner has not requested a resumption of the Work or has not notified Contractor of any extension of the suspension period (but in no event beyond three hundred sixty five (365) days), Contractor may, upon ten (10) days’ advance Notice to Owner, terminate this Agreement. Upon any such termination by Contractor, Owner shall pay Contractor for the Work performed pursuant to Section 20.2.2. Contractor shall have no termination right in respect of any suspension pursuant to Section 20.5.2(a).

### Extension of Time and Compensation Rights. In the case of any suspension under Section 20.5.1:

#### the Project Schedule, applicable Key Date Items, and the Project Guaranteed Dates shall be extended by a period equal to the suspension period, plus a reasonable period for demobilization and remobilization as reasonably agreed upon by Contractor and Owner; and

#### Owner shall pay Contractor for those reasonable direct costs (including overhead) incurred during the suspension period that are documented by Contractor to the reasonable satisfaction of Owner, to the extent directly attributable to the suspension, and that are incurred:

##### for the purpose of safeguarding or storing the Work and the Equipment and Materials at the point of fabrication, in transit, or at the Site;

##### for personnel, Subcontractors or Equipment and Materials, the payments for which are continued during the suspension period;

##### for costs of demobilization and remobilization of Contractor and its Subcontractors, including suspension costs set forth in any subcontract, purchase order or other agreement;

##### for rescheduling the Work (including penalties or additional payments to Subcontractors for the same); and

##### (A) ten percent (10%) of such costs as an allowance for profit and home office overhead and (B) five percent (5%) of such costs as an allowance for contingency.

## Claims for Payment.

All claims by Contractor for compensation or extension of time under Sections 20.5.2(b) and 20.5.4 must be made within ninety (90) days after Notice from the Owner that the Work has been terminated or the suspension period has ended, respectively. Failure of Contractor to make such claim within said period shall be deemed a waiver by Contractor of any such claims.

# INSURANCE

## General.

### Contractor shall procure at its own expense and maintain in full force and effect as required under this Agreement, with responsible insurance companies authorized to do business in California, the types, limits and requirements of insurance as set forth in Sections 21.2, 21.4 and 21.5.

### Owner shall procure at its own expense and maintain in full force and effect as required under this Agreement, with responsible insurance companies authorized to do business in the United States, the types and limits of insurance as set forth in Section 21.3.

### Such insurance companies shall have an A.M. Best Insurance financial strength and financial size rating category of A-VII or better or shall be of recognized responsibility satisfactory to the Parties.

### Capitalized terms used in this Article 21 and not otherwise defined in this Agreement shall have the meanings generally ascribed to them in the commercial insurance industry in the United States.

### Each Party, at its own cost, may purchase any additional insurance it believes necessary to protect its interests, but these costs cannot be passed on to the other Party.

## Contractor’s Insurance.

Contractor’s obligations to obtain and maintain in full force and effect the insurance policies specified in this Article 21 shall be subject to the specified coverage being available on commercially reasonable terms.

### Workers’ Compensation and Employer’s Liability Insurance. Contractor shall maintain workers’ compensation insurance and such other forms of insurance which Contractor is required to maintain in order to comply with statutory requirements and limits under workers’ compensation laws of California, and employer’s liability (including occupational disease) coverage with limits of One Million Dollars ($1,000,000) per accident, One Million Dollars ($1,000,000) for disease, and One Million Dollars ($1,000,000) for each employee, which shall cover all of Contractor’s employees, whether full-time, leased, temporary or casual, who are engaged in the Work.

### Commercial General Liability Insurance. Contractor shall maintain commercial general liability insurance written on an occurrence basis in limits of not less than One Million Dollars ($1,000,000) per occurrence and Two Million Dollars ($2,000,000) annual aggregate. Coverage shall be at least as similar to or broad as the Insurance Services Office Commercial General Liability Coverage. Such insurance shall include coverage for products/completed operations, broad form/blanket contractual liability for written contracts, property damage and personal injury liability, premises/operations explosion, independent contractor liability, and collapse and underground hazards coverage and hostile fire liability. Defense costs shall be provided as an additional benefit and may be included within the limits of liability. Coverage limits may be satisfied using an umbrella or excess liability policy. In the event the Commercial General Liability policy includes a “blanket additional insured endorsement where required by contract,” the following language added to the certificate of insurance will satisfy Owner’s requirement: “Owner, its affiliates, the Financing Entities, and each of their respective directors, officers, agents and employees are included as additional insured by endorsement with respect to liability arising out of the Work performed by Contractor or any of its Subcontractors.”

### Automobile Liability Insurance. Contractor shall maintain automobile liability insurance (including coverage for owned, non-owned, and hired automobiles) covering vehicles used by Contractor in connection with the Work in an amount of at least One Million Dollars ($1,000,000) combined single limit per occurrence for bodily injury and property damage. Contractor’s automobile liability insurance coverage shall contain appropriate no-fault insurance provisions or other endorsements in accordance with Applicable Laws. Coverage shall be at least as broad as the Insurance Services Office Business Auto Coverage form covering Automobile Liability, code 1 “any auto”. If the Statement of Work involves hauling hazardous materials, coverage shall be endorsed to include MCS 90 endorsement.

### Umbrella or Excess Liability Insurance. Contractor shall maintain umbrella/excess insurance on an occurrence basis covering claims in excess of the underlying insurance described in Section 21.2.1, Section 21.2.2 and Section 21.2.3, in the amount of not less than Ten Million Dollars ($10,000,000) per occurrence, and on a following-form basis.

### Professional Liability Insurance. If the Work includes engineering, architectural, design or other professional services, Contractor shall secure and maintain, professional liability insurance (errors and omissions) with a minimum per occurrence single limit of Ten Million Dollars ($10,000,000). Coverage shall be for a professional error, act or omission arising out of the scope of services shown in the Agreement, including coverage for bodily injury, property damage, and consequential financial loss.

### Contractors Equipment, Tools Supplies and Materials. All Temporary Work (a) belonging to Contractor or to any of its Subcontractors, whether owned, rented, leased or hired or (b) used by or on behalf of Contractor or any of its Subcontractors for its performance hereunder, shall be brought to and kept at the Site at the sole cost, risk and expense of Contractor or such Subcontractor, and Owner shall not be liable for loss or damage thereto. Should such property be insured, said insurers shall waive rights of subrogation against Owner, and any insurance premium costs for such insurance, whether under the builders all risk policy in Section 21.5 or a separate policy, shall not be passed along to Owner.

### Aircraft Liability. If the Statement of Work involves aircraft, Contractor shall or shall cause its Subcontractor to procure and maintain over the term of this Agreement, aircraft liability insurance covering third party bodily injury and property damage exposure, including, but not limited to, passenger liability, property damage liability, and contractual liability insurance (with an express acknowledgement by the underwriters that the indemnification and hold harmless provisions of this Agreement are insured). Such insurance shall be in the amount of Eight Million (USD$8,000,000) per passenger being transported at any one time, however, shall at no time be less than Fifteen Million (USD$15,000,000) Combined Single Limit (CSL) per occurrence. There shall be no per passenger sublimit. The aircraft liability insurance policy shall not exclude fire suppression costs.

### Watercraft Liability. If the Statement of Work involves watercraft, Marine protection and indemnity or other liability coverage, including coverage for injury sustained by any passenger, apply to all watercraft used in the performance of the Work. The limit shall not be less than $1,000,000 for each occurrence for bodily injury and property damage including passenger legal liability.

### Pollution Liability. If applicable to the Statement of Work, coverage for bodily injury, property damage, including cleanup costs and defense costs resulting from sudden, accidental and gradual pollution conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water shall be maintained. The limit shall not be less than $1,000,000 each occurrence for bodily injury and property damage.

### Cyber Risk Liability Insurance. Contractor shall maintain cyber risk liability insurance with a combined single limit of not less than $10,000,000 per occurrence. Such insurance shall cover any and all errors, omissions or negligent acts arising in or connected with the performance of the Scope of Work under this Agreement. Such cyber risk liability insurance shall include coverage of claims and losses with respect to network risks (such as data breaches, unauthorized access/use, ID theft, invasion of privacy, damage/loss/theft of data, degradation, downtime, etc.), failure to supply, and intellectual property infringement, such as copyrights, trademarks, service marks and trade dress. No exclusions shall be listed within the policy for unencrypted, media or portable devices. Notwithstanding any other provision of this Agreement, Contractor shall purchase and maintain extended reporting period coverage providing that claims first made and reported to the insurance company within two (2) years after termination of the Agreement or cancelation of the insurance policy (and without new policy having the same retroactive date as the effective date of this Agreement) will be deemed to have been made during the policy period. Policy or policies shall also explicitly include subcontractors.

### Deductibles. Deductibles on all Contractor’s insurances in excess of Five Hundred Fifty Thousand Dollars ($500,000) shall be subject to Owner approval (not to be unreasonably withheld or delayed).

## Owner’s Insurance.

Owner’s obligation to obtain and maintain in full force and effect the insurance policies specified in this Article 21 shall be subject to the specified coverage being available on commercially reasonable terms.

### Workers’ Compensation Insurance and Employers’ Liability Insurance. In accordance with the laws of the State of California, Owner shall maintain in force workers’ compensation insurance for all of its employees. Owner shall also maintain employer’s liability coverage in an amount of One Million Dollars ($1,000,000) per accident and per employee for disease. In lieu of such insurance, Owner may maintain a self-insurance program meeting the requirements of the State of California along with the required employer’s liability insurance.

### Commercial General Liability Insurance. Owner shall maintain commercial general liability insurance in limits of One Million Dollars ($1,000,000) per occurrence and Two Million Dollars ($2,000,000) annual aggregate. Such insurance shall include coverage for products/completed operations, broad form/blanket contractual liability for written contracts, broad form property damage and personal injury liability, premises/operations explosion, independent contractor liability, and collapse and underground hazards coverage and hostile fire liability.

### Automobile Liability Insurance. Owner shall maintain automobile liability insurance (including coverage for owned, non-owned, and hired automobiles) covering vehicles used by Owner, including the loading or unloading of such vehicles, in an amount of One Million Dollars ($1,000,000) combined single limit per occurrence for bodily injury, and property damage. Owner’s automobile liability insurance coverage shall contain appropriate no-fault insurance provisions or other endorsements in accordance with Applicable Laws.

### Self Insurance. Owner shall have the right to self-insure all or a portion of the insurance provided under Section 21.3.

## Endorsements.

All policies of liability insurance to be maintained by Contractor shall be written or endorsed to include the following:

### With respect to workers’ compensation/employer’s liability insurance, to provide that the insurer shall waive for the benefit of the Owner and where permitted by law, all rights of subrogation against the Owner, its subsidiaries and Affiliates, co-ventures, Financing Entities, or, in each case, their directors, officers, members, managers, as well as their respective employees and/or agents of each.

### With respect to general liability, automobile liability, aircraft liability, watercraft liability, and excess/umbrella insurance, to provide that the insurance shall waive any and all right of subrogation or recovery which the insurer may have or acquire against the Owner, its subsidiaries and Affiliates, co-ventures, Financing Entities, or, in each case, their directors, officers, members, managers, as well as the employees and/or agents of each, and shall also waive any right of the insurers to any setoff or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under such policy.

### With respect to general liability, to provide a severability of interest and cross liability clause.

### With respect to general liability, and excess/umbrella insurance, that the insurance shall be primary and not excess to or contributing with any insurance or self-insurance maintained by such party.

### With respect to general liability, and excess/umbrella insurance, to identify the Owner, its subsidiaries and Affiliates, co-ventures, and, in each case, their directors, officers, members, managers, as well as the employees and/or agents of each, Financing Entities as additional insureds for the legal liability arising out of the operations of Contractor, and such policies shall provide that such insurance will not be invalidated by any action or inaction of each such insured and will insure each such insured regardless of any breach or violation of any warranty, declaration or condition contained in such insurance by the primary named insured. This additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Agreement.

### With respect to coverage for completed operations under the general liability insurance under Sections 21.2.2 and Section 21.2.4, to be in place throughout the performance of the Work and for three (3) years after Final Completion.

## Builder’s All-Risk Insurance.

Prior to significant accumulation by Contractor or any Subcontractor of insurable values at the Site, but no later than the earlier to occur of Site mobilization and thirty (30) days after the Full Notice To Proceed Date, Contractor shall obtain and thereafter at all times during performance of the Work on the Project up to Substantial Completion, maintain, or cause to be maintained, builder’s all-risk insurance in relation to the Project. Contractor shall be responsible for any additional premium for any extensions of the Builders’ All Risk Policy beyond the scheduled expiration date as well as any additional premium related to policy expiration audits. Such builder’s all-risk insurance shall insure as additional insureds Owner and Contractor’s subcontractors of any tier, as such Contractor or Contractor’s subcontractors interests may appear until the Substantial Completion Date of the Project. Builder’s all-risk shall cover all property in the course of transit or construction, including all property stored at Site or any temporary off-Site storage locations, including the Work, Equipment and Materials (other than Equipment and Materials properly covered under Contractor’s equipment floater), from physical loss or damage caused by perils covered by a builder’s all-risk form or equivalent coverage for projects similar in size and scope similar to the Project. Should any property in transit by ocean, air, rail or road not be covered under the builders all risk policy, then Contractor shall obtain and maintain cargo insurance to provide coverage for all such property in transit, unless such property is insured for transit under purchase agreement terms. Such builders all risk insurance shall: (a) include “extended coverage” (including earthquake, flood, collapse, sinkhole, subsidence), (b) include mechanical and electrical breakdown coverage during start-up and testing, including Acceptance Tests and other operations of the Project prior to Substantial Completion, (c) cover the Project and the Site for removal of debris and (d) otherwise cover damage to property and other claims arising out of the unloading, lifting, lowering or other handling of property at the Site, in an amount to cover materials and equipment to be used by Contractor in performance of this Agreement. Coverage shall be on a full replacement cost valuation basis, and not on an actual costs valuation or depreciated basis. The limit of liability shall be the full replacement cost of the Work or the property in relation to the Project, as the case may be, then at risk, including primary cost of the Equipment and Materials plus freight. Except as set forth in the next sentence, all deductibles for builders all-risk insurance shall be the responsibility of Contractor. Owner shall bear the deductible under the builders all risk insurance for damage to the Work caused by Owner or the Owner’s Separate Contractors, or damage to the Work caused by Force Majeure Events (except to the extent that Contractors actions or omissions result in or contributes to any loss or damage arising from Force Majeure Events). The builder’s all-risk coverage shall not contain an exclusion for resultant damage caused by faulty workmanship, design or materials. Such insurance shall provide for a waiver of the underwriters’ right to subrogation against Owner, Owner’s Separate Contractors, Contractor and Subcontractors. Contractor shall be responsible for preparing all claim forms and coordinating with the various underwriters with respect to all claims to be made under the builder’s all risk policy, all without increase to the Contract Price. Owner shall cooperate with the Contractor in preparing all such claims.

## Loss Payable.

Losses if any, covered by builder’s all-risk in Section 21.5 shall be payable to Owner, Financing Entities (if any), Contractor, and Subcontractors as loss payees, as their respective interests may appear. The policies shall be endorsed to state that, notwithstanding anything to the contrary, the interest of the aforementioned Persons, if any, shall not be invalidated by any act or failure to act on the part of Owner, Contractor or any other Person, and shall be insured regardless of any breach or violation by Owner, Contractor or any other Person, of any warranties, declarations or conditions contained in such insurance policies. The Parties agree that, in the event of physical loss of any portion of the Project, any insurance proceeds under this Section 21.6 shall be reserved in a segregated account until such time as it has been determined whether or not to repair, replace or rebuild the damaged portions. To the extent that any Financing Entities exist, distribution of proceeds under the builder’s risk policy shall be distributed in accordance with the requirements of the applicable financing documents. With respect to the distribution of proceeds under the builder’s risk policy in the case where there are no Financing Entities, if Owner elects to repair, replace or rebuild the damaged portions of the Project, Owner shall not withhold its prompt endorsement of the applicable payment from the builder’s risk underwriters so as to permit Contractor to receive the distribution of such proceeds, and should Owner withhold such prompt endorsement, Contractor shall be relieved from its obligations under Section 22.3 from and after such refusal until Owner provides such endorsement. Contractor and Owner shall both be responsible for signing proof of loss statements. Any signature by Contractor or Owner shall not be an admission to entitlement or non-entitlement for relief hereunder under Article 8, and shall not act as a waiver by either Party to seek contribution for deductible amounts as permitted herein.

## Subcontractor Insurance.

Contractor shall require each of its Major Subcontractors performing work at the Site that are not Suppliers, to obtain, maintain and keep in force during the time during which they are involved in performance of the Work, insurance coverage in accordance with the insurance requirements of Contractor set forth in Sections 21.2.1, 21.2.2, 21.2.3 and 21.2.4; provided, however, that the limits of any such Major Subcontractors’ Umbrella Excess Liability Insurance policies otherwise maintained in accordance with the requirements under Section 21.2.4, shall not be less than Two Million Dollars ($2,000,000).

## Contractor’s Waiver; Waiver of Subrogation.

Except to the extent liability for deductibles is explicitly set forth herein, Contractor releases, assigns and waives any and all rights of recovery against the Owner and its respective Affiliates, subsidiaries, employees, successors, permitted assigns, insurers and underwriters, because of the existence of deductible clauses in, or inadequacy of limits of, any policies of insurance maintained or required to be maintained by Contractor pursuant to this Agreement in the amounts stated herein. The Contractor shall in all policies of insurance related to the Project maintained by Contractor include clauses providing that each underwriter shall release, assign to the Owner, and its successors and assigns and waive all of its rights of recovery, under subrogation or otherwise, against the Owner, and its parent company, Affiliates, subsidiaries, employees, successors, permitted assigns, insurers and underwriters.

## Contractor Certificates.

On or prior to thirty (30) days after the Full Notice to Proceed Date, and upon written Notice from Owner, Contractor shall furnish to Owner certificates of insurance (including the declaration page) from each insurance carrier showing that the above required insurance is in full force and effect, the amount of the carrier’s liability thereunder, and further providing that the insurance will not be canceled, changed or not renewed until the expiration of at least thirty (30) days (or ten (10) days in the case of cancellation due to non-payment of premiums) after Notice of such cancellation, change or non-renewal has been received by Owner. Contractor shall also be responsible for obtaining certificates of insurance for the insurances required to be maintained by such Major Subcontractor in accordance with Section 21.7 from each of the Major Subcontractors before such Major Subcontractor is allowed to commence Work. Certificates of insurance submitted under this Section 21.9 shall be in form and content reasonably acceptable to Owner and shall provide that Owner and any Financing Entities shall timely receive copies of any Notices to Owner or Contractor under such policies of any default or other act or omission by Owner, Contractor or other insured parties that might invalidate, render unenforceable or result in a lapse of such policy in whole or in part. Certificates of each renewal of the insurance required hereunder shall also be delivered to Owner and any Financing Entity prior to or promptly after each renewal.

## Owner’s Certificates.

On or prior to the Full Notice to Proceed Date, and upon written request from Contractor, Owner shall furnish to Contractor certificates of insurance showing that the above required insurance is in full force and effect, the amount of the carrier’s liability thereunder, and further providing that such insurance will not be canceled, changed or not renewed until the expiration of at least thirty (30) days (or ten (10) days in the case of cancellation due to non-payment of premiums) after Notice of such cancellation, change or non-renewal has been received by Contractor. Certificates of insurance submitted under this Section 21.10 shall be in form and content reasonably acceptable to Contractor and shall provide that Contractor shall timely receive copies of any Notices under such policies of any default or other act or omission by Owner, Contractor or other insured parties that might invalidate, render unenforceable or result in a lapse of such policy in whole or in part. Certificates of each renewal of the insurance required hereunder shall also be delivered to Contractor prior to or promptly after each renewal.

## Descriptions Not Limitations.

The insurances coverages referred to in this Article 21 will be set forth in full in the respective policy forms, and the foregoing descriptions of such policies are not intended to be complete, nor to alter or amend any provision of the actual policies and in matters (if any) in which the said description may be conflicting with such instruments, the provisions of the policies of the insurance shall govern; provided, however, that neither the content of any insurance policy or certificate nor approval thereof shall relieve either Parties of any of their obligations under this Agreement.

## Cost of Premium.

It is expressly agreed and understood that:

#### the cost of premiums and deductibles for insurance required to be maintained by Contractor as set forth in this Article 21 shall be borne by Contractor, except with respect to the deductible for the builders all-risk insurance as provided in Section 21.5, and shall be written or endorsed to provide that Owner shall have no liability for the payment of any premium thereon;

#### that the cost of premiums and deductibles for insurance required to be maintained by Owner as set forth in this Article 21 shall be borne by Owner (except as set forth in Section 22.4 with respect to the deductible), and shall be written or endorsed to provide that Contractor shall have no liability for the payment of any premium thereon; and

#### If either Party fails to provide or maintain any insurance required of it hereunder, the other Party shall have the right, upon reasonable Notice, but not the obligation, to provide or maintain any such insurance, and to deduct the cost thereof from any amounts due and payable to the breaching Party (including, in the case of Owner, from any amounts due and payable to Contractor in respect of the Contract Price), or, in the event there are no such amounts due and payable to the breaching Party, the breaching Party shall reimburse the other Party for such costs on demand. Should any of the policies required to be maintained by either Party become commercially unavailable or be canceled for any reason during the period of this Agreement, such Party shall immediately procure replacement coverage. The failure of either Party to procure such replacement coverage which is within the reasonable control of such Party (so as to provide continuous coverage) shall constitute a material breach hereunder.

## No Limitation of Liability.

The insurance coverages required of Contractor set forth in this Article 21 shall in no way affect, nor are they intended as a limitation of, Contractor’s liability with respect to its performance of the Work. The insurance coverages required of Owner set forth in this Article 21 shall in no way affect, nor are they intended as a limitation of, Owner’s liability with respect to its performance of its obligations hereunder.

## Other Terms and Provisions.

### Omissions; Errors. It is hereby understood and agreed that the coverages afforded by the insurances required of either Party set forth in this Article 21 shall not be invalidated or affected by any unintentional omissions or errors.

### Notification. Contractor and Owner shall Notify the other Party of any and all incidents giving rise to an insurance claim, and otherwise keep the other Party timely apprised of insurance claim proceedings.

### Other Insurances. Owner may elect at any time during the term of this Agreement to require Contractor to procure and maintain other or additional insurance, but only to the extent any such insurances are reasonably available. Notice of such election shall be given at least sixty (60) Days prior to the effective date of the required modifications. Any additional costs incurred by these parties in securing insurance shall be reimbursed by Owner and shall be documented as a Change Order pursuant to Section 16.2.

# RISK OF LOSS OR DAMAGE

## Contractor Assumption of Risk.

Until the Substantial Completion Date, Contractor shall have care, custody and control of the Project; provided that upon a termination of this Agreement Owner shall have care, custody and control of the Project to the extent of such transfer of title.

## Risk of Loss.

With respect to all Work (including all Common Infrastructure necessary to operate the Project), until the Substantial Completion Date, or, upon the earlier termination of this Agreement as provided in Article 19 or Article 20, and subject to the provisions of Section 16.4.3 and this Article 22, Contractor assumes risk of loss, and full responsibility, for the cost of replacing or repairing any damage to all such Work (including the Equipment and Materials) and assumes risk of loss, and full responsibility, for the cost of replacing or repairing any damage to, any maintenance equipment (including Temporary Work). Nothing in this Section 22.2 shall limit the allocation for responsibility for deductibles under the builder’s all risk policy as set forth in Section 16.4.3. For purposes of clarity, Contractor at all times under this Agreement assumes the risk of loss, and full responsibility, for the cost of repairing or replacing any loss or damage to the Temporary Work.

## Repair or Replacement.

Until the Substantial Completion Date, or, upon the earlier termination of this Agreement as provided in Article 19 or Article 20, if any portion of such Work is lost or damaged, subject to the provisions of Article 8, Contractor shall replace or repair any such loss or damage and shall complete the Work in accordance with this Agreement.

## Risk of Loss After Substantial Completion.

Owner shall bear the risk of loss for, and full responsibility for, the cost of replacing or repairing any damage to the Project from and after the Substantial Completion Date. Notwithstanding the foregoing, to the extent any portion of the Project is lost or damaged after the Substantial Completion Date due to any act or omission of Contractor or any Subcontractor, or anyone directly or indirectly employed by any of them, Contractor shall be liable for replacing or repairing such loss or damage (in an amount not to exceed Owner’s property insurance deductible for such loss or damage). In any event, the care, custody, and control of the Project shall pass to Owner no later than the Substantial Completion Date.

# INDEMNIFICATION

## By Contractor.

To the fullest extent permitted under Applicable Law, and subject to Section 23.8, Contractor shall defend, indemnify, and hold harmless, Owner, Owner’s Engineer, the Financing Entities and any Person acting for or on behalf of Owner, and their respective employees, agents, partners, Affiliates, shareholders, officers, directors, members, managers and permitted assigns (each, an “**Owner Indemnitee**”), from and against all Losses to the extent such Losses arise out of or result from:

#### all Losses arising from claims for property damage (including damage to the Work and the Project) or bodily injury or death, in each case, due to, during, arising from or resulting from the performance of the Work (including any curative action under any warranty) by any member of the Contractor Group;

#### all Losses that are due to, arise out of or result from the following:

##### except to the extent of an Owner Event of Default with respect to Owner’s payment obligations hereunder has occurred and continuing, all claims for payment or compensation for Work performed hereunder, whether or not reduced to Contractor’s Lien filed by any member of the Contractor Group, including reasonable attorneys’ fees and expenses incurred by any Owner Indemnitee in discharging any Contractor Lien; or

##### employers’ liability or workers’ compensation claims filed by any member of the Contractor Group;

#### all Losses arising from third-party claims, including claims by Subcontractors, and claims for property damage or bodily injury or death that are due to, arise out of or result from the failure of any member of the Contractor Group to comply with the terms and conditions of either Labor Agreement, Applicable Laws or Applicable Permits during their performance of the Work;

#### all Losses arising, assessed or claimed by a Governmental Authority that are due to, arise out of or result from the failure of the Project, as designed, constructed and completed by Contractor or any Subcontractor, to be capable of operating in compliance with all Applicable Laws or the conditions or provisions of all Applicable Permits;

#### any and all fines, penalties, or assessments or similar Losses issued, assessed or claimed by any Governmental Authority that Owner may incur as a result of executing any applications at Contractor’s request;

#### all Losses arising from claims by any Governmental Authority that are due to, arise out of or result from the failure of Contractor to pay, as and when due, all Taxes (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority for which Contractor is obligated to pay pursuant to the terms of this Agreement;

#### all Losses, including claims for property or natural resource damage or bodily injury, sickness or death, whether or not involving damage to the Project or the Site, that are due to, arise out of or result from:

##### the use of Hazardous Materials by any member of the Contractor Group in connection with the performance of the Work, which use includes the storage, transportation, processing or disposal of Hazardous Materials by any member of the Contractor Group;

##### any Release of Hazardous Materials in connection with the performance of the Work by any member of the Contractor Group; or

##### any enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Applicable Law by any member of the Contractor Group with respect to Hazardous Materials in connection with the performance of the Work;

#### claims, actions or suits filed against Owner by any Subcontractor for costs incurred or for compensation (including claims for additional costs or compensation in excess of the applicable contract price of such Subcontract), in each case, due to, arising out of or resulting from Subcontractor’s performance of the Work pursuant to a subcontract with Contractor or any other Subcontractor;

#### from and against all Losses that are due to, arise out of or result from any insurance policy procured under Article 23 being vitiated as a result of Contractor’s failure to comply with any of the requirements set forth in such policy or any other act by Contractor or any Subcontractor; or

#### from and against all Losses that result from Contractor or any Subcontractor’s breach of either Labor Agreement.

## By Owner.

Owner shall defend, indemnify and hold harmless Contractor and its respective employees, partners, Affiliates (other than those Affiliates who are Subcontractors), shareholders, officers, directors, members, managers, and permitted assigns (each a “Contractor Indemnitee”) from and against all Losses that directly or indirectly arise out of or result from:

#### all Losses arising from claims for property damage or bodily injury or death, in each case, to the extent caused by any negligent, willful, reckless, or otherwise tortious act or omission (including strict liability) of Owner, or anyone directly or indirectly employed by Owner, or anyone for whose acts such Person may be liable (collectively, the “Owner Group”) any member of the Owner Group during the performance of Owner’s obligations under this Contract; and

#### all Losses that directly arise out of or result from the following employer’s liability or worker’s compensation claims filed by any member of the Owner Group.

#### all Losses arising from claims by any Governmental Authority that arise out of or result from the failure of Owner to pay, as and when due, all Taxes (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority for which Owner is obligated to pay pursuant to the terms of this Contract;

## Actions by Government Authorities.

To the fullest extent permitted under Applicable Law, and subject to Section 23.8, Contractor shall defend, indemnify, and hold the Owner Indemnitees harmless from and against all Losses that directly or indirectly arise out of claim from any Governmental Authority claiming taxes based on gross receipts or on income of Contractor, or any other member of the Contractor Group with respect to any payment for the Work made to or earned by Contractor, any of its Subcontractors, or any of their respective agents or employees.

## Limitation.

Nothing contained in this Contract shall obligate either Party to indemnify or hold harmless the other Party or any of their respective employees, agents, partners, Affiliates, shareholders, officers, directors, members, managers, and permitted assigns from any Loss to the extent of the active negligent, reckless, or otherwise tortious conduct (including strict liability) of the Party seeking indemnification. The Parties intend that, where active negligence is determined to have been contributory, principles of comparative negligence will apply and each Party shall bear the proportionate cost of any loss, damage, expense, and liability attributable to that Party’s negligence.

## Patent Infringement and Other Indemnification Rights.

To the fullest extent permitted under Applicable Law, and subject to Section 23.8, Contractor shall defend, indemnify, and hold harmless the Owner Indemnitees against all Losses arising directly or indirectly from any Intellectual Property Claim. If Owner provides Notice to Contractor of the receipt of any such claim, Contractor shall, at its own expense, settle or defend any such Intellectual Property Claim and pay all damages and costs awarded in such Intellectual Property Claim against Owner and either: (a) procure for Owner, or reimburse Owner for procuring, the right to continue using the infringing service, Equipment and Materials, or other Work, as the case may be: (b) modify the infringing service, Equipment and Materials, or other Work, as the case may be, so that the same becomes non-infringing; or (c) replace the infringing service, Equipment and Materials, or other Work, as the case may be, with noninfringing service, Equipment and Materials, or other Work, as the case may be. If Owner is enjoined from completing the Project or any part thereof, or from the use, operation, or enjoyment of the Project or any part thereof, as a result of such claim or legal action or any litigation based thereon, then Contractor shall promptly use reasonable efforts to have such injunction removed and to take one or more of the actions under the preceding clauses (a), (b) or (c), provided, that in no case shall Contractor take any action which materially adversely affects Owner’s continued use and enjoyment of the applicable service, Equipment and Materials, or other Work, as the case may be, without the prior written consent of Owner. Owner’s acceptance of the Contractor Deliverables or supplied Equipment and Materials shall not be construed to relieve Contractor of any obligation hereunder.

## Indemnity Procedure.

An indemnitee hereunder shall provide Notice to the indemnifying party, within thirty (30) Days after receiving written notice of the commencement of any legal action or of any claims or threatened claims against such indemnitee in respect of which indemnification may be sought pursuant to the foregoing provisions of this Article 23 or any other provision of this Contract providing for an indemnity (such notice, a “Claim Notice”). The indemnitee’s failure to give, or tardiness in giving, such Claim Notice will reduce the liability of the indemnifying party by the amount of damages attributable to such failure or tardiness, or to the extent the indemnifying Party is prejudiced by such failure or late notice, but shall not otherwise relieve the indemnifying party from any liability that it may have under this Contract. In case any such claim or legal action shall be made or brought against an indemnitee hereunder and such indemnitee shall notify (by sending a Claim Notice) the indemnifying party thereof, the indemnifying party shall have the right, by Notice given to the indemnitee within ten (10) Days after the date of the applicable Claim Notice, and if applicable, after notifying and consulting with any insurers who may provide claims coverage for the claim subject to such Claim Notice, to assume and control the defense of the claim that is the subject of such Claim Notice, including the employment of counsel selected by the indemnifying party after consultation with the indemnitee and the indemnifying party shall pay all expenses of the conduct of such defense. The indemnitee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such claim, but the fees and expenses of such counsel shall be borne by the indemnitee unless the indemnifying party shall agree otherwise; provided, however, if the named parties to any such proceeding (including any impleaded parties) include both the indemnitee and the indemnifying party, the indemnifying party requires that the same counsel represent both the indemnitee and the indemnifying party, and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them, then the indemnitee shall have the right to retain its own counsel at the cost and expense of the indemnifying party. If the indemnifying party shall have failed to assume or diligently prosecute the defense of any claim in accordance with the provisions of this Section 23.6, then the indemnitee shall have the absolute right to control the defense of such claim and the fees and expenses of such defense, including reasonable attorneys’ fees of the indemnitee’s counsel and any amount determined to be owed by the indemnitee pursuant to such claim shall be borne by the indemnifying party, provided that the indemnifying party shall be entitled, at its expense, to participate in (but not control) such defense. Subject to the foregoing, (a) the indemnifying party shall control the settlement of all claims, in coordination with any insurer as required under the applicable insurance policies set forth in Exhibit “Q”, as applicable, as to which it has assumed the defense; provided, however, that (i) such settlement shall include a dismissal with prejudice of the claim and an explicit and unconditional release from the party bringing such claim or other proceedings of all indemnitees; and (ii) the indemnifying party shall not conclude any settlement without the prior approval of the indemnitee, which approval shall not be unreasonably withheld; and (b) except as provided in the preceding sentence concerning the indemnifying party’s failure to assume or to diligently prosecute the defense of any claim, no indemnitee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnifying party, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any action, claim, suit, investigation or proceeding for which indemnity is afforded hereunder unless such indemnitee reasonably believes that the matter in question involves potential criminal liability. The indemnitee shall provide reasonable assistance to the indemnifying party when the indemnifying party so requests, at the indemnifying party’s expense, in connection with such legal action or claim, including executing any powers-of-attorney or other documents required by the indemnifying party with regard to the defense or indemnity obligations.

## Obligation Not Limited by Law.

A party’s obligation to indemnify under this Article shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for such party under any Applicable Law, including, without limitation, under any worker’s compensation acts, disability benefit acts or other employee benefit acts.

# CONFIDENTIAL INFORMATION

## Confidential Information.

Confidential Information is disclosed in confidence, and the transferee shall restrict its use of such information solely to uses related to the Project or performance of this Agreement and shall not use the Confidential Information in any way detrimental to the transferor, including, without limitation, to gain a competitive advantage with the businesses of the transferor. The transferee shall not publish or otherwise disclose any Confidential Information received to others without the prior written approval of the transferor, including the fact that the Confidential Information has been made available to the transferee, that it has entered into this Agreement, or any of the terms, conditions, or other facts with respect to this Agreement. Contractor shall disclose only such Confidential Information to those of its Subcontractors (of all tiers) and its and their Affiliates as is necessary to carry out the purposes of this Agreement. Contractor shall require each of its Subcontractors and their Affiliates to abide by the terms and conditions relating to Confidential Information contained herein. Contractor shall inform its Subcontractors and Affiliates of the confidential nature of the Confidential Information and shall indemnify Owner for any acts or omissions by Contractor or its Subcontractors or their Affiliates with respect to the Confidential Information provided by Owner. Nothing herein shall limit: (a) the right of Owner to provide any information regarding Contractor, any Subcontractor, this Agreement, the Project, or the Work (including, without limitation, any Contractor Deliverable) to its legal, technical and other officers, Financing Entities, its then existing or prospective successors or assigns; (b) the right of either Party to supply such information to any Governmental Authority as may be required by Applicable Law or any securities exchange; or (c) the right of Owner to reproduce and use as many copies of any Contractor Deliverables or other documents provided to Owner as Owner in its sole discretion considers useful or necessary for the furtherance of the Work, operation and maintenance of the Project, or otherwise related to the Project, regardless of any notices, legends, or disclaimers on such submittals or other documents. No right or license is granted to Contractor or any third-party respecting the use of such Confidential Information by virtue of this Agreement, except to the extent required for Contractor’s performance of its obligations hereunder. The transferee’s obligations regarding Confidential Information shall extend to all derivatives or references to such Confidential Information that are incorporated in any documentation prepared by the transferee in connection with the Work.

## Disclosures to Governmental Authorities.

Owner and the Independent Evaluator may disclose the terms, conditions or other facts with respect to this Agreement and all Confidential Information furnished or made available by either Party pursuant to this Agreement:

#### to duly authorized Governmental Authorities, including without limitation the FERC, the CPUC and all divisions thereof, and to Owner’s Procurement Review Group (the “PRG”), a group of non-market participants including members of the CPUC, other governmental agencies and consumer groups established by the CPUC in D.02-08-071, to demonstrate the reasonableness of Owner’s actions;

#### to the extent necessary to comply with any Applicable Law or any discovery of data request of a party to any proceeding pending before any of the foregoing;

provided that Owner shall, prior to any such disclosure by it or the Independent Evaluator, use reasonable efforts to seek confidential treatment by the Governmental Authority or the PRG of the Confidential Information or other information disclosed to any of them by Owner or the Independent Evaluator under this Section. Owner shall have no liability whatsoever to Contractor in the event of any unauthorized use or disclosure by a Governmental Authority or by the PRG of any Confidential Information or other information disclosed to any of them by Owner or the Independent Evaluator.

## Applicable Law Disclosures.

In the event that a transferor is requested or required (by oral questions, interrogatories, requests for information, documents in legal proceedings or periodic filings, or by the Securities and Exchange Commission, the Internal Revenue Service, subpoena, civil investigative demand or other similar process) to disclose any Confidential Information, the transferor shall provide the transferee with prompt written notice of any such request or requirement so that the transferee may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement. If, in the absence of a protective order or other remedy or the receipt of a waiver by the transferee, the transferor is nonetheless legally compelled to make any such disclosure of Confidential Information or else stand liable for contempt, the transferor may, without liability hereunder, disclose to such Person only that portion of the Confidential Information that on the advice of counsel is legally required to be disclosed, provided that the transferor uses its reasonable efforts to assist the transferee in obtaining an appropriate protective order or other reliable assurance that confidential treatment will be accorded the Confidential Information.

## Ownership of Confidential Information.

All Confidential Information obtained, developed or created by or for Contractor exclusively for the Project, including the drawings and specifications and any copies of Confidential Information, is the exclusive property of Owner whether delivered to Owner or not; provided, however, that Contractor may also use such Confidential Information for internal purposes. No right or license is granted to Contractor or any third-party respecting the use of such Confidential Information by virtue of this Agreement, except to the extent required for Contractor’s performance of its obligations hereunder. Contractor shall deliver all Owner’s Confidential Information, including all copies thereof, to Owner upon request; provided, however, that Contractor may keep one copy for archival purposes only, which copy shall remain subject to the obligations of this Article 24.

## Remedies.

Contractor and Owner each recognize and acknowledge the competitive and confidential nature of the Confidential Information and each agrees that irreparable damage may result to the other Party if Confidential Information of such other Party is disclosed to any third party except as herein permitted or is used for any purpose other than the purposes of this Agreement. The Parties agree that money damages may not be a sufficient remedy for any breach of this Article 24. Accordingly, the Parties agree that a Party whose Confidential Information is disclosed to a third party in breach of this Article 24 shall be entitled to an injunction or injunctions (without the posting of any bond and without proof of actual damages) to prevent breaches or threatened breaches of this Article 24, and to specific performance of this Article 24, and that neither the other Party nor its Affiliates will oppose the granting of such relief. Such remedies shall not be deemed to be the exclusive remedies for a breach of this Article 24, but shall be in addition to all other remedies available at law or equity.

## Survival.

The confidentiality obligations under this Article 24 shall apply even in the event of fault, breach of contract, breach of warranty, negligence, or strict liability of a Party and shall extend to such Party’s subcontractors, and in each case to such Party’s and its subcontractors’ Affiliates, officers, directors, members, managers, employees, licensees, agents or partners and shall survive the completion, cancellation, expiration, suspension and/or termination of this Agreement.

# INVENTIONS AND LICENSES

## Invention, License.

Any idea, invention, work of authorship, drawing, design, formula, algorithm, utility, tool, pattern, compilation, program, device, method, technique, process, improvement, development or discovery (collectively, “**Invention**”), whether or not patentable, or copyrightable or entitled to legal protection as a trade secret or otherwise, that Contractor may conceive, make, develop, create, reduce to practice or work on, in whole or in part, in the course of performing the Work, shall be owned and retained by Contractor. Contractor hereby grants to Owner an irrevocable, nonexclusive royalty-free license (which license is freely transferable to any party to which the Project is sold, collaterally assigned, or otherwise transferred) to use all Inventions, other proprietary rights and specialized knowledge of Contractor which, in each case, form a part of the Work for Owner’s use to the extent reasonably necessary for the operation, maintenance, repair, or alteration of the Project or components thereof. Contractor shall, prior to such Subcontractor performing any Work in connection with the Project, obtain a valid written license of any such Subcontractor’s Inventions, specialized knowledge or other proprietary property from such Subcontractor in terms substantially similar to those that obligate Contractor to Owner as expressed in this Section 25.1. Without diminishing the rights granted in this Section 25.1, Contractor also acknowledges and agrees that it shall not be a breach of the license granted in this Section 25.1 for any Affiliate of Owner to utilize as reference material any such Invention, proprietary right or specialized knowledge. Contractor shall promptly Notify Owner of any such Invention or discovery. Except as specifically stated herein, no other license in such patents and proprietary information is granted pursuant to this Agreement. All Contractor Deliverables and computer software prepared by Contractor pursuant to this Agreement are instruments of service in respect of the Project.

## Contractor Deliverables.

Subject to Section 25.1, the Contractor Deliverables accumulated or developed by Contractor, its employees or any Subcontractors shall become the property of Owner without any further consideration to be provided therefor, when prepared or in process, whether or not delivered by Contractor. All Contractor Deliverables and computer software prepared by Contractor pursuant to this Agreement are instruments of service in respect of the Project. Contractor shall procure title to any Contractor Deliverables from each Subcontractor pursuant to its subcontract with such Subcontractors, for the purposes of passing title to Owner under this Section 25.3. Contractor or Subcontractors, as applicable, will maintain ownership of all copyrights and other intellectual property contained within the Contractor Deliverables. Contractor shall deliver the Contractor Deliverables to Owner upon its request upon any termination of this Agreement, or completion of the Work.

## Software Licenses.

To the extent Contractor purchases any software which software is necessary or otherwise desirable for the continued operation of the Project after Substantial Completion in which such software is integrated or otherwise used, Contractor shall register Owner as the licensee of such software with the applicable Subcontractor.

# ASSIGNMENT

## Assignment by Contractor to Other Persons.

Contractor understands that this Agreement is personal to Contractor. Subject to the immediately succeeding sentence, without Owner’s prior written consent (which shall not be unreasonably withheld or delayed) Contractor shall have no right, power, or authority to assign or delegate this Agreement or any portion thereof, either voluntarily or involuntarily, or by operation of law; provided, however, that nothing in this Section 26.1 shall prevent Contractor from engaging Subcontractors in connection with the performance of its obligations under this Agreement. Absent Owner’s prior written approval, Contractor’s attempted assignment or delegation of any of its Work hereunder shall be null and void and shall be ineffective to relieve Contractor of its responsibility for the Work assigned or delegated.

## Indemnitees; Successors and Assigns.

Upon any assignment by either Party hereunder, the definition of “**Owner Indemnitee**” or “**Contractor Indemnitee**”, as applicable, shall be deemed modified to include the assignor and permitted assignee under such assignment and each of their respective employees, agents, partners, Affiliates, shareholders, officers, directors, members, managers, successors and assigns.

# OBLIGATIONS REGARDING APPLICABLE LAW AND HAZARDOUS MATERIALS

## Proper Qualifications.

Without limiting Section 9.4, Contractor shall use, and shall require each of its Subcontractors (other than vendors) to use only personnel who are qualified and properly licensed to enable such personnel to perform their work involving any part of Contractor’s obligations under this Agreement. Contractor shall cause all Equipment and Materials and Temporary Work to be supplied or used by Contractor or its Subcontractors in the performance of its obligations under this Agreement, including, but not limited to vehicles, loading equipment, and containers, to be in good condition and fit for the use(s) for which they are employed by Contractor or its Subcontractor, if any. Such Equipment and Materials and Temporary Work shall at all times be maintained, inspected and operated as required by Applicable Law. Contractor further agrees that all Contractor Acquired Permits required by any Applicable Law or Governmental Authority shall be procured and maintained for such Equipment and Materials and Temporary Work at all times during the use of the same by Contractor or its Subcontractors, if any, in the performance of any of Contractor’s obligations under this Agreement.

## Compliance With Laws.

Contractor specifically agrees that in the performance of its obligations under this Agreement, Contractor shall at all times fully comply with and cause each of its Subcontractors, if any, to comply with all Applicable Laws and Applicable Permits.

## Hazardous Materials.

Contractor shall prepare and maintain accurate and complete documentation of all Hazardous Materials used by Contractor or Contractor’s Subcontractors at the Site in connection with the Project, and of the disposal of any such materials, including transportation documentation and the identity of all Subcontractors providing Hazardous Materials disposal services to Contractor at the Site. Contractor shall promptly comply with all lawful orders and directives of all Governmental Authorities regarding Applicable Laws relating to the use, transportation, storage, handling, presence, or release by Contractor, any Subcontractor or any Person acting on its or their behalf or under its or their control of any Hazardous Materials brought onto or generated at the Site by Contractor or any Subcontractor. Contractor shall not and shall not permit any of its Subcontractors, directly or indirectly, to manufacture, store, transmit, transport or have present any Hazardous Materials on the Site, and Contractor shall not and shall not permit any of its Subcontractors to release, discharge or otherwise dispose of any Hazardous Materials on the Site, in each case, except in accordance with Applicable Law.

## Release.

In the event of any Release of a Hazardous Material at the Site by Contractor or any Subcontractor, Contractor shall perform the following actions:

#### Immediately notify Owner thereof and take all reasonable steps necessary to stop and contain said Release;

#### To the extent that such Release is reportable to a Governmental Authority under Applicable Law, make any report of such Release as required under Applicable Law; and

#### Fully clean-up such Release as required by any Governmental Authority.

## Communication.

Contractor shall promptly notify Owner of any communication from any Governmental Authority that alleges that Contractor is not acting in compliance with Applicable Law or any Applicable Permit.

## Reports.

Contractor shall promptly submit within forty-eight (48) hours to Owner Representative a written report, in a form mutually agreed (but which does not waive attorney client privilege with respect to any such matter), describing in detail any Release of a Hazardous Material, which report shall include the following information:

#### Name and address of Contractor and any Subcontractor(s) involved;

#### Name and address of Contractor’s insurance carrier;

#### Detailed descriptions of any injuries and the extent of such injuries suffered by any individuals, if applicable (provided that Contractor shall not be required to provide the name of the injured person(s));

#### Location, address and a detailed description of any property or natural resource damage, and name and address of the owner of such property, if applicable;

#### A detailed description of the Release including the identification of the Hazardous Material, the date and time of the Release, the volume released, and the nature of the environmental condition;

#### A determination of whether any Owner personnel, equipment, tools or materials were involved; and

#### A detailed description of all reports whether oral or written made to any Governmental Authority, and a description of the actions taken to respond to the Release.

## Further Information.

Contractor shall provide the following to Owner for each Hazardous Material which Contractor furnishes to the Site, at any time, for use in fulfilling its obligations under this Agreement a description of: (a) the hazardous properties of the Hazardous Material; (b) the protective measures that are necessary for the safe use of each Hazardous Material; and (c) the emergency procedures to be followed in case of a Release of or exposure to each Hazardous Material.

## Handling Pre-Existing Contamination as Part of the Work.

Contractor shall have no obligation to remediate or otherwise handle any Hazardous Materials which are located on or under the Site prior to the commencement of the Work or which migrated onto the Site from a location other than the Site, unless such migration was caused by Contractor or any Subcontractor.

# NON-PAYMENT CLAIMS

Except to the extent of an Owner Event of Default exists with respect to its payment obligations hereunder: (a) Contractor shall not directly or indirectly create, incur, assume or suffer to be created, or permit to remain in existence, by Contractor or any Subcontractor, employee, laborer, materialman or other supplier of goods or services any right of retention, mortgage, pledge, assessment, security interest, lease, advance claim, levy, stop notice, claim, lien, mechanic’s lien, charge or encumbrance on the Work, the Site, the Project or any part thereof or interest therein (each a “**Contractor Lien**”); (b) Contractor shall keep the Site, the work and the Equipment and Materials, including all Subcontractor equipment and materials free of Contractor Liens; and (c) Contractor shall promptly pay or discharge and discharge of record (including by recording a bond to the extent permitted by and in accordance with Applicable Law), any such Contractor Lien or other charges which, if unpaid, might be or become a Contractor Lien. Contractor shall Notify Owner as soon as practicable of the assertion of any Contractor Lien. If any Owner Indemnitee becomes aware of any such Contractor Lien, such Owner Indemnitee shall Notify Contractor, and Contractor shall then, to the extent payment by Owner has been made in accordance with Article 6: (x) satisfy and obtain the release of such Contractor Lien; or (y) defend Owner Indemnitees against any such Contractor Lien, and provide assurances of payment as described in the last sentence of this Article 28 and obtain the release of such Contractor Lien. If Contractor does not promptly, and in any event within ten (10) days after such Notice, satisfy such Contractor Lien, give such Owner Indemnitee reasons in writing that are satisfactory to such Owner Indemnitee for not causing the release of such Contractor Lien, or contest such Contractor Lien in accordance with the provisions of the last sentence of this Article 28, then any Owner Indemnitee shall have the right, at its option, after Notification to Contractor, and subject to Applicable Law, to cause the release of, pay, or settle such Contractor Lien, and Owner at its sole option may: (1) require Contractor to pay, within five (5) days after request by Owner; or (2) offset against any Retainage due Contractor; or (3) withhold (in accordance with Applicable Law) and/or offset other amounts due or to become due to Contractor (in which case Owner shall, if it is not the applicable Owner Indemnitee, pay such amounts directly to Owner Indemnitee causing the release, payment, or settlement of such liens or claims), all actual costs and expenses incurred by Owner Indemnitee in causing the release of, paying, or settling such Contractor Lien, including administrative costs, reasonable attorneys’ fees, and other expenses. Contractor shall have the right to contest any such Contractor Lien; provided, that Contractor first provides to Owner a bond or other assurances of payment reasonably satisfactory to Owner in the amount of such Contractor Lien and in form and substance reasonably satisfactory to Owner.

# NOTICES AND COMMUNICATIONS

## Requirements.

Any Notice or Notification made pursuant to the terms and conditions of this Agreement shall be in writing and be: (a) delivered personally; (b) sent by certified mail, return receipt requested; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested; or (d) sent by confirmed facsimile transmission or by electronic mail, with telephonic confirmation, to the following addresses:

|  |  |  |
| --- | --- | --- |
| If to Contractor: |  | [NAME AND ADDRESS] |
| With a copy to: |  | [NAME AND ADDRESS] |
| If to Owner: |  | San Diego Gas & Electric Company  8315 Century Park Court, CP21G  San Diego, CA 92123  Attn: [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] |
| With a copy to: |  | San Diego Gas & Electric Company  8330 Century Park Ct.  San Diego, CA 92123  Attn: General Counsel |

## Representatives.

Any technical or other communications pertaining to the Work shall be with the Parties’ designated representative. Each Party shall notify the other in writing of the name of such representatives. The Contractor’s Construction Manager and the Owner Representative each shall have knowledge of the Work and be available at all reasonable times for consultation. Each Party’s representative shall be authorized on behalf of such Party to administer this Agreement, agree upon procedures for coordinating the efforts of the Parties, and, when appropriate, to furnish information to or receive information from the other Party in matters concerning the Work.

## Effective Time.

Any Notice or Notification given personally, overnight mail or certified letter shall be deemed to have been received on delivery, any Notice given by express courier service shall be deemed to have been received the next Business Day after the same shall have been delivered to the relevant courier, and any Notice given by facsimile transmission or electronic mail shall be deemed to have been received on dispatch.

# LIMITATIONS OF LIABILITY AND REMEDIES

## Limitations on Damages.

Except  to the extent of the fraud or willful misconduct of a Party, notwithstanding anything else in this Agreement to the contrary, no Party shall be liable to any other Party for any loss, damage or other liability otherwise equivalent to or in the nature of any indirect, incidental, consequential, exemplary, punitive, or special damages arising from performing or a failure to perform any obligation under this Agreement, whether such liability arises in contract (including claims for increased costs as a result of Excusable Event and/or Force Majeure Event), tort (including negligence or strict liability), from statute, or otherwise, including for any loss of productivity, claims for cumulative impact or constructive acceleration, loss of opportunity or goodwill, or cost of capital. Notwithstanding the foregoing and for purposes of clarity, Losses claimed by third parties (but not including any Contractor Indemnitee or Owner Indemnitee) for which Contractor or Owner have a duty to indemnify the Owner Indemnitee or Contractor Indemnitee, as applicable, pursuant to this Agreement, shall not be subject to the limitations set forth in this Section 30.1.

## Limitations on Contractor’s Liability.

### Limitations on Contractor’s Liability.

#### Contractor’s liability to Owner and/or Owner Indemnitees under this Agreement, whether such liability arises in contract, tort, warranty or otherwise, shall in no event be greater in the aggregate than an amount equal to one hundred percent (100%) of the Contract Price (as the same may be adjusted from time to time).

#### The above limit of the applicable Section 30.2.1(a) shall not apply to (i) any insured claim to the extent that such claim is covered by insurance proceeds actually received from the insurance required to be maintained under this Agreement; (ii) amounts paid by Contractor to or on behalf of Owner or Owner Indemnitee arising out of the gross negligence, willful misconduct or fraud of Contractor’s or any Person whom at law Contractor is responsible; (iii) amounts paid by Contractor to or on behalf of Owner or Owner’s Indemnitee in respect of any Losses for which Contractor is obligated to indemnify Owner or any Owner Indemnitee pursuant to Article 23; or (iv) with respect to Contractor’s obligation to achieve Mechanical Completion.

### Maximum Liquidated Damages. In no event shall Contractor’s aggregate liability under this Agreement (a) for all Delay Liquidated Damages exceed [\_\_\_\_] percent ([\_\_]%) of the Contract Price; (b) for all Performance Liquidated Damages exceed [\_\_\_\_] percent ([\_\_]%) of the Contract Price.

## Limitation on Owner’s Liability.

#### Subject to Section 30.3(b) below, other than Owner’s obligation to pay the Contract Price as the same may increase from time to time in accordance with the terms of this Agreement, Owner’s liability for claims by Contractor and/or Contractor Indemnitees arising out of or relating to the performance or non-performance of obligations under this Agreement shall in no event be greater in the aggregate than an amount equal to one hundred percent (100%) of the then unpaid portion of the Contract Price (as the same may be adjusted from time to time). Contractor’s sole recourse for any damages or liabilities due to Contractor by Owner pursuant to this Agreement shall be limited to the Project, without recourse individually or collectively to the other assets of the Owner, other members or the Affiliates of Owner, the Financing Entities or their respective officers, directors, employees or agents of Owner, its members or their Affiliates.

#### The limits in Section 30.3(a) shall not apply to (i) any insured claim to the extent that such claim is covered by insurance proceeds actually received from the insurance required to be maintained under this Agreement; (ii) amounts paid by Owner to or on behalf of Contractor or Contractor Indemnitee arising out of the gross negligence, willful misconduct or fraud of Owner’s or any Person whom at law Owner is responsible; or (iii) amounts paid by Owner to or on behalf of Contractor or Contractor’s Indemnitee in respect of any third-party claims for any damage or destruction to property or death or personal injury.

## Releases, Indemnities and Limitations.

The releases, waivers, subrogation, assumptions of and limitations on liabilities and limitations on remedies expressed in this Agreement, subject to the terms hereof, shall apply even in the event of fault, breach of contract, breach of warranty, negligence, or strict liability of the Party released or indemnified, or whose liability is limited or assumed or against whom right of subrogation are waived and shall extend to such Party’s subcontractors, and in each case to such Party’s and its subcontractors’ Affiliates, officers, directors, members, managers, employees, licensees, agents or partners and shall survive the completion, cancellation, expiration, suspension and/or termination of this Agreement.

## No Limitation on Remedies.

It is the intent of Owner and Contractor that, except where this Agreement states that the applicable remedy set forth herein is the sole or exclusive remedy (or words of similar import) for such event, that the rights and remedies of the Parties with respect to this Agreement are in addition to those rights and remedies that may be available to a Party at law or in equity.

# DISPUTES

## Negotiations.

Any dispute or matter in question between the Parties arising out of or related to this Agreement (a “**Dispute**”) shall be subject to and resolved pursuant to the mandatory and exclusive dispute resolution process set forth in this Article following compliance with any other requirements of this Agreement concerning any such Disputes, including but not limited to notice requirements and timely completion and submission of Change In Work documentation. In the event of an arbitration under this Article, the arbitrator(s) shall enforce these requirements and conditions. A Party must comply with each step of the dispute resolution ladder established by this Article as a condition to pursuing a Dispute. Any Dispute shall first be referred to Owner's Representative and Contractor's Representative for negotiations by a formal Notice (specifically referencing this Section 31.1) specifying the nature of the Dispute and the resolution sought by the Party giving the notice (“**Party Representative Negotiations**”). Party Representative Negotiations conducted following formal Notice is required notwithstanding prior efforts of the Parties to resolve a Dispute unless the Parties mutually agree in writing specifically referencing this Section 31.1 that the Party Representative Negotiations shall be deemed to have been satisfied as of the date of such writing. Any Dispute that is not resolved through Party Representative Negotiations within thirty (30) days after receipt of the Notice (or the date of the writing deeming satisfaction of same) and which a Party wishes to further pursue shall be referred by Notice signed by Owner's Representative and Contractor's Representative to the executive officers of the Parties designated by them as their designated representatives (which shall not be Owner's Representative or Contractor's Representative) for further negotiations (“**Executive Officer Negotiations**”). If the Parties fail to resolve the Dispute through Executive Officer Negotiations within a reasonable period of time, not exceeding thirty (30) days after the applicable Notice, then a Party who wishes to pursue resolution of the Dispute shall initiate mediation as provided in Section 31.2 to be followed, if necessary, by binding arbitration as set forth in Section 31.3.

## Mediation.

### Initiation of Mediation. If a Dispute is not resolved by the negotiations described in Section 31.1, either Party may initiate mediation. Mediation shall be initiated by providing Notice to the other Party. The mediation shall be attended by representatives of Owner and Contractor. Representatives of Owner and Contractor attending the mediation shall have sufficient authority to resolve the Dispute or have ready access to persons with such authority.

### Selection of Mediator. Unless Owner and Contractor otherwise agree, the mediation shall be conducted by an independent JAMS mediator and in accordance with the JAMS mediation guide. In the case of a Dispute for which Owner has exercised its audit rights pursuant to Section 32.17 of the Agreement, such mediation may commence no earlier than thirty (30) days after delivery to Owner of all the documentation required by such Section (or delivery of a certification from Contractor that such documentation does not exist). The mediation shall be conducted in San Diego, California, and the Parties shall endeavor to conduct the mediation within thirty (30) calendar days after the notice initiating mediation is delivered, unless a different time is agreed to by the Parties. The costs of the mediator and JAMS shall be shared equally by Owner and Contractor.

### Completion of Mediation. Completion of the negotiations and mediation is a condition precedent to the initiation of arbitration and no Dispute shall be brought either separately or together with other claims or disputes, whether as an independent claim, alternative basis for relief, separate element of damage, additional remedy or otherwise unless such Dispute first has been the subject of negotiations and mediation. Notwithstanding the foregoing, arbitration or litigation may be initiated before completion of mediation if necessary, and only to the extent necessary, to preserve a Party's rights or to avoid irreparable harm pending resolution of the Dispute, but any such proceedings shall be limited to those purposes until the mediation is completed.

## Arbitration.

### Generally. All Disputes that are not settled pursuant to Section 31.1 and Section 31.2 shall be decided by binding arbitration in accordance with the JAMS Engineering and Construction Arbitration Rules and Procedures then pertaining (“**JAMS Rules**”), except as otherwise provided herein. If there is a conflict between the provisions of this Agreement and the provisions of the JAMS Rules, the provisions of this Agreement shall prevail. Notwithstanding anything in the JAMS Rules to the contrary, the arbitrators shall apply the governing law specified in Section 32.2 of this Agreement. This agreement to arbitrate shall be specifically enforceable in the forum provided in Section 31.3.5. Any award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in the forum specified in Section 31.3.5.

### Notice. Notice of the demand for arbitration shall be filed with the other Party and with the JAMS. Any demand for arbitration shall be made within the time beyond which legal or equitable proceedings based on such Dispute would be barred by the applicable statute of limitations.

### Panel.

#### Panel Members. The arbitration shall be conducted by a panel of three neutral and impartial arbitrators selected in accordance with the process and with the qualifications set forth in this paragraph.

#### Qualification of Panel. Each of the three arbitrators is to be experienced with the engineering and construction industry and disputes on large construction projects. At least two (2) of the arbitrators, including the chairperson, shall be retired judges with experience with construction disputes or attorneys with at least fifteen (15) years of legal experience in the engineering and construction industry. A non-lawyer arbitrator, if any, shall have at least twenty (20) years of experience in the engineering and construction industry and shall be trained and have served as an arbitrator. All arbitrators shall be fluent in English.

#### Selection of Arbitrators. Within twelve (12) days after a demand for arbitration is filed with the JAMS, the Parties shall endeavor to mutually agree on the selection of three (3) arbitrators. Unless otherwise agreed, each Party shall propose in writing five (5) arbitrators to the other Party and such lists, with accompanying biographical information and conflict disclosure information equivalent to that provided per the JAMS Rules, shall be exchanged within three (3) days of filing of the arbitration demand. Within three (3) business days of the exchange of lists, each Party shall indicate in writing whether one (1) arbitrator from the Party’s list is acceptable. If two (2) arbitrators have been agreed upon by the Parties with the requisite qualifications (including at least one of who is an attorney or retired judge), then the two (2) appointed arbitrators shall select a third arbitrator to serve as the chairperson with the requisite qualifications. In the event that the two (2) Party identified arbitrators do not select the third arbitrator within the remaining time to constitute the panel, JAMS shall appoint a third arbitrator meeting the specified qualifications. In the event a panel is not constituted within the time frame set forth herein, then the process set forth in Section 31.3.3(d) shall apply for selecting the arbitrators.

#### Resolution of Deadlock on Arbitrator Membership. If the arbitration panel has not been constituted in accordance with the procedure and within the time frame set forth in Section 31.3.3(c), then JAMS shall provide the Parties with the names of fifteen (15) arbitrators from the JAMS's panel of arbitrators, each of whom shall not be employed by or otherwise affiliated with either Party. Each Party shall then have the right to remove three (3) arbitrators from such panel, all at such Party's sole discretion. Such removal shall be made by Notice to the other Party and to the JAMS within five (5) Business Days after the JAMS has delivered its initial list of fifteen (15) arbitrators. After such removal by each Party, the JAMS shall choose three (3) arbitrators from the remaining arbitrators in such list to preside over the dispute between the Parties, with the qualifications, including for the chairperson, set forth by Section 31.3.3(b). In the event it is necessary, JAMS shall repeat the process in this paragraph to ensure the qualification of Section 31.3.3(b) are satisfied.

### Timeline for Arbitration. The arbitration shall be conducted expeditiously in an effort to conclude all proceedings, including the hearing, within 365 days after filing of the demand for arbitration or as soon thereafter as reasonably practicable. The arbitration of all Disputes shall be held in San Diego, California, and shall be conducted solely in the English language. A Party producing, submitting or offering any document, which is not in the English language must also provide a certified English translation at its sole expense. In any arbitration proceeding, the Parties agree that discovery shall be permitted to the full extent provided by the California Rules of Civil Procedure, inclusive, and that additional discovery may be permitted as established under the applicable JAMS rules. The arbitrators do not have the authority to appoint or retain any expert witnesses of consultants for any purpose unless agreed to by the Parties. The arbitrators must render a reasoned award in writing.

### Venue. Any litigation between the Parties concerning this Agreement, the dispute resolution procedures or the arbitration shall be initiated and maintained in the Federal District of California located in San Diego, State of California, and such court shall have sole and exclusive jurisdiction over such litigation which may not be removed to federal court. Each Party consents to the personal jurisdiction of such court and waives any jurisdictional defenses that may be available.

### Carry On Work During Dispute. Unless otherwise agreed in writing, Contractor shall diligently carry on the Work during the pendency of any Disputes or arbitration proceedings so long as all undisputed amounts payable to Contractor hereunder have been paid.

### Parties Bear Own Cost. Each Party shall bear its own costs, expenses and attorneys’ fees associated with the Dispute resolution process and the arbitrators shall not have authority to allocate the costs or expenses of the arbitration, including the arbitrators’ fees, to either Party.

# MISCELLANEOUS

## Severability.

The invalidity or unenforceability of any portion or provision of this Agreement shall in no way affect the validity or enforceability of any other portion or provision hereof. Any invalid or unenforceable portion or provision shall be deemed severed from this Agreement and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain such invalid or unenforceable portion or provision. If any such provision of this Agreement is so declared invalid, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity and to restore this Agreement as near as possible to its original intent and effect.

## Governing Law; Stipulations.

This Agreement shall be governed by the internal laws of the State of California, excluding its conflict of laws provisions. THE PARTIES ACKNOWLEDGE AND AGREE THAT THE TERMS AND CONDITIONS OF THIS AGREEMENT HAVE BEEN FREELY, FAIRLY AND THOROUGHLY NEGOTIATED.

## Financing Matters.

### Contractor Cooperation. Owner contemplates that it may obtain financing for the Project consisting of: (a) one or more construction or permanent loans, to be secured by all or a portion of the Project and its rights under this Agreement; (b) lease financing pursuant to which Owner may assign this Agreement to one or more Financing Entities that may then collaterally assign this Agreement to other Financing Entities or sub-assign all or any portion of Owner’s rights and obligations hereunder to Owner or an Affiliate of Owner; or (c) a combination thereof. In connection therewith, Contractor shall: (x) execute any amendments and modifications hereto reasonably requested by the Financing Entities; (y) promptly execute or consent to other documents to the extent reasonably required by the Financing Entities, which consents may, among other things, include provisions whereby Contractor agrees to: (i) provide such Financing Entities reasonable notice of and opportunity to cure Owner’s defaults hereunder; (ii) allow such Financing Entities (as security for Owner’s financing) to be assigned all of Owner’s rights hereunder and in such assets in the event of an Owner’s Event of Default; provided, however, that Owner shall keep Contractor currently informed of such assignment or reassignment; and (iii) provide for customary review and approvals of various items of Work (including, but not limited to, all drawings, specifications, test results, Contractor’s Invoices, etc) of an independent engineer retained by the Financing Entities to supervise the construction of the Project on behalf of the Financing Entities, if any; (iv) provide for other customary lender protection provisions that are not in violation of Applicable Law; and (v) if required by the Financing Entities pursuant to any financing of the Project, execute a “mechanic’s lien” indemnity in favor of the applicable title company; and (z) deliver customary legal opinions of counsel to Contractor. Without limiting the foregoing, Contractor shall enter into such arrangements as Owner or the Financing Entities may reasonably request to ensure the continued availability of the Contractor’s Equipment and Materials at the Site and the right to use such Equipment and Materials (whether by Contractor, Owner, or Owner’s nominees) in the prosecution of the Work as contemplated by this Agreement until the Work is completed, including the granting of security interests in such Equipment and Materials or entering into lease/leaseback or similar arrangements, and shall keep such Equipment and Materials free and clear of any liens or encumbrances that could materially affect Contractor’s, Owner’s, or Owner’s nominee’s rights with respect to such Equipment and Materials. Contractor shall respond promptly to requests for information regarding the qualifications, experience, past performance and financial condition of Contractor and other matters pertaining to Contractor’s obligations hereunder.

### Documents Requested by Financing Entities. Contractor shall provide such data, reports, certifications, opinions of counsel, and other documents, up to a maximum of ten (10) copies each, or assistance related to the Work or this Agreement as may be reasonably requested by the Financing Entities with respect to the financing of the Project; provided, however, that the provision of this information shall not in any manner modify Contractor’s rights or obligations under any other provision of this Agreement. Contractor shall also deliver (a) unaudited financial statements of Contractor within forty-five (45) days after the end of each calendar quarter; (b) audited financial statements of Contractor within ninety (90) days after the end of each year; and (c) from time to time, such other information or documents (financial or otherwise) regarding the financial condition of Contractor as Owner or the Financing Entities may reasonably request and as may be available to Contractor without undue cost or effort; provided, however, that Contractor may impose reasonable confidentiality requirements in connection with the disclosure of such information and documents in the nature of those set forth in Article 24 (for purposes of clarity, however, Owner may disclose such information to the Financing Entities provided such Financing Entities have executed a commercially reasonable confidentiality agreement).

## No Oral Modification.

No oral or written amendment or modification of this Agreement by any officer, agent, member, manager or employee of Contractor or Owner, either before or after execution of this Agreement, shall be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized representative of the Party to be bound thereby.

## No Waiver.

A Party’s waiver of any Event of Default, breach or failure to enforce any of the terms, covenants, conditions, or other provisions of this Agreement at any time shall not in any way affect, limit, modify or waive that Party’s right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision hereof, any course of dealing or custom of the trade notwithstanding. All waivers must be in writing and signed on behalf of Owner and Contractor in accordance with Section 32.4.

## Review and Approval.

Notwithstanding Owner’s review or Owner’s approval of any items submitted to Owner for review or approval (including any Contractor Deliverable), neither Owner nor any of its representatives or agents reviewing such items, including the Owner’s Engineer, shall have any liability for, under or in connection with the items such Person reviews or approves, and Contractor shall remain responsible for the quality and performance of the Work. Owner’s review or approval of any items, including the Contractor Deliverables, shall not constitute a waiver of any claim or right that Owner may then or thereafter have against Contractor including a Defect claim for Defective Work. Any inspection comment, review or approval of any Contractor Deliverable shall be performed in Owner’s sole discretion.

## Third Party Beneficiaries.

The provisions of this Agreement are intended for the sole benefit of Owner and Contractor and there are no third-party beneficiaries hereof.

## Time Is of the Essence.

Contractor acknowledges that timely achievement of Substantial Completion by the Substantial Completion Guaranteed Date, and Final Completion by the Final Completion Guaranteed Date, are essential to Owner, and therefore TIME IS OF THE ESSENCE with respect to meeting each of the applicable Project Guaranteed Dates.

## Further Assurances.

Owner and Contractor will each use its reasonable efforts to implement the provisions of this Agreement, and for such purpose each, at the reasonable request of the other, will, without further consideration, promptly execute and deliver or cause to be executed and delivered to the other such assistance (including in connection with any financing involving the Project by either Party), or assignments, consents to collateral assignment, other consents or other instruments in addition to those required by this Agreement, in form and substance reasonably satisfactory to the other, as the other may reasonably deem necessary or desirable to implement any provision of this Agreement.

## Record Retention.

Contractor agrees to retain for a period of five (5) years from the Final Completion Date all material records relating to its performance of the Work or Contractor’s warranty obligations herein.

## Binding on Successors, Etc.

Subject to Article 26, this Agreement shall be binding on the Parties hereto and on their respective successors, heirs and assigns.

## Merger of Prior Contracts.

This Agreement and the Exhibits attached hereto constitute the entire agreement between the Parties with respect to the design, engineering, procurement and construction of the Project, and there are no other agreements or commitments with respect to the Project except as set forth herein and therein.

## Counterparts.

This Agreement may be executed in any number of counterparts, and any Party hereto may execute any such counterpart, each of which when executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument. This Agreement shall become effective when each Party shall have received a counterpart by facsimile or electronic mail hereof signed by the other Party. The Parties agree that the delivery of this Agreement may be effected by means of an exchange of facsimile or emailed signatures with original copies to follow by mail or courier service.

## Set-Off.

Either Party may at any time, but shall be under no obligation to, set off any and all sums due from the other Party under the Agreement against sums due to such Party hereunder.

## Announcements; Publications.

Subject to Section 24.2, neither Party shall (either directly or indirectly), and neither Party shall permit any of its Affiliates to, issue or make any public release or announcement with respect to or concerning any matter the subject of, or contemplated by, this Agreement without reasonable prior consultation with the other Party and affording such other Party a reasonable opportunity to provide comments on such proposed release or announcement; provided, however, that nothing in this Agreement shall prevent either Party from independently making such public disclosure or filing as it determines in good faith is required by Applicable Law.

## Independent Contractor.

Contractor is an independent contractor, and nothing contained herein shall be construed as constituting any relationship with Owner other than that of owner and independent contractor, except as expressly provided in this Agreement pursuant to which Owner appoints Contractor as Owner’s agent with respect to certain equipment purchase agreements or purchase orders, or as creating any relationship whatsoever between Owner and Contractor’s employees. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner.

## Bid Documents; Audit.

### Owner shall have the right, in its sole discretion and at such times as Owner may elect to (i) audit Contractor or any Subcontractors compliance with all Applicable Permits and other Applicable Laws; and/or (ii) audit all claims of Contractor (or any Subcontractor for which Contractor seeks compensation from Owner) related to (1) any Change In Work performed on a non-lump sum basis; (2) any claim for additional compensation or Project Schedule relief claimed by Contractor or any Subcontractor (including claims based on or arising out of an Excusable Event or a Force Majeure Event (or any other theory of recovery (without waiving Owner’s right to contest that such theory of recovery is barred hereunder)); (3) claims for compensation arising out of Section 20.2.2; or (4) Taxes payable by Owner that are subject to an inquiry by a Governmental Authority. In connection with any such audit Owner shall have the right to inspect all of Contractor’s non-attorney-client privileged records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda, electronic files and any other information reasonably related to such audit, including the information set forth in clause (b) of this Section 32.17 (collectively, the “**Project Documents**”). Owner’s audit and inspection rights shall include but not be limited to the inspection and copying of Project Documents, and reasonable interviews of personnel employed by Contractor and its Subcontractors at reasonable times and in the presence of representatives of Contractor. At Owner’s expense, Contractor shall provide reasonable access for inspection and copying, and make personnel reasonably available for interviews, within a reasonable time after Owner’s request. To the extent required pursuant to Section 9.3(g), Contractor shall ensure that its Subcontracts specify that Owner may audit, inspect and copy Project Documents and interview personnel, in the presence of Contractor’s representatives, to the same extent as Owner may do so as to Contractor and that this Article 32.17 flows down to Subcontractors.

### Contractor shall keep one complete set of the Bid Documents and other records and books of accounts on a recognized cost accounting basis reasonably satisfactory to Owner showing all fees incurred and expenditures made in connection with the Agreement. To the extent Contractor actually maintains the following (and if it does not, it shall so certify in writing to the extent requested by Owner), it shall make available for Owner’s inspection such records and books of account which shall include, without limitation, all time sheets, invoices, work logs, job cost reports accounting records, written policies and procedures, sub-consultant files, original estimates, estimating worksheets, correspondence, change order files (including documentation covering negotiated settlements) and any other supporting material necessary to substantiate Contractor’s performance of services and costs and charges related to such performance. All such documents shall be considered Project Documents hereunder.

### Contractor shall maintain such records and books of account for at least four (4) years after the Final Payment. Should Contractor not be able to substantiate costs for which Owner provided reimbursement, those costs shall conclusively be deemed not to have been incurred by Contractor and Owner shall be reimbursed accordingly. Owner shall conduct any such audit at its own cost and expense, unless the audit discloses a discrepancy from any individual payment application or requirements of this Agreement in excess of three percent (3%), in which case Contractor shall be responsible for reimbursing Owner for the costs of the audit. In all events, Contractor shall reimburse Owner for overpayments made to Contractor.

## Contractor’s License.

Contractor is licensed and regulated by the Contractor’s State License Board, which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Register, Contractor’s State License Board, P.O. Box 26000, Sacramento, California. Contractor holds California Contractor’s License No. [ ].

## Equal Opportunity.

### Owner is an equal opportunity employer and federal contractor or subcontractor.  Consequently, the parties agree that, as applicable, they will abide by the requirements of 41 C.F.R. 60-1.4(a), the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended (and its implementing regulations at 41 C.F.R. 60-300.5(a)) and Section 503 of the Rehabilitation Act of 1973, as amended (and its implementing regulations at 41 C.F.R. 60-741.5(a)) and that these laws are incorporated herein by reference.  These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin.  These regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.  The parties also agree that, as applicable, they will abide by the requirements of Executive Order 13496 (29 C.F.R. Part 471, Appendix A to Subpart A), relating to the notice of employee rights under federal labor laws, and Executive Order 11246 (and its implementing regulations at 41 C.F.R. part 60).

### Contractor agrees to use good faith efforts to utilize certified Minority, Women, and Service-Disabled Veteran Business Enterprise (hereinafter called “DBE”) subcontractors consistent with the performance of this Agreement and Applicable Law. Contractor shall confirm that DBE subcontractors proposed to perform work under this Agreement are certified through the CPUC Supplier Clearinghouse (“Clearinghouse”) at <http://www.cpuc.ca.gov/PUC/SupplierDiversity/clearing.htm>, or, for Service Disabled Veteran–owned companies, that they are certified by the California DGS Office of Small Business & Disabled Veteran Business Enterprise Services (“OSDS”) at <http://www.dgs.ca.gov/pd/Programs/OSDS.aspx>. In accordance with CPUC General Order 156, Contractor shall submit all documentation required by Owner to report verified DBE Subcontractor expenditures in support of or subcontracted under this Agreement. Contractor shall provide to Owner monthly reports on payments to certified DBE Subcontractors using the Internet on-line subcontracting reporting system at http://dbespendreporting.sempra.com/.

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IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the Execution Date.

[NAME OF OWNER]

By:

Name:

Title:

[NAME OF CONTRACTOR]

By:

Name:

Title:

1. NOTE TO BIDDER: BIDDER MAY, AS PART OF ITS BID, SUBMIT A LETTER OF CREDIT IN LIEU OF RETAINAGE IF BIDDER BELIEVES THAT THIS WILL MAKE ITS BID MORE COMPETITIVE. THE LETTER OF CREDIT SHOULD WORK THE SAME WAS AS RETAINAGE, I.E. THE STATED AMOUNT MUST APPROXIMATE 10% OF ALL PAYMENTS MADE UNDER THE CONTRACT, AND TOPPED UP AS PAYMENTS ARE MADE. THE LETTER OF CREDIT WILL HAVE TO BE ISSUED BY AN LC BANK MEETING CERTAIN REQUIREMENTS (SUBJECT TO PROJECT DETAILS AND DEAL ARRANGEMENTS), AND DRAWABLE UPON STANDARD EVENTS, INCLUDING BREACH OF CONTRACTOR, FAILURE TO PAY AMOUNTS DUE, AND FAILURE TO RENEW WITHIN 30 DAYS OF TERMINATION. THE STATED AMOUNT OF THE LETTER OF CREDIT WOULD BE REDUCED AT SUBSTANTIAL COMPLETION IN A SIMILAR WAY AS THAT SET FORTH ABOVE FOR RETAINAGE. IF BIDDER SELECTS THIS OPTION, BIDDER SHOULD NOTE IT IN ITS MARKUP OF THE PROVISIONS ABOVE. [↑](#footnote-ref-1)
2. NOTE TO BIDDER: OWNER RESERVES THE RIGHT TO INCLUDE OTHER KEY SUBCONTRACTORS IF BIDDER’S BID IS SELECTED BASED ON THE PROVISION OF SERVICES BY IDENTIFIED KEY CONTRACTORS. [↑](#footnote-ref-2)