

Appendix I

# EPC Form Agreement

2023 All-Source RFP



**TURNKEY ENGINEERING, PROCUREMENT AND  
CONSTRUCTION AGREEMENT**

**FOR THE**

**[PROJECT]**

**BY AND BETWEEN**

**PORTLAND GENERAL ELECTRIC COMPANY, AS OWNER**

**AND**

**[NAME OF CONTRACTOR], AS CONTRACTOR**

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## TURNKEY ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT

This **Turnkey Engineering Procurement and Construction Agreement** (the “**Agreement**”) is made, entered into and effective as of [\_\_\_\_], 202[ ] (the “**Effective Date**”), by and between [\_\_\_\_], LLC, a Delaware Limited Liability Company (“**Owner**”), and [\_\_\_\_], a [\_\_\_\_] (“**Contractor**”). Each of Owner and Contractor is referred to herein individually as a “**Party**” and collectively, the “**Parties**”.

### RECITALS

**WHEREAS**, Owner is developing that certain [type of project] to be located on the real property described in the Site Description attached as Exhibit R and known as the [\_\_\_\_] Project] (the “**Project**”);

**WHEREAS**, Owner desires to engage Contractor to design, engineer, procure, install, construct, test, interconnect, and commission the Project on a turnkey, fixed-price, guaranteed-completion-date basis, and Contractor desires to perform such work, all as further defined by and in accordance with the terms and conditions set forth in this Agreement and in the Scope of Work attached hereto as Exhibit A; and

**WHEREAS**, Contractor guarantees the timely completion and performance of the Work (as defined below) for the Project in accordance with the terms and conditions of this Agreement.

**NOW THEREFORE**, in consideration of the premises and the mutual promises and agreements of the Parties herein expressed, the Parties, intending to be legally bound, hereby agree as follows:

### ARTICLE 1 DEFINITIONS

1.1 **Definitions.** As used in this Agreement, the following capitalized terms have the meanings indicated below, unless the context clearly requires otherwise:

“**Abandon**” has the meaning set forth in Section 15.1.1(j).

“**Affiliate**” means, in relation to any Person, any other Person, who: (a) directly or indirectly controls, or is controlled by, or is under common control with, such Person; (b) directly or indirectly beneficially owns or holds fifty percent (50%) or more of any class of voting stock or other equity interests of such Person; (c) has fifty percent (50%) or more of any class of voting stock or other equity interests that is directly or indirectly beneficially owned or held by such Person; or (d) either holds a general partnership interest in such Person or such Person holds a general partnership interest in the other Person. For purposes of this definition, the word “controls” means possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of voting securities or otherwise.



“Agreement” means this agreement (including all Exhibits attached hereto) as amended, supplemented or otherwise modified, in writing, from time to time in accordance with the terms hereof.

“Applicable Laws” means any act, statute, law, regulation, Permit, license, ordinance, rule, judgment, order, decree, directive, guideline or policy (to the extent mandatory) of, or any similar form of decision or determination by, or any interpretation or administration of, any of the foregoing by any Governmental Authority with jurisdiction over Contractor, Owner, the Project, the Project Site, the performance of the Work or other services to be performed under this Agreement, or the use and operation of the Project and the Work, as any of the foregoing may be amended or imposed from time to time.

“Applicable Permits” means each and every Permit with or of any Governmental Authority that is required by any Applicable Law, or that is otherwise necessary, for the performance of the Work or operation of the Project, including those set forth in Exhibit W.

“Apprenticeship Requirements” means the requirements under section 48(a)(11) of the Code.

“As-Built Drawings” means final Drawings for the Work, as revised to reflect the changes in the Work during construction, testing and installation (including all design changes assembled and installed pursuant to any Change Orders), that accurately and completely represent in detail the physical placement of all equipment and other components of the Project as assembled and installed. Drawings shall include things such as, but not limited to, (a) the physical placement of the [equipment], the SCADA system, and substation, (b) the location of all underground and aboveground components and cables and the SCADA System pursuant to the Scope of Work, (c) the final installation of all power, control and communication systems with respect to the Work, (d) piping and instrumentation diagrams, (e) electric one lines, electric schematics and connection diagrams, and (f) final access roads.

“Background Technology” means Works created, first conceived, or acquired by or for a Party (alone or with others) (a) prior to the Effective Date or (b) during the term and independent of performance of this Agreement.

“Business Day” means a Day, other than a Saturday, Sunday or recognized bank holiday in the State of Oregon.

“Change” has the meaning set forth in Section 10.1.

“Change in Law” means (i) the enactment, adoption, promulgation, issuance, modification, amendment, change in interpretation, or repeal, after the Effective Date, of any Applicable Laws, or (ii) the imposition of any conditions on the issuance or renewal of any Applicable Permit after the Effective Date (notwithstanding the general requirements contained in any Permit at the time of application or issuance to comply with future laws, ordinances, codes, rules, regulations, or similar legislation), in each case, which directly causes an adverse change in a Party’s costs or schedule for performing its obligations under this Agreement; provided, however that a “Change in Law” excludes: (a) any change in national, federal, state, provincial, local, or any other income or franchise tax Law, workers’ compensation laws, or payroll or withholding tax laws; (b) any

enactment, adoption, promulgation, issuance, modification, amendment, change in interpretation, or repeal that is published prior to the Effective Date but that becomes effective after the Effective Date; (c) any change that prevents Contractor from importing equipment into the United States because the equipment was manufactured in whole or in part using forced labor or using components or materials sourced from the Xinjiang Uyghur Autonomous Region in the People's Republic of China; (d) any modification to any Permit obtained prior to the Effective Date that results from actions or omissions of Contractor; (e) any change in Applicable Laws related to immigration, labor, securities or investments, corporate structuring, or import or export laws, and (f) any Change in Tariffs.

“Change In Tariffs” means the imposition of, or potential imposition of, or any change in the imposition of, duties, tariffs, customs, levies, imports, fees, royalties or charges of any kind, arising after the Effective Date, arising out of the importation of any component or part of the Work or out of Contractor's or any Subcontractor's or Supplier's performance of the Work, or with respect to any equipment, materials, labor, or services provided by Contractor under this Agreement, including any increases thereof that may occur after the Effective Date.

“Change Order” means a material Change in the Work, the Scope of Work, the Guaranteed Mechanical Completion Date, the Guaranteed Substantial Completion Date, the Contract Price, or any other obligation of Contractor to Owner under this Agreement, as memorialized in accordance with the process set forth in Section 10.2.

“Change Order Request” has the meaning set forth in Section 10.2.

“Code” means the Internal Revenue Code of 1986, as set forth in Title 26 of the United States Code, as amended and restated.

“Commissioning Plan” has the meaning set forth in Section 2.21.

“Completion Certificate” means a Mechanical Completion Certificate, a Substantial Completion Certificate or a Final Completion Certificate, as applicable.

“Completion Milestone” means each of Mechanical Completion, Substantial Completion, or Final Completion, as applicable.

“Confidential Information” has the meaning set forth in Section 18.7.

“Construction” means construction as such term is used in Code Sections 45(b)(7) and (8) and 48(a)(10) and (11) and the PWA Guidance.

“Construction Schedule” means the detailed schedule for Contractor's performance of Milestones and timely completion of the Work utilizing the Critical Path Method compatible with Primavera format, prepared by Contractor and approved by Owner, as may be modified pursuant to any Change Order or Section 3.1. The Construction Schedule as of the Effective Date is attached hereto as Exhibit C.

“Contract Price” means [Price], as such may be adjusted from time to time by Change Order.

“Contractor” has the meaning set forth in the preamble and includes its legal successors and permitted assignees as may be accepted by Owner, in writing, pursuant to this Agreement.

“Contractor Deliverables” means the documents, materials, and other deliverables prepared by or on behalf of Contractor specifically identified as such in this Agreement and in the Scope of Work, including but not limited to all Drawings, As-Built Drawings, and Job Books. Unless otherwise specifically excluded, Contractor Deliverables include all documentation, equipment, materials and work reasonably required for the complete performance of the Work in accordance with Prudent Industry Practices, even if the same are not specified in this Agreement or the Scope of Work.

“Contractor Equipment” means tools, equipment, apparatus, structures, materials, goods, supplies, temporary facilities and other items provided by Contractor for purposes of facilitating the performance of the Work and that are not intended to become part of the Work or incorporated into the Project.

“Contractor Event of Default” has the meaning set forth in Section 15.1.1.

“Contractor Indemnified Party” has the meaning set forth in Section 14.1.2.

“Contractor Parent” means [\_\_\_\_\_].

“Contractor Parent Guaranty” has the meaning set forth in Section 7.9.1.

“Contractor Permits” means those Permits required to be obtained by Contractor, including as set forth in Exhibit W.

“Contractor Safety Plan” has the meaning set forth in Section 2.15.1.

“Contractor Taxes” means all Taxes other than Owner Taxes, including all sales, excise, use, gross receipts, income, value-added, occupational, unemployment, FICA (and other payroll taxes) and income taxes, license fees and any other similar taxes and/or contributions (including penalties and interest related to such taxes) and all duties (including import duties): (a) imposed by any taxing authority upon the sale, purchase, transportation or use of materials, goods, supplies or equipment (excluding Owner-Supplied Equipment) to be incorporated in the Project by Contractor or provided by Contractor or any Subcontractor or Supplier in connection with the Work; (b) imposed by any taxing authority upon services or labor provided by Contractor or any Subcontractor or Supplier in connection with the Work; (c) otherwise imposed by any taxing authority on or in connection with the Work; and (d) imposed by any taxing authority upon or measured by Contractor’s receipts under this Agreement or by wages earned by employees of Contractor or any Subcontractor or Supplier.

“Contractor Termination for Cause” has the meaning set forth in Section 15.2.2.

“Contractor’s Project Manager” means the Person appointed by Contractor pursuant to Section 2.10.1.

“Contractor’s Rate Schedule” shall mean Contractor’s schedule of rates and costs set forth in the Payment Schedule.

“Contractor’s Warranty” has the meaning set forth in Section 7.1.1.

“Contractor’s Warranty Period” has the meaning set forth in Section 7.1.2.

“Contractor’s Warranty Service” has the meaning set forth in Section 7.1.3.

“Credits” means any credits, credit certificates or similar items (including reporting rights) such as those for greenhouse gas reduction, or the generation of green power or renewable energy, as well as any capacity credits, RECs, tradable generation rights, pollution/emission credits or other associated benefits, in each case created and defined by a Governmental Authority, any applicable state or local utility commission or governing entity and/or its specified replacement for such purposes, related to the electric energy generated by or associated with the Project or the electric energy produced thereby, but specifically excluding Tax Attributes.

“Critical Path Method” means a step-by-step project management technique that identifies critical and non-critical project tasks with the goal of preventing bottlenecks and providing the shortest time to complete a project.

“Customer Information” has the meaning set forth in Section 18.8.

“Cure Provisions” means Sections 48(a)(10)(B) and 45(b)(8)(D)(i)(II) (including any increase as set forth in (iii), as applicable) of the Code (including amounts payable under rules similar to the rules of such Sections of the Code pursuant to Sections 48E(d)(3) and 48E(d)(4) of the Code).

“Day” or “day” means a period of twenty-four (24) consecutive hours from 12:00 midnight, and shall include Saturdays, Sundays and all holidays in the prevailing time zone at the Project Site, except that in the event a time period set forth in the Agreement expires on a Day that is not a Business Day, such period shall be deemed to expire on the next Business Day thereafter.

“Defect” or “Defective” means as the context requires, any Work or equipment that (i) does not conform to the terms of this Agreement, Scope of Work or Contractor Deliverables or (ii) is of a design, workmanship or material that fails to comply with, or is otherwise improper or inferior as determined by reference to, Prudent Industry Practices, or that otherwise does not conform to the warranty set forth in Section 7.1.

“Delay Liquidated Damages” has the meaning set forth in Section 3.7.2.

“Direct Costs” has the meaning set forth in Section 10.5.3(c).

“Dollar” or “\$” means a dollar of the currency of the United States of America.

“Domestic Content Requirements” means the requirements under section 48(a)(12).

“Drawings” means (a) all specifications, calculations, designs, plans, drawings, engineering and analyses, and other documents that determine, establish, define or otherwise describe the scope, quantity, and relationship of the components of the Project, including the structure and foundation thereof, and (b) all technical drawings, specifications, shop drawings, vendor drawings, diagrams, illustrations, schedules and performance charts, calculations, samples, patterns, models, operation and maintenance manuals, piping and instrumentation diagrams, underground structure drawings, conduit and grounding drawings, lighting drawings, conduit and cable drawings, electric one-lines, electric schematics, connection diagrams and technical information of a like nature, prepared or modified by Contractor or any of its Subcontractors, which illustrates any portion of the Work, either in components or as completed, in each case to the extent same is specifically identified as a deliverable in this Agreement or is required for the ownership, use, operation, maintenance and repair of the Project in accordance with prudent industry standards and/or Applicable Laws. All Drawings shall be in PDF and CAD format.

“Effective Date” has the meaning set forth in the preamble to this Agreement.

“Eligible Surety” means a bonding surety licensed in the State where the Project is located rated at least A or higher, and has assets of \$2 billion or greater, according to A.M. Best’s Financial Strength Rating and Financial Size Category.

“Final Completion” has the meaning set forth in Section 3.6.

“Final Completion Certificate” means the certificate by this name as described in Section 3.6.2, and in the form set forth in, Exhibit L.

“Final Completion Date” means the date on which Final Completion occurs as per Section 3.6.

“Final Determination” means the final determination by an auditing agent of the Internal Revenue Service.

“Financial Party” means any Person (a) providing senior or subordinated construction, interim or long-term debt or equity financing or refinancing to Owner or any of Owner’s Affiliates (including any permitted assignee of all or any portion of this Agreement) for or in connection with the development, construction, purchase, installation or operation of the Project, whether that financing or refinancing takes the form of private debt, public debt or any other form (including debt financing or refinancing), including any equity and tax investor directly or indirectly providing financing or refinancing for the Project or purchasing equity ownership interests of Owner and/or any of its Affiliates, and any trustee or agent acting on such Person’s behalf; (b) providing interest rate protection agreements to hedge any of the foregoing obligations; or (c) participating in a leasing structure (including any sale leaseback or leveraged leasing structure) with respect to the Project; or (d) acquiring directly or indirectly the Project assets or any equity interest in the entity owning the Project assets.

“Force Majeure Event” means any event or circumstance, or combination of events or circumstances that meets all the following criteria:

(a) arises after, and was not reasonably foreseeable prior to, the Effective Date,

(b) was not caused by, and is beyond the reasonable control of, the Party claiming the Force Majeure Event, and

(c) the Party claiming the Force Majeure Event can demonstrate that such event is the cause of a delay in or prevents performance or the meeting of an obligation of such Party under this Agreement, and which in the case of Contractor as the claimant, has a demonstrable and adverse effect upon Contractor's ability to perform Work on the Project Site.

Provided all of the criteria described above are met, Force Majeure Events may include: acts of God, natural disasters, wildfires, earthquakes, tornadoes, lightning, floods, abnormally severe weather conditions (except those excluded from the definition of Force Majeure Event below, civil disturbances, riots, war and military invasion, acts of the public enemy, blockades, acts of terrorism, insurrections, riots or revolutions, sabotage, embargoes, declared state or national emergency, court orders or injunctions, epidemics or pandemics including impacts from the spread of the coronavirus (COVID-19) that are not known as of the Effective Date, and labor strikes, work stoppages, boycotts, walkouts and other labor difficulties that are not excluded below ("**Labor Disputes**") *provided, however*, the following shall not constitute a Force Majeure Event: (i) Labor Disputes specific to the Project Site involving Contractor's (or its Affiliate's) or any Subcontractor's on-site employees; (ii) Labor Disputes resulting from Contractor's or any of its Subcontractor's violation of any agreements with labor unions; (iii) Contractor's or its Subcontractors' material shortages except if caused by a separate Force Majeure Event; (iv) the site climate and weather conditions that are within normal climate or normal weather conditions for the geographic area in which they occur, where weather conditions shall be deemed within normal climate and weather conditions unless such conditions constitute at least a twenty-five (25) year event according to the records of the National Oceanic and Atmospheric Administration for the vicinity of the affected location), (v) the effects of climate and weather conditions that are outside normal climate or normal weather conditions for the geographic area in which they occur for which the claimant had reasonable advance knowledge where Contractor or any of its Subcontractors, suppliers or vendors failed to take reasonable precautions to mitigate the effect of such weather conditions (including rescheduling crews, expediting the procurement process to the extent commercially practicable, and moving any equipment in advance of incoming weather), (vi) any delay, default or failure (direct or indirect) in any Subcontractor, supplier, vendor or worker performing any Work, except to the extent such delay is caused by a separate Force Majeure Event, (vii) a Party's financial inability to perform under this Agreement, (viii) Change in Law or tariffs, duties or import taxes imposed subsequent to the execution of this Agreement, including any Change in Tariff; (ix) sabotage by employees, agents or representatives of Contractor or any Subcontractor; (x) supply issues generally, including shipping delays, port congestion, issues with the supply chain, and commodity prices, except to the extent any such delay is caused by a separate Force Majeure Event; or (xi) any disruptions to labor, materials, suppliers, manufacturing or market conditions in general in connection with the COVID-19 coronavirus pandemic existing as of the Effective Date, including the effect of any private or governmental restrictions imposed with respect to COVID-19 on the claiming Party or its employees or Subcontractors.

“Force Majeure Notice” has the meaning set forth in Section 9.1.1.

“Geotechnical Study” means a study describing the character and accessibility of the Project Site, the existence of known obstacles to construction, the availability of facilities, water and utilities, the location and character of existing or adjacent work or structures, the surface and subsurface ground and soil conditions, and other general and local conditions (including labor) which might affect its performance of the Work

“Governmental Authority” means any and all foreign, national, federal, state, county, city, municipal, local or regional authorities, departments, bodies, commissions, corporations, branches, directorates, agencies, ministries, courts, tribunals, judicial authorities, legislative bodies, administrative bodies, regulatory bodies, autonomous or quasi-autonomous entities or taxing authorities or any department, municipality or other political subdivision thereof, having jurisdiction as to the matter in question.

“Guaranteed Mechanical Completion Date” means the [Date], as the same may be adjusted pursuant to the terms of this Agreement.

“Guaranteed Substantial Completion Date” means the [Date], as the same may be adjusted pursuant to the terms of this Agreement.

“Hazardous Material” means (a) any petroleum, petroleum constituents or petroleum products, flammable, ignitable, corrosive or explosive substances or materials, biohazardous materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation and transformers or other equipment that contain dielectric fluid containing levels of polychlorinated biphenyls, (b) any chemicals or other materials or substances which are defined as or included in the definition of “hazardous substances,” “hazardous wastes,” “hazardous materials,” “extremely hazardous wastes,” “restricted hazardous wastes,” “toxic substances,” “toxic pollutants” or words of similar import under any Applicable Laws, and (c) any other chemicals, constituents, contaminants, pollutants, materials, and wastes and any other carcinogenic, corrosive, ignitable, radioactive, reactive, toxic or otherwise hazardous substances or mixtures (whether solids, liquids, gases), or any similar substances now or at any time subject to regulation, control, remediation or otherwise addressed under Applicable Laws, including those laws, regulations and policies relating to the Release, or threatened Release into the environment or relating to the disposal (or arranging for the disposal), distribution, manufacture, processing, storage, treatment, transport, or other use of such substances.

“Indemnified Person” has the meaning set forth in Section 14.2.1.

“Indemnifying Party” has the meaning set forth in Section 14.2.1.

“Inflation Reduction Act” means U.S. federal public law 117-169 and all regulations and guidance promulgated thereunder.

“Intellectual Property” means recognized protectable intellectual property of Contractor or its parent company or third parties from whom Contractor has obtained rights, including patents, copyrights, corporate names, trade names, trademarks, trade dress service marks, applications for any of the foregoing, software, firmware, trade secrets, mask works, industrial design rights, rights

of priority, know how, design flows, methodologies and any and all intangible proprietary information that is legally recognized, including any trade secret practices utilized in the performance of the Work.

“Interconnection Agreement” means the agreement between the Interconnection Provider and Owner, dated [\_\_\_\_].

“Interconnection Provider” means [Name of Interconnection Provider].

“Interconnection Provider Delay” has the meaning set forth in Section 2.8.2.

“Investment Tax Credit” means the investment tax credit provided for in Code Section 48.

“IRS” means the Internal Revenue Service.

“Job Books” means all engineering, design, purchasing and other information relating to the Work, including: (a) a drawing index; (b) a reference index; (c) copies of Contractor’s and Subcontractors’ Permits and all associated inspection documentation; (d) Subcontractor information for equipment purchased (as received from Subcontractors) including instruction and maintenance manuals from Subcontractors, all on-site and factory acceptance tests as set forth in Exhibit CC, and material test reports; (e) one copy of the As-Built Drawings and documentation; (f) Contractor manuals identified in the Scope of Work; (g) a cable and raceway schedule including all vendor datasheets; (h) the Operating Manuals; (i) electrical one-line diagrams for the Project; (j) field testing of all cables (power, fiber optic, etc. as applicable) and materials (subgrade compaction, concrete cylinders, etc.); (k) a compilation of final Project safety records; and (l) a final list of the Work performed by all Subcontractors retained by Contractor to perform the Work or any portion thereof, identifying the scope of work performed by such Subcontractor.

“Key Personnel” has the meaning set forth in Section 2.10.3.

“Labor” means the workforce of the relevant Person, including its staff and employee and non-employee and skilled and unskilled workers (and including those provided by Subcontractors).

“Laborer or Mechanic” means laborer or mechanic as such terms are used in Sections 45(b)(7) and (8) and 48(a)(10) and the PWA Guidance.

“Lien” means any charge, claim, lien, option, encumbrance, mortgage, deed of trust, pledge, assessment, lease, levy, security interest, equitable interest, easement, restrictive covenant, encroachment, title imperfection, restriction on transfer, conditional sale or other restriction on title or property interest.

“Lien Waiver and Release” means waivers to Lien rights and may be conditional or unconditional. Lien Waiver and Releases will follow the form as set forth in Exhibit N, Exhibit O, Exhibit P and Exhibit Q, as required.

“Licensed Materials” has the meaning set forth in Section 12.1.



“Licensed Professional Engineer” means a Person proposed by Contractor and acceptable to Owner in its reasonable judgment who (a) to the extent mandated by Law is licensed to practice engineering in the appropriate engineering discipline for the required certification being made, in the United States, and in all states for which the person is providing a certification, evaluation or opinion with respect to matters or Law specific to such state, (b) has training and experience in the engineering disciplines relevant to the matters with respect to which such person is called upon to provide a certification, evaluation or opinion, (c) has no economic relationship, association, or nexus with Contractor or its members or Affiliates, other than with the prior written consent of Owner, services previously or currently being rendered to Contractor or its members or Affiliates, and (d) is not a representative of a consulting engineer, contractor, designer or other individual involved in the development of the Work, or of a manufacturer or seller of any equipment installed.

“Limited Notice to Proceed” or “LNTTP” has the meaning set forth in Section 4.1.

“Losses” has the meaning set forth in Section 14.1.1.

“Major Subcontractor” has the meaning set forth in Section 2.9.1.

“Management Settlement Conference” has the meaning set forth in Section 17.2.

“Material Adverse Effect” means a change in financial condition, properties, assets, liabilities, rights, obligations, operations, business, or prospects, which substantially adversely affects, or could reasonably be expected to adversely affect, a Person.

“Mechanical Completion” has the meaning set forth in Section 3.3.1.

“Mechanical Completion Certificate” means the certificate by this name as described in, and in the form set forth in, Exhibit J.

“Mechanical Completion Date” means the date Mechanical Completion is achieved as determined in accordance with Section 3.3.

“Mechanical Completion Liquidated Damages” has the meaning set forth in Section 3.7.2.

“Milestone” means each milestone listed in the Milestone Schedule and includes each of the Completion Milestones.

“Milestone Schedule” means the schedule for achievement of the Milestones, as attached hereto as Exhibit B.

“Monthly Progress Report” means a monthly written report that includes a description of the progress and status of the Work compared to the Construction Schedule and Milestone Schedule (including the incorporation of delay and acceleration analyses where appropriate), an update to the Construction Schedule, an update on the delivery of all Contractor Deliverables, a summary of any Change Orders executed by the Parties since the immediately preceding Progress Report, and a summary of any events then actually known to Contractor that are reasonably likely to materially impact the Construction Schedule (including any Force Majeure Events, Owner-

Caused Delays, Liens on the Project Site or the Project, or any asserted violations of Applicable Laws).

“NDA” has the meaning set forth in Section 18.7.

“Notice to Proceed” or “NTP” has the meaning set forth in Section 4.2.

“Operating Manuals” means the documentation provided by Contractor so as to provide Owner with complete system instructions and procedures for the operation and maintenance of the Project, which shall comply with the requirements of the Scope of Work, including Contractor’s manufacturers’, vendors’, suppliers’ and Subcontractors’ recommended list of spare parts, all safety information, equipment and maintenance manuals and any specified precautionary measures.

“Other Owner Contractors” mean those Persons, other than Contractor, with whom Owner contracts or subcontracts to perform work in connection with the Project. Other Owner Contractors may also include Owner in the event Owner elects to perform any work in connection with the Project.

“Owner” has the meaning set forth in the preamble hereto.

“Owner-Caused Delay” means an actual and unavoidable delay in Contractor’s performance of a Milestone in the Work or an increase in Contractor’s costs but only to the extent directly caused by (a) the failure of Owner or Other Owner Contractors to timely perform any obligation of Owner under this Agreement (other than by exercise of rights under this Agreement, including the exercise by Owner of the right to have Defective Work corrected or re-executed) including a failure to deliver the Owner-Supplied Equipment by the Owner Equipment Delivery Date; (b) an Interconnection Provider Delay, (c) issue the Notice to Proceed by the date set forth in the Milestone Schedule, or (d) any other event or circumstance identified in this Agreement as an Owner-Caused Delay. Notwithstanding the foregoing or any other provision to the contrary in this Agreement, (i) any delay or failure by Owner that is attributable to Contractor’s or any Subcontractor’s actions or inactions shall not be an Owner-Caused Delay; (ii) no Change Order, except as triggered by an Owner-Caused Delay, shall not be an Owner-Caused Delay; and (iii) any delay or failure that would otherwise be an Owner-Caused Delay but that occurs concurrently with any other delay or failure that is the responsibly of Contractor under this Agreement shall not be an Owner-Caused Delay.

“Owner Equipment Delivery Date” means the dates by which Owner (or the Other Owner Contractors) are to deliver the Owner-Supplied Equipment as set forth in the Milestone Schedule.

“Owner Event of Default” has the meaning set forth in Section 15.2.1.

“Owner Indemnified Party” has the meaning set forth in Section 14.1.1.

“Owner Permits” means those Permits required to be obtained by Owner, as set forth in Exhibit [ ].

“Owner-Supplied Equipment” means the equipment to be incorporated into the Project that Owner is required to procure and supply as listed in Exhibit F hereto.

“Owner Taxes” means all Taxes: (a) that constitute property taxes assessed on the Project Site; (b) that are measured by Owner’s sale of products or services from the Project; (c) upon services or labor provided by Owner (other than services or labor provided by Contractor or any Subcontractor or Supplier) in connection with the Project, including in connection with the Owner-Supplied Equipment; and (d) imposed by any taxing authority upon the sale, purchase, transportation, or use of Owner-Supplied Equipment.

“Owner Termination for Cause” has the meaning set forth in Section 15.1.2.

“Owner Termination for Convenience” has the meaning set forth in Section 15.1.3.

“Owner’s Project Manager” means the individual appointed by Owner to act on its behalf in connection with this Agreement.

“Party” and “Parties” have the meaning set forth in the introductory paragraph.

“Payment Milestone” means the specific payment milestones set forth in the Payment Schedule, attached hereto as Exhibit D.

“Payment Schedule” means the schedule for payments attached hereto as Exhibit D.

“Performance Bond” has the meaning set forth in Section 7.9.2(a).

“Performance Test(ing)” means each commissioning and performance test as set forth in Exhibit G demonstrating compliance of the Work with the requirements set forth in this Agreement.

“Permit” means any waiver, exemption, variance, certificate, franchise, permit, approval, exemption, authorization, clearance, license, consent, or similar order of or from, or filing or registration with, or notice to, any Governmental Authority, including environmental, health and safety permits, site plan approval, building permits, certificates of occupancy, and all amendments, modifications, supplements, general conditions and addenda thereto.

“Person” means any individual, corporation, partnership, limited liability company, association, joint stock company, trust, unincorporated organization, joint venture, Governmental Authority or other entity of whatever nature.

“Personnel” means, with respect to a Person, such Person’s employees, agents, personnel, representatives, invitees, subcontractors (including, as applicable, the Subcontractors), vendors and any other third party independent contractors with whom such Person has contracted, and its agents’, personnel’s, representatives’, invitees’, subcontractors’, vendors’ or third party independent contractors’ respective employees, agents, personnel, representatives, invitees, subcontractors, vendors or third party independent contractors.

“Pre-Existing Hazardous Material” means any Hazardous Material (a) that existed on or in the Project Site prior to the first date when Contractor or any of its Subcontractors or other representatives were present on the Project Site, following the Notice to Proceed, or (b) brought to the Project Site by Owner, any Other Owner Contractor or any third party other than Contractor, a Subcontractor, Supplier or any of its Personnel after the Effective Date, or (c) that migrates onto or within the Project Site, *provided* such migration is not the result of any acts or omissions by Contractor or any persons for whom it is responsible.

“Prevailing Wage Rates” means wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which the Project is located as most recently determined by the U.S. Department of Labor in accordance with subchapter IV of chapter 31 of title 40, U.S. Code for the taxable year in which the Work occurs.

“Prevailing Wage and Apprenticeship Requirements” means the requirements under Code Sections 48(a)(10) and (11) and, to the extent relevant, Code Sections 45(b)(7) and (8) and any PWA Guidance.

“Project” has the meaning set forth in the recitals to this Agreement as more particularly described in the “Scope of Work” contained in Exhibit A.

“Project Documents” means the Project Site documents listed on Exhibit [ ].

“Project Site” means the site on which the Project is located and any other areas or sites to which access is obtained for purposes of laydown, storage, etc. as described in the Site Description.

“Prudent Industry Practices” means, in connection with the design, engineering, procurement, construction, and commissioning of projects and Work of a type and size and having geographical and climatic attributes similar to the Project and the Work, those practices, methods, specifications and standards of safety, performance, dependability, efficiency and economy generally recognized by utility industry members in the United States as good and proper, and such other practices, methods or acts which, in the exercise of reasonable judgment by those reasonably experienced in the industry in light of the facts known at the time a decision is made, would be expected to accomplish the result intended at a reasonable cost and consistent with reliability, safety and expedition, and shall include, at a minimum, those professionally responsible practices, methods and acts described above that comply with this Agreement, and the requirements of Government Authorities and Applicable Laws. Prudent Industry Practices are not intended to be limited to the optimum practices, methods or acts to the exclusion of all others, but rather to be a spectrum of good and proper practices, methods and acts generally accepted in the industry and which are consistent with Applicable Laws, Applicable Permits, safe operation and environmental protection.

“Punch List” has the meaning set forth in Section 3.5.1.

“Punch List Holdback Amount” means two hundred percent (200%) of the dollar value assigned to the corresponding Punch List item.

“PWA Guidance” means IRS Notice 2022-61 (November 29, 2022) and any additional guidance issued by the U.S. Department of the Treasury (including any guidance issued by the

Internal Revenue Service) pursuant to Sections 45(b)(7), 45(b)(8), 48(a)(10), and 48(a)(11) of the Code, or any provision of the Code that is cross-referenced therein.

“PWA Requirements Certificate” is defined in Section 2.26.7.

“Qualified Apprentice” means an individual who is employed by Contractor or any Tax Subcontractor and who is participating in a Registered Apprenticeship Program.

“Recommended Spare Parts” has the meaning given in Section 2.6.

“Registered Apprenticeship Program” has the meaning given to such term in Section 3131(e)(3)(B) of the Code and any PWA Guidance.

“Release” means, except as may be expressly authorized by Applicable Laws, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including the soils or other surface feature, sub-soils or any subsurface feature or strata, surface water, groundwater, or ambient air (including the abandonment or discarding of barrels, containers, and other receptacles containing any Hazardous Material).

“Repair or Alteration” means alteration or repair work as such terms are used in Code Sections 45(b)(7) and (8) and 48(a)(10) and any PWA Guidance.

“Request for Payment” means the written requests from Contractor to Owner for payment as described in, and in the form set forth in, Exhibit T.

“Restricted Equipment” has the meaning set forth in Section 2.22.1.

“Restricted Supplier” means any entity prohibited under the National Defense Authorization Act.

“Retainage” has the meaning set forth in Section 5.2.

“Scope of Work” means the equipment, materials, services and work to be provided, or caused to be provided, by or through Contractor under this Agreement, as more particularly described in Exhibit A, as the same may be amended from time to time in accordance with the terms hereof.

“Serial Failure” has the meaning set forth in Section 7.4.1.

“Serial Failure Warranty Work” has the meaning set forth in Section 7.4.2.

“Serial Failure Warranty Work Completion Date” has the meaning set forth in Section 7.4.2.

“Serial Failure Warranty Work Start Date” has the meaning set forth in Section 7.4.2.

“Site Description” means the Project Site description attached hereto as Exhibit R.

“Site Documents” means the documents and agreements listed in Exhibit S hereto that grant rights in or to (i) real property (such as leasehold or other rights to use or access the Project Site) maintained by Owner in connection with the construction of the Project on the Project Site, (ii) the transmission of electricity to the interconnected high voltage distribution facilities that are a part of the distribution system to which the Project connects, (iii) the performance of the Work, or (iv) the operation and maintenance of the Project.

“Site Requirements” means the applicable covenants, agreements, restrictions, limitations, or requirements regarding the use and possession of the Project Site, the installation, construction, commissioning, operation or maintenance of the Project on the Project Site, and any other activities on or over the Project Site, as set forth in the Site Documents hereto.

“Standard of Care” has the meaning set forth in Section 2.2.

“Subcontract” means an agreement between Contractor and any Subcontractor for performance of any portion of the Work.

“Subcontractor” means any Person engaged or employed by Contractor or any subcontractor thereto in connection with the performance of the Work (including the procurement of equipment or materials to be provided as part of the Work).

“Substantial Completion” has the meaning set forth in Section 3.4.

“Substantial Completion Certificate” means the certificate by this name as described in, and in the form set forth in, Exhibit K.

“Substantial Completion Date” means the date on which the Project achieves Substantial Completion in accordance with Section 3.4.

“Substantial Completion Liquidated Damages” has the meaning set forth in Section 3.7.3.

“Supplier” means any Person supplying materials or equipment to Contractor or to any Subcontractor for the Work, but who does not perform labor at the Project Site.

“Tax Attributes” means any and all federal, state or local tax credits, tax incentives, tax deductions, depreciation allowances, tax abatements, or other tax benefits that may now or in the future accrue under the Internal Revenue Code or under any applicable federal, state, or local law, as a result of the ownership, development, installation or operation of the Project, or the output generated by the Project.

“Tax Contest” is defined in Section 17.2.

“Tax Credit” means either (i) the investment tax credit for property described in Code Section 48(a)(3)(A)(i) or 48(a)(3)(A)(ix) or (ii) the production tax credit available for facilities described in Code Section 45(d)(1) or 45(d)(4), in each case, as applicable to the Project.

“Tax Subcontractor” means any Person other than Contractor that employs (within the meaning of Sections 3.03(1) or 4.02(1), as applicable, of Notice 2022-61) any other Person for the

purpose of performing any portion of the Work that constitutes Construction or Repair or Alteration.<sup>1</sup>

“Technical Dispute” means any dispute between the Parties where the particular subject matter of such dispute relates to technical engineering, procurement or construction issues regarding Contractor’s performance of the Work, including:

- (a) whether a Force Majeure Event or Owner-Caused Delay has occurred which solely is an issue of a technical nature and, in each case, whether Contractor followed the appropriate procedures for relief in respect of the same pursuant to the applicable provisions of this Agreement;
- (b) technical issues in respect of the Project Site conditions;
- (c) technical issues regarding the performance of Performance Test;
- (d) technical issues regarding the completion of items set forth on the Punch List;
- (e) technical issues concerning whether any Milestone has been achieved;
- (f) technical issues concerning Contractor’s Warranty, including whether any Work satisfies or fails to satisfy the Contractor’s Warranty; or
- (g) if Contractor is entitled to a Change or Change Order for any of the items listed in clauses (a) through (f) above.

“Technical Dispute Engineer” means [Name of Technical Dispute Engineer] or any successor thereto or replacement thereof appointed by mutual agreement of the Parties and who is competent in the design, engineering, procurement, construction, and commissioning of projects and Work of a type and size and having geographical and climatic attributes similar to the Project and the Work.

“Termination Payment” has the meaning set forth in Section 15.3.2.

“Third-Party Warranties” has the meaning set forth in Section 7.3.

“Time and Materials Rates” means those rates set forth in Exhibit Z applicable to a Change Order in accordance with Article 10.

“Unforeseen Site Conditions” means subsurface or otherwise concealed physical conditions at the Project Site (other than Pre-Existing Hazardous Materials) that are (a) not apparent from a visual inspection of the Project Site or actually identified by Contractor in its

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<sup>1</sup> NTD: This is intended to address a portion of the people who may be treated as Subcontractors because the defined term Subcontractor is broader than needed or practical for U.S. federal income tax purposes.

inspection of the Project Site, (b) differ materially from those indicated in the site environmental assessments and Geotechnical Studies attached hereto as Exhibit M, or (c) are unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, including archaeological artifacts, endangered or threatened species, flora or fauna protected under Applicable Laws, religious, historical or archaeological resources.

“Use” has the meaning set forth in Section 13.2.

“Warranty Bond” has the meaning set forth in Section 7.9.2(b).

“Work” means all necessary work and services, including all of the obligations described in Article 2 and the Scope of Work, required in connection with (a) the design, engineering, specified permitting, procurement, construction, assembly, installation, startup, testing, commissioning and completion of the work described in Exhibit [ ], but excluding testing and commissioning of any Owner-Supplied Equipment; (b) the provision, management and supervision of all Contractor Personnel, including transportation, administration and other services as required in connection with any of the foregoing; and (c) the inspection and furnishing of all materials, equipment, machinery, tools, apparatus, temporary structures and temporary utilities as may be required in connection with the foregoing.

“Work Order” has the meaning set forth in Section 10.2.

1.2 **Rules of Interpretation.** Unless otherwise required by the context in which any term appears: (a) references to “Articles,” “Sections,” or “Exhibits” shall be to Articles, Sections, or Exhibits of this Agreement, as the same may be amended, supplemented or replaced from time to time in accordance with this Agreement; (b) all references to a Person shall include a reference to such Person’s successors and permitted assigns; (c) references to any agreement, document or instrument shall mean a reference to such agreement, document or instrument as the same may be amended, modified, supplemented or replaced from time to time; (d) the use of the word “including” or “include” in this Agreement to refer to specific examples shall be construed to mean “including, without limitation” and shall not be construed to mean that the examples given are an exclusive list of the topics covered; (e) the term “shall” is understood to be mandatory, meaning must, and the term “may” is understood to be permissive; (f) the headings contained herein are used solely for convenience and should not be used to aid in any manner to construe or interpret this Agreement; (g) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders; and (h) references to any amount of money shall mean a reference to the amount in United States dollars. The Parties collectively have prepared this Agreement, with advice of legal counsel; none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Agreement or any part hereof.

In the event of any inconsistencies between this Agreement and the other Contract Documents, the following order of precedence in the interpretation hereof or resolution of such conflict under this Agreement shall prevail:



- a. duly authorized and executed Change Orders and written amendments to this Agreement executed by both Parties;
- b. this Agreement;
- c. Exhibit A – Scope of Work;
- d. the other Exhibits; and
- e. the Standard of Care.

The Exhibits, together with all exhibits, annexes and appendices thereto, are specifically incorporated into, and made a part of, this Agreement by reference. Where an irreconcilable conflict exists among Applicable Laws, this Agreement, the Exhibits hereto, or the Standard of Care, the strictest requirement shall apply. Notwithstanding the foregoing provisions of this section, if a conflict exists within or between parts of the Contract Documents, or between the Contract Documents and Applicable Laws, they shall be reconciled reasonably to be consistent with this Agreement as a whole. All obligations imposed on Contractor and each Subcontractor under the Contract Documents (other than this Agreement) or under Applicable Laws and not expressly imposed or addressed in this Agreement shall be in addition to and supplement the obligations imposed on Contractor under this Agreement, and shall not be construed to create an “irreconcilable conflict”. Where a conflict exists among codes and standards applicable to Contractor’s performance of the Work, they shall be reconciled reasonably to be consistent with this Agreement as a whole; *provided*, that if such reconciliation is not possible, the strictest requirement shall apply.

## **ARTICLE 2 CONTRACTOR RESPONSIBILITIES**

2.1 **Work**. Owner hereby retains Contractor, and Contractor hereby agrees to be retained by Owner, to perform or cause to be performed the Work in accordance with the Standard of Care and subject to the terms and conditions of this Agreement. Where this Agreement describes the Work in general terms, but not in complete detail (and except as otherwise stated in the Scope of Work, or as stated in Article 4 or elsewhere in this Agreement as being the responsibility of Owner), the Work shall be deemed to include any reasonably foreseeable incidental work and materials that are required and necessary to complete the Work in accordance with this Agreement. As part of the Work, at no additional cost or expense to Owner, Contractor shall pay all transportation charges incurred by Contractor in connection with its performance of this Agreement including procuring, transporting and delivering all items provided by Contractor to the Project Site pursuant to this Agreement, and all charges for shipping, air travel and in-land transportation for the same. Contractor acknowledges that this Agreement constitutes a fixed price obligation to perform the Work, including to design, engineer, procure, construct, test, startup and commission the Work. Contractor hereby represents and commits that, subject to the terms and conditions of this Agreement, it can complete the Work for the Contract Price in accordance with the Milestone Schedule.

2.2 **Standard of Care**. Contractor shall perform the Work in a manner that is (a) in compliance with Prudent Industry Practices and the Scope of Work; (b) in compliance with the terms of this

Agreement (including all Exhibits attached hereto); (c) in compliance with the rules and procedures of the Interconnection Provider to the extent applicable to the performance of the Work; (d) in compliance with Applicable Laws, including the Federal Foreign Corrupt Practices Act (15 U.S.C.S. §§ 78a and 78m et seq.), and Applicable Permits; (e) in a safe, expeditious, good, diligent and workmanlike manner, (f) in compliance with the applicable terms of the Project Documents; (g) in compliance with the safety regulations and standards adopted under the Occupational Safety and Health Act of 1970, as amended from time to time and any corresponding state laws applicable to the Project Site and the Work; (h) in compliance with the standards, as amended or updated from time to time, set forth in Exhibit E; and (i) in compliance with the written specifications of the manufacturers of all equipment and materials supplied as part of the Work and (items (a) through (i) collectively, the “**Standard of Care**”). In no event will references in any provision of this Agreement to one or more of the standards, guidelines, practices, regulations, laws, or Permits comprising the Standard of Care be interpreted to limit the applicability of all such standards, guidelines, practices, regulations, laws, and Permits to such provision.

2.3 **Design and Engineering Standards.** The Work performed by Contractor under this Agreement shall be designed and engineered in accordance with the Standard of Care, such that upon Final Completion, the Work shall comply with the Standard of Care. All Work of Contractor requiring certification shall be certified, and all Drawings requiring sealing shall be sealed, in each case by professional engineers licensed and properly qualified to perform such engineering services in all appropriate jurisdictions. Contractor shall (a) prepare comprehensive Drawings and specifications setting forth in detail the requirements for the performance of the Work and for integrating and joining the Work with the Owner-Supplied Equipment, *provided* that such Drawings and specifications related to integrating and joining the Work with the Owner-Supplied Equipment shall be in accordance with the requirements for the Owner-Supplied Equipment specified in the Scope of Work, and (b) procure and maintain all equipment certifications, and label applicable equipment as required by the Applicable Laws.

## 2.4 **Pre-Mobilization Work.**

2.4.1 **Design.** Contractor shall design the Work in compliance with the Standard of Care and the requirements set forth in the Scope of Work. Contractor shall prepare comprehensive Drawings setting forth in detail the requirements for the performance of the Work. Contractor shall deliver to Owner each of the Drawings for the Work on the date specified for the delivery of such Drawings on the Milestone Schedule for Owner’s review. Owner shall have ten (10) Business Days to conduct its review and provide any comments. As the Drawings for the Work are issued to Owner, they shall be clearly identified by Contractor as Drawings for the Project. Contractor shall, within five (5) days after notification by Owner of any comments or questions with respect to any Drawing submitted by Contractor, amend or modify such Drawing, or otherwise respond to Owner’s comments or questions, and, if necessary, resubmit such Drawings for Owner’s additional review in accordance with this Section 2.4.1. To the extent that the Work includes the completion of any additional design work (pursuant to a Change Order or otherwise), Contractor shall prepare all relevant Drawings for Owner’s review and comment. Modifications to such Drawings resulting from Owner’s review or comments that do not materially change the Scope of Work shall not result in a change to the Contract Price. Corrections or requested changes to Drawings in order to conform to the Standard of Care

are not Changes to the Scope of Work. Notwithstanding anything contained herein to the contrary, Owner's review, provision of comments (or lack of provision of comments) or acceptance of the Drawings, or any portion thereof, shall not in any way relieve Contractor of any of its obligations, liabilities or warranties set forth herein, including Contractor being solely responsible for the accuracy of the dimensions, details, integrity and quality of the Drawings, and Owner assumes no responsibility for such obligations, liabilities or warranties as a result of its provision or lack of provision of comments or in connection with any acceptance. Owner shall notify Contractor as soon as practicable after it becomes aware of any errors in such Drawings; *provided, however*, that any failure to notify Contractor shall not reduce Contractor's responsibility for any error and shall not constitute a breach of this Agreement by Owner. If this Agreement is terminated prior to the Substantial Completion Date, Contractor shall furnish Owner with any and all final Drawings that have been prepared and the most up-to-date versions of Drawings that are not yet in final form.

2.4.2 **Ownership of Drawings.** Except as otherwise specified in Section 13.1, all Drawings and other documents prepared by or for Contractor with respect to the Work shall be deemed "work for hire" and shall be the property of Owner. All Drawings, calculations, memoranda, data, notes and other materials containing information supplied by Owner that come into Contractor's possession during its performance of the Work shall be the property of Owner and shall be returned to Owner upon the earlier of the Substantial Completion Date or termination of this Agreement. Review (or lack thereof) by Owner or its designees of any Drawings provided by Contractor, and the fact that Owner has not discovered any errors reflected in such Project documents, shall not relieve or release Contractor of any of its duties, obligations or liabilities under the terms of this Agreement.

2.4.3 **As-Built Drawings.** Contractor shall maintain on the Project Site an up-to-date set of Drawings and shall provide all written comments, field changes, and redlined drawings to Owner, and Contractor shall prepare and provide Owner a complete set of As-Built Drawings in hard copies or such other format as reasonably required by Owner. Contractor shall provide all Contractor Deliverables, including a complete set of As-Built Drawings, in hard copies or such other format as reasonably required by Owner on or prior to the date in the Milestone Schedule.

2.5 **Materials and Equipment.** Contractor shall purchase (including payment of any import duties, tariffs or other taxes, subject to the occurrence of a Change in Law or Change in Tariffs), import, transport, procure, supply, and deliver, at its own expense, all materials, consumables and equipment (including Contractor Equipment, but excluding Owner-Supplied Equipment) required to complete the Work and the performance and completion of its obligations under this Agreement (whether on or off the Project Site). Contractor shall deliver all materials and equipment to the Project Site at its expense on a DDP (Incoterms © 2020) basis. Contractor shall transport the Equipment and all other materials in a manner that minimizes the creation of traffic or other external community issues. Contractor shall ensure that all equipment (a) complies with all Applicable Laws, Applicable Permits, and Prudent Industry Practices, and (b) is (i) in safe operating condition, (ii) good working order, and (iii) free of any errors and Defects. Contractor shall provide Owner with at least ten (10) days advance written notice of the day on which any major equipment is to be delivered to the Project Site. Owner shall have the right to visually

inspect (or cause its Other Owner Contractors to inspect) any major equipment included in the Work upon its arrival on the Project Site. If any damage is identified during such inspection, Contractor shall promptly either repair or replace the damaged equipment prior to installation thereof. Notwithstanding anything contained herein to the contrary, Owner's inspection or non-inspection shall not in any way relieve Contractor of any of its obligations, liabilities or warranties under this Agreement. Contractor shall be responsible, at its sole expense, for the furnishing and installation of all temporary utilities, telephone, data lines, cabling and wiring necessary for all activities associated with the completion of the Work. For purposes of this Agreement, in order for equipment to be "new", such equipment must have been manufactured no earlier than twelve (12) months prior to their delivery to the Project Site. Contractor shall provide appropriate storage for materials, supplies, and equipment at the Project Site for use in performance of the Work. All materials, supplies, and equipment which may be used in performance of the Work and which are stored at a location other than on the Project Site shall be segregated from other materials, supplies, and equipment not related to the Project. All deliveries to the Project Site are subject to the existence at the time of acceptable weather conditions and Owner shall not be penalized or be required to pay any demurrage or storage fees for cancelled deliveries to the Project Site due to inclement weather not constituting a Force Majeure Event, in accordance with this Agreement, and in no event shall any such cancellation constitute or be deemed to be an Owner-Caused Delay or Owner Event of Default. In the event of any cancelled delivery to any Project Site due to inclement weather not constituting a Force Majeure Event, Contractor shall not be entitled to any increase in the Contract Price under any Change Order issued pursuant to this Agreement as a result thereof.

2.6 **Spare Parts**. Contractor's recommended list of spare parts that are necessary to operate and maintain the Project, together with an indicate list of quantities, types, prices, delivery lead times and maintenance cycles (of any) of spare parts, is contained in Exhibit U (the "**Recommended Spare Parts**"). Pursuant to a Change Order, Contractor shall deliver, at Owner's expense, the Recommended Spare Parts to the Project Site by no later than the Substantial Completion Date. Any Recommended Spare Parts separately purchased by Owner shall also remain the sole property of Owner. To the extent applicable, if Contractor requires use of a previously supplied Recommended Spare Part prior to Substantial Completion, then Contractor may use such Recommended Spare Part, *provided* that Contractor shall notify Owner thereof, and Contractor shall replace any such withdrawn Recommended Spare Part at its own cost and expense as a condition to achieving Substantial Completion. In addition to the foregoing, certain spare parts requiring longer lead time or custom manufacturing and identified in Exhibit U as "included spare parts" are included in the Scope of Work and shall be provided by Contractor at no additional cost to Owner as a condition to achieving Substantial Completion.

2.7 **Storage**. Subject to Section 6.3 regarding risk of loss, at all times prior to the date of Substantial Completion, Contractor shall properly store all spare parts, including Owner-Supplied Equipment that have been delivered to Contractor's possession at the Project Site, utilized by Contractor in connection with the Work, and all personal property owned or leased by Contractor or any Subcontractor for purposes of the Work on the Project Site, in a climate-controlled area, if applicable, through the Substantial Completion Date and, during such time, Contractor shall bear the risk of loss for all such spare parts. Contractor shall provide Owner with written instructions for the on-going storage and care of all Recommended Spare Parts at the Project Site prior to Substantial Completion.

## 2.8 **Building and Structural Inspections; Interconnection.**

2.8.1 Except as otherwise set forth in this Agreement, Contractor shall conduct and supervise inspections of the Work as required by this Agreement, any Contractor Permit or Applicable Laws, and shall promptly provide to Owner all Permits received in conjunction therewith. Contractor shall reasonably cooperate with and assist any inspections requested by Owner's Project Manager.

2.8.2 Contractor shall be responsible for interconnection of the Project up to the point of interconnection as set forth in Exhibit A. Contractor shall coordinate with Owner to install the interconnection works between such point of interconnection and the grid, as specified in Exhibit A; *provided that*, other than with respect to any delays resulting from or caused by any omission, delay, default or failure of Contractor or any Subcontractor in performing the Work (including the failure to timely submit engineering deliverables or to timely meet Milestones that are required for interconnection, in each case in accordance with the Milestone Schedule), Contractor shall have no responsibility for delays by Owner, Other Owner Contractors or third parties in providing such interconnection (any such delay, an "**Interconnection Provider Delay**").

## 2.9 **Subcontractors.**

2.9.1 Owner acknowledges that Contractor intends to have portions of the Work completed by Subcontractors qualified to perform such portions of the Work pursuant to written Subcontracts, *provided* that such use and engagement of Subcontractors shall be in compliance with the terms and conditions of this Agreement. Such Subcontractors must be listed on the Owner-approved list of Subcontractors set forth on Exhibit V. Except as otherwise expressly provided in this Agreement, Contractor shall be solely responsible for engaging, managing, supervising and paying all Subcontractors and Persons directly or indirectly employed by such Subcontractors. Contractor shall secure Owner's written consent (not to be unreasonably withheld, conditioned or delayed) prior to contracting with any Subcontractor not included on the list of approved Subcontractors set forth on Exhibit V. Any Subcontractor with a Subcontract, or aggregation of Subcontracts, that has a value greater than one hundred thousand dollars (\$100,000) shall be deemed a "**Major Subcontractor**." Contractor shall include in Monthly Progress Reports provided pursuant to this Agreement a report of all Subcontractors performing the Work during the period covered by such report.

2.9.2 Owner may require Contractor to remove any Subcontractors or Suppliers that fail to comply with the Contractor Safety Plan or Applicable Laws. Any use of Subcontractors shall not relieve Contractor of, or otherwise affect, any of its obligations, duties and responsibilities under this Agreement. Should Owner become aware that any Subcontractor is not in compliance with the Contractor Safety Plan and/or any Applicable Laws, Owner, acting reasonably, may provide notice to Contractor that such Subcontractor must immediately cure such non-compliance, or in the event of serious, willful or repeated violations, be terminated and removed from the Project Site and Contractor shall promptly comply with such notice. Contractor shall be solely responsible for the performance of the Work and for timely paying each Subcontractor amounts due to such Subcontractor.

Nothing contained herein shall obligate Owner to pay any Subcontractor for any of the Work performed by such Subcontractor, to pay any taxes related to such Work performed by any such Subcontractor, or to reimburse Contractor for Contractor payments to Subcontractors for such taxes. No Subcontractor is intended to be, nor shall any such Subcontractor be deemed to be, a third-party beneficiary of this Agreement. Contractor shall cause all Subcontractors to comply with the standards of performance set forth in this Agreement applicable to Contractor, including compliance with the Standard of Care. Contractor shall cause all Major Subcontractors to maintain, and comply with, the insurance requirements of Contractor as detailed in Exhibit X. Any Subcontractor other than a Major Subcontractor shall carry insurance that is (i) in compliance with Applicable Laws, and (ii) otherwise comparable in scope of coverage and limitations to that customarily provided by others performing a scope of work similar to the portion of the Work to be performed by such Subcontractor. If any Subcontractor does not meet the foregoing insurance requirements, Contractor shall cover any such Subcontractor under its own insurance policies.

2.9.3 Contractor shall require that all Work performed by Subcontractors be received, inspected and otherwise furnished in accordance with this Agreement. Contractor shall be solely liable for all acts, omissions, liabilities and performance of Work (including Defects therein) of its Subcontractors. All Subcontracts shall be consistent with the terms and provisions of this Agreement.

2.9.4 Notwithstanding anything to the contrary contained herein, nothing in this Agreement shall be construed to impose on Owner any obligation, liability or duty to a Subcontractor engaged under this Agreement or to create any contractual relationship between any such Subcontractor or other third party and Owner including, an obligation to pay or to see to the payment of any moneys due any such Subcontractor or other third party. Notwithstanding the foregoing, Owner (unless requested by Owner) shall be a third-party beneficiary of all Subcontracts, and Contractor shall include a provision in each agreement specifically stating that Owner is a third-party beneficiary to each such Subcontract. Contractor shall advise each Subcontractor of the substance of this Section 2.9.4 with regard to the primary relationship between Owner and Contractor.

## 2.10 **Labor and Personnel.**

2.10.1 **Contractor's Project Manager.** Contractor will identify Contractor's Project Manager ninety (90) days prior to mobilization to the Project Site, subject to the approval of Owner, not to be unreasonably withheld. Contractor may change the Contractor's Project Manager with Owner's written consent, which consent shall not be unreasonably withheld, conditioned, or delayed; *provided*, that Owner's consent shall not be required with respect to the resignation, employee-initiated transfer or termination of Contractor's Project Manager. The Contractor's Project Manager shall (a) act as the single point of contact for Contractor's communications with Owner, (b) be responsible for receiving all reports and documents due under this Agreement from Owner and delivering all reports due under this Agreement to Owner, (c) have authority to act on behalf of Contractor and administer this Agreement on behalf of Contractor, including the authority to execute Change Orders, and (d) have the experience and authority to make reasonably

prompt means and methods decisions at the Project Site on a real time basis. All notices, approvals and consents given to or received from the Contractor's Project Manager shall have the same effect as if given to or received from Contractor. Notwithstanding the foregoing, Contractor's Project Manager shall not have authority to amend or to modify any of the provisions of this Agreement. If Owner, acting reasonably and in good faith, has cause to object to the individual acting as Contractor's Project Manager, Owner may issue written notice to Contractor to that effect, specifying the grounds for objecting to Contractor's Project Manager. Promptly following receipt of such written notice, the Parties shall meet and, acting reasonably and in good faith, attempt to address Owner's concerns.

**2.10.2 Engagement of Personnel.** Contractor shall maintain harmonious labor relations at the Project Site. Contractor shall utilize qualified personnel for the Project to ensure the safe and accurate completion of the Work. Contractor shall provide, manage, and transport all of its Personnel required in connection with the performance of the Work and of its obligations under this Agreement, including: (a) professional engineers licensed to perform engineering services in each jurisdiction where the performance of the Work requires such licensing, if applicable; (b) Contractor's Project Manager and Key Personnel; (c) lead project engineer, field engineers, and cost and schedule engineers, if applicable; and (d) supervisors for the Work, all of whom shall have experience necessary to perform the Work and who are competent to perform their assigned duties in a safe and secure manner. Contractor shall require its Subcontractors to adhere to the same standards set forth in this Agreement with respect to their Personnel. Where required by Applicable Laws, Contractor shall employ only licensed Personnel in good standing with their respective trades and licensing authorities to perform engineering, design, architectural and other professional services in the performance of the Work. To the extent required by Applicable Laws and Prudent Industry Practices, all Personnel shall have received formal documented training and certification in their area of expertise.

**2.10.3 Key Personnel.** Exhibit AA contains a list of Contractor's key personnel who shall be responsible for supervising the performance of Contractor's obligations under this Agreement (the "**Key Personnel**") and includes an organizational chart showing the roles and responsibilities of other personnel responsible for supervising the performance of Contractor's obligations under this Agreement. Not less than twenty (20) days prior to the commencement of physical Work under the Agreement at the Project Site, Contractor shall deliver in writing the list of Key Personnel to Owner for approval. Owner may request changes to the Key Personnel and Contractor shall use commercially reasonable efforts to make such changes. Any replacement (other than due to termination for cause by Contractor or employee-initiated voluntary departure or employee-initiated transfer) of the Key Personnel shall be subject to the prior written consent of Owner, which such consent shall not be unreasonably withheld.

**2.10.4 Alcohol and Drugs.** The following terms shall have the meanings set forth below: (i) "chemical substance" or "drug" means any chemical substance producing physical, mental, emotional or behavioral change in a person; (ii) "illegal drug" means any drug listed in Schedules I through V of the Federal Controlled Substances Act, as amended, that is not obtained and used in accordance with Applicable Laws including opiates,

hallucinogens, depressants, stimulants and narcotics; and (iii) “under the influence” means exhibiting evidence of alcohol or drugs in the urine, blood or breath, or the impairment of mental or physical abilities to any perceptible degree. Contractor shall not possess, consume, import, sell, give, barter or otherwise dispose of any alcohol, chemical substance or drugs (excluding drugs for proper medical purposes and then only in accordance with Applicable Laws) at the Project Site, or permit any such possession, consumption, importation, sale, gift, barter or disposal by its Subcontractors or Personnel. Subject to requirements of Applicable Laws, Contractor shall have in place a drug and alcohol testing program that includes pre-employment and reasonable cause-based drug testing and random drug and alcohol testing on Contractor’s Personnel. Contractor shall, or as applicable, shall cause its Subcontractors to, immediately identify and remove from the Project Site any Person (whether in the charge of Contractor or any of its Subcontractors) that (a) violates this Section 2.10.5 or the Contractor’s drug and alcohol policy, or (b) creates or may create any unsafe condition or any other situation that may cause damage or harm to any Person or property at the Project Site, including any Person using any prescription drug under supervision of and approval from a medical doctor. Contractor’s drug and alcohol policy shall not apply to Owner and its Personnel or to Other Owner Contractors or their Personnel.

2.10.5 **Arms and Ammunition.** Contractor and its Personnel shall not possess, import, sell, give, barter or otherwise dispose of any arms or ammunition of any kind at the Project Site, and shall at all times assure that the Project Site is kept free from arms and ammunition. No hunting of any kind by Contractor or its Personnel, or other invitees, shall be permitted on the Project Site. Contractor shall immediately identify, terminate from employment and remove from the Project Site any Person that violates this Section 2.10.6.

2.10.6 **Disorderly Conduct.** Contractor shall be responsible for the conduct and actions of its Personnel relating to the performance of Work under this Agreement and the consequences thereof. Contractor shall at all times take all precautions (a) to prevent any unlawful, riotous or disorderly conduct by or among its Personnel and (b) for the preservation of peace, protection and safety of Persons and property on or adjacent to the Project Site. Contractor and Subcontractors shall not interfere with any members of any police, military or security force in the execution of their duties on or adjacent to the Project Site. Owner reserves the right to remove any Person from the Project Site whose conduct, in the judgment of Owner, creates an imminent risk of damage to property or injury to persons.

2.10.7 **Labor Disputes.** Contractor shall use reasonable efforts to minimize the risk of labor-related delays or disruption of the progress of the Work. Contractor shall promptly take any and all commercially reasonable steps that may be available in connection with the resolution of violations of collective bargaining agreements or labor jurisdictional disputes relating to the Work, including the filing of appropriate processes with any court or administrative agency having jurisdiction to settle, enjoin or award damages resulting from violations of collective bargaining agreements or labor jurisdictional disputes. Contractor shall promptly notify Owner, in writing, of any actual or threatened labor dispute by Contractor or by any of its Subcontractors of which Contractor has knowledge that could reasonably be expected to materially affect the



performance of the Work. Notwithstanding the foregoing, the settlement of strikes, walkouts, lockouts or other labor disputes shall be at the discretion of the Party that is subject to such labor disputes.

2.10.8 **Execution of Labor Agreements.** To the extent that any engagement with local or national labor unions becomes necessary in connection with the Project, Contractor shall be responsible for initiating and maintaining such engagement. To the extent Contractor's execution of any project labor or collective bargaining agreement with labor unions is necessary for achieving the successful completion of the Work, Contractor shall execute such project labor or collective bargaining agreement and shall fully abide by, and cause all Subcontractors to fully abide by, all terms, conditions, and provisions of any such project labor or collective bargaining agreement.

(a) **Notice of Labor Disputes.** If Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of the Work, Contractor shall immediately give written notice, including all relevant information, to Owner. Contractor agrees to include the substance of this Section 2.10.9 in any Subcontract under which a labor dispute could delay the timely performance of this Agreement, and each such Subcontract shall also provide that in the event its timely performance is delayed or threatened by any actual or potential labor dispute, the Subcontractor shall immediately notify the next higher tier Subcontractor or Contractor, as the case may be, of all relevant information concerning the dispute.

(b) **Continuation of Work During Labor Disputes.** In the event of any strike, picket, sympathy strike, work stoppage, or other form of labor dispute at the Project Site, regardless of whether that dispute or picket relates to Owner, Contractor, or any other contractor on the Project Site, Contractor will take all reasonable actions to continue to perform the Work required herein without interruption or delay.

(c) **Avoidance of Work Stoppages.** Should Contractor be party to one or more labor agreements, it shall take all reasonable action to avoid any work stoppage and, in the event a work stoppage should occur, it shall, within twenty-four (24) hours, take any and all reasonable legal action provided for, or permitted by, such labor agreements in order to expedite resumption of the Work. Contractor shall, if necessary, utilize to the fullest extent possible any and all rights that Contractor may have to hire replacement employees, should the hiring hall of Contractor be unable or unwilling to meet the needs of Contractor.

(d) **Contractor Indemnity Relating to Labor Agreements.** Contractor shall indemnify, defend (with counsel of Owner's choosing) and hold harmless Owner from and against any and all claims arising out of or in any manner relating to (i) Contractor's failure to execute a project labor agreement or collective bargaining agreement or failure to otherwise engage with any labor unions when required under this Section 2.10.9 or (ii) Contractor's or its Subcontractors' failure to abide by the terms of any executed project labor or collective bargaining agreement. Contractor shall promptly notify Owner of any claims for which indemnity or defense is warranted.

2.10.9 **Oregon House Bill 2021 Compliant Labor.** Project labor must fully comply with the requirements of Oregon House Bill 2021 (HB 2021). Pursuant to ORS 757.306 Seller will within thirty (30) days from the date construction begins, provide a copy of the attestation or declaration or executed project labor agreement to the Oregon Department of Energy. The labor group that constructs and maintains the Project must have policies in place that are designed to limit or prevent workplace harassment and discrimination. Additionally, such labor group must have policies in place that are designed to promote workplace diversity, equity and inclusion of communities who have been traditionally underrepresented in the renewable energy sector including, but not limited to, women, veterans and Black, Indigenous and People of Color, with an aspirational goal of having at least fifteen percent (15%) of the total work hours performed by individuals from those communities.

2.11 **Responsibility for the Project Site.**

2.11.1 **Project Site Diligence.** Contractor represents that it has conducted a diligent review and non-invasive, non-destructive investigation of the surface of the Project Site and has thoroughly reviewed and is fully familiar with all matters contained in the Geotechnical Studies. As of the Effective Date, other than Unforeseen Site Conditions and Pre-Existing Hazardous Materials not identified in Exhibit M, Contractor represents and warrants that (a) it has visually inspected and is familiar with all aspects of (i) the Project Site (including the general boundaries and the general character and accessibility thereof, the existence of known overhead or surface obstacles to construction, the location and general character of existing or adjacent work or structures, and other general and local conditions, including Applicable Laws) and has reviewed and is familiar with the site environmental assessments and Geotechnical Studies attached hereto as Exhibit M and the conditions identified therein, and (ii) the availability of facilities and utilities necessary for performance of the Work, (b) based on the foregoing, and subject to the existence of Unforeseen Site Conditions, the Project Site is sufficient for Contractor to undertake and complete the Work and the Project in accordance with the Standard of Care and Drawings, (c) subject to the terms and conditions of this Agreement the Contract Price and the Guaranteed Substantial Completion Date are each based on and fully reflect the existence of such conditions, and (d) as of the Effective Date, it has not discovered any conditions that in its reasonable judgment would be a basis for claiming a Change. As applicable to the Work, and subject to the existence of Unforeseen Site Conditions, Contractor shall ascertain the location of and avoid damage to all underground installations of utilities or other entities existing at the time particular Work is performed, including power, gas, water, sewer, telephone, data transmission, cable television and other underground installations. During the performance of the Work, Contractor shall take reasonable care to protect existing improvements, facilities and equipment at the Project Site, unless and to the extent they are to be altered or removed as a part of the Work. Contractor shall also repair any damage and, as applicable, restore any fixtures damaged in completion of the Work (including repairing fences, sidewalks, roads, etc. on or abutting the Project Site which are damaged in the performance of the Work to their prior condition. Owner assumes no responsibility whatsoever in respect of the sufficiency or accuracy of the investigations, the surveys or other records delivered to Owner in the Geotechnical Studies. Contractor is responsible for investigating all Project Site conditions and performing all risk analyses,

environmental, geotechnical, hydrological, climatic and other studies as it deems appropriate for the purpose of the design and construction of the Work.

2.11.2 **Site Requirements**. Contractor shall comply with the Site Requirements to the extent applicable to its performance of the Work. In the performance of the Work at the Project Site, Contractor and its Subcontractors shall at all times remain within the Project Site boundaries or any easement corridors as surveyed and staked and shall abide by any restrictions in regard to the location of facilities that are part of the Site Requirements. Contractor shall use reasonable care and respect for the real property at the Project Site. Contractor shall be responsible for any and all damages to real property outside of the Project Site or at the Project Site to the extent caused by Contractor or its Subcontractors. Pursuant to Section 14.1.1, Contractor shall indemnify, defend and hold harmless Owner from any claims or expenses to the extent caused by the failure of Contractor or its Subcontractors to comply with the Site Requirements. Contractor shall notify Owner upon the occurrence, or likely occurrence, of a dispute, conflict, confrontation, or other similar problem, or potential problem, involving one or more owners or occupiers of land located within or adjacent to the Project Site as to potentially result in a situation that may have a material effect upon the performance of the Work. Contractor shall cooperate with Owner in resolving any such problem.

2.11.3 **Clean-up**. Contractor shall (and shall cause its Subcontractors to) maintain the Project Site in a neat and orderly condition throughout the performance of the Work and shall at all times keep the Project Site reasonably free from waste materials, rubbish and Hazardous Materials associated with or produced by the Work. As part of the Work, Contractor will arrange and pay for disposal or recycling of all package materials, sewage and wastes generated by Contractor or its Subcontractors. Prior to the Final Completion Date or as soon as practicable after the termination of this Agreement by Owner in accordance with and subject to Article 15, Contractor shall (a) remove all Contractor Equipment from the Project Site, (b) tear down and remove all temporary structures on the Project Site built by Contractor or its Subcontractors and restore such areas to a condition consistent with that existing immediately prior to Contractor's commencement of performance of the Work on the Project Site (or as otherwise specified in the Scope of Work) and as required by Applicable Permits, (c) reclaim lay down areas and other construction areas as required by the Site Requirements and any Applicable Permits, and (d) remove and dispose of all waste and rubbish generated by Contractor and its Subcontractors from and around the Project Site. Contractor shall provide to Owner all legally required waste disposal manifests in accordance with Applicable Laws. Should Contractor fail at any time to keep the Project Site free from waste materials and rubbish, Owner may notify Contractor of its failure and may have the Project Site cleaned at Contractor's expense.

2.12 **Contractor Permits**. Contractor shall timely obtain and maintain all Contractor Permits set forth in Exhibit W. Contractor shall deliver for Owner's review and comment copies of all applications and other information to be submitted for such Contractor Permit not less than ten (10) days prior to the submittal thereof to the applicable Governmental Authority and will incorporate such revisions thereto as reasonably recommended by Owner. In addition, Contractor shall provide all assistance reasonably requested by Owner in connection with Owner's efforts to

obtain and maintain the Owner Permits, including witness testimony, depositions, preparation of exhibits, technical calculations, and attending meetings. All Applicable Permits (other than any building Permit) designated as either "To be issued in the name of Owner" or "To be issued in the name of Owner and Contractor" shall be issued in the name of Owner or Owner and Contractor, as required, to the best of Contractor's ability unless otherwise required by Applicable Laws or such Applicable Permit. If any Contractor Permit (or application therefor) is in the name of Owner or otherwise requires action by Owner, Owner shall, upon the request of Contractor, timely sign such application or take such action as reasonably appropriate. Owner's exercise of any right to review an application shall not, under any circumstances, be considered an approval of the necessity, effect or contents of such application or related Permit or be allowed to unreasonably delay the submittal of such application. Contractor shall deliver to Owner true and complete copies of all Permits obtained by Contractor upon its receipt thereof. If any Permit is required for the Project or to perform the Work that is not identified as a Contractor Permit or Owner Permit in this Agreement, Contractor or Owner, as applicable, shall promptly, after a Party becomes aware of the need for such Permit, notify the other Party that such Permit is required. If such Permit is of a nature typically obtained by contractors in similar projects, Contractor shall, at its sole cost and expense, be obligated to obtain and maintain such Permit. Otherwise, Owner shall obtain and maintain such Permit.

2.13 **Environmental Compliance.** Contractor shall comply with all environmental assessment requirements applicable to Contractor and the Work in accordance with Applicable Laws.

2.14 **Hazardous Materials.**

2.14.1 **Contractor Duties.** Contractor shall, and shall cause its Subcontractors to, comply with all Applicable Laws relating to Hazardous Material. Without limiting the generality of the foregoing: (a) Contractor shall have, and shall cause its Subcontractors to comply with, a Release prevention and response plan to contain and clean up any Release of Hazardous Material by Contractor or its Personnel (such plan to be made available to Owner upon Owner's request); (b) Contractor shall, and shall cause its Subcontractors to, apply for, obtain, comply with, maintain and renew all Applicable Permits required by Applicable Laws regarding Hazardous Material that are necessary, customary or advisable for the performance of the Work and in accordance with Prudent Industry Practices; (c) Contractor shall, and shall cause its Subcontractors to, have an independent Environmental Protection Agency identification number and any identification number required by any other Governmental Authority for disposal of Hazardous Material generated by Contractor, if and as required under Applicable Laws; (d) Contractor shall, and shall cause its Subcontractors to, fulfill its/their obligations under this Agreement in a manner designed to prevent any pollution of the environment or any Release of Hazardous Material by any of them that would require remediation pursuant to any Applicable Laws; (e) neither Contractor nor its Subcontractors shall cause the Release or disposal of Hazardous Material at the Project Site (*provided that*, with respect to Pre-Existing Hazardous Materials, Contractor's obligation shall be to not Release the same to the extent that it has, or should have reasonably had, knowledge of same at the Project Site), bring Hazardous Material to the Project Site, or transport Hazardous Material from the Project Site, except in accordance with Applicable Laws; (f) Contractor shall be responsible for the management and proper disposal of all Hazardous Material Released, brought onto or

generated at the Project Site by it or its Subcontractors, if any; (g) Contractor shall cause any Hazardous Material that are Released, brought onto or generated at the Project Site by it or its Subcontractors, if any, (i) to be transported only by carriers (A) maintaining valid Hazardous Material transportation Permits (as required) and (B) operating in compliance with such Permits and Applicable Laws regarding the transportation of Hazardous Material and only pursuant to manifest and shipping documents identifying only Contractor as the generator of waste or Person who arranged for waste disposal, and (ii) to be treated and disposed of only at treatment, storage and disposal facilities maintaining valid Permits (as required) regarding Hazardous Material; (h) Contractor shall submit to Owner a list of all Hazardous Material to be brought onto or generated at the Project Site or at any construction area related to the Work prior to bringing or generating such Hazardous Materials and shall maintain an accurate record and current inventory thereof, and the record shall identify quantities, location of storage, use and final disposition of such Hazardous Materials; and (i) Contractor shall keep Owner informed as to the status of all Hazardous Materials brought onto or generated at the Project Site by Contractor or its Subcontractors, and disposal of all such Hazardous Material from the Project Site. Notwithstanding the foregoing, except as set forth in Section 2.14.2, Contractor will have no liability or responsibility for any Release, clean-up, remediation, transportation, or disposal of any Pre-Existing Hazardous Material, and as between Owner and Contractor, Owner will retain responsibility for Pre-Existing Hazardous Material.

#### 2.14.2 **Remedial Actions.**

(a) If Contractor or any of its Subcontractors Releases any Hazardous Material on, at, or from the Project Site, or becomes aware of any Person who has stored, Released or disposed of Hazardous Material on, at, or from the Project Site during the Work, Contractor shall immediately so notify Owner in writing. If Contractor's Work is involved in the area where such Release occurred, Contractor shall immediately stop any Work affecting the area.

(b) Contractor shall, at its sole cost and expense, diligently proceed to take all necessary or desirable remedial action to clean up and remediate fully and dispose of, in accordance with Applicable Laws, any contamination, whether on or off the Project Site, caused by (i) any Release by Contractor or any of its Subcontractors of any Pre-Existing Hazardous Material where Contractor knew or reasonably should have known that the same is present at the Project Site, (ii) any exacerbation of known Pre-Existing Hazardous Materials by Contractor or any of its Subcontractors, if such Pre-Existing Hazardous Material was disclosed in writing to Contractor prior to the Effective Date or where Contractor actually knew or should have known that the same is present at the Project Site prior to the exacerbation, and (iii) any Hazardous Material that was brought onto or generated at the Project Site by Contractor or any of its Subcontractors.

(c) If Contractor discovers any Pre-Existing Hazardous Material, the location of which was not known to Contractor prior to the Effective Date that has been stored, Released or disposed of at the Project Site, Contractor shall immediately notify Owner in writing. If Contractor's Work involves the area where such a discovery was made, Contractor shall immediately stop any Work affecting the area and Owner shall

determine a reasonable course of action. Contractor will not thereafter resume performance of the Work in the affected area except with the prior written permission of Owner. If and when Contractor is instructed to resume performance of the Work (after disposal or other decision by Owner regarding treatment of such Pre-Existing Hazardous Material), Contractor may be entitled to a Change Order as set forth in Section 10.5.1(d). Contractor shall not, and shall cause its Subcontractors not to take any action that may cause or exacerbate a Release of any known or discovered Pre-Existing Hazardous Material.

(d) In addition to Contractor's obligations as set forth above, if Owner desires Contractor to perform all or part of any clean up or remediation that may become necessary as a result of the discovery of any Pre-Existing Hazardous Material as described in Section 2.14.2(c), the clean-up and remediation of which is not the responsibility of Contractor as set forth in Section 2.14.2(b), Owner shall request a Change Order pursuant to Section 10.2. Furthermore, if so requested by Owner, Contractor shall cooperate with and assist Owner in making the Project Site available for taking necessary remedial steps to clean-up and remediate any such Pre-Existing Hazardous Material at Owner's expense as determined in accordance with Article 10; *provided*, that Contractor shall not be required to participate in such clean-up and remediation of a Pre-Existing Hazardous Material if such Release is not Contractor's responsibility as set forth in Section 2.14.2(b) above.

2.14.3 **Restriction on Transport of Hazardous Materials**. In no event shall either Contractor or Owner transport or dispose of the other Party's Hazardous Materials.

## 2.15 **Safety and Emergencies**.

2.15.1 **Safety**. Contractor shall initiate and maintain health and safety precautions and programs designed to prevent injury to all Persons (including members of the public and the employees, agents, contractors, consultants and representatives of Owner, Contractor and its Subcontractors, and other contractors and subcontractors) or damage to property on or adjacent to the Project Site in accordance with the Standard of Care, Applicable Laws and Prudent Industry Practices, and shall incorporate all such health and safety precautions and programs in a written, site specific health and safety plan ("**Contractor Safety Plan**"). Contractor shall submit the Contractor Safety Plan to Owner no later than thirty (30) days after the Notice to Proceed for review and approval, not to be unreasonably withheld by Owner. Owner may ask Contractor to amend the Contractor Safety Plan at Owner's discretion, so long as requested amendments are in accordance with the Standard of Care, Applicable Laws and Prudent Industry Practices. Owner's approval of the Contractor Safety Plan shall not relinquish Owner's right to request amendments throughout the Project. Contractor shall also provide additional safety information at Owner's request. Information may include job safety assessments, lift plans, and method statements. Contractor shall implement the requirements of the Contractor Safety Plan, including for the protection of Personnel and the public. Contractor shall eliminate or abate all reasonably foreseeable safety hazards created by or otherwise resulting from performance of the Work. Contractor shall, and shall cause all of its Personnel to, follow the policies and safety plans set forth in Contractor's drug and alcohol policy and the Contractor Safety Plan and to follow all other reasonable safety measures and procedures implemented by Owner at the Project Site.

2.15.2 **Emergencies.** In the event of any emergency endangering Persons or property at the Project Site during performance of the Work, Contractor shall immediately notify Owner and take such action as may be reasonable and necessary to prevent, avoid or mitigate injury, damage or loss and shall, as soon as practicable, report any such incidents, including Contractor's response thereto, to Owner in accordance with the Contractor Safety Plan. If Contractor fails to take reasonable precautions for the safety of the public or the protection of the Work or of structures or property on or adjacent to the Project Site, Owner may, but shall have no obligation to, take such action as is reasonably necessary under the circumstances which may include stopping all Work at the Site. Owner's election to take action, or not to take action, shall in no way limit Contractor's obligations or liability under this Agreement. Owner shall notify Contractor of any actions taken by Owner. To the extent Contractor or its Personnel are legally responsible for causing the emergency, Contractor shall reimburse Owner for any third-party costs actually incurred by Owner in taking such actions in the event of an emergency. Contractor shall assist Owner in any safety or accident investigation and promptly provide information as requested by Owner related thereto. So long as the emergency was not caused by the acts or omissions of Contractor or its Subcontractors, Contractor shall be entitled to a Change Order pursuant to Article 10 of this Agreement for actions taken pursuant to this Section 2.15.2.

2.15.3 **Fire Prevention.** Contractor shall be responsible for providing adequate fire prevention and protection at the Project Site during the performance of the Work and shall take all reasonable precautions to minimize the risk of fire at the Project Site during the performance of the Work. Contractor shall promptly collect and remove its combustible debris and waste material from the Project Site and shall not permit such debris and material to accumulate. Contractor shall provide fire prevention instruction to its Personnel and appropriate fire-fighting and fire protection equipment at the Project Site in a manner consistent with the Standard of Care and the Contractor Safety Plan. In the event of a fire at the Project Site, Contractor's or any of its Subcontractors' Personnel shall immediately take steps to ensure the safety of themselves and others and contact the local fire department to report such fire and determine the appropriate course of action.

2.16 **Site Correspondence.** From and after the Effective Date, Contractor shall promptly advise Owner of any material notices, demands, claims, requests for information or other communications received from any Government Authority or any other third party relating to or in connection with (a) any action or omission by Contractor or any Subcontractors that would constitute a violation of Site Requirements, Applicable Permits, or Applicable Laws; or (b) any circumstance that could reasonably be expected to have a Material Adverse Effect on the ability of Contractor to perform any of its obligations under this Agreement.

2.17 **Security.** During the performance of the Work, Contractor shall provide, and be responsible for Project Site security as specified in Exhibit A to prevent vandalism, theft, damage and danger to the Project, the Project Site, and Personnel (including fencing, alarm systems, security guarding services and the like) and shall take reasonable precautions, consistent with the Standard of Care and the Scope of Work, to provide for the security and protection through the Substantial Completion Date of: (a) the Work, and (b) any property, materials, supplies or equipment owned or leased by Contractor or any Subcontractor and located either on the Project

Site or stored or warehoused off the Project Site. Contractor shall use at least the same care as it does with its own property, but in no event less than reasonable care, to protect any of Owner's property at any time such property is in its possession or under its control while performing the Work and shall be responsible for damage to such property resulting from its failure to take such level of care. Contractor shall coordinate with Owner's Other Contractors to allow Owner's Other Contractors to perform their obligations on the Project Site.

2.18 **Operating Manuals and Job Books.** As a condition to Substantial Completion, Contractor shall deliver to Owner two (2) copies of the semi-final draft of the Job Books. A semi-final draft of the Job Books shall mean a draft of the Job Books that is as complete as the then-available information will allow, and contains sufficient information to permit the operator training, operation, repair and modification of the Project by Persons generally familiar with machinery and equipment similar to the Project. Contractor shall provide three (3) original hard copy sets and two (2) electronic copies (in a form reasonably acceptable to Owner in its reasonable discretion) of the final and complete Job Books to Owner on or prior to the date set forth in the Milestone Schedule. If any of the information in the Job Books was produced by computer-aided design and is available to be provided in electronic form, Contractor shall provide, or cause its Subcontractors to provide, Owner with an electronic copy of such information.

2.19 **Ownership of Electric Energy and Attributes; Tax Credit.** Contractor acknowledges that Owner intends to claim one or more Tax Credits with respect to the Project, and Contractor shall provide to Owner any information, documentation or certificates required to file Owner's claim for the Tax Credit, including in accordance with Section 2.26. Contractor acknowledges that Owner shall at all times be the owner of all electric energy, ancillary services, products, attributes, Credits and all other equipment for which title has passed to Owner pursuant to Article 6. If any Credits or other items are initially credited or paid to Contractor, Contractor will cause such Credits and other items to be assigned or transferred to Owner, or at Owner's direction, any Affiliate of Owner or any Financial Party, without delay.

2.20 **Training; Technical Advice.** Prior to the Substantial Completion Date, and in accordance with the Scope of Work, Contractor shall provide Personnel at the Project Site for a minimum six (6) sessions, each session equal to an eight (8) hour period, of on-Site operation and maintenance training (to be scheduled by mutual agreement) to enable a competent operator of the Project to properly operate that portion of the Project included in the Scope of Work in compliance with the Operating Manuals and any technical bulletins delivered to Owner by Contractor. Such training provided by Contractor shall include classroom training and field training on topics including safety training with respect to the equipment furnished by Contractor and reasonable assistance to Owner in providing required safety training to first responders and applicable local authorities and training on how to use any equipment included in the Work. Contractor shall provide training to local fire and first responders in accordance with the Scope of Work. Contractor shall also provide Owner with electronic and hard-copies of manuals, drawings and other educational training materials in electronic format necessary or desirable for the adequate training of operations and maintenance Personnel. Contractor shall make every effort to use Owner Personnel during the Project start-up and initial operation, *provided* that Owner shall not be obligated to supply Personnel for the construction of the Project. Contractor shall be responsible for coordinating start-up and initial operation with Owner. All training programs conducted shall be recorded and made available to Owner in electronic format.



2.21 **Commissioning Plan.** By the date that is no later than forty-five (45) days after Notice to Proceed, Contractor shall provide its detailed commissioning plan for the Work for review and mutual agreement by Owner (the “**Commissioning Plan**”), which Commissioning Plan shall specify the commissioning activities to be performed, the date on which they are expected to be performed, and any supporting activities required from Owner or any Other Owner Contractors. Within ten (10) days after receipt of the Commissioning Plan for review, Owner will have the right to notify Contractor in writing of any reasonable comments, including any revisions required in order to coordinate activities with any Other Owner Contractors. Contractor will promptly incorporate Owner’s comments and resubmit the Commissioning Plan for Owner’s review and approval in accordance with this **Section 2.21** until Owner no longer has comments. Contractor will provide copies of the final version of the Commissioning Plan to Owner in digital format. Owner’s approval of the Commissioning Plan will be evidenced in writing to Contractor. Owner’s review and mutual agreement of the Commissioning Plan shall not in any way relieve Contractor of any of its obligations under this Agreement.

2.22 **Restricted Supply Chain.**

2.22.1 Section 889 of the National Defense Authorization Act for Fiscal Year 2019 imposes restrictions on the procurement and use of certain telecommunications equipment, software, and services from manufacturers owned (including through a minority stake) or controlled by the Government of the People’s Republic of China. Contractor shall not procure, incorporate into the Work or the Project Site, or utilize any spare part, component, programmable or routable equipment, software, or unmanned aerial systems often referred to as “drones” that are manufactured or sold by any Restricted Supplier (“**Restricted Equipment**”). In the event either Party discovers that any Restricted Equipment has been obtained for the Work or the Project Site, such Party shall provide written notice thereof to the other Party no later than five (5) Business Days following the discovery thereof. Upon receipt of such notice, the Parties shall meet and confer to discuss corrective measures to be in full compliance with Applicable Law. Contractor shall cause its Subcontractors to refrain from procuring Restricted Equipment in connection with the Work or the Project Site.

2.22.2 In the event that any supplied materials or equipment included in the Work or the Project Site, including any materials or equipment supplied by Subcontractors, (i) has programmable or routable capabilities (either for temporary or permanent use with direct or indirect connection to the North America Bulk Electric System, or (ii) is from a Chinese or Russian company, regardless of whether they are a Restricted Supplier, or (iii) may be subject to the Bulk Power Executive Order or any regulations promulgated thereunder, Contractor shall provide Owner a detailed bill of material showing country of origin and manufacturer for such materials and equipment. Contractor shall cooperate with Owner in the event of any issue arising in connection with such Restricted Equipment, which obligation shall survive termination of this Agreement.

2.23 **Supply Chain Map.** Upon any request by Owner, Contractor shall promptly, and in any event within thirty (30) Days, provide Owner with a supply-chain map for all equipment, materials and components thereof that is (a) procured by Contractor or any Subcontractor or Supplier and (b) furnished for or incorporated into the Work or the Project Site or otherwise utilized for Project.

Owner or its designee (including any Governmental Authority or third party selected by a Governmental Authority) shall be entitled to review Contractor's books and records to confirm compliance with this Section, and Contractor shall cooperate with any such review and inspection.

2.24 **Supply Chain Audits.** Owner shall have the right, at its cost and expense, to cause a third-party audit of Contractor's compliance with respect to supply chain mapping, quality, management, social responsibility and supply chain security as defined under ISO 9001, and Contractor shall provide Owner and its third-party auditors with reasonable access to all necessary facilities, personnel, documents and other information required for such audit to be performed.

2.25 **Supplier Code of Conduct.** Contractor shall comply with, and shall cause its Subcontractors and Suppliers to comply with, the Supplier Code of Conduct attached hereto as Exhibit DD.

2.26 **Inflation Reduction Act.**

2.26.1 Contractor shall ensure that any Laborers and Mechanics that perform any portion of the Work that constitutes Construction or Repair or Alteration are paid wages at rates not less than the prevailing rates for work of a similar character in the locality where such Construction or Repair or Alteration is performed, as most recently determined by the Secretary of Labor at the time of the relevant Work, in accordance with subchapter IV of chapter 31 of title 40, United States Code.

2.26.2 Except as provided in this Section 2.26.2, Contractor shall ensure that the percentage of the total Labor hours incurred in connection with any portion of the Work that constitutes Construction or Repair or Alteration and that is performed by Qualified Apprentices is at least equal to that percentage set forth in that subsection of Code Section 45(b)(8)(A)(ii) applicable to the year in which the Project begins construction for purposes of Code Section 48. Contractor shall employ, and shall ensure that any Tax Subcontractor that employs four or more individuals in connection with such Construction employs, one or more Qualified Apprentices. Contractor shall, and shall cause all Tax Subcontractors to retain books and records sufficient to demonstrate compliance with the foregoing. In the event that Contractor or any Tax Subcontractor is not able to provide such written documentation, Contractor shall be deemed to have satisfied the responsibility set forth in this Section 2.26.2 to the extent that Contractor provides written documentation demonstrating to Owner's reasonable satisfaction (i) that Contractor or any such Tax Subcontractor requested Qualified Apprentices from a Registered Apprenticeship Program, and (ii) either (I) such request was denied for reasons other than the failure of Contractor or such Tax Subcontractor to comply with the established standards and requirements of such Registered Apprenticeship Program, or (II) such Registered Apprenticeship Program failed to respond to such request within five (5) Business Days.

2.26.3 Contractor acknowledges that the requirements of Section 2.26.1 and Section 2.26.2 are based on Applicable Law as of the date of this Agreement and are essential to the qualification of the Project for the Investment Tax Credit. Should new or different requirements be promulgated un PWA Guidance, then such PWA Guidance requirements will be reflected in a Change Order.

2.26.4 Contractor shall, and shall cause all Tax Subcontractors to retain for at least 10 years books and records for the purpose of demonstrating compliance with Contractor's responsibilities set forth in Sections 2.26.1 and 2.26.2, and that such books and records shall be maintained in accordance with Code Section 6001. Notwithstanding anything to the contrary, Contractor shall retain through the statute of limitations period applicable to the Investment Tax Credit, plus ninety (90) days, (A) a copy of all contracts by and between Contractor and any Tax Subcontractor, including, for avoidance of doubt, in connection with work performed by Contractor or any Tax Subcontractor engaged by Contractor pursuant to Contractor's Warranty, (B) any documentation provided to Contractor by a Tax Subcontractor for the purpose of demonstrating compliance by such Tax Subcontractor with the responsibilities set forth in Sections 2.26.1 and 2.26.2, and (C) any additional books and records necessary to meet the requirements of Code Section 6001 for the purpose of demonstrating compliance by Contractor and any Tax Subcontractors with the representations set forth in Sections 2.26.1 and 2.26.2.

2.26.5 Contractor shall ensure that the Project meets the Domestic Content Requirements.

2.26.6 Contractor shall cooperate with Owner in the provision or filing with the IRS of information, registration or other requirements associated with the satisfaction of the Prevailing Wage and Apprenticeship Requirements, Domestic Content Requirements, and section 6417 or 6418 of the Code.

2.26.7 Contractor shall provide an officer's certification in form and substance materially identical to that set forth in Exhibit FF ("**PWA Requirements Certificate**") together with the Substantial Completion Certificate. Contractor shall include with the PWA Requirements Certificate (A) a copy of all relevant provisions of any Subcontract that requires a Tax Subcontractor to comply with the Prevailing Wage and Apprenticeship Requirements and (B) the certification of any Tax Subcontractor that such Tax Subcontractor has complied with the Prevailing Wage and Apprenticeship Requirements, in each case in form and substance materially similar to the PWA Requirements Certificate.

2.26.8 In the event any additional Work that constitutes Construction or Repair or Alteration occurs after Substantial Completion or through the date on which Final Completion occurs, Contractor shall provide an amended PWA Requirements Certificate that also reflects such Work.

2.26.9 No later than the last day of each calendar quarter following NTP, Contractor shall provide written documentation demonstrating compliance with Section 2.26.1 and Section 2.26.2 in the forms set forth in Exhibits HH and II.

2.26.10 Contractor shall cooperate with Owner's reasonable requests for information and documentation concerning compliance by Contractor and all Tax Subcontractors with the Prevailing Wage and Apprenticeship Requirements and Domestic Content Requirements, which cooperation shall extend to reasonable attempts to obtain such cooperation from any Tax Subcontractors.

2.26.11 Contractor shall provide commercially reasonable support and cooperate with Owner in connection with any tax proceeding regarding the Project's compliance with Code Sections 45, 45Y, 48, and 48E, as applicable (each, a "Tax Contest"). In connection with any such tax proceeding concerning the Prevailing Wage and Apprenticeship Requirements or the Domestic Content Bonus Requirements, Owner shall timely notify Contractor of such audit or examination. Owner's failure to timely notify Contractor of Tax Contest or any proceeding with respect to such Tax Contest shall not relieve Contractor of its obligations hereunder. Owner shall keep Contractor reasonably informed of the proceedings of any Tax Contest, shall provide Contractor with any written submissions in connection therewith that are relevant to matters for which Contractor may have an indemnification obligation under this Agreement and consider in good faith comments that Contractor provides prior to the due date for any such submission prior to submission, and (provided that Contractor has acknowledged in writing its obligation to indemnify Owner) shall not agree to a settlement of such Tax Contest without Contractor's written consent, not to be unreasonably withheld, conditioned, or delayed.

2.26.12 This Section 2.26 shall survive the expiration or earlier termination of this Agreement.

### **ARTICLE 3 COMPLETION OF THE WORK**

3.1 **Time is of the Essence; Commencement of Work.** Time limits stated in this Agreement are of the essence. Upon receiving the Notice to Proceed from Owner, Contractor shall diligently commence performance of the Work.

3.2 **Construction Schedule; Monthly Progress Reports; Acceleration Plan.**

3.2.1 **Construction Schedule.** The Construction Schedule, as set forth in Exhibit C, shall (i) commence upon the issuance of Notice to Proceed and conclude at Final Completion and shall include no open-ended activities; (ii) shall include all engineering, procurement and construction activities included in the Work; (iii) shall not be submitted with negative float; (iii) shall be broken down into construction activities that do not exceed ten (10) days each; and (iv) shall be provided in Primavera P6 compatible format.

3.2.2 **Monthly Progress Reports.** Contractor shall perform the Work in accordance with the Construction Schedule. Contractor shall provide Owner with progress reports as Owner may reasonably request, but no less frequently than once per month on or before the fifth (5th) day of each month for Work during the previous month, and no more frequently than once per month prior to the issuance of Notice to Proceed (each, a "**Monthly Progress Report**"). With each Monthly Progress Report Contractor shall deliver an updated Construction Schedule to the extent adjustments to such schedule are required and a document showing a comparison of such updated Construction Schedule to the baseline Construction Schedule, it being acknowledged that while Contractor may adjust the sequence or schedule of activities within the Construction Schedule, no change

shall be made to any Milestones or to the Milestone Schedule without a Change Order, and the duration of activities shall remain as set forth in the Construction Schedule unless otherwise approved by Owner. The Monthly Progress Reports shall be presented electronically and shall address all material elements of the Work. After Mobilization, Contractor shall conduct monthly meetings with Owner on Project Site at Contractor's trailer. Contractor shall conduct weekly Project meetings at mutually agreeable locations or by telephone between representatives of Owner and Contractor to review the status of the Work and shall, if any adjustments to the Construction Schedule are required, provide in advance of such meeting an updated Construction Schedule along with a written explanation of any logic or duration changes relative to the prior Construction Schedule. Contractor shall promptly notify Owner in writing at any time that Contractor has reason to believe that there will be a material deviation in the Construction Schedule and shall set forth in such notice any corrective action planned by Contractor to remedy same. Delivery of such notice shall not relieve Contractor of its obligations under this Article 3. In addition to the foregoing, Contractor shall provide: (a) by the end of each Business Day during the performance of the Work a plan of Work and activities scheduled to be performed during the following Business Day; and (b) by the first Business Day of each week during the performance of the Work a weekly plan of Work and activities scheduled to be performed during such week.

3.2.3 **Acceleration of Work**. If, at any time or from time to time, Contractor fails to achieve a Milestone on the Construction Schedule, then upon written request of Owner, Contractor shall promptly, but in any event within ten (10) Business Days of such Owner request, submit for Owner's review and approval a written recovery plan to complete all necessary Work (including acceleration of the Work by means of overtime, expedited shipments, additional crews, additional shifts, additional equipment, and/or resequencing of the Work) to the extent reasonably practicable to achieve the remaining dates or Milestones in the Construction Schedule. Owner shall promptly submit suggestions to such written recovery plan. To the extent reasonable and feasible, Contractor shall incorporate such suggestions into such recovery plan or shall provide reasonable explanation for why such suggestions were not incorporated, which reasonable explanations may include alternative Work acceleration proposals. Contractor shall diligently prosecute the Work in accordance with such recovery plan at Contractor's sole cost and expense. Neither review or approval by Owner of such recovery plan nor Contractor's prosecution of the Work in compliance with such recovery plan shall (a) be deemed in any way to have relieved Contractor of its obligations under this Agreement relating to the failure to timely achieve a date or milestone on the Construction Schedule or the Guaranteed Substantial Completion Date or (b) be the basis for a Change Order or any other compensation or increase in the Contract Price. Neither submittal of such recovery plan nor prosecution of the Work by Contractor in accordance therewith shall be deemed to waive Contractor's right to a Change Order due to any delay caused by a Force Majeure Event or an Owner-Caused Delay or other event provided for under Section 10.5.

### 3.3 **Mechanical Completion; Performance Test**.

3.3.1 "**Mechanical Completion**" shall be achieved when all of the following have been satisfied in accordance with this agreement:

(a) all requirements for the installation of the Owner-Supplied Equipment have been completed;

(b) the Work is sufficiently complete so as to permit the commencement of Performance Testing and the safe operation of the Work; and

(c) a Punch List has been prepared and agreed upon between the Parties in accordance with Section 3.5.

3.3.2 **Mechanical Completion Certificate**. Contractor shall achieve Mechanical Completion by the Guaranteed Mechanical Completion Date. When Contractor believes it has satisfied all of the requirements for Mechanical Completion, Contractor shall submit to Owner the Mechanical Completion Certificate in the form of Exhibit J, along with all documentation necessary for Owner to determine if Mechanical Completion has been achieved. Within ten (10) Business Days following the date on which the Mechanical Completion Certificate is received by Owner, Owner shall review and inspect all Work and shall either (a) countersign and deliver to Contractor such Mechanical Completion Certificate or (b) if reasonable cause exists for doing so, notify Contractor that Mechanical Completion has not been achieved. Any notice issued pursuant to clause (b) above shall state in reasonable detail Owner's reasons for rejecting the Mechanical Completion Certificate. If Mechanical Completion has not been achieved and Owner delivers the notice under clause (b) above, Contractor shall promptly perform corrective measures to remove such failures, Defects, deficiencies or discrepancies as so indicated by Owner, including the performance of additional Work to achieve Mechanical Completion. Upon completing such corrective measures to achieve such Mechanical Completion, Contractor shall issue a new Mechanical Completion Certificate for Owner's consideration. Such procedure shall be repeated as necessary until Mechanical Completion is achieved. Any delay in Contractor's or a Subcontractor's performance of the Work due to the failure of Owner to respond within the applicable review period to the Mechanical Completion Certificate provided by Contractor shall be treated as an Owner-Caused Delay, and if Owner fails to respond within fifteen (15) days following Owner's receipt of the Mechanical Certificate, the Mechanical Completion Certificate shall be deemed accepted by Owner; *provided*, that such Owner-Caused Delay or deemed acceptance shall not relieve Contractor from any of its obligations under this Agreement, including Contractor's obligations to actually achieve Mechanical Completion. For all purposes of this Agreement, the date upon which Mechanical Completion is achieved by Contractor shall be the date that Mechanical Completion Certificate is accepted or deemed accepted by Owner. Any disagreement about the achievement of Mechanical Completion is subject to the dispute resolution process in Article 17.

3.3.3 **Performance Test**. No later than fourteen (14) days before Substantial Completion, Contractor shall coordinate with Owner the Other Owner Contractors the commencement of the Performance Tests. Contractor shall thereafter conduct and complete all Performance Tests no later than two (2) days before Substantial Completion. Contractor shall notify and provide Owner a copy of Contractor's Performance Test results as soon as they are available, but not later than two (2) Business Days after completion of the Performance Test. In the event that the Performance Test demonstrates that the Work

fails to comply with the requirements set forth in this Agreement, Contractor shall promptly replace, repair, adjust or otherwise correct the Work so as to be able to meet the requirements of this Agreement and shall do so in a manner that minimizes disruption to the operation of the Project to the greatest extent practicable. When Contractor believes the applicable deficiencies to have been cured, Contractor shall provide notice to Owner and re-perform the applicable Performance Test(s) to verify compliance of the Work with the requirements of this Agreement. Contractor shall provide Owner at least five (5) days' notice prior to the commencement of re-testing and permit Owner and/or its representative(s) to attend and witness the testing. Contractor shall notify and provide Owner a copy of Contractor's re-test results as soon as they are available, but no later than two (2) Business Days after completion of the re-test. This procedure shall be repeated until the Work has been determined to meet the Standard of Care and the requirements of this Agreement. Contractor shall pay Owner for any damages set forth in Exhibit [ ] related to the Performance Tests.

### 3.4 **Substantial Completion.**

3.4.1 "**Substantial Completion**" shall be achieved when all of the following have been satisfied in accordance with this Agreement:

- (a) Mechanical Completion has been achieved with respect to such system and all Work necessary for the safe use and operation of the system has been completed;
- (b) Owner has received and review a copy of all Performance Tests, and has demonstrated that the Work complies with this Agreement;
- (c) the Job Books have been submitted and accepted by Owner;
- (d) Owner's staff or contracted operations and maintenance staff has received the necessary documentation so as to be ready to assume operational control of the Project with the required draft Contractor Deliverables and training has been completed in accordance with Section 2.20;
- (e) all Contractor Permits have been successfully closed in accordance with Applicable Laws to the extent necessary to permit Owner to operate the Project, and as requested by Owner and in accordance with Applicable Law, Contractor shall have transferred or caused to be transferred to Owner or, if necessary, reissued in Owner's name, any unclosed Contractor Permits;
- (f) Contractor has been provided a certificate from a Licensed Professional Engineer, acceptable to Owner in its reasonable discretion, certifying that the project is complete in all material respects (other than Punch List Items that will not materially and adversely affect the safe operation, performance or maintenance of the Project)
- (g) life safety training has been completed for the Project with local fire and first responders;

(h) any Recommended Spare Parts used by Contractor shall have been replaced in accordance with Section 2.6; and

(i) an updated Punch List has been prepared and agreed upon between the Parties in accordance with Section 3.5.2.

**3.4.2 Substantial Completion Certificate.** Contractor shall achieve Substantial Completion by the Guaranteed Substantial Completion Date. Upon achieving Substantial Completion, Contractor shall deliver to Owner a Substantial Completion Certificate in the form of Exhibit K, along with all documentation necessary for Owner to determine if Substantial Completion has been achieved. Within ten (10) Business Days following the date on which the Substantial Completion Certificate is received by Owner, Owner shall review and inspect all Work and shall either (a) countersign and deliver to Contractor such Substantial Completion Certificate or (b) if reasonable cause exists for doing so, notify Contractor that Substantial Completion has not been achieved. Any notice issued pursuant to clause (b) above shall state in reasonable detail Owner's reasons for rejecting the Substantial Completion Certificate. If Substantial Completion has not been achieved and Owner delivers the notice under clause (b) above, Contractor shall promptly perform corrective measures to remove such failures, Defects, deficiencies or discrepancies as so indicated by Owner, including the performance of additional Work to achieve Substantial Completion. Upon completing such corrective measures to achieve such Substantial Completion, Contractor shall issue a new Substantial Completion Certificate for Owner's consideration. Such procedure shall be repeated as necessary until Substantial Completion is achieved. Any delay in Contractor's or a Subcontractor's performance of the Work due to the failure of Owner to respond within the applicable review period to the Substantial Completion Certificate provided by Contractor shall be treated as an Owner-Caused Delay, and if Owner fails to respond within fifteen (15) days of Owner's receipt of the Substantial Completion Certificate, the Substantial Completion Certificate shall be deemed accepted by Owner; *provided*, that such Owner-Caused Delay or deemed acceptance shall not relieve Contractor from any of its obligations under this Agreement, including Contractor's obligations to actually achieve Substantial Completion. For all purposes of this Agreement, the date upon which Substantial Completion is achieved by Contractor shall be the date that Substantial Completion Certificate is accepted or deemed accepted by Owner. Any disagreement about the achievement of Substantial Completion is subject to the dispute resolution process in Article 17.

### 3.5 **Punch List.**

**3.5.1 Development of Punch List.** No later than fifteen (15) days prior to the date on which Contractor expects to achieve Mechanical Completion, the Parties shall inspect the Work, and on the basis thereof Contractor shall prepare a list of the outstanding items of Work that remain to be completed, and provide such list to Owner for review; *provided*, that such items of Work on such list shall only be items that (a) are minor in nature, (b) are not related to the functionality, utility, operation or restoration Work, (c) are not related to the compliance of any such Work with any Applicable Laws or Applicable Permits, and (d) do not include any items that could reasonably be expected to prevent the safe operation of the Project in accordance with the Standard of Care and the Operating



Manuals. Such list shall also state the proposed time limits within which Contractor will complete each such item of remaining Work and dollar values assigned to each item. Owner will review the list and notify Contractor of any proposed revisions thereto within five (5) Business Days. Owner's Project Manager and Contractor's Project Manager will meet and consult in good faith to agree upon the definitive version of such list (including the approved dollar values and time limits within which Contractor will perform such remaining Work items) (such version, as agreed by Owner, the "**Punch List**").

3.5.2 **Updated Punch List.** No later than fifteen (15) days prior to the date on which Contractor expects to achieve Substantial Completion, the Parties shall inspect the Work, and on the basis thereof Contractor shall update the Punch List prepared in accordance with Section 3.5.1 and provide such updated Punch List to Owner for review. Such updated Punch List shall conform to the same requirements set forth in Section 3.5.1. Owner will review the updated Punch List and notify Contractor of any proposed revisions thereto within five (5) Business Days. Owner's Project Manager and Contractor's Project Manager will meet and consult in good faith to agree upon the definitive version of such updated Punch List (including the approved dollar values and time limits within which Contractor will perform such remaining Work items).

3.5.3 **Completion of Punch List Items.** Once a Punch List is agreed upon, Contractor will promptly begin performing the items of Work thereon. Contractor's Work on the Punch List shall be performed in a manner that does not unreasonably interfere with the commercial operation of the Project in accordance with the Scope of Work and the Standard of Care. Owner will continue to provide Contractor with reasonable access to the Project Site so that Contractor may perform the Work on the Punch List. Any Work that requires a site outage shall be performed during a mutually agreeable time so as to minimize interruption to the operation of the Project. Notwithstanding any provision to the contrary in this Agreement, Owner's completion of any Work on a Punch List shall not invalidate or affect Contractor's Warranty.

### 3.6 **Final Completion.**

3.6.1 "**Final Completion**" shall be achieved when all of the following have been satisfied in accordance with Standard of Care and this Agreement:

- (a) Substantial Completion has been achieved;
- (b) all documents as required by the Scope of Work (including As-Built Drawings) or the Milestone Schedule, including Job Books, required to be delivered to Owner by Contractor have been delivered to Owner; and
- (c) all Punch List items have been completed and all Contractor Equipment and Personnel are off the Project Site.

3.6.2 **Final Completion Certificate.** Upon achieving Final Completion, Contractor shall deliver to Owner a Final Completion Certificate substantially in the form of Exhibit L, executed by, or on behalf of, Contractor indicating the date on which Final Completion was achieved. Within ten (10) Business Days following the date on which the

Final Completion Certificate is received by Owner, Owner shall review and inspect all Work and shall either (a) countersign and deliver to Contractor such Final Completion Certificate or (b) if reasonable cause exists for doing so, notify Contractor that Final Completion has not been achieved. Any notice issued pursuant to clause (b) above shall state in reasonable detail Owner's reasons for rejecting the Final Completion Certificate. If Final Completion has not been achieved and Owner delivers the notice under clause (b) above, Contractor shall promptly perform corrective measures to remove such failures, Defects, deficiencies or discrepancies as so indicated by Owner, including the performance of additional Work to achieve Final Completion. Upon completing such corrective measures to achieve such Final Completion, Contractor shall issue a new Final Completion Certificate for Owner's consideration. Such procedure shall be repeated as necessary until Final Completion is achieved. Any delay in Contractor's or a Subcontractor's performance of the Work due to the failure of Owner to respond within the applicable review period to the Final Completion Certificate provided by Contractor shall be treated as an Owner-Caused Delay, and if Owner fails to respond within fifteen (15) days of Owner's receipt of the Final Certificate, the Final Completion Certificate shall be deemed accepted by Owner; *provided*, that such Owner-Caused Delay or deemed acceptance shall not relieve Contractor from any of its obligations under this Agreement, including Contractor's obligations to actually achieve Final Completion. For all purposes of this Agreement, the date upon which Final Completion is achieved by Contractor shall be the date that Final Completion Certificate is accepted or deemed accepted by Owner. Any disagreement about the achievement of Final Completion is subject to the dispute resolution process in Article 17.

3.6.3 **Owner's Self-Performance of Punch List.** The Final Completion Certificate shall be delivered to Owner within thirty (30) days of the achievement of Substantial Completion unless otherwise specified by mutual agreement of Owner and Contractor. In the event that all Punch List items are not completed within thirty (30) days of the achievement of Substantial Completion, or other time as mutually agreed, Owner may elect, but is not obligated, to self-perform or to hire a third-party contractor to complete, all or any portion of such Punch List items, the cost of which shall be deducted from the Final Completion payment and shall not be limited by or to the Punch List Holdback Amount.

### 3.7 **Delay Liquidated Damages.**

3.7.1 **Mechanical Completion Liquidated Damages.** The Parties acknowledge that (a) Owner shall be damaged by any failure of Contractor to achieve Mechanical Completion by the Guaranteed Mechanical Completion Date, (b) it would be impracticable or extremely difficult to fix the actual damages resulting therefrom, (c) any sums which would be payable under this Section 3.7.1 are in the nature of liquidated damages, are not a penalty, and are fair and reasonable, and (d) such liquidated damage amount represents a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failure. If Contractor fails to achieve Mechanical Completion by the Guaranteed Mechanical Completion Date, Contractor shall pay to Owner, as liquidated and agreed damages and not as a penalty, for each day from the Guaranteed Mechanical Completion Date until the date when Mechanical Completion has been achieved, an amount per day

equal to [Amount] (the “**Mechanical Completion Liquidated Damages**”), *provided, however,* if Contractor achieves Substantial Completion by the Guaranteed Substantial Completion Date, any Mechanical Completion Liquidated Damages accrued or paid will be forgiven.

3.7.2 **Substantial Completion Liquidated Damages.** The Parties agree that (a) Owner shall be damaged by any failure of Contractor to achieve Substantial Completion by the Guaranteed Substantial Completion Date, (b) it would be impracticable or extremely difficult to fix the actual damages resulting therefrom, (c) any sums which would be payable under this Section 3.7.2 are in the nature of liquidated damages, are not a penalty, and are fair and reasonable and (d) such liquidated damage amount represents a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failure. If Contractor fails to achieve Substantial Completion by the Guaranteed Substantial Completion Date, Contractor shall pay to Owner, as liquidated and agreed damages and not as a penalty, for each day from the Guaranteed Substantial Completion Date until the date when Substantial Completion has been achieved, an amount per day equal to [Amount] (the “**Substantial Completion Liquidated Damages**” and together with Mechanical Completion Liquidated Damages, “**Delay Liquidated Damages**”).

3.7.3 **Exclusive Remedy.** Except as set forth in Article 15, collection of Delay Liquidated Damages shall constitute Owner’s exclusive remedy and Contractor’s exclusive liability for Contractor’s failure to cause Mechanical Completion to occur by the Guaranteed Mechanical Completion Date or Substantial Completion to occur by the Guaranteed Substantial Completion Date, as applicable. The foregoing sentence shall not relieve Contractor from its obligations (nor limit Owner’s ability to seek other available remedies in connection with Contractor’s failure to comply with its obligations) to perform the Work in accordance with this Agreement or from Contractor’s Warranty or other obligations under this Agreement.

3.7.4 **Accrual; Payment.** Delay Liquidated Damages, if any, shall accrue on a daily basis for each day that Contractor fails to achieve Mechanical Completion or Substantial Completion by the Guaranteed Mechanical Completion Date or the Guaranteed Substantial Completion Date, as applicable. For each week during which Delay Liquidated Damages accrue under this Section 3.7, on or prior to the Wednesday of the following week Owner shall provide Contractor with a statement of the amount of Delay Liquidated Damages owed for such prior week. Contractor shall pay any Delay Liquidated Damages owed within thirty (30) days after receipt of such statement(s). Contractor shall pay such Delay Liquidated Damages without deduction, set-off, reduction or counterclaim. Contractor shall continue to make such payments of Delay Liquidated Damages until achievement of Mechanical Completion or Substantial Agreement, as applicable, at which time Contractor shall pay all previously accrued and unpaid Delay Liquidated Damages.

#### **ARTICLE 4 OWNER RESPONSIBILITIES**

In addition to Owner’s other duties and responsibilities under and pursuant to this Agreement, Owner shall have the following general obligations and responsibilities:

4.1 **Limited Notice to Proceed.** Prior to the Effective date, Owner and Contractor have agreed to one or more limited notices to proceed (each, a “**Limited Notice to Proceed**” or “**LNTP**”) with respect to initial engineering and design, procurement of long-lead items, and other preliminary Work as listed in the LNTP list attached hereto as **Exhibit BB**. Any work described in and performed pursuant to an LNTP shall be deemed to be Work hereunder and be subject to the terms of this Agreement. Any payment by Owner under any LNTP shall be credited against the first payments of the Contract Price to be made in accordance with this Agreement. Such LNTPs are superseded and replaced by this Agreement.

4.2 **Notice to Proceed.** On any day after the Effective Date, but prior to the date set forth in the Milestone Schedule, Owner may issue to Contractor a written notice (“**Notice to Proceed**” or “**NTP**”) directing Contractor to commence the Work in accordance with the terms of this Agreement. Prior to or simultaneously with the issuance of a Notice to Proceed Owner shall provide to Contractor access to the Project Site for Contractor to perform the Work in accordance with **Exhibit A**.

4.3 **Project Site Access.** As required by the Construction Schedule in order for Contractor to perform the Work, but subject to and in accordance with the Site Requirements, Owner shall provide access to the Project Site to Contractor, Subcontractors and their respective Personnel. Owner shall provide Contractor with suitable lay-down areas as specified in the Scope of Work. Contractor shall prepare such lay-down area to suit its needs and obligations under this Agreement.

4.4 **Owner-Supplied Equipment.** If Owner-Supplied Equipment is to be provided pursuant to the Scope of Work, Owner shall procure and deliver, or shall cause its contractors or suppliers to deliver, the Owner-Supplied Equipment set forth in **Exhibit F** to Contractor’s possession at the Project Site by no later than the Owner Equipment Delivery Date. A failure to timely deliver Owner-Supplied Equipment by the Owner Equipment Delivery Date shall be treated as an Owner-Caused Delay.

4.5 **Permits.** Owner shall, with Contractor’s reasonable assistance, timely obtain and maintain, at its own cost and expense, all Owner Permits, copies of which shall be delivered to Contractor. In addition, Owner shall execute such applications as Contractor may reasonably request in connection with obtaining any Contractor Permits.

4.6 **Cooperation.** Owner shall, and shall cause its Other Owner Contractors and its and their Personnel to, cooperate with Contractor to assure that no such party unreasonably hinders, delays, increases, or makes more difficult than necessary the Work being performed by Contractor and its Subcontractors.

4.7 **Owner’s Project Manager.** Owner shall notify Contractor of its selection of the Owner’s Project Manager. Owner may change the Owner’s Project Manager upon providing written notice of the same to Contractor. Owner’s Project Manager shall have the responsibility, authority and supervisory power of Owner for all matters relating to the administration of this Agreement. The Owner’s Project Manager (i) shall act as the liaison for Owner’s communications with Contractor, (ii) shall be responsible for receiving all reports due under this Agreement from Contractor and delivering all reports due under this Agreement to Contractor, (iii) shall have authority to act on behalf of Owner, subject to Owner’s corporate governance requirements, and (iv) shall have the

experience and authority to make reasonably prompt means and methods decisions on a real time basis. Notwithstanding the foregoing, Owner's Project Manager shall not have authority to amend or to modify any of the provisions of this Agreement or to approve any Change Orders.

4.8 **Compliance with Contractor Safety Plan.** Prior to Substantial Completion, all of Owner's employees, agents and subcontractors and Other Owner Contractors shall follow, when at the Project Site, the safety and security measures and procedures of Contractor as set forth in the Contractor Safety Plan.

4.9 **Coordination by Owner.** Owner shall (a) cause the Interconnection Provider to (i) provide specifications for utility metering and telemetering equipment to be installed by Contractor as set forth in the Interconnection Agreement, (ii) timely make back-feed power available, if required, to the Project, to support Contractor's performance of the Work, (iii) permit interconnection of the Project at the point of interconnection specified in the Scope of Work and accept electricity generated by or derived from the Project, as needed in connection with Contractor's performance of the Work, and (iv) otherwise timely perform all of its obligations under the Interconnection Agreement, (b) coordinate with the owner of the Project Site, if not Owner, and (c) cause its personnel and separate contractors to (i) comply with Contractor's Project Site safety and security requirements and Contractor Safety Plan at all times when such Persons are present at the Project Site; (ii) coordinate performance of their work with Contractor's performance of the Work; and (iii) not interfere with Contractor's Work.

4.10 **Owner's Right to Inspect/Correction of Defects.** Owner and its authorized representatives shall be allowed to inspect any portion of the equipment and the Work, whenever and wherever it is in preparation or progress, whether being performed on or off the Project Site, and to visit the manufacturing assemblies of Contractor, its Subcontractors and Suppliers, as deemed necessary by Owner. Owner shall be allowed to attend or observe any activity of Contractor while performing the Work, whether being performed on or off the Project Site, including any tests and inspections. Owner shall have the right to maintain Personnel at the Project Site for such purpose, subject in all cases to Contractor's safety precautions. Owner's right to inspection shall not materially interfere with the Work or Contractor on the Project Site. Such inspection (or failure to conduct any such inspection) of any part of the Work shall in no way relieve Contractor of its obligations to perform the Work in accordance with this Agreement, nor be deemed a waiver of Owner's right to subsequently reject Defective Work, or make a warranty claim under this Agreement. Contractor, at Contractor's own cost and expense (including the cost of shipping, import, including any import duties, tariffs or other taxes, labor and equipment) shall promptly correct or replace any part of the Work that is found following an inspection by Owner or its authorized representatives to be Defective, regardless of the stage of its completion, or the time or place of the discovery of such nonconformance and regardless of whether Owner has previously accepted such Work. If Contractor does not comply with the terms of this Section 4.9 within twenty (20) days after receipt of written notice, Owner may have such Defective work (i) corrected or repaired, or (ii) removed and replaced. All costs and expenses (including fees of engineers and architects) incurred or sustained by Owner in exercising its right under this Agreement shall be reimbursed by Contractor upon demand therefor.

## ARTICLE 5 CONTRACT PRICE

### 5.1 **Contract Price.**

5.1.1 As full consideration to Contractor for the full and complete performance of the Work and Contractor's other covenants in this Agreement, and subject to this Article 5, Owner agrees to pay the [ ] (the "**Contract Price**").

5.1.2 The Contract Price (as it may be adjusted in accordance with the terms of this Agreement) is firm and fixed and includes all costs and expenses to be incurred by Contractor in connection with Contractor's performance of its obligations under this Agreement, including all costs and expenses for performance of the Work and providing all governmental fees and costs associated with all licenses and inspections necessary for the proper execution and completion of the Work, all registration costs, royalty payments and expenses incident to Contractor's performance of the Work, Contractor's compliance with all Applicable Laws, all payments made or to be made to Subcontractors pursuant to Subcontracts entered into by Contractor relating to the Work, all costs and expenses for travel and lodging, and all Contractor Taxes, including payroll, income and sales taxes, and all costs and expenses for obtaining the Applicable Permits (including any fees with respect thereto).

5.1.3 The Contract Price may be adjusted only pursuant to a Change Order issued in accordance with Article 10. Subject to the terms and conditions of this Article 5, Owner shall pay the Contract Price to Contractor in the manner and at the times specified in Section 5.2.

5.1.4 Acceptance by Contractor of the final payment hereunder shall constitute a release by Contractor of Owner, its Affiliates and every officer and agent thereof from all liens (whether statutory or otherwise and including mechanics' or Contractors' liens), and claims for payment of the Contract Price, except (i) claims for which Contractor has delivered a written notice of dispute to Owner, or (ii) those obligations which continue past Final Completion (including Owner's indemnity obligations under this Agreement). No payment by Owner shall be deemed a waiver by Owner of any obligation of Contractor under this Agreement. Within fifteen (15) days after Contractor's receipt of final payment of the Contract Price from Owner, Contractor shall deliver to Owner Unconditional Final Lien Waivers covering the entirety of the Work, except with respect to claims for which Contractor has delivered a written notice of dispute to Owner.

5.2 **Invoicing.** Upon achievement of a Milestone for which a corresponding payment is due per the Payment Schedule, Contractor shall prepare and submit to Owner a Request for Payment specifying the Payment Milestone for which payment is sought, along with documentation related to such Payment Milestone. The Completion Milestones that are covered by a respective Completion Certificate shall be achieved on the dates provided for under Section 3.3, 3.4, and 3.6, respectively. Within thirty (30) days after receipt of each properly documented Request for Payment, and subject to Section 5.4, Owner shall pay Contractor the amount that remains after the deduction from the amount requested in the applicable Request for Payment of the following

amounts: (a) retainage in the amount of ten percent (10%) of the payment amount (“**Retainage**”); (b) any portion thereof that Owner in good faith disputes as not being due and owing, (c) any overpayment made by Owner for any previous period, (d) any Delay Liquidated Damages or other damages payable by Contractor pursuant to this Agreement, (e) the reasonable cost associated with any claim that has been asserted by Owner in writing against Contractor under this Agreement, (if any costs incurred by Owner in enforcing any provision hereof (including attorneys’ and other consultants’ fees) regardless of whether such provisions expressly provide for withholding or set-off; (f) the value of any liens against the Work or Project Site for which Contractor is responsible and for which a bond has not been posted in accordance with Section 5.4.3 and (g) any Punch List Holdback Amounts. All Requests for Payment shall be sent to Owner at the addresses set forth in Section 18.4. Owner’s payment of any Requests for Payment shall not be deemed in any way to be an acceptance by Owner of any of the Work subject to such Request for Payment nor shall such payment be deemed a waiver by Owner of any rights or Contractor obligations under this Agreement. Retainage and Punch List Holdback shall be released to Contractor along with the final payment due to Contractor pursuant to the Payment Schedule.

5.3 **Taxes Included and Excluded in Contract Price.** The Contract Price excludes any and all Owner Taxes, which shall be the sole responsibility of Owner, and Owner shall indemnify, defend and hold harmless Contractor against any claims or losses in connection with such Owner Taxes. The Contract Price includes any and all Contractor Taxes, which shall be the sole responsibility of Contractor, and Contractor shall indemnify, defend and hold harmless Owner against any claims or losses in connection with such Contractor Taxes. Each Party shall be responsible for its own income taxes. Except as otherwise provided in this Agreement, the Contract Price includes compliance with all requirements with respect to taxes of Contractor required or imposed by the relevant Governmental Authority with respect to the equipment, other Work, or Contractors’ or Subcontractors’ performance under this Agreement, excluding materials, supplies, equipment and other items that are tax exempt under Applicable Laws.

5.4 **No Liens.**

5.4.1 As a condition precedent to Owner’s obligation to make each payment under this Agreement (other than the final payment), Contractor shall be required to provide Owner with Lien Waivers and Release covering all Work performed to date, each in the form set forth in Exhibit N (Conditional) or Exhibit O (Unconditional) (as applicable), or as such form may be superseded or modified by any statutory form required by Applicable Law, duly executed and acknowledged by Contractor and each Major Subcontractor.

5.4.2 As a condition precedent to Owner’s obligation to make the final payment due to Contractor under this Agreement, Contractor shall be required to provide Owner with a Conditional Lien Waivers and Release covering all Work, in the form set forth in Exhibit P, duly executed and acknowledged by Contractor and each Major Subcontractor and conditioned only on the receipt of the final payment amount as set forth in the Payment Schedule. Within ten (10) Business Days after receipt of final payment, Contractor shall provide Owner with an Unconditional Lien Waiver and Release covering all Work, in the form set forth on Exhibit Q, duly executed and acknowledged by Contractor and each Major Subcontractor.

5.4.3 If a Lien is filed by any of Contractor's Subcontractors, or any of their respective subcontractors or subcontractors with respect to the Project, except where such Lien relates to any past due and outstanding payments properly due and payable to Contractor under this Agreement, Contractor shall, within thirty (30) days after the earlier of (a) receipt of a written demand from Owner or (b) the date on which Contractor became aware of the Lien or should have known of the Lien through the exercise of due diligence, at Contractor's sole expense, discharge and cause to be released, whether by payment or obtaining and recording a lien release bond in a form and substance reasonably satisfactory to Owner and from surety who is (and who has collateral for such security that is) reasonably satisfactory to Owner, covering an amount equal to the amount of such Lien, regardless of the action Contractor may take with respect to such claim. The foregoing obligation of Contractor shall extend to any Lien in respect to the Project, the equipment, the Project Site, or any fixtures or personal property included in the Project (whether any such Lien is valid or enforceable) created by, through or under, or as a result of any act or omission (or alleged act or omission) of, Contractor, any Subcontractor, or any other Person providing Personnel or materials within the scope of Contractor's Work.

5.4.4 If Contractor fails to promptly discharge or cause to be released any Lien as required by this Section 5.4 within thirty (30) days after notice to Contractor, Owner may, but shall not be obligated to, pay, discharge or obtain a surety bond or security for such Lien and, upon such payment, discharge or posting of surety bond therefor, Owner shall be entitled to immediately recover from Contractor the amount thereof together with all expenses incurred by Owner in connection with such payment, discharge or posting, or set off all such amounts against any sums owed by Owner to Contractor.

5.4.5 Contractor shall promptly notify Owner of the filing of any Lien against the Project, the Work, the Project Site, or any fixtures or personal property included in the Project promptly upon learning of the existence or filing of such Lien.

## **ARTICLE 6 TITLE AND RISK OF LOSS**

6.1 **Title to Project Facilities and the Work.** Contractor warrants and guarantees that good and legal title to all Work, equipment and other items furnished by it or any of its Subcontractors or Suppliers that become part of the Project, shall pass to Owner, free and clear of any and all Liens, upon Mechanical Completion. If any Lien arises, then Contractor shall promptly following receipt of written notice of such Lien or Contractor becoming aware of the assertion of such Lien provide written notice thereof to Owner; and as soon as reasonably practicable, but in no event later than ten (10) days after the date that Contractor receives written notice that the Lien was filed or otherwise becomes aware of such Lien, either pay the amounts giving rise to such Lien, bond against such Lien or otherwise discharge such Lien. Upon the failure of Contractor to promptly pay, bond against or discharge any such Lien within such ten (10) day period, Owner may, but shall not be obligated to, pay, bond against or discharge such Lien and, upon the payment, bonding against or discharge thereof, Owner shall be entitled (at its sole option) to (a) recover from Contractor the amount thereof together with the reasonable expenses incurred by Owner in connection with such payment or discharge, or (b) set off all such amounts against any sums owed by Owner to Contractor under this Agreement.



6.2 **Title to Contractor Deliverables.** Notwithstanding anything to the contrary in this Article 6, and subject to this Section 6.2 and Article 13, title to the Contractor Deliverables (including the contents of the Job Books) that are owned by Contractor shall be transferred to Owner upon Substantial Completion. In addition, Contractor grants to Owner an irrevocable, royalty free, non-exclusive license to use and reproduce such Contractor Deliverables, specifications and other design documentation to which Contractor does not have title, but has the right to grant sub-licenses solely for the purpose of completing, repairing, operating, maintaining, rebuilding or replacing and expanding the Project. Owner shall have the right to assign the benefit of such license to any purchaser in connection with a transfer of the Project, or to any permitted assignee. Any such purchaser or assignee shall acquire such license subject to the same terms and restrictions as stated in this Section 6.2. For the avoidance of doubt, title to Owner-Supplied Equipment shall at all times remain with Owner and shall not be transferred to Contractor.

6.3 **Risk of Loss.**

6.3.1 Notwithstanding passage of title as provided in Section 6.1, and save and except with respect to Owner-Supplied Equipment which shall be subject to Section 6.3.3, Contractor hereby assumes the risk of loss for the Work as of the Effective Date through the Substantial Completion Date, including: (a) all Work completed on or off the Project Site and (b) all Work in progress. If any loss, damage, theft or destruction occurs to the Work or other items, on or off the Project Site, prior to Substantial Completion, Contractor shall, at the option of Owner and at Contractor's sole cost and expense, promptly repair or replace the property affected thereby. In such event, Contractor shall have the right to receive payments made with respect to any such event under all available insurance coverage maintained by Contractor.

6.3.2 Risk of loss for the Work shall pass from Contractor to Owner (excluding Contractor Equipment and other items to be removed by Contractor, which shall remain the responsibility of Contractor) upon the Substantial Completion Date; *provided, however*, Contractor shall continue to be responsible for claims, physical loss or damage to the Work to the extent resulting from Contractor's or its Personnel's negligent acts or omissions, or failure to comply with the requirements of this Agreement. Notwithstanding the foregoing, if Contractor is obligated by the terms of this Agreement to perform additional Work subsequent to the date of Substantial Completion, Contractor shall bear the risk of loss and damage with respect to such Work until such additional Work is complete.

6.3.3 Upon delivery of any Owner-Supplied Equipment to Contractor's possession at the Project Site for purposes of performance of the Work, Contractor shall assume and bear the risk of loss for such Owner-Supplied Equipment consistent with Sections 6.3.1 and 6.3.2.

**ARTICLE 7**  
**WARRANTIES AND PERFORMANCE ASSURANCE**

**7.1 Warranty Provisions.**

7.1.1 **Warranty.** For the duration of the Contractor's Warranty Period, Contractor warrants to Owner that: (a) all equipment, materials and supplies incorporated into the Work or supplied under this Agreement shall be new, unused and undamaged, and of suitable grade for their respective purpose when delivered and installed at the Project Site; (b) all Work shall (i) be free from defects in design, materials, construction, installation and workmanship, and (ii) have been designed, manufactured, tested, commissioned and installed in accordance with, and shall conform to, the requirements of this Agreement; (c) the services comprising the Work will be performed in accordance with the Applicable Laws, the Standard of Care and Contractors' best skill and judgment in a good and workmanlike manner; and (d) none of the Work and other services rendered by or through Contractor under this Agreement, or the use of the Work by Owner, nor any license granted under this Agreement, infringes, violates or constitutes a misappropriation of the patent, copyright or other intellectual property rights of a third-party, whether registered or unregistered, except to the extent such infringement arises from (i) Owner-Supplied Equipment, (ii) drawings, specifications other documentation provided by Owner, or (iii) a design, process or a particular product of a particular manufacturer that Contractor is required to utilize under this Agreement ((a) through (d), the "**Contractor's Warranty**").

7.1.2 **Warranty Period; Extensions.** Without limiting Contractor's obligation to correct Defects as provided in this Agreement, the Contractor's Warranty shall commence on the Substantial Completion Date and shall continue for a period of [\_\_\_\_] months ("**Contractor's Warranty Period**"); *provided, however*, that if any component of the Work or equipment is repaired or replaced pursuant to the Contractor's Warranty Service (as defined below), then the Contractor's Warranty Period with respect to such component shall be continued for a period that is the longer of (a) the remainder of the original Contractor's Warranty Period and (b) one (1) year from the date of completion of the Contractor's Warranty Services.

7.1.3 **Correction of Deficiencies.** If at any time during the Contractor's Warranty Period the Work fails to comply with the Contractor's Warranty and Contractor receives notice thereof before the date that is thirty (30) days following the end of the Contractor's Warranty Period, Contractor shall cure such breach in accordance with Section 7.2 (such cure, the "**Contractor's Warranty Service**"). Owner shall provide Contractor with reasonable access to the Project in order to perform its obligations under this Article 7, and the Parties shall schedule such Contractor's Warranty Service so as to minimize disruptions to Owner and the on-going operation of the Project. Owner shall have the right to operate and otherwise use the Work and the Project until such time as Owner deems prudent to suspend such operation or use in order to accommodate Contractor's Warranty Service, *provided* Contractor deems it safe to do so or to do so will not cause additional subsequent damage to any of the Work. If the Work has been placed in service, Contractor shall perform such Contractor's Warranty Service as soon as Owner

deems it prudent to remove such Work from service for the Contractor's Warranty Service. Contractor shall bear any and all costs and expenses (including all labor costs) incurred in rectifying the breach of the Contractor's Warranty as part of the Contractor's Warranty Service, including all costs of labor and equipment and of any necessary disassembly, removal, replacement, transportation, reassembly, reinstallation, and retesting, as well as reworking, repair or replacement of such Work, and reassembly of structures, electrical work, machinery, equipment, or any other obstruction as necessary to give access to the non-conforming item for correction, and for removal, repair or replacement of any defect or nonconformity indirectly resulting from a breach of the Contractor's Warranty. Upon completion of Contractor's Warranty Service, the Project shall be returned or restored to its proper working condition (subject to normal wear and tear), including fit alignment, adjustment, operability and finish. So long as Contractor has been notified of a breach of Contractor's Warranty prior to the date that is thirty (30) days following the end of the Contractor's Warranty Period, the obligation of Contractor to provide Contractor's Warranty Service to correct such noncompliance, Defect or breach of Contractor's Warranty shall survive the expiration of Contractor's Warranty Period.

7.1.4 **Conformance of Warranty Service to Warranty.** Contractor warrants that all materials incorporated into the Work as part of any Contractor's Warranty Service by Contractor or any Subcontractor, and repairs to and replacements of the Work pursuant to Contractor's Warranty Service, shall conform to the requirements of this Agreement and the Contractor's Warranty. Contractor shall perform, at its cost and expense (including all labor costs), such tests as Owner may reasonably request to verify that any correction, repair, replacement or re-performance of the Work, pursuant to Contractor's Warranty Service, complies with the requirements of the Contractor's Warranty.

7.1.5 **Assignment of Warranties.** Owner shall have the right to assign, without notice or consent, the Contractor's Warranty and all Third-Party Warranties to any Financial Party taking a security interest in any Work after title transfers to Owner.

7.3 **Prevailing Wage and Apprenticeship Compliance.** No later than 10 days after completion of any Work performed by Contractor or any Tax Subcontractor pursuant to the Warranty that constitutes Construction or Repair or Alteration, Contractor shall provide documentation certifying compliance with the Prevailing Wage and Apprenticeship Requirements (the "Warranty Certificate") in form and substance as set out in Exhibit GG. **Timing for Warranty Service.** Contractor shall perform the Contractor's Warranty Service as promptly as reasonably possible after being notified of the noncompliance by Owner, and in any event shall commence and diligently pursue performance of the Contractor's Warranty Service no later than five (5) days after such notice, diligently pursuing such repair to completion no later than fifteen (15) days after Owner's notice of Defect; *provided, however*, if the noncompliance results in the power output of the Project being reduced by more than ten percent (10%), Contractor shall commence performance of the Contractor Warranty Service no later than one (1) Business Day after such notice, and shall diligently pursue such repair to completion no later than three (3) Business Days after Owner's notice of Defect. If either (a) Contractor fails to respond to Owner's notice in accordance with Section 7.1.3, or (b) Contractor fails promptly to commence, pursue or complete the Warranty Service as required in accordance with this Section 7.2, then Owner shall have the right, in addition to all other rights and remedies of Owner under this Agreement and, to elect

either: (A) to be reimbursed for the value of such Defective Work, in which case Contractor shall promptly reimburse Owner for the amount of such Defective Work, and Owner may, at its option, deduct such amounts from any amounts due to Contractor under this Agreement; or (B) to self-perform or hire a third-party contractor to perform all or any portion of the Contractor's Warranty Service, and in such event, (i) Contractor shall reimburse Owner for all costs and expenses incurred by Owner in connection with the performance of such replacement Contractor Warranty Service, and (ii) Owner shall have the right to take an assignment of, and Contractor shall assign to Owner, any and all Subcontracts with Contractor Subcontractors and warranties, guarantees and obligations provided to Contractor under the terms of any subcontract in connection with the Defective Work. Contractor shall be responsible for the quality of all Contractor Warranty Services performed by Contractor Subcontractors or other third parties retained by Contractor.

7.4 **Third-Party Warranties**. At all times during Contractor's Warranty Period, Contractor shall keep in full force and take such actions as are within its control to maintain the warranties provided to Contractor under the terms of any Subcontract entered into in connection herewith ("**Third-Party Warranties**") in accordance with the terms of such warranty. Contractor shall be responsible for submitting and enforcing claims under the Third-Party Warranties through Contractor's Warranty Period unless such warranties have been assigned to Owner, at Owner's written request, at an earlier date. Contractor hereby assigns to Owner all Third-Party Warranties that extend beyond the Contractor's Warranty Period effective upon the earlier of (a) the termination of this Agreement, or (b) the end of Contractor's Warranty Period. Upon the effectiveness of an assignment of any Third-Party Warranties to Owner, Contractor shall be relieved of further liability with respect to the parts which are the subject of the assigned Third-Party Warranties. Contractor shall provide reasonable assistance to Owner without cost to Contractor in connection with the enforcement by Owner of any Third-Party Warranties after such assignment; *provided*, that those warranties are broader in scope or duration than those set forth in Section 7.1.

7.5 **Serial Failure**.

7.5.1 A "**Serial Failure**" shall have occurred if at any time during the Contractor's Warranty Period, there are malfunctions from a Defect of, or breach of the Contractor's Warranty that has materialized in, any component or equipment of the Work in excess of the occurrences or percentage, as applicable, for such component or equipment specified in Exhibit EE. Upon the occurrence of a Serial Failure, Contractor shall, as soon as practicable, but in no event more than ten (10) Business Days, investigate the cause of the non-compliance or malfunctions and the affected components and whether or not such non-compliance or malfunctions constitute a Serial Failure. If Contractor does not believe a Serial Failure has occurred, Contractor shall provide Owner with evidence, reasonably satisfactory to Owner, that such non-compliance or malfunctions do not constitute a Serial Failure. If a Serial Failure has occurred, Contractor shall perform or cause to be performed a root cause analysis with respect to such Serial Failure and, as soon as practicable, but in any event shall make commercially reasonable efforts to provide such report within thirty (30) days after the delivery of the notice to Contractor of such Serial Failure (or within such time period as the Owner and Contractor may otherwise agree), provide to Owner in writing, for Owner's review and approval, a written report concerning such root cause analysis and the proposed solution for such Serial Failure, including the planned method

for redesign and/or repair, replacement or retrofit of the component for which the Serial Failure shall have occurred, any of the same components that could reasonably be assumed to be affected by such Serial Failure even if the Defect has not yet manifested itself, and the related or affected Work. Owner and Contractor shall negotiate in good faith with a view to reaching an agreed solution for the Serial Failure. If Contractor fails to perform the root-cause analysis or provide the written report to Owner within the time period contemplated in this Section 7.4 or if Owner and Contractor fail to agree as to the occurrence of a Serial Failure or the appropriate proposed solution for a Serial Failure within forty-five (45) days after the notice of the occurrence of the event giving rise to the Serial Failure, each of Contractor and Owner shall have the right to refer the matter for dispute resolution pursuant to Section 7.5.

7.5.2 No later than five (5) Business Days following the determination of the existence of, and a solution for, a Serial Failure, either through agreement of Owner and Contractor or pursuant to Section 7.5 (the “**Serial Failure Warranty Work Start Date**”), Contractor shall commence to undertake such action as is required to give effect to the agreed solution for such Serial Failure, which agreed solution shall (i) be applied to all of the equipment or the Work that have substantially the same Defect or failure to perform, regardless of whether or not such equipment or Work has yet to exhibit the adverse consequences of such Defect or other root-cause, (ii) address the cause, and not just the effect, of such Serial Failure and (iii) bring the equipment and the Work into compliance with the original requirements under this Agreement including the Contractor’s Warranty (the “**Serial Failure Warranty Work**”). Such agreed solution shall specify the period after which the Serial Failure Warranty Work is required to be completed (the “**Serial Failure Warranty Work Completion Date**”). Upon the completion of any redesign proposed to be included as part of the Serial Failure Warranty Work, but prior to any retrofitting required by this Section 7.4.2 as part of the Serial Failure Warranty Work, Contractor shall request the written approval of Owner, which shall not be unreasonably withheld, conditioned or delayed.

7.5.3 Without limiting any other remedy available to Owner pursuant to this Agreement, in the event Contractor fails to commence the Serial Failure Warranty Work by the Serial Failure Warranty Work Start Date or to complete the Serial Failure Warranty Work on a timely basis but in any event by the Serial Failure Warranty Work Completion Date, Owner shall, after giving Contractor at least three (3) days prior notice of Owner’s intent to perform or have third parties perform the Serial Failure Warranty Work, have the right to perform the necessary Serial Failure Warranty Work, or have third parties perform the necessary Serial Failure Warranty Work. Contractor shall, within thirty (30) days of receiving Owner’s invoice for the costs of Owner in performing or causing to be performed such Serial Failure Warranty Work, reimburse Owner for all such costs and expenses with respect to such Serial Failure Warranty Work. Notwithstanding the foregoing, if Contractor (or the relevant Subcontractors) begins to perform the applicable Serial Failure Warranty Work during such three (3) day period following notice of Owner’s intent to perform such Serial Failure Warranty Work (*provided* that such Serial Failure Warranty Work is completed by the Serial Failure Warranty Work Completion Date), Owner shall not perform, or cause any third party to perform, such Serial Failure Warranty Work.

7.6 **Warranty Disputes.** In the event that Owner provides notice of an alleged breach of the Contractor's Warranty pursuant to Section 7.1.3 or Contractor's obligations under Section 7.4 and Contractor disputes such alleged breach, the determination with respect to such alleged breach may, at the election of either Party, be submitted to the Technical Dispute Engineer for resolution. If (a) the Technical Dispute Engineer determines that Contractor has breached such Contractor's Warranty or Contractor's obligations under Section 7.4, Contractor shall be responsible for the fees and expenses of the Technical Dispute Engineer in determining the dispute; (b) the Technical Dispute Engineer determines that Contractor has not breached such Contractor's Warranty or Contractor's obligations under Section 7.4, Owner shall be responsible for the fees and expenses of the Technical Dispute Engineer in determining the dispute. For purposes of determining any such dispute, the Technical Dispute Engineer shall, with respect to the appropriate remedy for any breach by Contractor of the Contractor's Warranty or its obligations under Section 7.4, take into account the cost (including the ability to mitigate the cost) of implementing, and the feasibility of, any proposed solution.

7.7 **No Implied Warranties.** THE WARRANTIES SET FORTH IN THIS AGREEMENT ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING ANY WARRANTY OF PERFORMANCE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, CUSTOM, USAGE OR OTHERWISE. THERE ARE NO OTHER WARRANTIES, AGREEMENTS, ORAL OR WRITTEN, OR UNDERSTANDINGS WHICH EXTEND BEYOND THOSE SET FORTH IN THIS AGREEMENT WITH RESPECT TO THE WORK, MATERIALS AND EQUIPMENT. The foregoing sentence is not intended to disclaim any other obligations of Contractor set forth in this Agreement.

7.8 **Intellectual Property Warranties.** Contractor represents, warrants, and covenants that:

7.8.1 Contractor will not incorporate any Background Technology or third party materials into any Contractor Deliverables, create any Contractor Deliverable with a dependency upon any Background Technology or third party materials, or otherwise provide any Background Technology or third party materials to Owner in conjunction with any Contractor Deliverable unless: (i) Contractor specifically identifies such Background Technology and/or third party materials in the Scope of Work; (ii) each proposed use has been specifically preapproved by Owner in writing; and (iii) Contractor procures, at its sole cost and expense, all rights necessary to grant Owner any licenses in and to such Background Technology and/or third party materials as may be reasonably required by Owner;

7.8.2 None of the Contractor Deliverables will be subject to a license that requires that a Contractor Deliverable, or any software or other items combined or distributed with such materials, be disclosed or distributed in source code form, licensed for the making of derivative works, freely redistributable, or otherwise subject to a free or open source license;

7.8.3 Contractor has all rights and licenses necessary to grant the rights and licenses contemplated by this Agreement, without the need for any licenses, releases, consents, approvals or immunities not yet obtained from a third party; and

7.8.4 the Work and the Contractor Deliverables, and their use do not and will not infringe, misappropriate or violate any Intellectual Property rights or any other rights of any third party and are not and will not be subject to any restrictions or to any liens, security interests, or encumbrances.

7.9 **Limitations**. The Contractor's Warranty does not extend to: (a) damage or Defect caused by a Force Majeure Event or any damage or modification made to the Work or equipment by Owner or Other Owner Contractor not authorized by the terms of this Agreement, or (b) or any failure of the Owner-Supplied Equipment. Notwithstanding any exclusion from the validity or effectiveness of the Contractor's Warranty, in no event shall any such exclusion apply to any action (or any failure to act where a duty or obligation to act is imposed by this Agreement) by Contractor (or any of its Personnel), or to any action or failure to act by Owner or any Other Owner Contractor acting under the supervision or at the instruction of Contractor (or any of its Personnel).

7.10 **Performance Assurances**. Contractor shall cause to be delivered to Owner Surety Bonds pursuant to Section 7.9.2.

**Surety Bonds**. Within fifteen (15) Business Days from issuance of the Notice to Proceed, Contractor shall provide a Performance Bond, Payment Bond and a Warranty Bond, and Contractor shall provide such bond(s) as follows:

(a) **Performance Bond**. Within fifteen (15) days after issuance of the Notice to Proceed, Contractor shall deliver to Owner, at Contractor's sole cost and expense, a performance bond from an Eligible Surety for the Work in an initial amount of up to one hundred percent (100%) of the Contract Price (as adjusted by Change Orders up to the date of bond issuance) (the "**Performance Bond**"). The Performance Bond shall be provided in a form and by a surety reasonably acceptable to Owner and shall secure Contractor's obligations to perform the Work. The Performance Bond shall remain valid and in effect until Final Completion.

(b) **Payment Bond**. Within fifteen (15) days after issuance of the Notice to Proceed, Contractor shall deliver to Owner, at Contractor's sole cost and expense, a payment bond from an Eligible Surety for the Work in an initial amount of up to one hundred percent (100%) of the Contract Price (as adjusted by Change Orders up to the date of bond issuance) (the "Payment Bond"). The Payment Bond shall be provided in a form and by a surety reasonably acceptable to Owner and shall secure Contractor's payment obligations for all entities involved in the Project pursuant to Article 5.

(c) **Warranty Bond**. Within fifteen (15) days after issuance of the Notice to Proceed, Contractor shall deliver to Owner, at Contractor's sole cost and expense, a warranty bond from an Eligible Surety for the Work in an initial amount of up to [\_\_\_\_ percent ( \_\_ %)] of the Contract Price (as adjusted by Change Orders up to the date of bond issuance) (the "**Warranty Bond**"). The Warranty Bond shall be provided in a form and by a surety reasonably acceptable to Owner and shall secure Contractor's performance of its warranty obligations pursuant to Article 7. The Warranty Bond shall remain valid and in effect for the entire duration of the Warranty Period plus any re-warranty periods.

7.11 **Failure to Obtain Performance Assurances.** If Contractor fails to obtain, maintain or renew any Warranty Bond, Payment Bond or Performance Bond, as applicable, Owner shall be entitled to procure any such bond and Contractor shall reimburse Owner for its costs incurred in obtaining such bond plus a fee of ten percent (10%). Reimbursement for Owner's costs in accordance with the preceding sentence shall be made within fifteen (15) days of demand by Owner. Owner shall be entitled to offset amounts owing by Contractor pursuant to this Section 7.10 from any amounts due to Contractor.

## **ARTICLE 8. REPRESENTATIONS AND WARRANTIES**

8.1 **Contractor Representations.** Contractor represents and warrants the following:

8.1.1 **Organization.** It is duly formed or organized, validly existing and in good standing under the laws of the jurisdiction of its formation or incorporation, and it is duly licensed or qualified and in good standing under the laws of such state and in each other jurisdiction in which the nature of the business conducted by it makes such qualification necessary and where failure to be licensed or qualified would have a Material Adverse Effect on its ability to perform any of its obligations under this Agreement.

8.1.2 **No Violation of Law; Litigation.** It is not in violation of any Applicable Laws or judgments entered by any Governmental Authority, which violations, individually or in the aggregate, would affect its performance of any of its obligations under this Agreement. As of the Effective Date, there are no actions, suits, proceedings, patent or license infringements or investigations pending or, to its knowledge, threatened against it before any court or arbitrator that individually or in the aggregate could result in any Material Adverse Effect on the business, properties or assets or the condition, financial or otherwise, of it or any impairment of Contractor to perform any of its obligations under this Agreement. Contractor does not know of any basis for any such proceedings, controversies, actions or investigations.

8.1.3 **Government Approvals.** No approvals from, and no registration, declaration or filing with, any Governmental Authority is required on the part of Contractor in connection with the execution, delivery and performance of this Agreement, except those which have already been obtained or which Contractor reasonably anticipates will be timely obtained in the ordinary course of the performance of this Agreement.

8.1.4 **No Breach.** None of the execution, delivery and performance of this Agreement, the consummation of the transactions herein contemplated, or compliance with the terms and provisions hereof and thereof conflicts with or will (a) result in a violation or breach of the terms, conditions or provisions of any other agreement or instrument, (b) require any consent under, the charter, by-laws or similar organizational documents of Contractor, any Applicable Laws, or any agreement, contract, indenture or other instrument to which Contractor is a party or by which it or its assets are bound or to which it or its assets are subject, (c) or constitute a default under any such agreement or instrument.



8.1.5 **Corporate Action.** It has all necessary power and authority to conduct its business, own its properties and execute, deliver and perform its obligations under this Agreement. The execution, delivery and performance by Contractor of this Agreement have been duly authorized by all requisite action. This Agreement has been duly and validly executed and delivered by Contractor and constitutes the legal, valid and binding obligation of Contractor enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to the enforcement of creditors' rights generally and by general equitable principles.

8.1.6 **Qualifications.** Contractor has the experience and qualifications to perform the Work in a manner consistent with all of the requirements of this Agreement.

8.1.7 **Intellectual Property.** Contractor owns or has a valid license to all Intellectual Property that is reasonably necessary to install, operate and maintain the Project, which licenses required for operations and maintenance of the Project pursuant to this Agreement have been transferred to Owner, will be transferred to Owner upon Substantial Completion, or may otherwise be used by Owner. There are no pending or, to the knowledge of Contractor, threatened, claims, actions, judicial or other adversary proceedings, or disputes directly against Contractor concerning any item of Intellectual Property that would cause a Material Adverse Effect on the Project.

8.1.8 **Prevailing Wage and Apprenticeship Requirements.** Each representation, warranty, or covenant contained in any PWA Requirements Certificate and made by Contractor or an Affiliate of Contractor is true and correct as of the date made and, to Contractor's knowledge after due inquiry. To Contractor's knowledge after due inquiry, any certificate or other documentation provided by any Tax Subcontractor to Contractor pursuant to Section 2.26.7 is true and correct as of the date made.

8.2 **Owner Representations.** Owner represents and warrants the following:

8.2.1 **Organization.** It is duly formed or organized, validly existing and in good standing under the laws of the state of Oregon, and it is duly licensed or qualified and in good standing under the laws of such state and in each other jurisdiction in which the nature of the business conducted by it makes such qualification necessary and where failure to be licensed or qualified would have a Material Adverse Effect on its ability to perform any of its obligations under this Agreement.

8.2.2 **No Violation of Law; Litigation.** It is not in violation of any Applicable Laws or judgments entered by any Governmental Authority, which violations, individually or in the aggregate, would affect its performance of any of its obligations under this Agreement. As of the Effective Date, there are no actions, suits, proceedings, patent or license infringements or investigations pending or, to its knowledge, threatened against it before any court or arbitrator that individually or in the aggregate could result in any Material Adverse Effect on the business, properties or assets or the condition, financial or otherwise, of it or any impairment of Owner to perform any of its obligations under this

Agreement. Owner does not know of any basis for any such proceedings, controversies, actions or investigations.

8.2.3 **Government Approvals.** No approvals from, and no registration, declaration or filing with, any Governmental Authority is required on the part of Owner in connection with the execution, delivery and performance of this Agreement, except those which have already been obtained or which Owner anticipates will be timely obtained in the ordinary course of the performance of this Agreement

8.2.4 **No Breach.** None of the execution, delivery and performance of this Agreement, the consummation of the transactions herein contemplated, or compliance with the terms and provisions hereof and thereof conflicts with or will (a) result in a violation or breach of the terms, conditions or provisions of any other agreement or instrument, (b) require any consent under any Applicable Laws or any agreement, contract, indenture or other instrument to which Owner is a party or by which it or its assets are bound or to which it or its assets are subject, or (c) constitute a default under any such other agreement or instrument.

8.2.5 **Corporate Action.** It has all necessary power and authority to conduct its business, own its properties and execute, deliver and perform its obligations under this Agreement. The execution, delivery and performance by Owner of this Agreement have been duly authorized by all requisite action. This Agreement has been duly and validly executed and delivered by Owner and constitutes the legal, valid and binding obligation of Owner enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to the enforcement of creditors' rights generally and by general equitable principles.

## ARTICLE 9 FORCE MAJEURE; OWNER-CAUSED DELAYS

### 9.1 **Force Majeure.**

9.1.1 **Notice.** If a Party believes that an event constituting a Force Majeure Event has occurred that has or will prevent or delay the performance of its obligations under this Agreement, such Party shall deliver the other Party prompt written notice describing the alleged Force Majeure Event within five (5) days following the date on which such Party becomes aware of, or should reasonably have become aware of, such condition or event (the "**Force Majeure Notice**"). The Force Majeure Notice shall be delivered to the other Party and its on-site Project Manager. Within five (5) Business Days after delivery of the Force Majeure Notice, the Party claiming a Force Majeure Event shall, to the extent then known by the claiming Party: (a) specify the length of the delay expected to be incurred by reason of such Force Majeure Event including documentation of the impact to the critical path; (b) describe the particulars of the cause and nature of the Force Majeure Event; (c) provide evidence of the occurrence of such Force Majeure Event; and (d) provide its plans for overcoming and mitigating the impacts or effects of the Force Majeure Event. At all times after the Force Majeure Notice, the affected Party shall (x) continue to furnish weekly

reports with respect thereto during the continuation of the Force Majeure Event notifying the other Party of (i) the steps which have been taken to remedy the Force Majeure Event and (ii) the expected remaining duration of its inability to perform under this Agreement, and (y) use reasonable efforts to mitigate or overcome such event, including minimizing additional Direct Costs incurred by Contractor to mitigate the impacts or effects of the Force Majeure Event.

9.1.2 **Excuse of Non-Performance.** So long as the conditions set forth in this Section 9.1 are satisfied and *provided* the affected Party is taking reasonable steps to mitigate the effects of the Force Majeure Event, except with regard to payment obligations, neither Party shall be responsible or liable for or deemed in breach of this Agreement because of any failure or delay in complying with its obligations under or pursuant to this Agreement to the extent that such failure has been caused by one or more Force Majeure Events; *provided*, that in such event:

(a) any liability of either Party, which arose before the occurrence of the Force Majeure Event causing the suspension of performance, shall not be excused as a result of the occurrence;

(b) the affected Party shall continually exercise commercially reasonable efforts to alleviate and mitigate the cause and effect of such Force Majeure Event, remedy its inability to perform, and limit damages to the other Party;

(c) the affected Party shall use commercially reasonable efforts to continue to perform its obligations under this Agreement and to correct or cure the event or condition excusing performance;

(d) when the affected Party is able to resume performance of the affected obligations under this Agreement, that Party shall give the other Party written notice to that effect, and the affected Party promptly shall resume performance under this Agreement; and

(e) the suspension of performance and extension of time due to the occurrence of the Force Majeure Event shall be of no greater scope and of no longer duration than is required by the effects of the Force Majeure Event and shall in no event shall exceed the duration of the Force Majeure Event on a day per day basis.

9.1.3 **Burden of Proof.** The burden of proof as to whether a Force Majeure Event has occurred and whether the Force Majeure Event excuses a Party from performance shall be upon the Party claiming such Force Majeure Event.

## 9.2 **Owner-Caused Delay.**

9.2.1 **Notice.** If Contractor believes an event constituting an Owner-Caused Delay has occurred, Contractor shall deliver to Owner prompt written notice describing the alleged Owner-Caused Delay within five (5) Business Days following the date on which Contractor becomes aware of such condition or event and its impact on Contractor's performance. Within five (5) Business Days after the date of such initial notice, Contractor

shall deliver Owner an additional written notice providing to the extent then known and available to Contractor (a) evidence of the occurrence of such Owner-Caused Delay, (b) a description of the particulars of the cause and nature of such Owner-Caused Delay, and (c) specifying the length of the delay occasioned by reason of, such Owner-Caused Delay. Contractor's failure to deliver the initial notice of an Owner-Caused Delay as described in this Section 9.2.1 within the timeframe specified above shall be deemed a waiver of its right to any Change Order with respect thereto for the period of time between the occurrence of the Owner-Caused Delay until such a notice is duly delivered to Owner.

9.2.2 **Excuse of Non-Performance.** So long as the conditions set forth in this Section 9.2 are satisfied, Contractor shall not be responsible or liable for or deemed in breach of this Agreement because of any failure or delay in meeting any obligation set forth on the Milestone Schedule to the extent that such failure has been caused by one or more Owner-Caused Delays; *provided*, that: (a) such suspension of performance and extension of time shall be of no greater scope and of no longer duration than is required by the effects of the Owner-Caused Delay; and (b) Contractor provides all assistance reasonably requested by Owner, at Owner's cost, for the elimination or mitigation of the Owner-Caused Delay.

9.2.3 **Nature of Owner-Caused Delay.** To the extent an Owner-Caused Delay (can be remedied through the issuance of a Change Order in accordance with Section 10.5.1(d)); then such failure shall exclusively constitute an Owner-Caused Delay and shall not constitute and Owner Event of Default, and Contractor's sole and exclusive remedies as a result thereof will be as set forth in this Article 9 and in Section 10.5.

9.3 **Effect on Obligation to Pay Delay Liquidated Damages.** Adjustments to the Milestone Schedule may occur as a result of any of the events described in this Article 9 (Force Majeure; Owner-Caused Delay). Unless the Guaranteed Mechanical Completion Date or the Guaranteed Substantial Completion Date is adjusted by an executed Change Order, the obligation to pay Delay Liquidated Damages on either the Guaranteed Mechanical Completion Date or the Guaranteed Substantial Completion Date shall not be affected.

## ARTICLE 10 CHANGES

10.1 **Changes.** Except for minor modifications in the Work not changing the Contract Price or Milestone Schedule and not inconsistent with the Scope of Work, and except to the extent provided in this Article 10, all authorized extra Work and changes to the Work (and the agreed-to Contract Price and Milestone Schedule adjustments related thereto), shall be confirmed in a written Change Order signed by Owner and accepted in writing by Contractor, and no change to the Work or extra Work (and no Contract Price or Milestone Schedule adjustments related thereto) shall be effective without a written Change Order signed by Owner and accepted in writing by Contractor, stating their mutual agreement upon, to the extent applicable, the following: (a) a change in the Work or equipment, if any; (b) the amount of the adjustment in the Contract Price, if any (and only to the extent applicable hereunder); and (c) the extent of the adjustment in the Milestone Schedule, if any (any of the foregoing, a "**Change**").

10.2 **Changes at Owner's Request.** Owner may at any time, without invalidating this Agreement, request changes to the Scope of Work consisting of additions, deletions or revisions to the Work or acceleration of the Work to recover from delays caused by a Force Majeure Event or an Owner-Caused Delay, by notification in writing to Contractor substantially in the form attached as Exhibit I (a "**Change Order Request**"). As soon as practicable after such Change Order Request but no later than seven (7) Business Days unless otherwise agreed by the Parties, Contractor shall prepare and forward to Owner a Change Order substantially in the form attached as Exhibit H, setting forth (i) the description of the change in the Work or extra Work provided in Owner's notice, (ii) Contractor's proposed price for such extra or changed Work and the resulting adjustment to the Contract Price, and (iii) Contractor's proposal for any reasonably required adjustment to the Milestone Schedule, or any other term or condition of this Agreement. Contractor's proposed price for such extra or changed Work (and the corresponding adjustment to the Contract Price) shall be determined in accordance with the Time and Materials Rates set forth in Exhibit Z or, to the extent the requested changed or extra Work is expected to require materials or labor that are not set forth in Exhibit Z, based on a reasonable, good faith estimate of Contractor's anticipated actual costs therefor. If Contractor's price or time adjustment is not accepted by Owner, Contractor shall provide Owner with the details of and backup for its price or time estimate. If the Parties fail to agree on any aspect of the extra or changed Work or of Contractor's proposed Change Order implementing such extra or changed Work (including Contractor's proposed price and schedule adjustments), or if a proposed Change Order is being negotiated by the Parties or is otherwise not yet finalized and executed, Owner may nevertheless direct Contractor in writing to perform such extra or changed Work (a "**Work Order**"), and the Parties agree that in such event Contractor shall proceed with such extra or changed Work and be reimbursed in accordance with the Time and Materials Rates set forth in Exhibit Z, and to the extent the required change requires materials or labor that are not set forth in Exhibit Z, based on Contractor's actual, documented costs plus a mark-up (solely with respect to the requested changes) of five percent (5%). With respect to Work performed pursuant to a Work Order based on Contractor's actual, documented costs, Contractor shall deliver to Owner, within twenty (20) days after completion of such Work, invoices, statements, payroll data and other evidence of the actual cost of the extra Work attributable to the Work Order that Owner may reasonably require.

10.3 **No Unapproved Changes.** Subject to Section 10.5, any work outside the Work described in this Agreement performed by Contractor without having received a Change Order from Owner will be considered unauthorized work and will be at Contractor's sole risk and expense. Contractor shall not suspend, in whole or in part, performance of this Agreement during any dispute over any Change Order unless directed to do so by Owner. Contractor shall proceed with a Change or disputed item pending resolution of any dispute over any Change Order pursuant to a Work Order without waiving any rights with respect to such Change or disputed item. Once any such dispute over a Change Order has been resolved, the Parties shall adjust the Contract Price and Milestone Schedule pursuant to such resolution. Following such resolution, Owner may offset against payment of the Contract Price any amounts paid to Contractor for any additional Work, pursuant to the last sentence of Section 10.2, in excess of the amount due to Contractor for such additional Work in accordance with the resolution of the dispute. If the offset is inadequate or no offset is possible, Contractor shall pay Owner the amount owing within thirty (30) days of Owner's mailing of notice thereof to Contractor at the address provided in Section 18.4.

**10.4 Changes Initiated by Contractor.** Except as otherwise provided in Article 10, and subject to Section 10.5, Contractor will issue to Owner a Change Order Request in the form attached hereto as Exhibit I within ten (10) days after Contractor becomes aware or should have become aware utilizing reasonable diligence of any circumstances which Contractor has reason to believe may necessitate a Change and in no event later than thirty (30) days after the occurrence giving rise to the Change Order Request, which proposed Change Order Request may be accepted or rejected by Owner in its sole discretion. All Contractor-issued Change Order Requests shall include documentation sufficient to enable Owner to determine: (a) the factors necessitating the possibility of a Change; (b) the impact that the Change is likely to have on the Contract Price; and (c) the impact that the Change is likely to have on the timely achievement of the activities set forth in the Milestone Schedule (including the Guaranteed Substantial Completion Date). Any additional compensation in connection with any such discretionary Contractor-initiated Change Order Request shall be determined in accordance with the Time and Materials Rates set forth in Exhibit Z, and to the extent the required change would require materials or labor that are not set forth in Exhibit Z, based on a reasonable, good faith estimate of Contractor's anticipated actual costs plus five percent (5%). Contractor shall also provide Owner with such other information, which Owner may reasonably request in connection with such Change. Except as provided in Section 10.5, Owner shall not be obligated to issue a Change Order pursuant to a Contractor-issued Change Order Request. Contractor's failure to issue a Change Order Request in a timely manner in accordance with this Section 10.4 shall be deemed a waiver by Contractor of any right to such Change Order.

**10.5 Required Change Orders.**

**10.5.1 Contractor Right to Change Orders.** Contractor will, to the extent described in Sections 10.5.2 and 10.5.3, be entitled to receive Change Orders for the events described in this Section 10.5, and on the terms and subject to the conditions set forth in this Article 10. Contractor shall use commercially reasonable efforts to reduce cost and schedule impacts, including any cost savings, to the following Change Orders.

(a) **Change Order Due to Force Majeure Event or Change in Law.** Subject to this Section 10.5.1(a) and Section 9.1, if and to the extent that a Force Majeure Event or Change in Law causes Contractor to suffer a delay in its performance of the Work, Owner shall issue a Change Order extending the Milestone Schedule to the extent set forth in Section 10.5.2. Such Change Order(s) shall be Contractor's sole and exclusive remedy for any delays and increased costs resulting from a Force Majeure Event or Change in Law and Contractor will not be entitled to any payment, damages or other compensation in connection with such Force Majeure Event or Change in Law.

(b) **Change Order Due to Unforeseen Site Conditions.** (i) If and to the extent that Contractor discovers an Unforeseen Site Conditions and such condition causes Contractor to suffer a delay in its performance of the Work, Owner shall issue a Change Order extending the Milestone Schedule to the extent required under Section 10.5.2, and (ii) if and to the extent that the Unforeseen Site Conditions increases Contractor's Direct Costs in performing the Work, Owner shall, via Change Order, increase the Contract Price to the extent set forth in Section 10.5.3. Such Change Order(s) shall be Contractor's sole and exclusive remedy for any delays and increased costs resulting from an

Unforeseen Site Condition, and Contractor will not be entitled to any additional payment, damages or other compensation in connection with any such delays or increased costs.

(c) **Change Order Due to Pre-Existing Hazardous Material.** Subject to this Section 10.5.1(c), and Contractor's obligations in Section 2.14.2(b), if and to the extent that Contractor discovers any Pre-Existing Hazardous Material which was not previously disclosed or known by type and location and could not have been discovered by a reasonable investigation of the Project Site by Contractor prior to the Effective Date that has been stored, Released or disposed on, at, or from the Project Site, and, as required under Section 2.14.2(c), Contractor stops performance of the Work in that area, then, once such Work is re-commenced, Owner shall issue a Change Order extending the Milestone Schedule to the extent required under Section 10.5.2. Subject to Section 10.5.1, if and to the extent that such cessation of Work actually and unavoidably increases Contractor's Direct Costs in performing the Work, Owner shall, via Change Order, increase the Contract Price to the extent required under Section 10.5.3. Such Change Order(s) shall be Contractor's sole and exclusive remedy for any delays and increased costs resulting from any such cessation of the Work, and Contractor will not be entitled to any payment, damages or other compensation in connection with any such delays or increased costs.

(d) **Change Order Due to Owner-Caused Delay.** Subject to this Section 10.5.1(d) and Section 9.2, if and to the extent that an Owner-Caused Delay actually and materially delays Contractor's performance of a Milestone in the Work, Contractor may request a Change Order extending the Milestone Schedule to the extent required under Section 10.5.2. In the event an Owner-Caused Delay extends for one hundred twenty (120) days or longer, and such Owner-Caused Delay increases Contractor's Direct Costs in performing the Work, Owner shall, via Change Order, increase the Contract Price to the extent set forth in Section 10.5.3. Such Change Order(s) shall be Contractor's sole and exclusive remedy for any delays and increased costs resulting from an Owner Caused Delay, and Contractor will not be entitled to any payment, damages or other compensation in connection with any such delays or increased costs. Notwithstanding any other provision of this Agreement, Contractor shall take reasonable steps to mitigate the effects and costs of any Owner-Caused Delay.

**10.5.2 Changes Involving Schedule Extensions.** In order for Contractor to obtain a Change Order for the events described in Section 10.5.1, Contractor must provide Owner notification describing the particulars of the event as soon as is reasonably practicable, and in any event within forty-eight (48) hours after the occurrence of the event, or, if Contractor was not aware that such event occurred at that time, within forty-eight (48) hours after Contractor first becomes aware of the event, describing both such event and the associated cost or delay, if any, in reasonable detail along with a Change Order Request. Contractor will also provide such further information relating to the claimed event as Owner may reasonably require. To the extent that Contractor demonstrates that an event necessitating a Change as described in Section 10.5.1 will actually and unavoidably impact Milestone and delay Contractor in performing the Work, Owner shall issue a Change Order extending the Milestone Schedule on an equitable basis as determined by the facts and circumstances surrounding such event and the effect on timing of the Work, including the time of year, the stage of the Work and the duration of the event. Contractor's demonstration of the

impact on the progress of the Work must be made on a basis that analyzes the actual impacts of the given event on the then-current schedule for completion of the Work. In no event will Contractor be entitled to an extension of time under this Section 10.5.2 to the extent that the performance of the Work for which the extension is sought would have been suspended, delayed or interrupted by the concurrent fault, actions or omissions of Contractor, nor will Contractor be entitled to any extension that is greater in duration than the event giving rise to the claim.

### 10.5.3 Changes to the Contract Price.

(a) Unless the Parties agree otherwise in writing, any Change Order required to be issued to increase the Contract Price as a direct result of an event resulting in an increase of Direct Costs described in Section 10.5.1, will, on a retrospective basis, increase the Contract Price by an amount equal to the Direct Costs incurred by Contractor solely in connection with such event, plus a mark-up equal to five percent (5%) of the Contractor's Direct Costs in connection with such Change, provided, however, that no such mark-up shall apply to any Change Orders pursuant to a Change in Law or Force Majeure Event under Section 10.5.1(a).

(b) In no event will Contractor be entitled to payment for any costs under this Agreement, including any Direct Costs, to the extent that such costs would have occurred, notwithstanding such event, due to the concurrent fault, actions or omissions of Contractor or its Subcontractors.

(c) For purposes hereof, "**Direct Costs**" shall mean only the actual and reasonable costs that are directly incurred by Contractor and supported by documentation reasonably evidencing the amount and incurrence of such costs, as a result of the event giving rise to the Change Order for the following items: (i) compensation for Labor, utilized and in the direct employ of Contractor or its Subcontractors relating to the Project, at the rates as set forth in Contractor's Rate Schedule; (ii) cost of materials and permanent equipment; (iii) payments properly made by Contractor to Subcontractors, and transportation costs; (iv) rental charges of necessary machinery and equipment (but excluding hand tools) used at the Project Site; (v) Permit fees ; and (vi) reasonable costs of mobilization or demobilization if the delay related to the event justifying the Change Order extends Contractor's time on the Project Site by more than thirty (30) days. Notwithstanding the foregoing, Direct Costs shall not include (A) salaries or other compensation (including costs of contributions, assessments, fringe benefits or taxes based on salaries or compensation) of Contractor's Personnel at Contractor's principal office and branch offices (except as provided in the previous sentence); (B) expenses of Contractor's principal and branch offices; (C) Contractor's profit, overhead or general expenses of any kind; (D) any replacement, repair or other costs or liabilities arising from any loss of or damage to any equipment, tools or other property owned or used by Contractor or its Subcontractors; (E) costs to correct or re-perform any components of such Work as a result of the acts or omissions of Contractor or its Personnel; (F) any fines or penalties assessed against Contractor or its Personnel in connection with such Work that were assessed due to the fault of Contractor or its Personnel; or (G) any costs or expenses other than those specifically set forth above as Direct Costs. In the event that Owner believes that any cost



is improperly included in the calculation of Direct Costs or that any cost included in the Direct Costs has been incorrectly determined, Owner may inform Contractor that it elects to submit such dispute to the Technical Dispute Engineer for full and final resolution of the matter in accordance with Section 17.1.

10.5.4 **Taxes.** The Parties acknowledge that Section 5.3 will apply to any additional Work covered by any Change Order.

10.5.5 **Change Order Constitutes Complete Relief.** Any Change Order signed by Owner and Contractor and the payment of any increase in the Contract Price reflected in such signed Change Order shall constitute full compensation to Contractor for all claims for direct or indirect costs for labor, temporary construction facilities, Project Site or home office overhead, inefficiencies, impacts or any other cost of any kind or nature. If the Change Order adjusts the Milestone Schedule, the Change Order signed by Owner and Contractor shall be complete relief to Contractor for schedule impacts for all events giving rise to the Change Order. Further, upon execution of a Change Order, Contractor shall waive any claims it may have relating to the subject matter of the Change Order, and the Change Order shall serve as Contractor's sole and exclusive remedy with respect to the matter that gave rise to such Change Order.

## **ARTICLE 11 INSURANCE**

Each Party, at its own expenses, shall procure or cause to be procured and maintain or cause to be maintained in full force and affect the insurance coverage specified in Exhibit X. The insurance policy limits set forth herein shall in no way be construed as limits on either Party's liability under this Agreement. Contractor shall submit to the appropriate insurer timely notices and claims of all losses insured under any insurance policy procured pursuant to this Agreement, pursue such claims diligently, and comply with all terms and conditions of such policies. Contractor shall promptly give notice to Owner of any incidents that may give rise to a claim under any policy procured under this Agreement and shall notify Owner prior to making a claim under any policy. Contractor shall copy Owner on the submission of any claim of loss under any policy procured under this Agreement. Contractor shall make all policies for Contractor insurance, policy amendments, and other related insurance documents available for inspection and photocopying by Owner on reasonable notice. The failure by either Contractor or Owner to obtain or maintain the insurance required under this Agreement shall entitle the other Party, in addition to any other remedies available under this Agreement, at law or in equity, to obtain such coverage at the expense of the Party failing to obtain or maintain such insurance and such Party shall reimburse the other Party for the cost of obtaining or maintaining such insurance.

## **ARTICLE 12 INTELLECTUAL PROPERTY RIGHTS**

12.1 **Intellectual Property.** As used herein, "**Licensed Materials**" means the following Intellectual Property that Contractor delivers to Owner or which is included in the Contractor Deliverables: (a) software and firmware, if any, and (b) any other Intellectual Property included in any Background Technology, Contractor shall prepare a written inventory of all such the Licensed

Materials and deliver it to Owner no later than the Substantial Completion Date. The Licensed Materials, including those contained within or accompanying the Work, are not being sold to Owner, but rather are being licensed in accordance with the terms and conditions of this Article 12. Without limiting any other provision hereunder, (i) Contractor (or its Subcontractors or Suppliers) owns or has sufficient rights as licensee to all Intellectual Property (a) encompassed in or related to the Work, and (b) necessary for the transfer of title in the Work and Contractor Deliverables or the license for the Permitted Use as defined below; (ii) Contractor (or its Subcontractors or Suppliers) has all necessary rights to fulfill its obligations and grant all licenses and rights granted under this Agreement; (iii) the Work, the equipment and any other services or materials supplied by Contractor, and Owner's receipt and use thereof as contemplated by this Agreement do not infringe or violate any intellectual property rights or other rights of any Person; and (iv) the Intellectual Property licensed hereunder includes all intellectual property and/or proprietary rights reasonably necessary and sufficient for the construction, operation, maintenance, utilization, modification, repair and dismantling of the Work and the Equipment.

12.2 **Grant of License.** Subject to Owner's ongoing compliance with all terms of this Agreement and upon delivery of the applicable Licensed Materials by Contractor to Owner, Contractor hereby grants to Owner an irrevocable, perpetual, royalty-free, non-exclusive, license to use the Licensed Materials (including Background Technology) solely as necessary to complete, use, operate, maintain and repair, upgrade, expand or replace the Project ("Permitted Use"), in accordance with the terms of this Agreement; such license is fully paid within the Contract Price, which license shall be transferable in connection with any permitted assignment of this Agreement. Owner may disclose the Licensed Materials to those third-party contractors who have a need to access them solely for the Permitted Use and its Affiliates, Financial Parties, actual or prospective lenders, equity holders, underwriters and insurers.

12.3 **Proprietary Notices.** Owner may not remove, change or obliterate any copyright, confidential, proprietary or trademark notices incorporated in, marked on or affixed to the Licensed Materials, and will reproduce such notices in all copies it makes of the Licensed Materials.

12.4 **No Reverse Engineering.** The Licensed Materials contain trade secrets of Contractor or third parties from whom Contractor has obtained rights. In order to protect the Licensed Materials, Owner may not modify, translate, decompile, reverse engineer, decrypt, extract or disassemble or otherwise reduce or attempt to reduce the Licensed Materials to source code form or disclose or expose the source code portions of the Licensed Materials to a third party, except as expressly authorized by law that cannot be altered by this Agreement.

12.5 **Ownership.** All right, title and interest in the Licensed Materials, all Intellectual Property therein and all copies remain the sole property of Contractor or its licensors. Owner acquires no rights therein except for the license rights expressly granted under this Agreement.

## **ARTICLE 13 OWNERSHIP OF CONTRACTOR DELIVERABLES, BACKGROUND TECHNOLOGY AND THIRD-PARTY MATERIALS**

13.1 **Ownership.** To the fullest extent permitted by Applicable Laws, as between Contractor and Owner, Owner shall be the sole and exclusive owner of all right, title, and interest to all

Contractor Deliverables (except for the Licensed Materials and Background Technology, which shall be governed by Article 12). At no time will Contractor dispute or contest Owner's exclusive ownership rights in any of the foregoing. Contractor hereby unconditionally, perpetually, and irrevocably assigns to Owner all of its right, title and interest throughout the world in and to the Contractor Deliverables and all Intellectual Property therein or pertaining to the manufacture or use thereof.

13.2 **Background Technology and Third-Party Materials.** Except as expressly provided herein, Contractor retains all of its rights in and to Contractor's Background Technology. If Contractor incorporates any of Contractor's Background Technology or third party materials into any Contractor Deliverable, creates any Contractor Deliverable with a dependency upon any Contractor's Background Technology or third party materials or otherwise provides Contractor's Background Technology or third party materials to Owner in conjunction with any Contractor Deliverable, then Contractor hereby grants, and agrees to grant, to Owner a non-exclusive, royalty-free, fully paid up, irrevocable, worldwide, perpetual license (with the right to sublicense through multiple tiers) to make, have made, sell, offer for sale, import, export, use, disclose, reproduce, publicly perform, transmit, publicly display, distribute, and create derivative works based on (collectively, "**Use**"), Contractor's Background Technology and third party materials in connection with the Contractor Deliverables and to permit others to do any of the foregoing. Without limiting the foregoing, Contractor further hereby grants, and agrees to grant, to Owner a non-exclusive, royalty-free, fully paid up, irrevocable, worldwide, perpetual license (with the right to sublicense through multiple tiers) to Use Contractor's Background Technology and third party materials made available by Contractor hereunder for the construction, operation, maintenance, repair, rebuilding, replacing or expanding of the project or facility for which they were prepared and intended. Modification of Contractor's Background Technology by Owner without Contractor's written permission shall be at Owner's sole risk, and Contractor shall have no liability with respect to such modification.

13.3 **Further Assurances.** Contractor will take such steps and actions, and provide such cooperation and assistance to Owner and its successors, assigns, and legal representatives, including the execution and delivery of documents as may be necessary to effect, evidence, or perfect the assignments set forth in Section 13.2 above to Owner, or any assignee or successor thereto. In addition, Contractor will, at the request of Owner, promptly sign, execute, make, and do all such deeds, documents, acts, and things as Owner may reasonably require to apply for, obtain, register, maintain, and vest in the name of Owner alone, Intellectual Property protection relating to any or all of the Contractor Deliverables in any country throughout the world, and when so obtained or vested, to renew and restore the same; to defend any judicial, opposition, or other proceedings, petitions, or applications for revocation of such Intellectual Property; and to assist Owner with the defense and enforcement of its rights in any registrations issuing from such applications and in all Intellectual Property protection in the Contractor Deliverables. Contractor hereby irrevocably appoints Owner, and its designees, as attorney-in-fact to act for or on Contractor's behalf with the same legal force and effect as if executed by Contractor with respect to such activities.

## ARTICLE 14 INDEMNIFICATION

### 14.1 **Indemnities.**

14.1.1 **Indemnity by Contractor.** To the fullest extent permitted by law, Contractor shall defend, indemnify and hold harmless Owner, its respective subsidiaries and Affiliates, the directors, officers, agents, employees, successors and assigns of each of them (each, an “**Owner Indemnified Party**”) from and against any and all losses, costs, damages, injuries, liabilities, claims, demands, fines, penalties, assessments, interest, causes of action, and expenses, including reasonable attorneys’ fees, courts costs and other legal fees and expenses listed in Section 17.3 (collectively, “**Losses**”), incurred by or asserted against any Owner Indemnified Party to the extent and as a result of any and all of the following:

(a) any third party claims for bodily injury, death or damage to property to the extent caused by any negligent act or omission (including strict liability) or willful misconduct arising out of the performance of the Work or any curative action under any warranty related to the Work, by Contractor or any Affiliate thereof, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable;

(b) any third party claims for bodily injury, death or property damage arising out of Contractor’s (or its Subcontractor’s) Defects, Contractor’s (or its Subcontractor’s) breach of Contractor’s Warranty or Contractor’s (or its Subcontractor’s) breach of any applicable Site Requirements;

(c) any claims by any Governmental Authority for any failure by Contractor to pay when due any Contractor Taxes or to comply with any Applicable Permits;

(d) any claims for Losses incurred or claims associated with fines, penalties, related costs and expenses attributable to any failure of Contractor or any Subcontractor to comply with all Applicable Laws and Permits;

(e) any release of a Pre-Existing Hazardous Material or Hazardous Material for which Contractor is liable pursuant to Section 2.14;

(f) any claims or expenses arising out of the failure of Contractor or its Subcontractors to comply with the Site Requirements;

(g) any claims with respect to employer’s liability or worker’s compensation filed by any employee of Contractor or any of its Subcontractors, except to the extent caused by the negligent acts or omissions of Owner or Other Owner Contractors; any failure of the Project to meet either the Prevailing Wage and Apprenticeship Requirements; and/or

(h) any failure of the Project to meet the Domestic Content Requirements.

14.1.2 **Indemnity by Owner.** Owner shall defend, indemnify and hold harmless Contractor and its directors, officers, agents, employees, successors and assigns (each, a “**Contractor Indemnified Party**”), from and against any and all Losses incurred by or asserted against any Contractor Indemnified Party to the extent and as a result of any and all of the following:

(a) any third-party claims for injury or death or damage to property of any Person, including employees of Owner, Contractor or any Person employed by any of them for whose acts any of them may be liable to the extent caused by the negligent acts or omissions (including strict liability) or willful misconduct of Owner or any Person for whose acts Owner may be responsible;

(b) any loss of or damage to property, but only to the extent caused by Owner’s negligent acts or omissions;

(c) any claims by any Governmental Authority for any failure by Owner to pay when due any taxes for which it is responsible under this Agreement or to comply with any Applicable Permits;

(d) any release of a Hazardous Material for which Owner is liable pursuant to Section 2.14; and/or

(e) any claims with respect to employer’s liability or worker’s compensation filed by any employee of Owner or Other Owner Contractors, except to the extent caused by the negligent acts or omissions of Contractor or Contractor’s Personnel.

## 14.2 **Indemnification Procedure.**

14.2.1 **Notice of Proceedings.** The Person claiming to be indemnified under the terms of this Article 14 (the “**Indemnified Person**”) shall give the Party from which indemnification is sought (the “**Indemnifying Party**”) written notice of commencement of any legal action or of any claims against such Indemnified Person in respect of which indemnification will be sought, together with a copy of such claim, process or other legal pleading. Failure of the Indemnified Person to give such notice will not reduce or relieve the Indemnifying Party of liability under this Agreement unless and to the extent that the Indemnifying Party was prejudiced in the defense of such claim, action, suit or proceeding as a result of the failure of the Indemnified Person to give such notice. In any event, the failure to so notify shall not relieve the Indemnifying Party from any liability that it may have to the Indemnified Person otherwise than under this Article 14.

14.2.2 **Conduct of Proceedings.** Each Party and each other Indemnified Person shall have the right, but not the obligation, to contest, defend and litigate any claim, action, suit or proceeding alleged or asserted against it arising out of any matter in respect of which it is entitled to be indemnified under this Agreement, and the reasonable costs and expenses thereof (including reasonable attorneys’ fees and expert witness fees) shall be subject to

the said indemnity; *provided*, that the Indemnifying Party shall be entitled, at its option, to assume and control the defense of such claim, action, suit or proceeding at its expense upon its giving written notice thereof to the Indemnified Person, and such Indemnifying Party shall conduct with due diligence and in good faith the defense of any claim against such Indemnified Person, whether or not the Indemnifying Party shall be joined therein, and the Indemnified Person shall cooperate with the Indemnifying Party in such defense. The Indemnifying Party shall have charge and direction of the defense and settlement of such claim; *provided, however*, that without relieving the Indemnifying Party of its obligations under this Agreement or impairing the Indemnifying Party's right to control the defense or settlement thereof, the Indemnified Person may elect to participate through separate counsel in the defense of any such claim, but the fees and expenses of such counsel shall be at the expense of such Indemnified Person unless (a) there exists a material conflict of interest between the Indemnifying Party and such Indemnified Person in the conduct of the defense of such claim, (b) the Indemnifying Party did not employ counsel to assume the defense of such claim within a reasonable time after notice of the commencement thereof or (c) the Indemnified Person reasonably concludes and specifically notifies the Indemnifying Party in writing that there may be specific defenses available to it that are different from or additional to those available to the Indemnifying Party. In each such case, the Indemnifying Party shall not have the right to control the defense or settlement of such claim and the reasonable fees and expenses of counsel engaged by the Indemnified Person shall be at the expense of the Indemnifying Party. The amount of any indemnity payment made under Section 14.1.2 shall be reduced by the amount of all insurance proceeds received by the Indemnified Person in respect of the event giving rise to the right of indemnity under Section 14.1.2.

14.2.3 **Contributory Negligence.** If the joint, concurring, comparative or contributory fault or negligence of the Parties gives rise to damages for which the Parties are entitled to indemnification under this Article 14, then such damages shall be allocated between the Parties in proportion to their respective degrees of fault or negligence contributing to such damages.

14.3 **Intellectual Property Indemnity.** Contractor shall indemnify, defend and hold harmless Owner and each other Owner Indemnitee from any Losses arising out of any claim alleging that any Work performed under this Agreement, or any Contractor Deliverables (including any third-party materials pertaining thereto) provided as part of the Work under this Agreement, or the use or other exploitation thereof, infringes, misappropriates, or otherwise violates any rights, including any Intellectual Property, of any Person. Contractor shall have no obligation to indemnify Owner or any Representative under this Section 14.3 to the extent such Losses arise out of: (a) use of the Contractor Deliverables by Owner in combination with products, materials or equipment not permitted under this Agreement in circumstances where the infringement would have been avoided by the use of the Work or Contractor Deliverables not so combined; or (b) any modifications or changes made to Contractor Deliverables not permitted under this Agreement in circumstances where the infringement would have been avoided without such modifications or changes. Contractor shall have the right to modify to render non-infringing or replace the infringing portion of the Work or Contractor Deliverables, at no cost to Owner, *provided* that Contractor can do so in a manner that will not have an adverse impact on the use of or performance of, as applicable, the Work or Contractor Deliverables.

**ARTICLE 15**  
**DEFAULT, TERMINATION AND SUSPENSION**

15.1 **Termination by Owner.**

15.1.1 **Contractor Events of Default.** The occurrence of any one or more of the following events shall constitute an event of default by Contractor under this Agreement (“**Contractor Event of Default**”):

(a) (i) Contractor consents to the appointment of, or taking possession by, a receiver, trustee, custodian, or liquidator of itself or of a substantial part of its assets, or fails or admits in writing its inability to pay its debts generally as they become due, or makes a general assignment for the benefit of creditors; (ii) Contractor files a voluntary petition in bankruptcy or a voluntary petition or an answer seeking reorganization in a proceeding under any applicable bankruptcy or insolvency laws or an answer admitting the material allegations of a petition filed against it in any such proceeding, or seeks relief by voluntary petition, answer or consent under the provisions of any now existing or future bankruptcy, insolvency or other similar law providing for the liquidation, reorganization, or winding up of corporations, or providing for an agreement, composition, extension, or adjustment with its creditors; (iii) a substantial part of Contractor’s assets are subject to the appointment of a receiver, trustee, liquidator, or custodian by court order, and such order remains in effect for more than thirty (30) days; or (iv) Contractor is adjudged bankrupt or insolvent, has any property sequestered by court order, and such order remains in effect for more than thirty (30) days, or has filed against it a petition under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction, whether now or hereafter in effect, and such petition is not dismissed within sixty (60) days of such filing;

(b) Contractor fails, for any reason, to pay when due any payment required to be made to Owner under this Agreement within ten (10) days after receipt of written notice from Owner of Contractor’s failure to make such payment (except to the extent Contractor disputes such other payment or payments in good faith and in accordance with the terms of this Agreement);

(c) Contractor fails to comply with any material provision of any Applicable Laws, Applicable Permit, or applicable Site Requirement, the effects of which have not been cured to Owner’s reasonable satisfaction within thirty (30) days after notice from Owner; *provided*, that if such failure to comply is not capable of being cured within thirty (30) days, Contractor shall not be in default so long as Contractor commences to cure within thirty (30) days and thereafter diligently proceeds to cure such breach in a manner reasonably satisfactory to Owner;

(d) any material breach by Contractor of any representation or warranty contained in Article 8, the impacts of which have not been cured to Owner’s reasonable satisfaction within thirty (30) days after notice thereof to Contractor;

(e) the dissolution of Contractor and the failure of Contractor's successor to demonstrate, within ten (10) Business Days of the dissolution of Contractor and to Owner's reasonable satisfaction, that it is willing and able to fully perform Contractor's obligations under this Agreement;

(f) the transfer by Contractor of all or a substantial portion of the rights or obligations of Contractor under this Agreement except for an assignment permitted under this Agreement;

(g) prior to Final Completion, the failure to maintain the Contractor's Parent Guaranty, or the Performance Bond or the Warranty Bond expires or otherwise becomes void or ineffective in any manner or the issuer of the Performance Bond or the Warranty Bond fails or ceases to be an Eligible Surety, and within five (5) Business Days of notice to Contractor to cure such event, a replacement credit support meeting the requirements of this Agreement is not issued to Owner by a party deemed reasonably acceptable by Owner in the case of the Contractor's Parent Guaranty, or by an Eligible Surety in the case of a Performance Bond or Warranty Bond;

(h) any failure by Contractor to maintain the insurance coverage required of it in accordance with Article 11;

(i) Contractor Abandons the Work or fails to make commercially reasonable progress with respect to the Work, following written notification thereof by Owner. For purposes of this Section 15.1.1(j), "**Abandon**" means that Contractor and its Subcontractors have either (i) substantially reduced personnel at the Project Site or removed required equipment from the Project Site such that, in Owner's reasonable judgment, Contractor would not be capable of completing the Milestones in accordance with the Milestone Schedule or the Construction Schedule, or (ii) not performed Work at the Project Site for ten (10) or more consecutive days; and

(j) Contractor is in breach of any provision of this Agreement or has failed to perform its obligations under this Agreement (other than those breaches specified in Section 15.1.1(a) through 15.1.1(j)) and such breach is not cured by Contractor within thirty (30) days following notice thereof to Contractor, or if such breach is not capable of being cured within such thirty (30)-day period, Contractor (i) fails to commence to cure such breach within such thirty (30)-day period or (ii) fails to thereafter diligently proceed to cure such breach in a manner reasonably satisfactory to Owner in its sole discretion.

15.1.2 **Owner Termination for Cause**. Upon the occurrence and during the continuation of any Contractor Event of Default under this Agreement, Owner, in addition to its right to pursue any other remedy given under this Agreement or now or hereafter existing at law or in equity or otherwise, shall have the right to terminate this Agreement by written notice to Contractor (an "**Owner Termination for Cause**") and retain replacement contractors to complete the Work. An Owner Termination for Cause shall be effective upon delivery of Owner's notice with respect thereto. In the event such termination occurs prior to Mechanical Completion, title to any Work completed by Contractor prior to such termination shall transfer to Owner as of the termination date. In



the event such termination occurs prior to Substantial Completion, Contractor shall promptly deliver to Owner all Contractor Deliverables completed prior to the termination date and title to such Contractor Deliverables shall transfer to Owner as of the termination date. Owner shall, within a reasonable period of time after the Work is finally completed by the work of one or more replacement contractors, determine the total cost to Owner for completing the Work in accordance with the Scope of Work, the Milestone Schedule, the Standard of Care and the other requirements of this Agreement, including all sums previously paid or then owed to Contractor pursuant to this Agreement. If the Contract Price is less than the sum of (a) all costs and expenses incurred by Owner to engage a substitute contractor to complete (or cure deficiencies in) the Work, including overhead and legal, engineering and other professional expenses, (b) all other costs, expenses and damages suffered by Owner as a result of the Contractor Event of Default and the Owner Termination for Cause, and (c) all amounts previously paid to Contractor pursuant to this Agreement, then Contractor shall pay to Owner on demand an amount equal to such difference. Any amount owed by Owner to Contractor for the completion of the Work shall be retained by Owner until after completion of the Work and applied by Owner to pay any amounts and damages owed by Contractor pursuant to this Section 15.1.2 or otherwise. Any excess of the amount retained over the amount due under this Section 15.1.2 shall be remitted to Contractor within sixty (60) days after final completion of the Work.

**15.1.3 Owner's Termination for Convenience.** In addition to such other termination rights set forth above, Owner reserves the right to terminate this Agreement in whole or in part at any time for any reason for convenience for the Owner ("**Owner Termination for Convenience**"). Upon receipt of written notice from Owner of termination of this Agreement, or any part thereof, for convenience, Contractor shall cease performance of the Work as directed and deliver or return for credit all materials and equipment which have been purchased and/or are in the possession of Contractor relating to the Work as indicated in the notice of termination. In the event of an Owner Termination for Convenience, Contractor shall be entitled to recover an amount equal to the Termination Payment pursuant to Section 15.3. Payment of such amount shall be Owner's sole and exclusive liability with respect to a termination for convenience and Contractor's sole and exclusive remedy. In the event such termination occurs prior to Mechanical Completion, title to any Work completed by Contractor prior to such termination and paid for by Owner shall transfer to Owner as of the termination date. In the event such termination occurs prior to Substantial Completion, Contractor shall promptly deliver to Owner all Contractor Deliverables completed prior to the termination date and title to such Contractor Deliverables shall transfer to Owner as of the termination date.

**15.1.4 Liability for Delay Liquidated Damages.** Without limiting Owner's remedies under Section 15.1.2, if Contractor is terminated for cause, then upon such termination, Contractor shall not be liable to Owner for any Delay Liquidated Damages, if any, accruing after such date of termination.

## 15.2 **Owner Default.**

15.2.1 **Owner Events of Default.** The occurrence of any one or more of the following events shall constitute an event of default by Owner under this Agreement (“**Owner Event of Default**”):

(a) (i) Owner consents to the appointment of, or taking possession by, a receiver, trustee, custodian, or liquidator of itself or of a substantial part of its assets, or fails or admits in writing its inability to pay its debts generally as they become due, or makes a general assignment for the benefit of creditors; (ii) Owner files a voluntary petition in bankruptcy or a voluntary petition or an answer seeking reorganization in a proceeding under any applicable bankruptcy or insolvency laws or an answer admitting the material allegations of a petition filed against it in any such proceeding, or seeks relief by voluntary petition, answer or consent under the provisions of any now existing or future bankruptcy, insolvency or other similar law providing for the liquidation, reorganization, or winding up of corporations, or providing for an agreement, composition, extension, or adjustment with its creditors; (iii) a substantial part of Owner’s assets are subject to the appointment of a receiver, trustee, liquidator, or custodian by court order, and such order remains in effect for more than thirty (30) days; or (iv) Owner is adjudged bankrupt or insolvent, has any property sequestered by court order, and such order remains in effect for more than thirty (30) days, or has filed against it a petition under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction, whether now or hereafter in effect, and such petition is not dismissed within sixty (60) days of such filing;

(b) Owner’s failure to pay to Contractor any required payment, that is not in dispute, when due, which failure continues for thirty (30) days after written notice of failure has been received by Owner from Contractor;

(c) any material breach by Owner of any Owner representation or warranty contained in Article 8, the impacts of which have not been cured to Contractor’s reasonable satisfaction within thirty (30) days after notice thereof to Owner; and

(d) Owner is in breach of any provision of this Agreement or has failed to perform its obligations under this Agreement (other than those breaches specified in Section 15.2.1(a) through 15.2.1(c) or any breach by Owner of its obligations that cannot be cured with the issuance of a Change Order pursuant to Section 10.5) and (i) such breach is not cured by Owner within thirty (30) days following notice thereof to Owner, or (ii) if such breach is not capable of being cured within such thirty (30)-day period, Owner (A) fails to commence to cure such breach within such thirty (30)-day period or (B) fails to thereafter diligently proceed to cure such breach in a manner reasonably satisfactory to Contractor.

15.2.2 **Contractor Termination for Cause.** Upon the occurrence and during the continuation of any Owner Event of Default under this Agreement, Contractor may terminate this Agreement upon thirty (30) days’ prior written notice following any Owner Event of Default (a “**Contractor Termination for Cause**”). In the event of a Contractor

Termination for Cause, Contractor shall be entitled to recover an amount equal to the Termination Payment pursuant to Section 15.3. In the event such termination occurs prior to Mechanical Completion, title to any Work completed by Contractor prior to such termination and paid for by Owner shall transfer to Owner as of the termination date. In the event such termination occurs prior to Substantial Completion, Contractor shall promptly deliver to Owner all Contractor Deliverables completed prior to the termination date and title to such Contractor Deliverables shall transfer to Owner as of the termination date.

15.2.3 **Suspension During Owner Event of Default or Dispute.** Upon Owner's failure to make any required payment that has not been cured by Owner within ten (10) days of receipt of written notice of such failure given by Contractor pursuant to Section 15.2.1(b), Contractor may suspend the Work until such Owner Event of Default under Section 15.2.1(b) is cured or the Agreement is terminated. Notwithstanding the foregoing, and subject to Section 10.3, Contractor shall continue performance of the Work during any good faith dispute over payment; *provided*, that Owner continues to pay all undisputed amounts.

15.2.4 **No Other Termination Rights.** Other than as stated in this Article 15, neither Party will have any right to terminate this Agreement, and Contractor acknowledges that its sole and exclusive remedies for any failure of Owner to comply with its obligations under this Agreement (other than as described in Sections 15.2.1 and 15.2.2) are limited to receipt of a Change Order as described in Section 10.5.

### 15.3 **Termination Payment.**

15.3.1 **Termination Payments Due to Contractor.** Upon a termination of this Agreement pursuant to Sections 15.1.3 or 15.2, Contractor shall be entitled to a payment (the "**Termination Payment**"), which shall equal the difference of (a) the portion of the Contract Price that is applicable to Work completed up to the date of termination as of the next scheduled Milestone in the Payment Schedule and (b) all amounts previously paid by Owner to Contractor pursuant to this Agreement as of the date of termination.

15.3.2 **Payment of Termination Payment.** Contractor shall submit an invoice to Owner for the Termination Payment with supporting information and documentation of any fees or expenses claimed by Contractor pursuant to Section 15.3 within sixty (60) days of the effective date of the termination. Owner shall pay such invoice within thirty (30) days after its receipt of same unless it disputes in good faith certain elements thereof, in which event only the undisputed portion of the Termination Payment need be made within such thirty (30)-day period. As a condition precedent to receiving any Termination Payment, Contractor shall comply with the timing requirements in Article 3.

15.3.3 **Contractor's Sole Remedy.** Payment of the Termination Payment shall be the sole and exclusive liability of Owner, and the sole and exclusive remedy of Contractor, with respect to termination by Owner of this Agreement under Sections 15.1.3 or 15.2, and in such event, Owner shall have no further liability to Contractor for uncompleted Work in connection with such termination.

15.4 **Force Majeure Termination.** If a Force Majeure Event prevents Contractor from performing its obligations under this Agreement for one-hundred eighty (180) consecutive days, or two hundred ten (210) non-consecutive days, Owner may terminate this Agreement at any time upon thirty (30) days written notice to Contractor. In the event that either Party exercises its rights to terminate this Agreement pursuant to this Section 15.4, such termination shall not constitute an Owner Event of Default or Contractor Event of Default and this Agreement shall terminate with no liability of either Party to the other Party, except for such amounts then due and owing under this Agreement as of the date of such termination for Work performed prior to the termination date.

15.5 **Discontinuation of Work.** Upon termination of this Agreement, Owner shall be immediately released from any and all obligations to Contractor (except for any claims outstanding against Owner under Section 14.1.2 prior to termination or Owner's obligation to pay any amounts specified in Sections 15.3 and 15.4, if applicable), Contractor shall (i) immediately discontinue the Work, (ii) remove from the Project Site its Personnel, all Contractor equipment, waste, rubbish and Hazardous Material brought onto the Project Site by Contractor or its Subcontractors or any Person for which Contractor is otherwise responsible, (iii) at Owner's request, license, in the manner provided herein, 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, and (iv) at Owner's request, assign to Owner any and all (a) Subcontracts with Subcontractors; (b) warranties, guarantees and obligations provided to Contractors under the terms of any Subcontract; (c) Third-Party Warranties; and (d) unclosed Permits. Owner shall be entitled to take exclusive possession of the Work, the Project Site, and any and all equipment (including materials delivered or in route to the Project Site). In each case, Contractor shall immediately take such steps as are reasonably necessary to preserve and protect Work completed and in progress and to protect the Work, materials, equipment and supplies at the Project Site, stored off-site, or in transit.

15.6 **Effects of Termination.** Except as otherwise set forth in this Agreement, the expiration or termination of this Agreement will not affect any liabilities of the Parties that accrued prior to such expiration or termination.

## ARTICLE 16 LIMITATION OF LIABILITY

16.1 **Consequential Damages.** Except with respect to (a) liabilities resulting from the gross negligence, fraud, willful misconduct or illegal or unlawful acts of a Party or their employees, agents, independent contractors or other personnel (including their labor, and including with respect to Contractor and Subcontractors); (b) any acts or omissions for which liability cannot be disclaimed or limited under Applicable Laws; (c) Contractor's indemnification obligations under Article 14; (d) liabilities resulting from a breach of Article 13 (Ownership of Contractor Deliverables; Background Technology and Third Party Materials); or (e) liabilities resulting from a breach of Article 12 (Intellectual Property or Section 18.7 (Confidentiality)), in no event shall Owner or Contractor (or the parent companies and Affiliates of each, and their respective members, managers, shareholders, partners, equity owners, officers, directors, agents, employees, successors or assigns) be liable to the other

**Party (or its parent companies and Affiliates, and their respective members, managers, shareholders, partners, equity owners, officers, directors, agents, employees, successors or assigns) in contract, tort, strict liability, warranty or otherwise, for any special, incidental, exemplary, punitive or consequential damages, including delay, disruption, loss of product, loss of anticipated profits or revenue, loss of use of the equipment or system, non-operation or increased expense of operation of other equipment or systems, cost of capital, or cost of purchase or replacement equipment, systems or power.** NOTWITHSTANDING THE FOREGOING, THE LIMITATION OF LIABILITY AS TO CONSEQUENTIAL DAMAGES DOES NOT APPLY TO ANY CLAIMS FOR WHICH CONTRACTOR HAS AGREED TO PROCURE LIABILITY INSURANCE PURSUANT TO THIS AGREEMENT. THE PARTIES AGREE THAT FOR ANY CONSEQUENTIAL DAMAGES CLAIM IMPLICATING ANY OF CONTRACTOR'S LIABILITY INSURANCE REQUIRED UNDER THIS AGREEMENT, THE LIMITATION OF LIABILITY WILL CORRESPOND TO THE REQUIRED LIMITS OF LIABILITY IN THE CONTRACTOR'S PRIMARY AND EXCESS LIABILITY INSURANCE POLICIES. CONTRACTOR'S LIABILITY FOR CONSEQUENTIAL DAMAGES SHALL BE COVERED, AT A MINIMUM, TO THE FULL EXTENT OF THE LIMITS OF INSURANCE REQUIRED HEREIN. ONLY IN THE EVENT THAT INSURANCE DOES NOT COVER ANY OF CONTRACTOR'S LIABILITY WILL ANY LIMITATION ON LIABILITY OR INDEMNITY FOR CONSEQUENTIAL DAMAGES SET OUT IN THIS AGREEMENT BE EFFECTIVE. NOTHING IN THIS SECTION INURES TO THE BENEFIT OF CONTRACTOR'S LIABILITY INSURERS. CONTRACTOR WILL PROCURE ALL LIABILITY INSURANCE COVERAGE IN COMPLIANCE WITH THIS LIMITATION OF LIABILITY PROVISION.

16.2 **Limitation on Liability.** Notwithstanding anything to the contrary contained in this Agreement, including Section 16.1 above, in no event shall Contractor or Owner be liable to the other for any Losses in excess of an amount equal to one hundred percent (100%) of the Contract Price, as adjusted for Change Orders, regardless of whether such liability arises out of breach of contract, tort, product liability, contribution, strict liability or any other legal or equitable theory; *provided, however,* that the preceding limitation of liability shall not apply to, and no liability amounts shall apply against such limitation of liability, for liabilities resulting from the (a) gross negligence, fraud, willful misconduct or illegal or unlawful acts of either Party or its Subcontractors or their Personnel (including their Labor); (b) any acts or omissions for which liability cannot be disclaimed or limited under applicable law; (c) third party claims property damage, bodily injury, or death; (d) liabilities covered by insurance required to be carried by the Parties under this Agreement; (e) any failure of the Project to satisfy the Prevailing Wage and Apprenticeship Requirements, or (f) any failure of the Project to meet the Domestic Content Requirements. In the event (i) either Party (or its Subcontractors) fails to procure and/or maintain the insurance required under Article 11 and (ii) an event or incident occurs that would have been covered by the insurance, such Party's liability cap under this Section 16.2 with respect to such event or incident shall be raised by the full amount of the policy(ies) that it failed to procure and/or maintain. For the avoidance of doubt, such Party's liability cap shall only be raised as set forth in the preceding sentence if an insurable event occurs during the time period covered by the lapse in insurance coverage.

## ARTICLE 17 DISPUTE RESOLUTION

17.1 **Technical Disputes.** In the event of any Technical Dispute arising under this Agreement, within ten (10) days following the receipt of a written notice from either Party identifying such dispute, the Parties shall meet, negotiate and attempt, in good faith, to resolve the dispute quickly, informally and inexpensively. If the Parties are unable to resolve a Technical Dispute arising under this Agreement within ten (10) days of initiating such discussions, or within fifteen (15) days after notice of the dispute, either Party may submit the Technical Dispute to the Technical Dispute Engineer in accordance with the following procedures:

17.1.1 At least ten (10) days before meeting with the Technical Dispute Engineer, the Parties shall exchange and provide to the Technical Dispute Engineer written proposals for the amount of money damages or other relief they would offer or demand, as applicable, and that they believe to be appropriate, with respect to each issue subject to a Technical Dispute. Any time prior to the close of the hearing, the Parties remain free to exchange revised written proposals of offers or demands, which will supersede all prior proposals. In rendering the decision, the Technical Dispute Engineer will select between the Parties' last proposals, choosing the proposal that the Technical Dispute Engineer find more reasonable and appropriate.

17.1.2 Any decision or award of the Technical Dispute Engineer shall be bound by all provisions of this Agreement and the Technical Dispute Engineer shall have no authority or power to enter an award that is in conflict with any of the provisions of this Agreement. The decision or award must be in writing and must contain findings of fact on which it is based. Absent fraud, collusion, mistake or manifest error such findings of fact shall be final. Any decision or award of the Technical Dispute Engineer may be enforced or confirmed in a court of competent jurisdiction.

17.1.3 The Parties shall jointly hire the Technical Dispute Engineer and each Party shall pay fifty percent (50%) of the fees and expenses of the Technical Dispute Engineer.

17.2 **Other Disputes.** In the event of any dispute arising under this Agreement where the particular subject matter is other than those set forth in the definition of Technical Disputes, within ten (10) days following the receipt of a written notice from either Party identifying such dispute, the Parties shall meet, negotiate and attempt, in good faith, to resolve the dispute quickly, informally and inexpensively ("**Management Settlement Conference**"). Any dispute not resolved through the Management Settlement Conference shall be decided by litigation in accordance with Section 18.12 of this Agreement.

17.3 **Attorneys' Fees.** In any litigation or arbitration to enforce this Agreement, the prevailing Party in such action shall be entitled to the recovery of its reasonable legal fees and expenses (including reasonable attorneys' fees and legal costs), and costs and expenses such as expert witness fees, all as fixed by the court without necessity of noticed motion.

17.4 **Continuation of Work During Disputes.** Subject to Section 15.2.3 and Section 10.3, Contractor agrees, that in the event of any dispute arising under this Agreement, Contractor shall

not suspend, in whole or in part, performance of this Agreement during any dispute unless directed to do so by Owner and will continue to perform the Work required herein without interruption or delay.

## **ARTICLE 18 MISCELLANEOUS PROVISIONS**

18.1 **Successors and Assigns.** References to Parties in this Agreement or to another particular Person shall be deemed to include references to their successors and permitted assigns. Except as set forth herein, this Agreement and all of Contractor's rights, duties and obligations under this Agreement are personal in nature and shall not be assigned, delegated or otherwise disposed of by Contractor without the prior written consent of Owner.

18.2 **Assignment.** Contractor shall not assign its rights or permit the assumption of its obligations under this Agreement without the prior written consent of Owner, which consent may be withheld in Owner's sole discretion. Owner shall not assign its rights or permit the assumption of its obligations under this Agreement without the prior written consent of Contractor, which consent may not be unreasonably withheld by Contractor; *provided, however*, that no such consent shall be required with respect to the assignment by Owner (i) to an Affiliate; (ii) to a non-Affiliate after the Final Completion Date and upon the payment of all outstanding amounts due to Contractor under this Agreement; (iii) to a purchaser of the Project or the ownership interests in Owner; (iv) the collateral assignment of this Agreement by Owner under Section 18.3, provided that, in the event of assignment under (i) or (iii), that such assignee (a) shall have agreed in writing to be bound by the terms and conditions hereof and furnished a copy of the assignment or transfer document to the Parties; (b) assignee has the same (or greater) financial ability as Owner to perform all of Owner's obligations; and (c) assignee owns/operates facilities substantially similar to the Project (or has engaged someone with such experience).

### 18.3 **Financial Party Accommodations.**

18.3.1 Owner, upon written notice to Contractor, may grant an interest in its rights and obligations under this Agreement to any Financial Party.

18.3.2 If Owner encumbers its interest under this Agreement as permitted herein, the following provisions shall apply: (a) such Financial Party shall have the right, but not the obligation, to perform any act required to be performed by Owner under this Agreement to prevent or cure an Owner Event of Default, and such act performed by such Financial Party shall be as effective to prevent or cure a default as if done by Owner; (b) Contractor hereby subordinates any and all Liens, and all rights to claim the foregoing, to which Contractor or any Subcontractor or Supplier is entitled under Applicable Law, whether now existing or hereafter arising, that may be brought by Contractor or any Subcontractor or Supplier against any or all of the Work, the Project or the Project Site to any Liens granted in favor of any Financial Party, whether such Lien in favor of any such Financial Party is created, attached or perfected prior to or after any such Liens of Contractor or any Subcontractor or Supplier, and Contractor shall require all Subcontractors and Suppliers to similarly subordinate their Liens; (c) Contractor shall submit proof reasonably satisfactory to Owner that Contractor has included in each Subcontract and Supplier agreements a

requirement that any Lien to which such Subcontractor or Supplier may be entitled to thereunder or by Applicable Law, whether now existing or hereafter arising, shall be subordinate and inferior to any Lien granted in favor of the applicable Financial Party, whether such Lien in favor of such Financial Party is created, attached or perfected prior to or after the Lien in favor of such Subcontractor or Supplier; (d) upon the receipt of a written request from Owner or any Financial Party, Contractor shall execute or arrange for the delivery of such certificates, estoppels, consents, amendments and other documents as may be reasonably necessary for Owner to consummate any financing or refinancing and will enter into reasonable agreements with such Financial Party requested by such Financial Party, including subordination agreements or agreements that provide that Contractor recognizes the rights of such Financial Party upon foreclosure of such Financial Party's security interest or other encumbrance and such other provisions as may be reasonably requested by any such Financial Party; and (e) Contractor agrees that no Financial Party shall be obligated to perform any obligation or be deemed to incur any liability or obligation provided in this Agreement on the part of Owner or shall have any obligation or liability to Contractor, its Affiliates or any Subcontractor or Supplier with respect to this Agreement except to the extent any Financial Party has assumed the obligations of Owner hereunder. In addition, Contractor shall, on the request of Owner, cooperate with Owner and any actual or potential Financial Party by (i) providing such information as any Financial Party may reasonably request in respect of this Agreement and the documents referred to in it and meeting with such Financial Party when reasonably requested; and (ii) permitting any actual or potential Financial Party to undertake reasonable review and due diligence of this Agreement and the documents referred to in it.

18.4 **Notice.** Any notice required or authorized to be given under this Agreement or any other communications between the Parties provided for under the terms of this Agreement shall be in writing (unless otherwise provided) and shall be delivered personally or by reputable express courier service or by email (read receipt requested), or at any other address notified by that Party to the other as its address for notice. Any notice so given personally or by express courier service shall be deemed to have been received upon delivery. In proving such delivery it shall be sufficient to produce a receipt showing personal service, the receipt of a reputable courier company showing the correct address of the addressee. The Parties' addresses for notice are:

If delivered to Owner:

Portland General Electric Company  
121 SW Salmon Street, [Mailstop]  
Portland, OR 97204

With copies to:

Portland General Electric Company  
Attn: Legal Department  
121 SW Salmon Street, 1WTC1301  
Portland, OR 97204

If delivered to Owner's Project Manager:

[ ]



[ ]  
[ ]  
[ ]

If delivered to Contractor:

[ ]  
[ ]  
[ ]  
[ ]

Attention: [ ]

Telephone: [ ]

18.5 **Term; Survival.**

18.5.1 For the avoidance of doubt, and subject to this Section 18.5, this Agreement shall be in full force and effect until the earlier of (a) the date all obligations of each Party have been indefeasibly fulfilled (including, any obligations related to Contractor's Warranty), or (b) the effective date of termination of this Agreement pursuant to its terms.

18.5.2 All provisions of this Agreement that are expressly or by implication to come into or continue in force and effect after the expiration or termination of this Agreement shall survive the expiration or termination of this Agreement.

18.5.4 Without limiting the generality of Section 18.5.2, provisions which by their nature are intended to survive the expiration or termination of this Agreement, including (a) Article 7 (Warranties), (b) the representations and warranties of Contractor and Owner contained herein (including those listed in Article 7 (Representations and Warranties), (c) Article 14 (Indemnification), Article 15 (Default, Termination and Suspension), Article 17 (Dispute Resolution) and Article 18 (Miscellaneous) shall survive the expiration or termination of this Agreement and remain in force and effect in accordance with their terms.

18.5.5 Except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, termination or expiration of this Agreement shall not relieve either Owner or Contractor of any obligations or liabilities for Losses to the other Party arising out of or caused by acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination, and shall not relieve Contractor of its obligations as to portions of the Work or other services under this Agreement already performed or of obligations assumed by Contractor prior to the date of termination.

18.6 **No Rights in Third Parties.** Except as otherwise set forth herein, including with respect to the rights of permitted successors and assigns, and indemnitees under Article 14, (i) nothing in this Agreement nor any action taken under this Agreement shall be construed to create any duty, liability or standard of care to any Person that is not a Party, (ii) no Person that is not a Party shall have any rights or interest, direct or indirect, in this Agreement or the services to be provided under this Agreement, and (iii) this Agreement is intended solely for the benefit of the Parties, and the

Parties expressly disclaim any intent to create any rights in any third party as a third-party beneficiary to this Agreement or the services to be provided under this Agreement.

18.7 **Confidentiality**. The Parties have entered into that certain [Mutual Confidentiality Agreement] dated [\_\_\_\_\_] (\_\_\_\_\_) (the “**NDA**”). The NDA is hereby incorporated herein by reference and made a part hereof. As used herein, the term “**Confidential Information**” shall have the meaning given to such term in the NDA. The Parties acknowledge and agree that information disclosed and received in connection with the Work and pursuant to this Agreement shall be Confidential Information subject to the NDA. The Parties’ obligations under this **Section 18.7** and the NDA shall remain in force, notwithstanding any expiration or termination of the NDA, during the term of this Agreement and for a period of three (3) years after Final Completion or, in the event this Agreement is terminated prior to Final Completion, for a period of three (3) years following the date that such early termination takes effect pursuant to the terms hereof. Notwithstanding anything to the contrary contained in this Agreement or the NDA, Purchaser may disclose Confidential Information to the Oregon Public Utility Commission (“OPUC”) to the extent necessary in connection with a regulatory proceeding; provided, however, Purchaser shall use commercially reasonable efforts to seek and obtain a protective order from the OPUC in connection with such disclosure of Confidential Information, and, if, to Purchaser’s actual knowledge, the OPUC plans to disclose any Confidential Information without the protection of a protective order, Purchaser shall give prompt notice to Seller of such possible disclosure and shall provide reasonable assistance to Seller in its efforts to oppose such disclosure.

18.8 **Data Protection**. Contractor represents and agrees that it has and will maintain in place commercially reasonable precautions to safeguard the confidentiality, security and integrity of Confidential Information. These precautions shall include, as applicable, (a) contractual restrictions on access to the information by vendors and other third parties, (b) intrusion detection systems on all information systems of Owner maintained or controlled by Contractor, and (c) if Contractor is provided with Customer Information as part of the Work, notification procedures for notifying Owner promptly in the event a security or information breach or disclosure is detected or suspected, as well as other response programs, when there is a suspected or detected unauthorized disclosure, access or attempted access of Customer Information (as defined below). These precautions shall include, as appropriate to Contractor’s performance of the Work: (i) access controls to Customer Information systems, including controls to identify and permit access only to authorized individuals and controls to prevent access to Customer Information through fraudulent means; (ii) employee controls and training; (iii) physical access restrictions at locations where Customer Information is located; (iv) encryption of electronic Customer Information when appropriate or legally required; and (v) a disaster recovery plan as appropriate to protect against loss or damage to Customer Information due to potential hazards such as fire or water damage or technological failures. Contractor agrees that it will monitor the foregoing measures with periodic audits or testing. “**Customer Information**” includes any personal identifying information or sensitive personal information including information on customers of Owner or otherwise contains materials that, in either Party’s reasonable determination, are the subject of relevant privacy law, rule or regulation.

18.9 **Public Statements**. Neither Party shall, 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 review and approve such proposed release or announcement.

18.10 **Non-waiver**. The failure of either Party to insist upon or enforce, in any instance, strict performance by the other Party of any of the terms of this Agreement or to exercise any rights herein conferred shall not be construed as a waiver or relinquishment to any extent of its right to assert, or rely upon any such terms or rights or any other terms or rights on any future occasion. No waiver shall be valid unless stated in writing as set forth in this Section 18.10.

18.11 **Governing Law; Venue**. This Agreement is governed by and shall be interpreted in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any legal action, suit or proceeding arising under this Agreement shall be brought exclusively in state court within Multnomah County, Oregon or federal court having jurisdiction over Multnomah County, Oregon. Each Party hereby consents to personal jurisdiction in any legal action, suit, or proceeding brought in any state court in Multnomah County, Oregon, or federal court having jurisdiction over Multnomah County, Oregon having subject matter jurisdiction, and irrevocably waives, to the fullest extent permitted by Applicable Laws and the law of the State of Oregon, any claim or any objection it may now or hereafter have, that venue or personal jurisdiction is not proper with respect to any such legal action, suit or proceeding brought in such a court in or having jurisdiction over Multnomah County, Oregon, including any claim that such legal action, suit or proceeding brought in such court has been brought in an inconvenient forum. Each Party further consents to the service of process out of any of the aforementioned courts in any such legal action, suit or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to such Party at its address specified herein for the giving of notices, or by such other notice given in accordance with the rules and procedures of such courts.

18.12 **Waiver of Jury Trial**. TO THE EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY HEREBY IRREVOCABLY WAIVES ITS RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION IN ANY COURT IN ANY JURISDICTION BASED UPON OR ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER TRANSACTION OR DOCUMENT RELATED TO THIS AGREEMENT.

18.13 **Expenses and Further Assurances**. Each Party shall pay its own costs and expenses in relation to the negotiation, preparation, execution and carrying into effect of this Agreement. Each Party shall provide such information, execute and deliver any instruments and documents and take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with this Agreement (at the cost and expense of the other Party) in order to give full effect to and carry out the intent of this Agreement.

18.14 **Status of Contractor; No Partnership; No Agency**. Contractor shall be an independent contractor with respect to any and all Work performed and to be performed under this Agreement. This Agreement shall not be interpreted or construed to create an association, joint venture or partnership relationship among or between the Parties or any similar relationship, obligation or liability. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, act on behalf of, act as or be an agent or representative of, or otherwise bind or obligate, the other Party.

18.15 **Drafting Ambiguities.** Preparation of this Agreement has been a joint effort of the Parties and the resulting document shall not be construed more severely against one of the Parties than against the other. Any rule of construction that ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement, or any amendments or exhibits hereto.

18.16 **Severability.** The provisions contained in each section, subsection and clause of this Agreement shall be enforceable independently of each of the others and their validity shall not be affected if any of the others are invalid. If any of those provisions is void but would be valid if some part of the provision were deleted, the provision in question shall apply with such modification as may be necessary to make it valid. The Parties shall, if necessary, negotiate in good faith and make any necessary amendments to ensure the enforceable terms of this Agreement reflect the true intent of the Parties as of the date of execution of this Agreement.

18.17 **Amendments.** No amendment or modification of this Agreement shall be valid or binding upon the Parties unless such amendment or modification shall be in writing and duly executed by authorized officers of both Parties. For the avoidance of doubt, emails between the Parties shall not be considered a “writing” for purposes of this Section 18.18.

18.18 **Counterparts.** This Agreement may be executed in any number of counterparts and each counterpart shall represent a fully executed original as if executed by both Parties, with all such counterparts together constituting but one and the same instrument.

18.19 **Electronic Delivery.** This Agreement may be duly executed and delivered by execution in electronic format (including portable document format (pdf)) delivery of the signature page of a counterpart to the other Party and shall be binding on and enforceable against each executing Party whether or not such electronic format execution is followed by delivery of an original counterpart to the other Party.

18.20 **Entire Agreement.** This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior agreements, arrangements, discussions, undertakings and commitments (whether written or oral) with respect thereto, and such prior agreements shall be null and void and of no further force and effect. All the Exhibits attached hereto are incorporated into and made a part of this Agreement. There are no other oral understandings, terms or conditions, and neither Party has relied upon any representation, express or implied, not contained in this Agreement.

[Signatures on following page]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date.

Owner:

Portland General Electric Company

By: \_\_\_\_\_

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

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

Contractor:

[Name of Contractor]

By: \_\_\_\_\_

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

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