

**ATTACHMENT 18 TO PACIFICORP'S  
ALL SOURCE  
REQUEST FOR PROPOSALS**

**Issued: December 2, 2009  
Responses Due: March 1, 2010**

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**ENGINEERING, PROCUREMENT  
AND CONSTRUCTION CONTRACT**

dated as of [DATE]

by and between

PacifiCorp,  
as Company

and

[Contractor Name]  
as Contractor

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THIS WORKING DRAFT DOES NOT CONSTITUTE A BINDING OFFER, SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE, AND IS CONDITIONED UPON SELECTION OF THE BIDDER, EXECUTION, AND EACH PARTY'S RECEIPT OF ALL REQUIRED MANAGEMENT AND BOARD APPROVALS IN THEIR SOLE DISCRETION (INCLUDING FINAL CREDIT AND LEGAL APPROVALS). ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS SET FORTH IN THIS WORKING DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS RELATING TO THIS WORKING DRAFT SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE TOLLING AGREEMENT IS NEGOTIATED, APPROVED BY ALL APPROPRIATE PARTIES AND EXECUTED BY EACH PARTY'S AUTHORIZED SIGNATORY, NO PARTY SHALL HAVE ANY LEGAL OBLIGATIONS, EXPRESSED OR IMPLIED, OR ARISING IN ANY OTHER MANNER UNDER THIS WORKING DRAFT OR IN THE COURSE OF NEGOTIATIONS. ANY ASSERTION TO THE CONTRARY IN ANY PROCEEDING OR ACTION REGARDING THIS WORKING DRAFT SHALL RENDER THIS WORKING DRAFT NULL AND VOID IN ITS ENTIRETY. DURING DISCUSSIONS AND NEGOTIATIONS ANY PARTY MAY CHANGE ITS POSITION ON ANY MATTER, WHETHER OR NOT SET FORTH IN OR BASED UPON THIS WORKING DRAFT, ANY OTHER DOCUMENT OR ANY COURSE OF DEALING, AT ANY TIME OR FOR ANY REASON.

## **ENGINEERING, PROCUREMENT AND CONSTRUCTION CONTRACT**

THIS ENGINEERING, PROCUREMENT AND CONSTRUCTION CONTRACT (this "Contract") is made and entered into as of \_\_\_\_\_ (the "Effective Date"), by and between PacifiCorp, an Oregon corporation ("Company"), and [CONTRACTOR FULL NAME], a \_\_\_\_\_ ("Contractor"), each referred to individually as a "Party" and collectively, as the "Parties."

### **RECITALS**

1. Contractor responded to a Request for Proposals – PacifiCorp RFP-2012 (the "RFP") which was issued by Company on [RFP DATE]. Company's objective in issuing the RFP was to fulfill a portion of its resource requirements as contemplated in Company's integrated resource plan published in January 2005.
2. Contractor responded to the RFP with a detailed written proposal for the construction of a generation facility of approximately \_\_\_\_ MW net generation capacity.
3. In accordance with the procedures set forth in the RFP, Contractor and Company have agreed upon a conformed scope of work (as described herein and in the Exhibits hereto, the "Work") setting forth any exceptions or modifications to the Specifications included in the RFP, upon which the Parties have agreed.

4. Contractor will, subject to the terms and conditions in this Contract, carry out and complete the Work.

5. Company will, in consideration of the performance by Contractor of the Work in strict accordance with the terms and conditions of this Contract, pay Contractor the Contract Price at the times and in the manner specified in this Contract.

## **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual representations and warranties and covenants made herein, Company and Contractor, each intending to be legally bound, hereby agree as follows:

### **ARTICLE 1**

#### **DEFINITIONS AND INTERPRETATION**

##### **Section 1.1 Defined Terms**

Unless the context requires otherwise, capitalized terms used in this Contract shall have the meanings assigned to them in the Glossary of Defined Terms attached hereto as Appendix A.

##### **Section 1.2 Interpretation**

Unless the context requires otherwise, in this Contract: (a) words singular or plural in number shall be deemed to include the other and pronouns having a masculine or feminine gender shall be deemed to include the other; (b) any reference in this Contract to any person shall include its permitted successors and assigns and, in the case of any governmental instrumentality, any person succeeding to its functions and capacities; (c) unless otherwise indicated, any reference in this Contract to any Article, sub-Article, Section, sub-Section, Appendix, Exhibit, Schedule or Attachment to any of these shall mean and refer to the Article, sub-Article, Section, sub-Section, Appendix, Exhibit, Schedule or Attachment contained in or the Article, sub-Article, Section, sub-Section, Appendix, Exhibit, Schedule or Attachment attached to this Contract, as the same may be amended or modified from time to time; and (d) the words “include” and “including” shall mean to include, without limitation.

### **ARTICLE 2**

#### **PROJECT COMMENCEMENT AND COMPLETION**

##### **Section 2.1 Notice To Proceed**

(a) Contractor shall not take any action with respect to the Project until Company has issued the Notice to Proceed substantially in the form attached as Exhibit B, except as provided in this Section 2.1. Issuance of the Notice to Proceed is expressly made subject to the satisfaction or waiver by Company of each of the conditions in Section 2.1(b). Following issuance of the Notice to Proceed Contractor shall proceed with developing the Project and performing the Work. Company shall provide Contractor at least three (3) Business Days’ prior notice of its intention to issue the Notice to Proceed. At Company’s option, Company may issue one or more limited notices to proceed prior to

issuing the Notice to Proceed, pursuant to which Contractor shall perform or cause to be performed certain development activities specified in any such limited notice to proceed.

(b) The obligation of Company to issue the Notice to Proceed to Contractor is subject to the satisfaction or waiver by Company of all of the following conditions precedent:

(i) CCN and Governmental Approvals. Company's receipt of and satisfaction with the terms of the CCN and all Governmental Approvals;

(ii) Network Resource Integration. PacifiCorp Transmission shall have demonstrated to Company that the Project can be integrated with PacifiCorp Transmission's System as a network resource on or prior to [May 1, 2012, 2013 or 2014,] as determined by the Bidder.

(iii) Accounting Treatment. Company shall be satisfied that the accounting treatment relating to PacifiCorp's obligations under any Project Document or in connection with the Project will not result in the addition of liabilities to the balance sheet of PacifiCorp.

(iv) Appendices, Exhibits and Schedules. Each Appendix, Exhibit and Schedule to this Contract shall be in final form and substance satisfactory to Company and Company's Representative, each in its sole discretion.

(v) Project Documents. Company shall have received the Project Documents, the Security Documents (including any Guaranty), and the Consents, (together with all amendments, supplements, schedules, and exhibits thereto), each of which shall (A) have been duly authorized, executed and delivered by each party thereto, (B) be substantially in the form of the applicable form attached hereto (if such a form is attached) and otherwise in form and substance satisfactory to Company, and (C) be in full force and effect.

(vi) Officers' Certificates. Company shall have received the certificate of an authorized officer of Contractor certifying that (A) each of the conditions precedent to the issuance of the Notice to Proceed set forth in this Section 2.1 has been satisfied (other than to the extent that the satisfaction of a condition is dependent on the judgment of Company) (B) that each of the conditions in Sections 3.2(b), 3.2(c) 3.2(d), 3.2(e), 3.2(f), 3.2(h) and 3.2(i) has been and will be satisfied as of the date of the issuance of the Notice to Proceed; and (C) each of the representations of Contractor set forth in Article 4 is true and correct. The form of such aforementioned certificate is attached hereto as Exhibit E.

(vii) Security Documents; Filings. The Security Documents and all financing statements or other instruments with respect thereto, as may be necessary, shall have been duly filed or recorded in such manner and in such places as are required by Applicable Law to establish and perfect first priority Liens, in favor of Company, as granted pursuant to the Security Documents. Company shall have received either copies of all such documents (including copies of all acknowledgment copies of filed financing statements and all other recordings made pursuant hereto) or other evidence satisfactory to Company of the filing of all such financing statements and other recordings.

(viii) Record Searches. A search, made no more than thirty (30) days prior to the date of issuance of the Notice to Proceed, of the Uniform Commercial Code filing offices or other registers in each jurisdiction in which Contractor is organized, has an office, or in which assets of Contractor are located, as certified by an authorized officer of Contractor, shall have revealed no filings, recordings or equivalent standards with respect to any of the Collateral (except such filings and recordings with respect to the Permitted Liens) in favor of any Person other than Company. A list of all of such filings and recordings or equivalent standards is set forth on Schedule 2.1(b)(viii). Company shall have received a copy of the search reports received as a result of such search.

(ix) Emission Reduction Credits. Company shall be satisfied with the form, substance and quantity of ERCs, if any, to provide for the lifetime operation of the Project.

(x) Equipment. Company shall be satisfied with the Equipment and all anticipated storage plans with respect thereto.

(xi) Additional Matters. Company shall have received such other certificates, documents and instruments relating to the transactions contemplated hereby as may have been reasonably requested by Company, and all corporate or other organizational actions and other matters and all other documents (including all documents referred to herein and not appearing as exhibits hereto) and all legal matters in connection with such transactions shall be satisfactory in form and substance to Company.

## **Section 2.2 Time for Completion**

Contractor shall complete the Work and the Performance Tests in accordance with the Project Schedule and the terms of this Contract. Without limiting the foregoing, Contractor shall cause the Substantial Completion Date to occur no later than the Guaranteed Substantial Completion Date.

## **Section 2.3 Company's Request for Earlier Completion**

Company may request completion of the Project earlier than the Guaranteed Substantial Completion Date and Contractor shall make all commercially reasonable efforts to comply with such request.

## **Section 2.4 Delay in Completion**

If Contractor fails to meet the Substantial Completion Criteria by the Substantial Completion LD Commencement Date, Company shall be entitled to liquidated damages under article 23 ("Liquidated Damages").

## ARTICLE 3

### CONSIDERATION AND PAYMENT

#### Section 3.1 Payment Milestones

(a) As full consideration for the satisfactory performance of Contractor's obligations under this Contract, Company shall pay Contractor the aggregate fixed price amount (the "Contract Price") in accordance with Exhibit D. Company shall pay Contractor all undisputed invoice amounts within thirty (30) days upon receipt of an invoice in strict accordance with the Milestones, less a retention of five (5) percent; provided, however, in no event shall any payment be due and owing until such time as the Work has been satisfactorily completed and accepted by Company pursuant to the procedures set forth in Exhibit D and all other conditions have been satisfied. Notwithstanding the foregoing, no payment shall be made 30 days prior to the date set forth in the Payment Milestones. No payment shall be made unless Contractor (i) has achieved the Milestones for which the payment is requested, and (ii) all Milestones with Milestone Dates prior to such Milestone have been achieved prior to Contractor submitting its invoice with respect thereto. Contractor shall submit to Company a request for release of retention upon achieving Final Completion, as defined in article 19 ("Notice of Substantial Completion"). Payment of undisputed retention amounts shall be made to Contractor within thirty (30) days of receipt of invoice.

(b) Payment Milestones have been selected to clearly identify the actual status of Work completed, rather than anticipated Project Schedules. This will establish a tangible basis for mutual agreement that the Milestone objective has been met.

(c) Company will consider all Work complete only when the Work is completed in accordance with this Contract, Exhibits and Appendices, including but not limited to: all training and documentation has been provided, all Equipment and spares have been provided, the Work is finished, the final product has been inspected and tested, all deficiencies are corrected, all Liquidated Damages have been reconciled and the Project is operating in a condition satisfactory to Company in its reasonable discretion, as specified in this Contract.

(d) Company's Representative shall, within fifteen (15) days after receipt of any invoice, determine whether (i) the Work evidenced by Contractor's invoice has been completed in conformance with the requirements of this Contract; (ii) the invoice, together with any required backup information, has been properly submitted; and (iii) the invoiced amount reflects the payment due under Payment Milestones. Company's Representative shall inform Contractor as to whether it disputes the invoice or any portion of the invoice.

#### Section 3.2 Conditions Precedent

The obligation of Company to make payments of any invoice, is subject to the satisfaction on each Payment Date of each of the following conditions precedent:

(a) Notice Required. Prior to being entitled to any payment under this Contract, Contractor shall submit a Notice of Request for Progress Payment in the form attached hereto as Exhibit A and in



substance satisfactory to Buyer, that meets all of the requirements of this Section 3.2 and of Section 3.4 (collectively, the “Invoice Instructions”)

(b) Payments on Business Days. The payment due date shall be a Business Day. If any payment becomes payable on a day that is not a Business Day, the payment shall be paid on the next succeeding Business Day. Contractor shall bear the cost of any and all banking charges imposed by Contractor’s bank with respect to any payment.

(c) Milestones. Contractor shall have achieved and Company shall have verified the achievement of the Milestones associated with the Work for which the payment is requested prior to Contractor submitting its invoice with respect thereto, and shall have completed all Milestones to have been achieved prior to the date of such payment.

(d) Representations and Warranties. (i) The representations and warranties made by Contractor in each Project Document to which it is a party shall be true and correct in all material respects on such payment date both before and after giving effect to the making of such payment, and (ii) the representations and warranties made by each Project Party other than Contractor in the Project Documents shall be true and correct in all material respects on such payment date both before and after giving effect to the making of such payment. In each case such representations and warranties shall be deemed renewed and re-stated as of the date of such payment.

(e) No Default. (i) No circumstance, event or condition shall exist which either immediately or with the passage of time or the giving of notice, or both, would permit Contractor to withhold payment under any Primary Construction Contract; (ii) no breach, violation or default shall have occurred and be continuing under (A) this Contract, (B) any Guaranty, (C) any Consent, or (D) the Security Documents; and (iii) to the extent not already set forth in this Section 3.2(e), no circumstance, event or condition shall exist which either immediately or with the passage of time or the giving of notice, or both, would permit Contractor’s counterparty to terminate or suspend performance under any Project Document.

(f) No Proceeding or Litigation. No action, suit, proceeding or investigation by or before any Governmental Authority or any arbitrator shall be pending or to Contractor’s knowledge, threatened against or affecting a Project Party or the Project which would result in a Material Adverse Change, unless such action, suit, proceeding or investigation has been initiated or threatened by Company.

(g) Material Adverse Change. Since the date hereof, no Material Adverse Change shall have occurred, except and to the extent that such Material Adverse Change is a result of an act or omission of Company.

(h) Governmental Approvals. Except with respect to the Deferred Governmental Approvals, all Necessary Governmental Approvals required to be obtained by such time shall have been obtained and shall be in full force and effect.

(i) Notice to Proceed. Company shall have issued the Notice to Proceed.

(j) Right to Withhold Payment. Company shall have determined that it is not necessary to withhold payment to protect Company from loss relating to any of the following causes:

- (i) Work not in accordance with the requirements of the Project Documents;
- (ii) Claims filed or pending against Company, the Plant, or the Site arising from Contractor's actions or inactions in connection with the performance of the Work (and not otherwise covered by insurance), unless Contractor is disputing such Claims in good faith and if reasonably requested by Company, has bonded the Claim with a bonding company or other surety reasonably acceptable to Company, and if any Lien is imposed with respect to such Claims, Contractor has discharged such Lien; or
- (iii) failure of Contractor to make payments in respect of material or labor or other obligations incurred as a result of activities covered by this Contract, unless Contractor has, in good faith, disputed such payments and, if any Lien is filed with respect thereto, Contractor has posted a bond against such Lien with a bonding company or other surety reasonably acceptable to Company.

**Section 3.3 Wire Transfer**

All payments to Contractor hereunder shall be paid in dollars via wire transfer to a bank account of Contractor, as specified by Contractor.

**Section 3.4 Invoice Instructions**

(a) Separate Invoices. In order to facilitate sales tax compliance, Contractor shall provide separate invoices for items as follows:

- (i) Taxable Items. Tax paid by contractor on Materials and parts shall be listed as a separate line item and identified as 'Tax on Parts to be reimbursed.'
- (ii) Non Taxable Items Listed Separately. The following items shall be listed separately and not taxed on the invoice: (A) labor to recondition Materials and parts (non-taxable) and (B) freight (non-taxable).
- (iii) Non Taxable Items able to be Invoiced Together. The following items may be invoiced together but shall be listed separately on the same invoice and shall not be taxed on the invoice: (A) scheduled and unscheduled work, including inspection and on site turbine services work (non Taxable), and (B) scheduled and unscheduled work and management services, consulting, administrative, engineering or professional services (non-taxable);

(b) All invoices shall (i) provide all information as specified in Exhibit E, (ii) reference this Contract by number, and (iii) be addressed as follows:

PacifiCorp  
 Attn: \_\_\_\_\_  
 201 South Main Street, Suite 2200  
 Salt Lake City, UT 84111

With a copy provided to: \_\_\_\_\_

Attn: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(c) ANY INVOICE THAT DOES NOT MEET THE REQUIREMENTS OF THIS SECTION 3.4 MAY RESULT IN A PAYMENT DELAY.

**Section 3.5 Contractor Taxes**

Contractor shall be responsible for payment of all taxes, fees and contributions on or measured by Contractor's income, and all taxes, fees and contributions on or measured by employee or other labor costs of Contractor or any Subcontractor, including without limitation all payroll or employment compensation tax, social security tax or similar taxes for Contractor's or any Subcontractor employees, and any other taxes or fees that are expressly the responsibility of Contractor under this Contract (collectively, the "Contractor Taxes"). Notwithstanding the foregoing, Contractor shall not be liable for any real estate taxes, sales, use gross receipts or ownership taxes for the Site. All taxes other than Contractor Taxes shall be the responsibility of Company, and shall be paid by Company or reimbursed to Contractor.

**Section 3.6 Project Taxes**

(a) The Contract Price does not include any state or local property, license, privilege, sales, use, excise, value added, or other similar tax which may now or hereafter be imposed by the federal or any state government of the United States of America or any of their respective political subdivisions upon the sale, purchase or use by Contractor of materials, supplies, equipment or services or labor (other than employees of Contractor) for the Project (collectively, the "Project Taxes"). Contractor shall pay Project Taxes directly to the applicable governmental authorities imposing such. Company shall reimburse Contractor outside of the Contract Price for any such Project Taxes paid by Contractor directly to the applicable governmental authorities within thirty (30) days after receipt of appropriate supporting documentation and an accompanying invoice. Contractor shall use reasonable efforts to efficiently manage its provision of the Work so as to minimize the incurrence of Project Taxes. Contractor will use prudence and diligence in the administration of Project Taxes to be paid by Contractor hereunder, and Contractor shall confirm with Company in advance any discretionary action, election or omission permitted in connection with Project Taxes.

(b) The amount of any and all customs duties, and related customs broker fees and charges or similar charges, for delivery of any components to the United States from countries outside of the United States and transportation to the Site are not included as Project Taxes, and are the responsibility of Contractor. Contractor shall be liable for all payroll and other employee related taxes and costs, and for all taxes based on its income.

**Section 3.7 Offset Provisions**

Company may offset any payment due Contractor under this Contract to reflect amounts owing from Contractor to Company or its subsidiaries pursuant to this Contract or any other agreement between the parties or otherwise. In addition, Company may withhold all payments otherwise due Contractor until such time as Contractor has provided the Letter of Credit required by this Contract.

### **Section 3.8 Payment Lien and Claim Releases**

Upon request by Company, Contractor shall provide Lien and Claim releases executed by Contractor, each and every Subcontractor, and all suppliers through the date of each invoice submitted in accordance with Exhibit F (Form of Contractor Lien Release), Exhibit G (Form of Subcontractor Lien Release) and Exhibit H (Form of Supplier Lien Release), respectively.

### **Section 3.9 Withholding Payment**

Company may, without limiting any other rights or remedies of Company, withhold from payment sufficient amounts which, in the commercially reasonable opinion of Company, reflect the reasonable cost to repair or replace unsatisfactory Work or the value of any claim against Company which Contractor has failed to settle pursuant to its indemnity contained herein. Company may also retain from any payment sufficient funds to settle any Liquidated Damages due Company by Contractor pursuant to this Contract and retain from any payment sufficient funds to discharge any delinquent accounts of Contractor for which Liens on Company's property have been or can be filed that have not been cleared or a bond provided by Contractor in accordance with Section 19.6(f) ("Marking of Equipment and Plant"), and Company may at any time and from time to time pay therefrom for Contractor's account such amounts as are, in the commercially reasonable opinion of Company, due thereon, including any sums due under any Applicable Law.

### **Section 3.10 Basis of Contract Price**

(a) Contractor Duty to be Fully Informed. Contractor shall be deemed to have satisfied itself, through its own due diligence efforts and not based on any representation of Company or employees or agents thereof (except as set forth in this article 3 ("Consideration and Payment")), as to the nature and location of the Work, the general, local, physical and other conditions of the Work, and all other matters which could in any way affect the Work or the cost thereof under this Contract. In addition, Contractor shall be deemed to have inspected the Site and to have satisfied itself as to the state and condition (including but not limited to ground, geological, climatic and hydrological condition) of all circumstances affecting the Site (including but not limited to any reasonable safety regulations of Company or otherwise applicable to the Work and the Project) and to have examined any documentation and information supplied or made available to Contractor by Company or available for inspection in the public domain, the conditions and/or the Specifications (with such drawings, exhibits, plans and information as may be annexed thereto or referred to therein) and to have satisfied itself as to the feasibility of executing the Work at the Site. Contractor shall be responsible for its own interpretation of such documentation and information. The failure of Contractor to adequately investigate and acquaint itself with any applicable conditions and other matters shall not relieve Contractor from the responsibility for properly estimating the difficulties and costs of successfully performing the Work and completing this Contract, and shall not be grounds for adjusting either the Contract Price or the Project Schedule.

(b) Underground Obstructions. Without prejudicing or limiting the provisions of Section 3.10(a) or Section 10.1 ("Project Schedule"), Contractor shall be responsible for ascertaining the location of and avoiding damage to all underground installations including without limitation cable, gas, water pipes, telephone lines, and other underground installations, whether the location of the excavation, digging, or trenching required for performance of the Work is fixed by Company or by

Contractor. Contractor shall be responsible for all delays, costs, loss and/or expense arising, whether directly or indirectly, from any ground conditions or artificial obstructions or hazards (excluding hazardous materials encountered by Contractor during the execution of the Work), including any Work underground or involving excavation that Contractor should have been made reasonably aware of based on information available and Contractor shall not be entitled to any additional Costs, any extension to the Time for Completion or any increase in the Contract Price as a result thereof.

(c) Surveying. Contractor is responsible for performing, and shall include in its pricing, all construction layout surveying required for execution of the Work. Contractor shall be held responsible for preserving all established project control monuments unless their removal is requested by Contractor and authorized in writing by Company. Any costs incurred by Company to reestablish control monuments destroyed by Contractor shall be borne by Contractor.

(d) Responsibility for Information. Contractor shall be responsible for any misunderstanding or incorrect information in connection with the Site (excluding information provided by Company or its representatives prior to the date of commencement of the Work, unless such information could have reasonably been verified by Contractor).

(e) Existing Foundations, Structures and Work. Contractor shall be solely responsible for the consequences of incorporating into the Work any existing foundations, structures, work, equipment or materials including, without limitation, any existing piling, floor slabs and culverts. To the extent that the same are incorporated into the Work, such pre—existing items shall be subject to the conditions as if they were supplied by Contractor hereunder. Without prejudice to the foregoing, Contractor shall notify Company’s Representative of its intention to incorporate any existing foundations, structures, work, equipment or materials into the Work other than those specifically identified in this Contract as soon as is practicable and seek the prior written consent of Company’s Representative to the use or utilization thereof, which consent may be withheld in the sole discretion of Company’s Representative.

## ARTICLE 4

### REPRESENTATIONS AND WARRANTIES OF CONTRACTOR

As used in this Article 4, “to Contractor’s knowledge” refers to matters within the actual knowledge of Contractor. Contractor represents and warrants to Company as of the Effective Date and each other date specified in this Contract, the following representations and warranties are made or are deemed made, as follows:

#### **Section 4.1 Organization, Standing and Power**

Contractor is a [ENTITY TYPE AND DESCRIPTION], duly formed, validly existing and in good standing under the laws of the State of \_\_\_\_\_ and has the full [corporate/limited liability company] power and authority and possesses all material governmental franchises, licenses, permits, authorizations and approvals necessary to enable it to own, lease or otherwise hold its properties and assets (including the Project) and to carry on its business in the places and in the manner currently conducted. Contractor is duly qualified to do business in each jurisdiction where the nature of its

business or the ownership or leasing of its properties makes such qualification necessary, including without limitation the State of Utah.

#### **Section 4.2 Capital Structure**

(a) [ASSUMES LLC STRUCTURE; CORRESPONDING REPRESENTATIONS WILL BE EXPECTED TO REFLECT CORPORATE STRUCTURE IF APPLICABLE] All of the membership interests of Contractor (the “Membership Interests”) are issued and outstanding, and no Membership Interests are held by Contractor in its treasury. The names of each member of Contractor and the amount of Membership Interests Controlled by each such Person are set forth on Schedule 4.2(a).

(b) Except as set forth on Schedule 4.2(b), no Membership Interests or other voting securities of Contractor are issued, reserved for issuance or outstanding. There are not any bonds, debentures, notes or other securities or Indebtedness of Contractor having the right to vote (or convertible into, or exchangeable for, securities having the right to vote) on any matters on which Members of Contractor may vote.

#### **Section 4.3 Authority; Execution and Delivery: Enforceability**

(a) Contractor has all requisite power and authority to execute each of the Project Documents to which it is a party and to consummate the transactions contemplated hereby and thereby. The execution and delivery by Contractor of this Contract and each Project Document to which it is a party and the consummation by Contractor of the transactions contemplated hereby and thereby has been duly authorized by all necessary [limited liability company/corporate] action on the part of Contractor. Each of Contractor has duly executed and delivered each Project Document to which it is a party, and each Project Document to which it is a party constitutes its legal, valid and binding obligation, enforceable against it in accordance with its terms except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws from time to time in effect that affect creditors’ rights generally and by legal and equitable limitations on the availability of specific remedies.

(b) No vote of the Membership with respect to any of the Membership Interests is required under applicable Law or otherwise in connection with Contractor’s execution and delivery of this Contract, the other Project Documents or the consummation of the transactions contemplated hereby and thereby.

#### **Section 4.4 Validity of Contract; No Conflict**

The execution, delivery and performance by Contractor of this Contract and each other Project Document to which Contractor is a party, the consummation of the transactions contemplated hereby and thereby, and the compliance with the provisions hereof or thereof, by Contractor shall not, with or without the passage of time or the giving of notice or both:

(a) conflict with, constitute or result in a breach, default or violation of any provision of, or give rise to any right of termination, cancellation or acceleration under, or loss of any right and/or benefit under, any contract, lease, license, Governmental Approval, instrument or other agreement to which Contractor is a party or by which it, the Project or its assets is bound;

- (b) conflict with or violate Contractor's Organizational Documents;
- (c) result in the creation or imposition of any Lien of any nature on the Project, other than Permitted Liens; or
- (d) violate any Applicable Law applicable to Contractor.

#### **Section 4.5 Governmental Approvals and Consents**

(a) Appendix E sets forth all Governmental Approvals. Such Governmental Approvals that are the responsibility of Company to obtain prior to Substantial Completion are separately identified on Appendix E (the "Company Governmental Approvals"). All Necessary Governmental Approvals have been obtained, are in full force and effect, and are final and all appeal periods with respect thereto have expired or terminated. Each Deferred Governmental Approval shall be obtained in a final and non-appealable form in the ordinary course prior to the time it is required to be obtained hereunder or under the other Project Documents. There is no action, suit, investigation or proceeding pending, or, to Contractor's knowledge, threatened, that could result in the modification, rescission, termination, or suspension of any Necessary Governmental Approval obtained prior to the date this representation is made or deemed made. Subject to Section 8.2 ("Planning Permissions, Consents"), except for the Governmental Approvals listed in Appendix E, Contractor is not required, and under existing Applicable Law will not in the future be required, to obtain any Governmental Approval in connection with the execution and delivery by Contractor of this Contract or the performance of Contractor's obligations hereunder.

(b) Except as set forth on Schedule 4.5(b), no consent or approval of any Person is required to be obtained or made by or with respect to Contractor transferring the Project to Company or in connection with the execution, delivery and performance of this Contract, the Project Documents or the consummation of the transactions contemplated hereby other than those that may be required solely as result of the specific regulatory status of Company.

#### **Section 4.6 No Proceedings**

Except as set forth on Schedule 4.6, (a) there are no actions, suits, investigations or proceedings by or before any Governmental Authority or arbitrator pending against Contractor or against the Project, or, to Contractor's knowledge, threatened against or affecting Contractor or the Project, which would result in a Material Adverse Change and (b) there are no actions, suits, investigations or proceedings by or before any Governmental Authority or arbitrator pending or, to Contractor's knowledge, threatened against or affecting Contractor or any Guarantor which could result in a Material Adverse Change.

#### **Section 4.7 Compliance**

(a) The Project is being designed and constructed and all components thereof are being procured, in compliance with all Applicable Law in existence as of the Effective Date and in compliance with the requirements of all Governmental Approvals and Prudent Industry Practice. As constructed, based on Applicable Law, the Project shall conform to and comply with all zoning, environmental, land use and other Applicable Law and the requirements of all Governmental Approvals.

(b) Contractor and the operation of its businesses are and at all times have been, in compliance with all Applicable Laws, including those relating to occupational health and safety.

#### **Section 4.8 Environmental Matters**

(a) The Project has been constructed and the Work has been performed, in compliance with all Environmental Laws.

(b) Contractor has not received any written notice of a pending or threatened Claim, or inquiry by any Governmental Authority or other Person relating to any actual or alleged violations of Environmental Laws or any actual or potential obligation on the part of Contractor to investigate or take any other action relative to any Regulated Material (as defined herein) or threatened Release of any Regulated Material and is and has been in compliance with all Environmental Laws.

(c) Contractor has not entered into or agreed to any decree or order with any Governmental Authority and Contractor is not subject to any Judgment relating to compliance with any Environmental Law or to the investigation or cleanup of Regulated Materials.

(d) Neither Contractor nor any other Person has generated, transported, treated, stored, disposed of, arranged to be disposed of, Released or threatened to Release any Regulated Materials at, on, from or under the Site in violation of, or so as would reasonably be expected to result in liability under, any Environmental Laws.

#### **Section 4.9 Security Interests and Liens**

The Security Documents create, valid and enforceable perfected first priority Liens on all of the Collateral, in favor of Company, subject to no Liens other than the Permitted Liens. All Necessary Governmental Approvals relating to such Liens in favor of Company have been duly effected or taken.

#### **Section 4.10 No Defaults**

Contractor is not in breach of, or in default under, any Project Document, or any other agreement or instrument to which it is a party or by which it or its properties or assets may be bound, and no Project Party is in breach of, or in default under, any other agreement or instrument to which it is a party or by which it or its properties or assets may be bound except where such breach or default would not, singly or in the aggregate, result in a Material Adverse Change.

#### **Section 4.11 Expertise**

(a) Contractor has no reason to believe that (i) the Project will not achieve Substantial Completion by May 1, 2012, 2013, or 2014 or (ii) that the cost to complete the Project will exceed the Contract Price.

(b) The construction and operation of the Project in accordance with the Project Documents and in compliance with Governmental Approvals, Applicable Law and pursuant to this Contract is technically feasible.



(c) Contractor has substantial experience and expertise in the development and management of turnkey construction of combined cycle power plants such as the Plant and the capability to carry out the Work and acknowledge that Company is relying on such experience, expertise and capability in executing this Contract.

(d) Contractor has not relied on any information supplied by Company, including information regarding conditions at, on, or under the Site in order to make any representation or warranty in this Contract accurate or not misleading.

## **ARTICLE 5**

### **REPRESENTATIONS AND WARRANTIES OF COMPANY**

As used in this Article 5, “to Company’s knowledge” refers to matters within the actual knowledge of Company. Company represents and warrants to Contractor as of the Effective Date and each other date specified in this Contract, the following representations and warranties are made or are deemed made as follows:

#### **Section 5.1 Corporate Organization; Etc.**

Company is a corporation duly organized and validly existing under the laws of the State of Oregon. Company has full corporate power and authority to carry on its business as it is now being conducted and to own the properties and assets it now owns.

#### **Section 5.2 Validity of Contract; No Conflict**

(a) This Contract has been duly authorized, executed and delivered by Company and is a legal, binding and valid obligation of Company enforceable against Company in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws from time to time in effect that affect creditors’ rights generally and by legal and equitable limitations on the availability of specific remedies.

(b) The execution, delivery and performance by Company of this Contract, the consummation of the transactions contemplated hereby, and the compliance with the provisions hereof by Company shall not, with or without the passage of time or the giving of notice or both:

(i) as to execution, delivery and performance, require any consent or approval of Company’s board of directors or any of Company’s shareholders which has not been obtained and each such consent and approval that has been obtained is in full force and effect,

(ii) conflict with, constitute a breach or violation of any provision of, or give rise to any right of termination, cancellation or acceleration under, or loss of any right and/or benefit under, any material contract or agreement to which Company is a party or to which it or its assets are subject or to any Governmental Approval held by or on behalf of Company, the loss of which would reasonably be expected to result in a Material Adverse Change on Company’s performance under this Contract;

(iii) conflict with or violate the certificate of incorporation or bylaws of Company;

- (iv) violate any Applicable Law applicable to Company.

### **Section 5.3 Consents, Approvals and Authorizations**

Appendix E sets forth all Company Governmental Approvals. Except for Company Governmental Approvals listed in Appendix E, to Company's knowledge, Company is not required, and under existing Applicable Law, will not in the future be required, to obtain any Governmental Approval in connection with the execution and delivery by Company of this Contract or the performance of its obligations hereunder, the failure to obtain which would materially impair Company's performance of its obligations hereunder.

### **Section 5.4 Resources**

Company has the financial resources, assets, operating capital, credit and other resources and means necessary to fulfill its obligations under this Contract on a timely basis.

### **Section 5.5 No Proceedings**

Except as otherwise disclosed by Company to Contractor prior to the Effective Date, there are no actions, suits, investigations or proceedings by or before any Governmental Authority or arbitrator pending or, to its knowledge, threatened against or affecting Company which, to Company's knowledge, would result in a Material Adverse Change.

## **ARTICLE 6**

### **CREDIT REQUIREMENTS**

#### **Section 6.1 Credit Requirements**

(a) Contractor is to utilize the Credit Matrix in the attached Exhibit C to determine the amount of any credit assurances to be provided. The amount of credit assurances will be based upon the Credit Rating of Contractor or the entity providing credit assurances on behalf of Contractor, and the size of the project.

(b) The Credit Rating will be the lower of: (x) the most recently published senior, unsecured long term debt rating (or corporate rating if a debt rating is not available) from Standard & Poor's (S&P), or (y) the most recently published senior, unsecured long term debt rating (or corporate rating if a debt rating is not available) from Moody's Investor Services. If Option (x) or (y) is not available, the Credit Rating will be determined by Company's internal credit department through an internal process review and utilizing a proprietary credit scoring model developed in conjunction with S&P.

(c) If requested by Company, Contractor shall, within thirty (30) days, provide Company with copies of its most recent annual and quarterly financial statements prepared in accordance with GAAP.

## **Section 6.2 Security**

(a) Security for the credit assurances required in the Credit Matrix shall include, but not be limited to, a guaranty in a form acceptable to Company, a Letter of Credit or cash escrow.

(b) If this Contract is terminated as a result of Contractor's default, Contractor shall pay Company the positive difference, if any, obtained by subtracting the Contract Price from the Replacement Price for any Work that Contractor was otherwise obligated to provide during the remaining term of this Contract, plus compensation for additional managerial and administrative services and such other costs and damages as Company may suffer as a result of Contractor's breach (the "Net Replacement Cost"). Amounts owed by Contractor pursuant to this Section 6.2(b) shall be due within five (5) Business Days after any invoice from Company for the same.

If required by Company, Contractor shall, within five (5) Business Days after the Effective Date, submit to Company a Letter of Credit in the amount set forth in the Credit Matrix. The terms of the Letter of Credit shall meet the requirements of the attached Exhibit F as well as the requirements of this Contract and be issued by a bank satisfactory to Company. The Letter of Credit shall provide for payment to Company of the Letter of Credit face value if Contractor defaults under the terms of this Contract. Company shall have the right to call the entire amount of the Letter of Credit if Contractor has not renewed the Letter of Credit at least thirty (30) days prior to its expiration date. Contractor's expenses of complying with this Letter of Credit requirement shall be paid by Contractor.

## **ARTICLE 7**

### **GENERAL OBLIGATIONS OF CONTRACTOR**

#### **Section 7.1 Contractor's General Obligations**

(a) Contractor's general obligation hereunder is to provide Company with a fully operational Project for the Contract Price, completed in accordance with the Project Schedule and the other terms of this Contract, on or before the Guaranteed Substantial Completion Date.

(b) The finished Work shall be complete in all respects. The intent of this Contract, the Appendices, Exhibits and the Scope of Work is for Contractor to Provide to Company an engineered solution of first class workmanship in each and every respect. All hardware shall be manufactured, fabricated, assembled, finished and documented with workmanship of the highest quality throughout, and all of its components shall be new and suitable for the purposes specified. In addition, the solution shall be engineered, implemented, tested and documented in accordance with Prudent Industry Practice and shall be suitable for the purpose specified.

(c) The Equipment shall be manufactured and the Work executed in the manner set forth in the Specifications and this Contract or, where not so set forth, to the satisfaction of Company and all Work on Site shall be carried out in accordance with Prudent Industry Practice and such directions as Company's Representative may give.

(d) Contractor shall, in accordance with the terms and conditions of this Contract, employ the Subcontractors who in turn shall provide all labor, services, management, supervision, Materials, tools, facilities, utilities, Governmental Approvals, licenses and other aspects of the Work necessary

for the design, engineering, construction, startup, testing, commissioning and completion of the Plant including those items specifically required in Appendix B.

(e) Additionally, Contractor shall: (i) carry out and complete, and cause the Subcontractors to carry out and complete, the Work in accordance with the requirements, duties and obligations imposed on the Subcontractors pursuant to Prudent Industry Practice and all applicable Site conditions; (ii) ensure that the Subcontractors design and perform the Work such as to achieve the objective of the Project which complies with Applicable Law and the other requirements of this Contract and their respective contracts; (iii) have the resources, experience, qualifications and capabilities as are required to fully perform its obligations under this Contract; (iv) keep Company informed as to the status of deliveries, and if any such materials or Equipment are not being properly manufactured or fabricated in accordance with the requirements of contracts and the requirements pursuant to which they were purchased, or do not otherwise conform with such requirements, promptly make Company aware thereof and take necessary corrective action; (v) acquire the Site, the Water Rights, all Governmental Approvals necessary for the development, construction and operation of the Plant, and the Emission Reduction Credits in accordance with the Milestones; (vi) cause each of the conditions precedent to the issuance of the Notice to Proceed set forth in Section 2.1(b) (“Notice to Proceed”) respectively, to occur; and (vii) maintain at least one office in the State of Utah.

## **Section 7.2 Physical Obstructions and Conditions**

If, during the performance of the Work on the Site, Contractor encounters unusual or unforeseen conditions (a) endangered plant and animal species which are regulated or require special handling under Environmental Laws, (b) unforeseen underground conditions or (c) items of archeological or historical significance, Contractor shall notify Company as soon as practicable and shall use best efforts to perform its obligations hereunder, including those obligations affected by such discoveries, and in compliance with Applicable Law.

## **Section 7.3 Selection of Vendors and Use of Subcontractors**

(a) In connection with its performance of this Contract, Contractor shall either (i) cause each Subcontractor to purchase Equipment from the Approved/Preferred Suppliers set forth in Appendix Q; or (ii) elect to use vendors that are reasonably satisfactory to Company, other than those set forth in Appendix Q, in which event, Contractor shall provide a price adjustment to the Contract Price. Such adjustment shall be set forth in Appendix R, and shall be accepted by Company in its sole discretion.

(b) Contractor shall be fully liable to Company hereunder for all acts and omissions of each Subcontractor to the same extent as though any such act or omission had been performed or omitted to be performed by Contractor directly. In no case shall Contractor’s engagement of any Subcontractor relieve Contractor of any of its obligations or Liabilities hereunder and, notwithstanding the use of any Subcontractors hereunder, Contractor shall remain fully and primarily liable to Company for the full and complete performance of Contractor’s obligations hereunder.

(c) Company shall have no contractual obligation to, and shall not be deemed to be in privity with, any Subcontractor; provided, however, that in the event Contractor’s obligations hereunder terminate for any reason, Contractor shall, at Company’s request, take such actions and

execute such documents as may be necessary or desirable to assign any or all of the Project Documents selected by Company to Company at Contractor's sole cost and expense.

#### **Section 7.4 Compliance With Applicable Law**

(a) Contractor shall comply with all Applicable Law, and shall cause each Subcontractor to comply with Applicable Law applicable to its respective scope of work on the Project, the noncompliance with which could adversely affect the Work, the Plant, the Site or Contractor's obligations under this Contract. Contractor shall be responsible for ascertaining the nature and extent of any Applicable Law, which may affect the Work, the Plant or the Site as a result of the performance by Contractor of its obligations under this Contract or, prior to Substantial Completion, the operation of the Plant. Contractor shall ensure that the Work complies with Applicable Law, Prudent Industry Practice and Governmental Approvals and further except to the extent any non-compliance therewith results from Company's gross negligence or willful misconduct or operation of the Work by or for Company (other than by Contractor) not in compliance with [*insert applicable Equipment manufacturer*] product manual, a copy of which is included in Appendix D.

(b) Subject to the preceding paragraph, Contractor shall be responsible for fines and penalties which may arise (including those that Company pays or becomes liable to pay) as a direct result of Contractor's non-compliance with Applicable Law, or as a result of Company's inability to operate the Project in compliance with Applicable Law due to the inaccuracy of Contractor's representations and warranties or the breach by Contractor of any of its covenants, other than any fines and penalties arising from any act or omission of Company, or the agents, employees, contractors (other than Contractor and Subcontractors), and representatives of Company.

#### **Section 7.5 Governmental Approvals**

(a) Contractor shall obtain all Governmental Approvals designated as Contractor's responsibility in Appendix E and all other Governmental Approvals that are not specifically designated as Company Governmental Approvals in Appendix E and shall cause Contractor and the Subcontractors to reasonably support the efforts of Company to obtain all Company Governmental Approvals, including providing such engineering and environmental data and statistical information as may be reasonably requested by Company. Company shall be properly included as the permittee, co-permittee or authorized party with respect to all Governmental Approvals.

#### **Section 7.6 Opportunities for Other Contractors; Labor Relations**

(a) Contractor shall, in accordance with Company's reasonable instructions, afford to other contractors identified by Company from time to time all reasonable opportunities for carrying out their work at the Site, provided that the same shall not materially obstruct or disturb the progress of the Work. Contractor shall also afford access to Company's employees, including employees who will operate and maintain the Plant, to perform their work at the Site.

(b) Contractor shall be responsible for coordinating Company's contractors and employees as it relates to mobilization and laydown space requirements, interconnection with Site construction power and temporary storage facilities, water, emergency evacuation requirements, trash/waste disposal, Site access, temporary office space, safety and security and other Site regulations and requirements. Each of Company's contractors shall be responsible for any costs with respect to that

contractor's work, including mobilization and laydown space requirements, interconnection with Site construction power and temporary storage facilities, water, emergency evacuation requirements, trash/waste disposal, Site access, safety and security and other Site regulations and requirements.

(c) Contractor agrees that claims resulting from the concurrent Company contractor activities shall be brought to Company's attention within ten (10) Business Days of their occurrence. Company and Contractor agree to informally resolve claims as they occur and otherwise in accordance with article 31 "Claims, Claim Notice and Dispute Resolution."

## **Section 7.7 Labor and Employment**

(a) Contractor shall, and shall cause Contractor to, ensure that all construction contracts and subcontracts of any tier for the Project be awarded (i) in compliance with Utah State and Federal and all other Applicable Law and (ii) on a Merit Shop basis. Contractor shall, and shall award construction contracts and subcontracts of any tier for the Work (x) in compliance with the requirements of U.S. Federal and Utah state laws and regulations and (y) on a Merit Shop basis or (z) through a project labor agreement. Contractor and each Subcontractor shall, subject always to the requirements of law or regulation or applicable collective bargaining agreement, and to the fullest extent commercially reasonable, perform the Work using Utah labor. Any contract or subcontract shall be awarded on the basis of the best value to the Project including an evaluation of the Subcontractors' ability to work in harmony with others working on the Project including Contractor, the existing labor force, Governmental Authorities, and without regard to whether or not the successful bidder is signatory or non-signatory to agreements with labor organizations. Contractor shall, and shall cause each Subcontractor to, refrain from any discrimination against any employee on the basis of such employee's membership in any labor organization, or his or her lack of such membership. All employees working on the Project shall be permitted to exercise their right to engage in protected concerted activity, as defined in Section 7 of the National Labor Relations Act, as amended, or to refrain from doing so, without any discrimination or other adverse consequence. Contractor shall, and shall cause each Subcontractor to, comply with Applicable Law regarding labor relations and employment matters. Any administrative or civil proceedings filed against a Project Party or any Subcontractor shall be promptly reported to Company. Nothing in this provision shall affect any obligation of a Project Party or Subcontractor under a lawful collective bargaining agreement applicable to some or all of such Person's operations on the Project.

(b) Contractor shall be aware of, and familiar with, all collective bargaining agreements, which do or may pertain to or affect the Work or other work at the Site. Contractor shall plan and conduct its operations so that its employees and subcontractors of any tier will work harmoniously with Company's employees and other workers employed on the same or related projects to assure that there will be no delays, work stoppages, excessive labor costs, or other labor difficulties. Contractor shall ensure that Contractor and each and every Subcontractor complies with all Applicable Law pertaining to such labor.

(c) Scarcity and Quality of Labor. Contractor shall have no claim for an extension of the Time for Completion or a claim for loss, damage or additional Costs of any kind in respect of any alleged or proved unsuitability, scarcity, inefficiency of the labor it may engage or wish to engage.

(d) Equal Employment Opportunity and Other Non-Discrimination Clauses.

(i) Contractor shall, at all times, comply with all Applicable Law applicable to employees, including without limitation those governing wages, hours, desegregation, employment discrimination, employment of minors, health and safety. Contractor shall comply with equal opportunity laws and regulations to the extent that they are applicable.

(ii) Contractor shall indemnify, defend and hold harmless Company, its Board of Directors, officers, employees and agents from all losses, costs and damages by reason of any violation thereof and from any liability, including without limitation fines, penalties and other costs arising out of Vendor's failure to so comply.

(iii) Contractor shall execute and deliver to Company a completed Certificate of Compliance using Company's form of certificate before starting to perform Work under this Contract.

(e) Workers Compensation. Contractor shall comply with all Applicable Law regarding workers' compensation and shall, prior to commencing Work, furnish proof thereof satisfactory to Company.

#### **Section 7.8 Authority For Access for Inspection**

Inspection of the Work at the Site and attendance at meetings (whether conducted in-person, telephonically or through similar medium) relating to the Project which are attended by Contractor and any Subcontractor and related to status, progress, quality, scope, schedule and safety coordination shall at all times be afforded by Contractor to Company, Company's Representative and such other Persons as shall be designated by Company or Company's Representative. Company, in its inspection, shall give due consideration to the needs of Contractor to carry out Contractor's obligations and strive not to hinder or unduly impede Contractor while carrying out such inspection. Company, in its inspection, may observe the progress and quality of the Work to determine, in general, if the Work has been performed and is proceeding in accordance with the Project Documents. Inspections under this Section 7.8 are solely for the benefit of Company and any inspection or failure to inspect and any objection or failure to object by Company shall not (i) relieve Contractor, or any Subcontractor of its respective obligations under any Project Document or (ii) be used as evidence that Company agreed that Contractor, or any Subcontractor had fulfilled any obligations under any Project Document or that Company had waived any of its rights under any Project Document.

#### **Section 7.9 Contractor's Use of Company's Drawings**

Contractor may use Company's Drawings only for fulfilling its obligations under this Contract. Company's Drawings, specifications and other information submitted by Company to Contractor shall remain the property of Company. Such materials shall not, without the written consent of Company, which consent may be withheld in Company's sole discretion, be used, copied or communicated to a third party, other than Contractor, by Contractor unless necessary to fulfill the purposes of this Contract, and then pursuant to a full reservation of rights in Company. Company makes no representations or warranties as to the accuracy, completeness or suitability of Company's Drawings and Contractor shall not rely on such Company's Drawings.

## **Section 7.10 Contractor Drawings and Manuals**

(a) Contractor shall at all times keep a copy of the most recent version of Contractor Drawings and Manuals at Contractor's office on the Site to be made available for Company's review. In addition, Contractor shall provide and make available to Company electronic versions of Contractor Drawings and Manuals accessible by Company through a file transfer protocol site to be maintained by Contractor. All Drawings shall be in an executable electronic format to be mutually agreed upon by the Parties if not in the most recent version of AUTOCAD.

(b) Contractor shall cause to be set forth in Contractor Drawings and Manuals provided to Company all such information as is reasonably required to operate and maintain the Work, the Project and all subsystems and components thereof, including to the extent applicable, recommended operating and maintenance procedures, system descriptions, product catalogs, drawings, design sheets, specifications, logic diagrams, maintenance and instruction sections, spare parts lists, any vendor-supplied training documents, and current heat balances. Contractor Drawings and Manuals shall be (i) prepared in accordance with the Specifications and when completed, shall be as-built drawings in sufficient detail to accurately represent the Project as constructed. Contractor Drawings and Manual shall be maintained and be available, with up-to-date drawings, specifications and design sheets, for the training as set forth in Section 7.11 ("Training").

(c) Contractor shall prepare initial system descriptions, design basis documents, and operational guidelines for the Project and deliver such to Company for its review at least one (1) year prior to the Guaranteed Substantial Completion Date.

(d) At least one hundred twenty (120) days prior to the Guaranteed Substantial Completion Date, Contractor shall provide Company with initial drafts of the final Contractor Drawings and Manuals for review (the "Draft Manuals"). The Draft Manuals shall contain such information described in Section 7.10(b), other than the drawings which, in accordance with this Section 7.10, are being maintained so as to be up-to-date. Two (2) complete sets of the Draft Manuals shall be provided to Company at least sixty (60) days prior to Substantial Completion and shall be a condition of Substantial Completion.

(e) Contractor shall provide to Company both hard copies and electronic copies of final Contractor Drawings and Manuals. Contractor shall provide to Company five (5) hard copies of final Contractor Drawings and Manuals within sixty (60) days after achievement of Substantial Completion. Company shall not be required to deliver the Notice of Final Acceptance until all such Contractor Drawings and Manuals have been so delivered.

(f) Any modifications to Contractor Drawings and Manuals made necessary as a consequence of any Final Punch List items or modifications to the Work shall be issued as addenda to the applicable Contractor Drawings and Manuals within sixty (60) days following completion thereof.

## **Section 7.11 Training**

(a) Training of Company's personnel (or other employees or agents of Company) shall be given by Contractor prior to the Substantial Completion Date as required by the Specifications, in accordance with a timetable to be agreed upon with Company prior to the Substantial Completion Date and shall include training (including on-site and classroom) covering the operation and



maintenance of the Work. Such training shall be provided directly to Company's personnel as specified in Section 10 to Appendix B and shall be conducted by trainers who are experienced in the operation and maintenance of the Work.

(b) As more fully described in Appendix B, starting at least sixty (60) days prior to the first operation of one of the combustion turbines at the Site of the Project and continuing until Final Acceptance, Contractor shall oversee the development of and provide qualified and experienced support personnel for Company's execution of a practical and participatory training program at the Site for an adequate number of employees designated by Company, which support personnel shall be experienced in electric generating facility operation appropriate for their respective job descriptions.

## **Section 7.12 Safety**

(a) Contractor shall be solely responsible for being aware of and initiating, maintaining and supervising compliance with all applicable safety laws, regulations, precautions, and programs in connection with the performance of this Contract, including without limitation the provisions of Section 9.2 ("Site Security"), Section 9.7 ("Fencing, Protection, Lighting") and Section 9.11 ("Material Safety Data"). Contractor shall submit a health and safety plan for the Project to Company for Company's review and approval at least sixty (60) days prior to commencement of construction activities at the Site. Prior to the start and throughout the performance of the Work, Contractor shall assure that each of its employees, together with all employees of its Subcontractors, are fully informed concerning all safety, health, and security regulations pertaining to the Work and Contractor's health and safety plan. Contractor shall conduct all operations under this Contract in such a manner as to avoid the risk of bodily harm to persons or risk of damage to any property.

(b) In the event Contractor fails to promptly correct any violation of safety or health regulations, Company may suspend all or any part of the Work. Contractor shall not be entitled to any extension of time or reimbursement for costs caused by any such suspension order. Failure of Company to order discontinuance of any or all of Contractor's operations shall not relieve Contractor of its responsibility for the safety of personnel and property. Contractor shall maintain an accurate record of, and shall promptly report to Company, all cases of property damage in excess of \$100 and of death, occupational diseases, or injury to employees or any other third parties incidental to performance of the Work. Contractor shall promptly notify Company and provide a copy of any safety citation issued by any governmental entity. Contractor shall perform all Work in strict accordance with its Company-approved Health and Safety Plan.

(c) Contractor shall, and shall cause its Subcontractors and its and their respective agents and employees to, comply with (i) Contractor's health and safety programs, to be approved by Company prior to commencement of construction activities at the Site, (ii) Company's safety program set forth in [Exhibit M] hereto, and (iii) any and all material Subcontractor's safety programs, as the same may be supplemented from time to time. If the standards or requirements provided in the foregoing are inconsistent, Contractor shall perform, or cause to be performed, the foregoing obligations in accordance with the requirements of the most stringent program, rule, standard, criteria or guideline.

(d) Without limiting Company's rights herein, Company has the right, but no obligation, to supervise or cause Contractor's compliance with this Section 7.12, and will have no liability for failing

to cause Contractor to comply with this Section 7.12. Company will have no liability for failing to advise Contractor of activities or omissions, including any condition, damages, circumstances, infraction, fact, act, omission or disclosure, discovered or not discovered by Company, with respect to the facility, the Site, the Contractor or any Subcontractor.

(e) Contractor shall, and shall cause all Subcontractors, to participate in weekly safety walk-downs of the Site.

### **Section 7.13 Intellectual Property Rights and Computer Program Licenses**

(a) In performance of the Work, Contractor shall not take any action that would violate or infringe any patent or copyright. Contractor represents and warrants that it has and upon the Substantial Completion Date will have, (i) all rights necessary with respect to the Work (and each part thereof) and operation of the Project and the ownership or operation of the Project after it is constructed and to perform Contractor's obligations under this Contract and (ii) that the Work (and each part thereof) and operation of the Project does not violate or infringe any patent or copyright.

(b) Contractor shall, at its sole cost and expense, settle or defend and pay any costs (including attorney's fees) and damages awarded in connection with, and shall defend, indemnify and hold harmless each of Company and Company's Representative, and any of its respective officers, directors, employees, contractors, agents or representatives, from and against, any and all Claims, suits or proceedings based on a Claim that the Work (or any part thereof) or the ownership or operation of the Project, infringes or violates any patent or copyright. Company shall give Contractor notice of any such Claim promptly after Company has actual knowledge thereof, provided that the omission of Company to give such notice shall not relieve Contractor of its obligations hereunder except to the extent that Contractor is damaged as a result of failure to receive actual notice. The provisions of article 22 ("Warranties of Work") and article 31 ("Claims, Claim Notice and Dispute Resolution") shall also apply to any Claim under this Section 7.13(b).

(c) In case the Work (or any part thereof) or the ownership or operation of the Project is held to infringe or violate any patent or copyright and the use of the Work (or any part thereof) or the operation of the Project is restricted or prohibited as a result thereof, Contractor shall, at its sole cost and expense, at Contractor's option, either procure for Company the right to continue using the Work (or the applicable part thereof), replace the same with non-infringing comparable substitute Work, or modify the Work (or the applicable part thereof) so that it becomes non-infringing (provided that such modification does not adversely affect the Work (or any part thereof)).

(d) Contractor shall obtain and transfer to Company perpetual, fully-paid licenses to use all computer programs and other intellectual property necessary or useful for the operation and maintenance of the Plant, together with all warranties related thereto.

### **Section 7.14 Contractor's Representative**

(a) Contractor shall employ one or more competent representatives, whose name or names and details of qualifications and previous experience shall have been provided to Company and Company's Representative by Contractor, to manage performance of the Work and who shall have Contractor's authority in respect of all matters arising out of or in connection with this Contract and the Work.

(b) Assigned Project Roster.

(i) Contractor shall designate a Project Manager, a Project Engineer, a Lead Mechanical and Lead Electrical, a Construction/Site Manager, a Safety Manager and a Startup or Commissioning Manager for performance of the Work. All employees assigned by Contractor to perform any of Contractor's obligations shall be fully qualified to perform the tasks assigned them.

(ii) Such representative, or if more than one shall be employed, then one of such representatives, shall be present on the Site at all times the Work is in progress, and any orders or instructions which Company or Company's Representative may give to the representative of Contractor shall be deemed to have been given to Contractor.

(iii) Company or Company's Representative shall each have the right, in its sole discretion, to approve or disapprove Contractor's selections for Project Manager, Project Engineer, Lead Mechanical and Lead Electrical, Construction/Site Manager, Safety Manager, Startup or Commissioning Manager and any Subcontractors utilized by Contractor.

(iv) Contractor shall not replace its Project Manager, Project Engineer, Lead Mechanical and Lead Electrical, Construction/Site Manager, Safety Manager, or Start up or Commissioning Manager assigned to the project without the prior written consent of Company. In the event Contractor intends to remove or change its Project Manager, Project Engineer, Lead Mechanical and Lead Electrical, Construction/Site Manager, Safety Manager, or Startup or Commissioning Manager assigned to the Work or to reassign any such personnel to another project, Contractor shall give Company fifteen (15) days advance written notice of Contractor's intentions. Company shall give due diligence and consideration to any suitable replacement suggested by Contractor to replace such persons and shall respond within fifteen (15) days to any such requests.

(v) Company shall have the right to approve Contractor's senior staff on Site, and may request the removal of any of Contractor's personnel.

(c) Objection to Representatives or Employees. Company shall be entitled by notice to Contractor to object to any representative or person employed directly or indirectly by Contractor in the execution of or otherwise relating to performance of the Work who, in the opinion of Company, misconducts itself, is incompetent or negligent, and Contractor or any Subcontractor, as the case may be, shall remove and exclude such person from the Work.

**Section 7.15 Contractor's Personnel/Drugs, Alcohol and Firearms**

With regard to the performance of the Work, Contractor shall employ, and shall cause that each Subcontractor shall only employ, persons qualified to perform the Work. Contractor shall, at all times, enforce strict discipline and good order among its employees and the employees of Contractor and any Subcontractor. Contractor shall not permit or allow the introduction or use of any firearms, illegal drugs or intoxicants upon the Work under this Contract, or upon any of the grounds occupied, controlled, or used by Contractor in the performance of the Work. Contractor shall immediately remove from the Work, whenever requested by Company, any person considered by Company to be incompetent, insubordinate, careless, disorderly, in violation of the above restriction on firearms,

illegal drugs or intoxicating liquor, or under the influence of illegal drugs or intoxicants, and such person shall not again be employed in the performance of the Work herein without the prior written consent of Company.

#### **Section 7.16 Use of Premises and Trespassing**

Contractor shall confine the storage of materials and construction equipment to locations acceptable to Company and in accordance with all Applicable Law. Contractor shall, at all times, prohibit its staff, workers and all other persons employed directly or indirectly by Contractor on the Site from poaching or trespassing and any such person found so doing shall be removed from the Work and shall not be re-employed without the prior written consent of Company.

#### **Section 7.17 Electricity, Water and Pipeline Natural Gas**

(a) During the construction of the Plant, Contractor shall provide, or cause a Subcontractor to provide, for its own use, on-Site distribution for all utilities, including, the following: drainage, water, sewage and electrical power. Contractor shall pay for electrical power, fuel and raw water used by Contractor during the construction of the Project. Contractor shall make provisions in its temporary construction power load center for loads and feeds of Company, provided that Contractor have been supplied with adequate information relative to such additional uses prior to initial mobilization to the Site; provided, however, distribution of such additional power feeds, and the cost of usage of such electrical power, shall be borne by Company or contractors engaged by Company.

(b) Contractor shall provide all required supplies of demineralized water, pipeline natural gas and other commodities required for the purposes of commissioning and startup activities and the Performance Tests in accordance with manufacturers' and/or contractors' published specifications for the Plant and Equipment. Notwithstanding the foregoing, Company shall reimburse Contractor for the cost of providing pipeline natural gas in an amount not to exceed the equivalent to two hundred seventy-five (275) hours of full-load CT operation, without duct burners in operation, based on the design documents for the facility, for purposes of commissioning and startup activities and the Performance Tests. Contractor shall provide to Company in writing not less than 180 days prior to first firing of the gas turbines, the design consumption rate to be used in calculating Company's reimbursement obligations under this Section 7.17(b). Contractor shall be responsible for all pipeline imbalance and other charges that may be assessed by any party in connection with the supply of natural gas and/or electric service to the Project in connection with commissioning and startup activities and Performance Testing. Contractor shall be responsible for the initial filling of all chemicals, lubricants, and any other consumables necessary for the startup activities and Performance Tests.

#### **Section 7.18 Temporary Facilities**

Contractor shall make provisions, at its cost, for all temporary facilities necessary for the construction of the Project and the installation of the Equipment, including arrangements for the supply of telephone, office equipment, sanitary toilet facilities, compressed air and other services for the Work and shall provide and maintain all pipes, cables and services required for its operation. Contractor shall provide and maintain on the Site office accommodations for itself and an office for Company and Company's Representative. Contractor shall also install and maintain, at its own cost and expense, a system of lighting to provide a reasonable degree of illumination at the Site during performance of the

Work. Contractor shall remove any of such temporary installations pursuant to Section 19.7 (“Removal of Equipment”).

### **Section 7.19 Decisions and Instructions Of Company’s Representative**

(a) Contractor shall proceed with the decisions and instructions given by Company’s Representative in accordance with this Contract. Such decisions or instructions may be given orally but shall be effective only when confirmed in writing, unless and only to the extent that such instructions are necessary to remedy an emergency situation, or to ensure Site safety, that would make the provision of written instructions impractical or insufficiently timely.

(b) If Contractor disputes or questions any decision or instruction by Company’s Representative, Contractor shall give notice to Company within five (5) days after receipt thereof, giving reasons therefor. Within five (5) days after receipt of such notice, Company shall, by notice to Contractor with reasons, confirm, reverse or vary such decision or instruction. If Contractor disagrees with Company’s response, or if Company fails to reply to Contractor’s notice within the stipulated days, the matter shall be resolved in accordance with article 31. Notwithstanding the foregoing, to the extent that an instruction by Company’s Representative is necessary to remedy an emergency situation and Contractor disputes the action requested in such instruction, then Contractor shall nonetheless comply with Company’s instruction and the dispute shall be resolved as provided in Article 31.

### **Section 7.20 Cooperation Between the Parties**

The Parties are expected to be called upon to make decisions regarding matters not reasonably anticipated in order to meet their respective obligations under this Contract. In making such decisions, the Parties shall cooperate fully in all regards with the intent to improve the performance of the Work and reduce the likely operating and maintenance impacts. The vehicle for reaching agreement and causing a change to occur in the Work and/or the schedule for performance and/or the Guaranteed Substantial Completion Date and/or additional substantiated costs as a result of errors and omissions in information supplied by Company shall be by Change Order. Additionally, if errors or omissions in information provided by Contractor materially affect Company’s or its other contractors’ work during construction of the Plant, Company shall be entitled to make a Claim against Contractor for Company’s substantiated costs as the result of errors or omissions. Notwithstanding the foregoing, the Parties at all times shall abide by the terms of the Construction Coordination Agreement.

### **Section 7.21 Spare Parts Inventory**

(a) Contractor shall provide and include in the Contract Price all spares and consumables necessary for the complete performance of the Work through Final Acceptance and through the Acceptance Period. Such spares and consumables shall be located at the Site and shall be immediately available to ensure all works, testing and reliability testing continues unimpeded by such unavailability of onsite spares and consumables.

(b) Contractor shall prepare a proposed list of spare parts for the Work to be available two hundred seventy (270) days prior to the Guaranteed Substantial Completion Date. Contractor shall submit the proposed inventory of spare parts to Company in Excel format in a timely fashion so as to permit thirty (30) days for Company to review the list and for Company, in Company’s sole discretion, to procure such spare parts or, at Company’s option pursuant to a Change Order, to direct Contractor to

procure such spare parts and have such spare parts delivered to the Site or cause such spare parts to be procured and delivered to the Site, to the extent practical, prior to the Guaranteed Substantial Completion Date. The proposed inventory of spare parts shall describe each component in detail, identify the manufacturer and supplier thereof and set forth the cost and lead time of such item. Upon the request of Company, Contractor shall meet with Company and its designees to discuss the proposed inventory of spare parts. If available, Company shall allow Contractor to use any spare parts owned by Company, but in no event shall Company be liable or shall Contractor be entitled to a Change Order in the event that the absence of any particular spare part or parts impacts completion of the Work.

(c) In the event Contractor uses Company's spare parts, such spare parts shall be expeditiously replaced by Contractor at its sole cost and expense.

(d) Company does not warrant the condition, quality, suitability, absence of defects, fitness for any purpose or aspect of any Company spare part and if a Contractor uses any Company spare part, it does so at its own risk.

(e) Availability of Spare and Expansion Parts. Contractor shall supply, at prices in accordance with prices already established within this Contract, all required spare and expansion parts, or their functional equivalents, and maintenance services under this Contract that may be required for the system, for a period of not less than one major maintenance cycle from date of Final Acceptance.

#### **Section 7.22 Further Assurances**

Contractor shall take all such further actions and execute all such further documents and instruments as Company may at any time reasonably determine to be necessary to further carry out and consummate the transactions contemplated by the Project Documents or to perfect or protect the Lien of Company on the Collateral under the Security Documents.

#### **Section 7.23 Indebtedness**

Until the Substantial Completion Date shall have occurred, Contractor shall not create, incur, assume, suffer to exist or otherwise become or remain directly or indirectly liable with respect to any Indebtedness other than Indebtedness incurred in the ordinary course of business that will not result in a Material Adverse Change.

#### **Section 7.24 Liens**

(a) Until the Substantial Completion Date shall have occurred, Contractor shall not create, incur, assume or suffer to exist, directly or indirectly, any Lien on any of its property now owned or hereafter acquired in connection with the Project, other than the following:

(i) Liens set forth on Schedule 7.1(a)(i) ("Permitted Liens");

(ii) mechanics Liens relating to the Work supplied and performed by Contractors or by any Subcontractor that have not yet been paid in the ordinary course of business; and

(iii) Liens filed with respect amounts payable to Contractor or any Subcontractor that are being disputed in good faith, provided that Contractor have posted a bond against such Liens with a bonding company or other surety reasonably acceptable to Company.

(b) Contractor shall cause all Subcontractors and Suppliers to deliver Lien releases in the form attached as Exhibits G and H, respectively, for all Liens that arise with respect to the Project.

#### **Section 7.25 Restriction on Fundamental Changes**

(a) Until the Substantial Completion Date shall have occurred, Contractor shall not, without Company's prior written consent, enter into any merger or consolidation, or liquidate, wind-up or dissolve (or suffer any liquidation or dissolution), or otherwise discontinue their business.

(b) Until the Substantial Completion Date shall have occurred, and except in the ordinary course of business (such as the replacement or substitution of items from customary wear and tear), Contractor shall not convey, sell, lease, assign, transfer or otherwise dispose of any of Contractor's assets if such sale, lease, assignment, transfer or other disposition would not, singly or in the aggregate, result in a Material Adverse Change.

#### **Section 7.26 Amendment of Project Documents; Additional Project Documents**

Until the Substantial Completion Date shall have occurred, Contractor shall not:

(a) without the prior written consent of Company (i) assign or permit any Person to assign any of its rights or obligations to or under any Project Document, (ii) terminate any Project Document, or (iii) make any amendment or other modification to any Project Document that would (A) result in a breach of this Contract or the inaccuracy of any representation or warranty in this Contract, (B) increase the Contract Price, (C) extend the Guaranteed Substantial Completion Date, or (D) have a Material Adverse Effect;

(b) to the extent not covered by Section 7.26(a), amend, modify, grant any consent or approval with respect to any obligation under, waive timely performance or observance by any Person (other than Company) of any obligation under, exercise any options or remedies or issue any change order, notice or make any elections under any Project Document that would result in a Material Adverse Change, and in any event, not without providing prior notice thereof and copies of all material documentation related thereto, to Company;

(c) compromise or settle any claim against any Project Party if to do so would have a Material Adverse Change; or

(d) enter into any Additional Project Document without providing to Company prior notice thereof and copies of all material documentation related thereto. Contractor shall deliver copies of all Additional Project Documents to Company within three (3) Business Days of the execution thereof.

#### **Section 7.27 Environmental Matters**

Until the Substantial Completion Date shall have occurred, Contractor shall not permit (a) any underground storage tanks (other than for water or sewage) to be located on the Site, (b) any asbestos

to be contained in or form part of any building, building component, or structure on the Site and (c) any polychlorinated biphenyls (PCBs) to be used or stored at the Site.

### **Section 7.28 Records and Accounts**

Contractor shall maintain all records and accounts in accordance with GAAP consistently applied and in Dollars in order to support any and all invoices, claims and disputes under this Contract. Contractor shall permit Company, upon reasonable prior notice and during business hours, to audit Contractor's records and accounts to verify invoice amounts, any increases or decreases to the Contract Price, any costs or projected costs associated with Change Orders, any report or correspondence related to permits or governmental approvals, and safety or environmental compliance.

### **Section 7.29 Condemnation, Eminent Domain, Casualty Events**

(a) In the event that any Governmental Authority or any Person, acting under any Governmental Authority, other than Company, takes any action to condemn, seize or appropriate all or any substantial part of the Project (each a "Condemnation Proceeding"), Contractor shall promptly notify Company of the Condemnation Proceeding and promptly update Company on significant events in connection with the Condemnation Proceeding, including with respect to settlement offers, and provide other information reasonably requested by Company as often as may be reasonably requested by Company. Any monetary offer to settle a Condemnation Proceeding or compensate Contractor with respect thereto shall at all times be subject to Company's sole and absolute discretion to accept or reject such offer, and in the event that Company directs Contractor to accept such offer, and provided that no Contractor Default, shall have occurred and be continuing, the proceeds thereof shall be applied first as a credit against any cancellation payment that may arise under article 29 ("Termination"), and the remainder of such proceeds shall be paid to Company.

(b) In the event that any casualty event (other than a Force Majeure) shall occur which causes a suspension of all or a substantial portion of the Work for a period greater than (i) forty-five (45) days after the receipt of insurance proceeds in an amount required to successfully restore or repair the Project without having to increase the Contract Price or (ii) ninety (90) days after the occurrence of such casualty event, then, provided that no Contractor Default shall have occurred and be continuing, the proceeds of any insurance policies in respect of such casualty event shall be applied first as a credit against any cancellation payment that may arise under article 29 ("Termination") and the remainder of such proceeds shall be paid to Company.

### **Section 7.30 Contractor's Organizational Documents**

Within thirty (30) days following the Effective Date, Contractor shall deliver to Company or its representatives true and complete copies of their [APPLICABLE ORGANIZATIONAL DOCUMENTS] (the "Contractor's Organizational Documents"), as amended through (and including) such date.

### **Section 7.31 Construction Coordination Agreement [Company Sites Only]**

Contractor shall conduct all development, construction, commissioning and testing activities in accordance with the provisions of the Construction Coordination Agreement, attached as Appendix S, and in a manner that shall not interfere with the operation of the existing facilities.



### **Section 7.32 Import Permits, Licenses and Duties**

Contractor shall obtain all import permits or licenses required for any part of the Plant, Equipment or Work within the time stated in the Project Schedule or, if not so stated, in reasonable time having regard to the time for delivery of the Plant, the Equipment and the Time for Completion. Contractor shall pay all customs and import duties arising upon the importation of the Equipment into the applicable port of entry. All such payments shall be deemed to be included in the Contract Price.

### **Section 7.33 Compliance with Planning Permissions, Consents**

Contractor shall comply fully in respect of design and work at the Site and all other obligations under this Contract, with the terms, conditions and requirements of all consents, licenses and planning permissions obtained by Company or Contractor in accordance with Section 8.2 (“Planning Permissions, Consents”).

### **Section 7.34 Permits**

Contractor shall, and shall cause each Subcontractor to, at its sole cost and expense, to secure and maintain all applicable construction and construction related permits which are required by Applicable Law (each a “Permit”) in order to undertake the Work.

### **Section 7.35 Lay Out**

(a) Contractor shall be, and ensure that each and every Subcontractor is, responsible for the true and accurate laying out of the Work by reference to original points, lines and levels of reference given by Company’s Representative and provide all necessary instruments, appliances and labor therefore.

(b) If, at any time during the execution of the Work, any error appears in the positions, levels, dimensions or alignment of the Work, Contractor shall rectify the error.

(c) Contractor shall bear the Cost of rectifying any error caused or permitted by Contractor.

(d) Contractor shall identify and protect bench marks, sight rails, pegs and other monuments or reference points used in laying out the Work.

## **ARTICLE 8**

### **GENERAL OBLIGATIONS OF THE COMPANY**

#### **Section 8.1 Company’s General Obligations**

(a) Company’s general obligation hereunder is to purchase the Project, upon satisfactory performance of Contractor’s obligations as provided in this Contract.

(b) Additionally, Company shall:

(i) keep Contractor informed as to the status of any governmental or regulatory or other activities undertaken by Company that would relate to the Plant and take corrective action related thereto, if necessary;

(ii) comply with all Applicable Law, the noncompliance with which would likely materially adversely affect the Work, the Plant, the Site or Contractor's or Company's obligations under this Contract; and

(iii) maintain all records and accounts in accordance with GAAP consistently applied and in Dollars in order to support any and all invoices, claims and disputes under this Contract.

## **Section 8.2 Planning Permissions, Consents**

(a) Company shall, before the time specified in the schedule for delivery of any Equipment or Plant to the Site, obtain the Planning Consents set forth in the Exhibit G. In the event Contractor considers that a consent not contained in Exhibit G must be obtained for the execution of the Work and/or operation of the Plant and use of the Site and which, as a result of the application of Applicable Law, can only be obtained by Company, Contractor shall immediately inform Company. If Company determines, in its sole discretion, that any additional consent is required, Company shall use commercially reasonable efforts to obtain such consent.

(b) Except as expressly provided or set out in this Section 8.2 or otherwise agreed to by the Parties in writing, Company shall have no obligation to obtain any further planning or similar consents which are or may be necessary for the performance of the Work. The obtaining of any and/or all other necessary consents, permits, planning permission from local or other authorities or adjacent lands shall be the responsibility of Contractor who shall ensure that the same are promptly obtained considering the Project Schedule and the time for delivery of the Equipment, the Plant and the Time for Completion.

(c) Each Party agrees to provide reasonable assistance to the other where such assistance is necessary for any consent, license or permission to be obtained. Contractor shall ascertain, comply with, and ensure that the Work complies with, all Applicable Law, and all consents, licenses and permissions relating thereto.

## **Section 8.3 Operations and Maintenance Staff**

Company shall provide to Contractor any reasonably necessary support staff during the commissioning and startup of the Plant as set out in this Section 8.3. Company shall provide operations and maintenance staff personnel to participate in the commissioning activities and Performance Tests as set out below. This support shall be provided during normal working hours or other times as may reasonably be requested by Contractor with advance notice. Company shall provide operation and maintenance personnel as may be reasonably required by Contractor to carry out the Performance Tests for purposes of commissioning, Performance Tests, training and system turnover, not to exceed ten (10) FTE (full-time equivalent) personnel for a period not to exceed 180 consecutive days. Contractor shall supply a schedule of support not less than one hundred twenty (120) days prior to commencing startup and commissioning activities. Company's operation and maintenance personnel shall work under the direction of Contractor to perform their work in connection with the startup and commissioning activities. Subject to the following sentence, Company's personnel shall have acceptable minimum skill levels to operate the Equipment. This participation shall be considered on the job training and treated as on the job training for Contractor.

#### **Section 8.4 Certificate of Convenience and Necessity**

Prior to the issuance of the Notice to Proceed, Company shall open a docket before the PSCU with respect to the CCN. Promptly after obtaining the CCN, Company shall provide notice thereof to Contractor. Contractor agrees to take commercially reasonable and prudent steps to represent themselves in the PSCU proceedings in support of the CCN, including causing the Subcontractors to provide cooperation and assistance to Company in connection therewith. Such regulatory participation by Contractor shall be at Contractor's sole cost and expense.

#### **Section 8.5 Company's Representative**

(a) Company's Power to Delegate. Company may at any time and from time to time delegate to its representative (the "Company's Representative") any of its duties and obligations (other than its payment obligations) under this Contract. Except as explicitly provided herein, any written decision, instruction or order given by Company's Representative to Contractor in accordance with such delegation shall have the same effect as though it had been given by Company.

(b) Duties of Company's Representative. Company's Representative shall carry out such duties in issuing certificates, decisions, instructions and orders as are specified in this Contract, provided that neither the performance of, nor the failure to perform such duties, whether properly or at all by Company's Representative, nor the fact that a representative has been appointed by Company shall in any way relieve Contractor of any responsibility or liability for any of its obligations under this Contract. No approval of, or consent to or failure to approve or disapprove of any matter by Company or Company's Representative shall relieve Contractor of any liability or of any of its obligations under this Contract.

(c) Company Representative's Decisions, Instructions and Orders. Contractor shall proceed with the Work in accordance with the decisions, instructions and orders given by Company's Representative in accordance with this Contract and to the reasonable satisfaction of Company's Representative. Any decision, instruction or order of Company's Representative may be oral or in writing; if given orally, such instruction or order shall be effective only when confirmed in writing.

#### **Section 8.6 Standard of Conduct**

Unless stated otherwise in this Contract, whenever the Parties or their representatives are required to exercise discretion by: (i) giving a decision or consent, or (ii) expressing satisfaction or approval, or (iii) determining value, or (iv) otherwise taking action which may affect their respective rights and obligations hereunder, the exercise of such discretion shall be made in a reasonable manner in accordance with Prudent Industry Practice and in good faith consistent with this Contract so as to reasonably minimize any disruption to the other Party, and having regard to all the circumstances reasonably applicable thereto.

## ARTICLE 9

### WORKING ARRANGEMENTS

#### Section 9.1 Site Regulations

Contractor, while performing Work at the Site, shall make itself aware of and adhere to Company's Site regulations, if any, including without limitation environmental protection, loss control, dust control, safety, and security, as well as any Site special conditions.

#### Section 9.2 Site Security

(a) Site security shall be under the direct control of Company and shall be in accordance with Company's established procedures, which include the requirements stated in this Section 9.2. Contractor and its personnel and its Subcontractors' personnel of any tier shall strictly adhere to all Site security provisions. Company will furnish within fenced-in areas of the Site a guard force to control access to and from the Site. [Company Site only.]

(b) All personnel working at the Site and all repeat visitors may be provided and where provided, shall be required to keep in their possession at all times, while on the premises, an identification tag ("ID Tag") provided by Company. Visitor's ID Tags will be available for visitors to the Site, but visitors with ID Tags may still be required to be escorted by a designated representative of Company.

(c) Contractor shall be assigned a personnel gate through which its employees must enter and depart. ID Tags issued to Contractor's employees may, at Company's option, be utilized as "brass", and Contractor shall be responsible for the control of ID Tags issued to its employees, subcontractors, suppliers and visitors.

(d) Notwithstanding Company's provision of guard service, Contractor shall be fully responsible for all Equipment, as well as Company-furnished material and Equipment in the care, custody and control of Contractor.

(e) Company shall designate parking areas for all persons outside the fenced-in area of the Site. Certain individuals, authorized specifically by Company, may drive vehicles onto the Site and may enter and leave through the main gate at times designated by Company. Access to the Site between the hours of 3:30 P.M. local time and 7:00 A.M. of the normal work week and all hours on weekends shall be subject to the prior consent of Company. Contractor shall follow the procedure designated by Company in obtaining consent for access to the Site at other than normal working hours.

(f) Contractor shall maintain and submit to Company an up-to-date inventory of Equipment and tools brought onto the Site.

(g) A representative of Company shall have the unqualified right to demand identification of and/or search all persons and all vehicles entering or leaving the Site. Materials leaving the Site must have an appropriate materials pass issued by Company. Contractor shall make, and cause its Subcontractors to make, advanced arrangements for tool inventory when leaving the Site upon

completion of the Project. The inventory shall be coordinated with Company and can be conducted on weekdays between 9:00 A.M. to 2:00 P.M.

(h) Company shall inform Contractor of all restricted areas of the Site. Before entering any such restricted area, Contractor shall obtain prior consent from Company's Representative. Any individual found in restricted areas without Company's prior consent shall be subject to removal from the Site.

### **Section 9.3 Preservation of Public and Private Access**

Contractor shall not damage, close, or obstruct any highway, road, or other public or private easement, except to the extent allowed by Permits. If such facilities are closed, obstructed, damaged, or made unsafe by Contractor, Contractor shall, at its sole cost and expense, make such repair as necessary and shall also provide such temporary guards, lights, and other signals as necessary or required for safety or as reasonably requested by Company.

### **Section 9.4 Night, Weekend or Holiday Work**

In the event Contractor determines it necessary to undertake the Work at night, on weekends, or on holidays, and such Work is on the Site, Contractor shall provide Company's Representative forty-eight (48) hours prior notice, unless the Work is necessary for the protection of life or property or for the safety of the Work, in which case Contractor shall immediately advise Company's Representative. Such Work shall be performed in accordance with Applicable Law, Permits, consents and licenses, and without inconvenience to third parties. Contractor explicitly agrees and acknowledges that full consideration and payment for the satisfactory completion of the Work includes all necessary labor hours, inclusive of Work during night, weekends and holidays and explicitly agrees and acknowledges that Contractor shall not file Change Orders because of the need to attract labor to perform Work at night, weekends or on holidays.

### **Section 9.5 Avoidance of Noise and Disturbance**

All Work at the Site (including night, weekend or holiday work subject to the requirements of Section 9.4 ("Night, Weekend or Holiday Work")), shall be carried out in such a way as to minimize noise and disturbance and Contractor shall indemnify and keep Company indemnified against any costs, losses or expenses, including without limitation, liability for damages arising out of or in connection with noise or other disturbance created by Contractor or any Subcontractor in performing the Work, falling outside of the limits specified by Applicable Law and created by Contractor in performing the Work.

### **Section 9.6 Opening Up of Work**

(a) No major material part of the Work shall be covered up or put out of view without the prior written consent of Company's Representative. Contractor shall timely inform Company's Representative and shall afford full opportunity for Company's Representative to inspect any part of such Work which is about to be covered up or put out of view and to examine foundations before any part of the Work is placed thereon, but in no event less than 24 (Business Day) hours prior written notice.

(b) Contractor shall uncover any part of such Work or make openings in or through the same as Company's Representative may from time to time direct and shall reinstate and repair such part. The cost of such uncovering, repair or reinstatement shall be borne by Contractor unless (i) the requirements of Section 13.2(c) ("Required Change Orders"), if applicable, have been fulfilled with respect to such part, (ii) such part is found to have been executed in accordance with this Contract, and (iii) it was not reasonable to have requested the opening based upon the existence of Defects of a similar nature in other parts of the Work or other reasonable evidence of the existence or possibility of a Defect, in which event the cost of such uncovering, repair, or reinstatement shall be borne by Company.

(c) Notwithstanding any other provision of this Section 9.6, if Defects are uncovered, Company shall be entitled to reject the defective Work, or either accept the defective Work or to accept only partial remediation of the defective Work and, provided that Contractor has had a reasonable opportunity to remedy the Defects, the Contract Price shall be reduced by an equitable amount that reflects either the reduced value to Company or the reduced cost to Contractor, as mutually agreed upon by Company and Contractor. In the absence of such agreement, an amount as is determined pursuant to the provisions of article 31 ("Claims, Claim Notice and Dispute Resolution").

### **Section 9.7 Fencing, Protection, Lighting**

Contractor shall provide adequate safety barriers, signs, lanterns, and other warning devices and service to properly protect any person having access to or near the Site. Contractor shall be solely responsible for any act of trespass or any damage to adjacent property resulting from or in connection with performance of the Work.

### **Section 9.8 Site Services**

Contractor shall be responsible for obtaining any and all electricity, water, fuel, air and other services as Contractor may require for the purposes of performing the Work, and Contractor shall be responsible for the cost thereof.

### **Section 9.9 Cleanup**

Contractor shall keep the Work area, including storage areas used by it, free from accumulation of waste materials or garbage arising out of the Work, and shall, prior to completion of the Work, remove and properly dispose of any such waste materials or garbage from and about the Work area as well as remove all tools, equipment and materials not the property of Company. Upon completion of the Work, Contractor shall leave the work area in a condition reasonably satisfactory to Company. In the event of Contractor's failure within a reasonable time to comply with any of the foregoing, Company may, after written notice to Contractor of such failure, perform the cleanup and removal at the sole cost and expense of Contractor. Company will perform site inspections for cleanliness and safety weekly. Company will have the right, but not the obligation, to implement such measures as it determines in its discretion to implement proper site safety and cleanliness, including cleaning the Site and disposing of waste, and invoicing Contractor for the full cost thereof, including any requisite licensing, with such payment due within ten (10) days of invoice.

## **Section 9.10 Contamination**

Contractor shall, at all times, be responsible for keeping the Site free from any Contamination brought to or generated at the Site by Contractor, Contractor or any Subcontractor. Prior to the Substantial Completion Date, Contractor shall manage any Contamination according to Applicable Law and within the requirements of Company's policies and programs for management and disposal of Contamination pre-existing commencement of the construction activities at the Site. Contractor shall not be responsible for the remediation or disposal of any pre-existing Contamination. Prior to the disposal or disposition of any Contamination, Contractor shall obtain the written approval of Company for such disposal or disposition.

## **Section 9.11 Material Safety Data**

Contractor shall be familiar with and abide by all provisions of the OSHA Hazard Communication Standard. Contractor shall pay special attention to the following provisions from the "Contractor Employees" section of the PacifiCorp Hazard Communication Program:

(a) Contractor shall require that suppliers furnish appropriate Material Safety Data Sheets (collectively, "MSDS") and appropriate labels of all purchased chemicals.

(b) For materials that Contractor or any Subcontractor plans to bring onto the Site, MSDS for those materials must first be presented to Company for review by Company's Plant Safety Coordinator. Contractors coming onto the Site will provide to Company an MSDS for the materials to be used. Materials will be contained so as to meet any State or Federal Regulations.

(c) Contractor and its employees shall review the MSDS of the appropriate hazardous chemicals, and follow the requirements of the OSHA Hazard Communication Standard.

(d) Contractor is responsible for all applicable training and adherence to the program by its employees, the Contractor and Subcontractors, and their respective employees, subcontractors and agents.

(e) Any employee of Contractor or any Subcontractor working in an area where hazardous chemicals are or may be present shall be notified in writing by Contractor of the chemicals pre-existing at the Site or otherwise brought onto the Site by Company.

## **Section 9.12 Historical Artifacts**

In the event that any relics, items or structures with archaeological, geographical or historical value or any articles (including but not limited to fossils, coins, articles of value or antiquity and any Native American relics) are discovered by Contractor or any Subcontractor of any tier or any of their representatives or employees, Contractor shall leave said items undisturbed and shall immediately notify Company and await its direction before proceeding with any work in the vicinity. All such historical artifacts shall be deemed to be the absolute property of Company and under no circumstances shall Contractor take possession of any item discovered..

## ARTICLE 10

### PROJECT SCHEDULE

#### Section 10.1 Project Schedule

Attached hereto as Exhibit C is a preliminary general project timetable setting forth the major tasks that must be completed by Contractor (each a “Milestone”) and completion dates for such tasks (“Milestone Completion Dates”) as provided by Contractor in accordance with the Specifications. One such Milestone is the final approval by both Parties of a more detailed project timetable (the “Project Schedule”) setting forth in more detail Milestones and Milestone Completion Dates, including all design, development and other Milestones to be achieved in performance of the Work. In the event that the Notice to Proceed is delayed, within thirty (30) Days from the date of the Notice to Proceed, Contractor shall submit to Company’s Representative an updated version of the Project Schedule for the approval of Company’s Representative.

#### Section 10.2 Form of Project Schedule

The Project Schedule shall be in form and content acceptable to Company. Such Project Schedule shall specify any tasks, obligations, or responsibilities (each a “Company Obligation”) which Company must perform or fulfill in order for Contractor to achieve the Milestone Completion Dates for each Milestone, and the date by which Company is to fulfill each and every Company Obligation.

#### Section 10.3 Rejection of the Project Schedule

(a) Company’s Representative shall have the right to reasonably reject, vary, amend, substitute or otherwise change the Project Schedule prior to approval thereof. Any such variation, amendment, substitution, or other change (other than a rejection) shall be considered a Company-Initiated Change under Section 13.1 (“Changes”).

(b) If, under Section 10.3(a), Company’s Representative rejects any Project Schedule submitted by Contractor, Contractor shall, within seven (7) days of such rejection, submit four (4) copies of the final form of a revised Project Schedule for approval by Company’s Representative and of the Project Schedule.

#### Section 10.4 Alterations to Project Schedule

Contractor shall not, without the prior written consent of Company’s Representative, make any material alteration to the Project Schedule.

#### Section 10.5 Revision of Project Schedule

If Company or Company’s Representative determines, each in its sole discretion, that progress of the Work does not or is unlikely to match the Project Schedule, or otherwise to enable the Work to be completed by the Time for Completion, Company’s Representative may require Contractor to revise the Project Schedule. Contractor shall thereafter revise the Project Schedule to show the modifications necessary to ensure completion of the Work within the Time for Completion. Contractor shall notify



Company's Representative as soon as possible of any circumstances of which Contractor is or becomes aware which might result in the progress of the Work not matching the Project Schedule.

### **Section 10.6 Contractor's Responsibility to Comply with Milestone Completion Dates**

Contractor shall undertake sole and complete responsibility to complete and to commit sufficient manpower and resources to ensure the completion of each Milestone by the appropriate Milestone Completion Date.

### **Section 10.7 Rate of Progress**

(a) Company's Representative shall notify Contractor if Company's Representative determines that the rate of progress of the Work is, in its opinion, too slow to meet the Time for Completion due to a circumstance for which Contractor is not entitled to an extension of the Time for Completion under the provisions of this Contract.

(b) Following receipt of such a notice, Contractor shall at its own cost take such steps as may be necessary and as Company's Representative may approve, to remedy or mitigate the likely delay, including revision of the Project Schedule. Contractor shall not be entitled to any additional payment or additional Cost or any increase in the Contract Price for taking such steps.

### **Section 10.8 Progress Reports**

(a) Contractor shall submit to Company's Representative on the third (3rd) working day of each month, or such other date as is agreed upon between Contractor and Company, a progress report (each a "Progress Report") in compliance with the requirements set forth in the Specifications. Contractor shall submit two (2) copies of each Progress Report to Company's Representative.

(b) The written progress reports submitted by Contractor shall specify in detail:

(i) any problem or circumstance (each a "Project Problem") encountered by Contractor during the preceding month (including without limitation the failure of Company to perform any Company Obligations under this Contract or the inadequacy of any such performance by Company) which might (A) prevent Contractor from completing any Milestone by its Milestone Completion Date or (B) cause Contractor to incur additional expenses to complete any Milestones;

(ii) the estimated length of any delay and the estimated amount of any additional expenses, if any, which may be chargeable to Company hereunder, as a result of any Project Problem identified pursuant to this Contract, and

(iii) to the best of Contractor's knowledge, after due inquiry and analysis, the cause of any Project Problem and the specific steps taken or proposed to be taken by Contractor to correct such Project Problem.

(c) In the event that Contractor fails to specify in writing any Project Problem of which it is aware of should have reasonably been aware (an "Unidentified Project Problem") with respect to a given monthly period in the appropriate report and in such manner and at such time as specified under

this Contract as a Project Problem, Contractor shall not be entitled to rely on any such Unidentified Project Problem as a purported justification for either (i) claiming that it is entitled to receive any additional amounts pursuant to this Contract (including without limitation, damages arising out of any alleged failure by Company to perform any of its obligations under this Contract) or (ii) failing to complete any Milestone by the specified Milestone Completion Date.

(d) The submission by Contractor of any Progress Report shall not alter, amend or modify Contractor's or Company's rights or obligations under to this Contract, including the Contract Price. In the event and to the extent any Milestone is not completed by the specified Milestone Completion Date as a direct and unavoidable result of Company's failure (other than as a result of Contractor's failure to perform any of its obligations on a timely basis) to fulfill any Company Obligation by its respective completion date, then the Milestone Completion Date for such Milestone shall be extended by one (1) day for each day in which completion of any such Company Obligation is delayed beyond its respective completion date and all extra costs actually incurred by Contractor by reason of such delay shall be paid by Company, except to the extent the delay in completing any of Company's obligations results from Contractor's failure to perform any of its obligations under this Contract on a timely basis.

### **Section 10.9 Progress Meetings**

Progress meetings will be held as deemed necessary by Company, but normally shall not be less frequently than once a week. Such meetings shall be at the Site unless Company requests to change the location of such meetings. Progress meetings will be utilized to review the Work and the Project Schedule and to discuss any delays, unusual conditions or critical items, which have affected or could affect the progress of the Work.

## **ARTICLE 11**

### **DELIVERY, SHIPPING, AND HANDLING OF PLANT AND EQUIPMENT**

#### **Section 11.1 Delivery Responsibility**

Contractor shall be responsible for the safe delivery of all the Equipment and Contractor's Equipment to the Site. Contractor shall abide by the requirements of Appendix B for delivery of major items of Equipment, Plant or Contractor's Equipment to the Site. Contractor shall be responsible for the reception and unloading on Site of all Equipment and Contractor's Equipment delivered for the purposes of this Contract.

#### **Section 11.2 Packing**

(a) Contractor is responsible for assuring that the Equipment is suitably packaged to ensure against damage under normal handling and transportation methods. All Equipment or components thereof shall be identified with Company's equipment number or tag number, if required by the Specifications. All shipping shall be in accordance with Appendix B.

(b) The Equipment and all related parts shall be shipped FOB the Site, freight prepaid and allowed, with Contractor retaining risk, liability and responsibility, financial and otherwise, until Substantial Completion, and then only in accordance with this Contract.

(c) Prior to the shipment of any Equipment, Contractor shall become knowledgeable of transportation conditions, such as clearances and restrictions, height and width, bridge load limits and other limitations affecting such shipment. Notwithstanding any other provision of this Contract, any limitations or the lack of transportation facilities shall not become the basis for Claims or damages, or for an extension of time for completion of Work under this Contract.

### **Section 11.3 Transportation**

Contractor shall observe all Applicable Law in relation to and obtain all necessary consents and permissions for the transport of Plant, Equipment and Contractor's Equipment over highways, bridges or culverts and shall indemnify Company against all claims for the repair of any such highways, bridges or culverts arising out of the execution of the Work and in respect of all proceedings, damages, costs, charges and expenses arising out of or in connection with such transportation.

### **Section 11.4 Extraordinary Traffic**

Contractor shall use best efforts to prevent damage to any of the highways, bridges or culverts on the routes to the Site by any traffic of Contractor or any Subcontractor. Contractor shall be responsible for the cost of protecting or strengthening any highway, bridge or culvert as necessary to facilitate the moving of the Equipment, Plant or Contractor's Equipment and shall be liable for any damage or injury to highways, bridges or culverts arising out of the execution of the Work, and shall indemnify Company in respect of any claim, proceedings, damages, cost, charges and expenses in relation thereto which may be incurred as a result of Contractor's default under this Section 11.4.

### **Section 11.5 Allocation**

In the event of a partial failure of Contractor's sources of supply, Contractor will first meet all of Company's requirements hereunder prior to any allocation among other customers.

## **ARTICLE 12**

### **CONTRACTOR'S EQUIPMENT**

#### **Section 12.1 Contractor's Equipment**

Contractor shall, within thirty (30) days after the Effective Date, provide to Company an indicative list of Contractor's Equipment that Contractor intends to use on the Site, which shall be updated from time to time during the performance of the Work and which shall be available for inspection by Company's Representative.

#### **Section 12.2 Contractor's Equipment on Site**

All Contractor Equipment shall, when brought onto the Site, be deemed to be exclusively intended for the execution of the Work. Contractor shall not thereafter remove the same or any part thereof from the Site without the prior consent of Company, which shall not be unreasonably withheld in the case of Contractor's Equipment not currently required for the execution of the Work on the Site.

#### **Section 12.3 Loss or Damage to Contractor's Equipment**

Contractor shall be liable for loss or damage to any of Contractor's Equipment which may occur otherwise than through the default of Company or those for whom Company is responsible.

### **Section 12.3 Maintenance of Contractor's Equipment**

Contractor shall be responsible for maintaining Contractor's Equipment on Site in safe working order.

## **ARTICLE 13**

### **CHANGE ORDERS**

#### **Section 13.1 Changes**

(a) From time to time circumstances may arise which justify a Change.

(b) No Change shall be effective unless authorized by Company by issuance of a Change Order pursuant to the provisions of this Article 13.

(c) Company shall, when reviewing each potential Change and determining the nature and extent of any Change Order which is to be granted in accordance with this Article 13, consider in detail the following information:

(i) The nature, scope and extent of the Change, including but not limited to any additions or deletions from the Scope of Work;

(ii) The effect, if any, of the Change on the Project Schedule or on the Guaranteed Substantial Completion Date(s), as applicable;

(iii) The effect, if any, of the Change on the amount the Contract Price; provided, however, that in no event shall the amount of the Contract Price be subject to change for any Change that does not constitute a material change in the Scope of Work requested by Company; and

(iv) Such other information as may be reasonably necessary for the implementation of the Change Order, including but not limited to the effect on any other provisions hereof which may be impacted by the Change.

Company shall, in the case of a Company-Initiated Change or, if it elects to do so, in the case of Contractor Initiated Changes, and in all events in the case of Required Changes, thereafter issue a Change Order addressing all circumstances that require adjustments as a result of the applicable Change, in a form substantially similar to the form of Change Order attached hereto as Exhibit D-1 which shall address, to the extent required, all of the issues set out in this Section 13.1(c).

(d) In the case of any request for a Change Order by Contractor which is permitted to be made in accordance with this Contract, such request shall take the form of a Change Order Request (each a "Change Order Request") which shall be delivered to Company in writing as soon as possible and in any event within ten (10) days after Contractor becomes aware of the circumstances which it

believes (or through the exercise of Prudent Industry Practice should have become aware) necessitates a Change. In no case shall Contractor be entitled to recover costs as a Change Order in connection with conditions that give rise to such Change Order arising prior to the date on which Contractor requests the Change Order, except to the extent that such costs are incurred reasonably and properly in order to achieve the Guaranteed Completion Dates. Any Change Order Request shall be in a form substantially similar to the form of Change Order Request attached hereto as Exhibit D-2 and shall include the following information: (a) the factors necessitating or the basis for the Change; (b) the impact, if any, which the proposed Change is likely to have on the Contract Price; (c) the impact, if any, which the proposed Change is likely to have on the Project Schedule (including the Guaranteed Substantial Completion Date); (d) other provisions of this Contract or the Specifications to be impacted by the proposed Change hereof; and (e) such other information which Company may reasonably request in connection with such proposed Change.

(e) The issuance of a Change Order shall not result in invalidation of this Contract.

(f) Except with respect to a Company Initiated Change, as to which the disregarded amount shall be \$25,000, no circumstances will constitute grounds for a Required Change Order or a Contractor Initiated Change Order unless and to the extent that (i) the costs of such Change Order, in either case, is in excess of \$5,000, or (ii) the effect of such Change Order request impairs the achievement of a Company Critical Schedule Milestone or a Contractor Critical Schedule Milestone, as applicable, by more than 3 days (except in circumstances where Contractor has no means of recovering such schedule impairment in which case Contractor shall be entitled to a Change Order if Contractor would otherwise have been so entitled). Neither Party shall game or otherwise manipulate the foregoing process, by aggregating or disaggregating cost and/or circumstances as the case may be (or otherwise), for the purpose of recovering or avoiding additional cost or time in accordance with the foregoing.

(g) Change Orders (in each case in excess of the applicable disregarded amount) shall address the change, if any, in the amount of the Contract Price in one of the following manners:

(i) Company and Contractor shall agree upon the amount by which the Change will impact the Contract Price; or

(ii) Company and Contractor shall agree as to the nature and extent of the Change, but in lieu of changing the Contract Price, Contractor shall perform the activities associated with the Change on a cost-reimbursable basis, in which event no change shall be made in the amount of the Contract Price.

## **Section 13.2 Procedure for Changes**

(a) Changes Initiated by Contractor. Contractor may, at any time and from time to time, make proposals to Company for improvements, efficiencies, cost savings and other similar Changes to the Work (each a "Contractor-Initiated Change"), but no such proposal shall be carried out by Contractor except as instructed in writing by Company in the form of a Change Order, which Company may in its discretion elect to issue as it sees fit. Such proposals of Contractor shall be submitted in the form of a written Change Order Request in the manner described in Section 13.1(d), and shall also contain and be supplemented with such information or additional information as

Company may reasonably require in order to effect a reasoned decision as to the implementation, or rejection, (as the case may be) of the Change Order Request.

(b) Changes Initiated by Company. If Company desires to make a Change (each a “Company-Initiated Change”) not comprising rectification or recovery Work due to Contractor’s negligence or breach of this Contract, Company will submit a written Change Order Notice to Contractor, substantially in the form of Exhibit D-3, setting forth the nature and extent of the proposed Change to the Scope of Work together with, to the extent available and/or applicable, Company’s opinion as to those matters required to be taken into account in accordance with Section 13.1 (“Changes”). Contractor will promptly review the Change Order Notice and, within five (5) Business Days, shall notify Company in writing of the reasonable time required to deliver a response, setting forth for the proposed Change, the options for implementing the proposed Change (including, if possible, any option that does not involve an extension of time) and the estimated effect(s), if any, that each such option would have on the Contract Price and the Project Schedule, and any other provision of this Contract or the Specifications to be impacted by the proposed Change, as applicable. Such response shall also contain all those matters required to be set out in a Change Order Request. Based upon such information, Company may, in its sole discretion, issue a Change Order making a Change.

(c) Required Change Orders. Contractor shall be entitled to the issuance of Change Orders pursuant to Article 13 in connection with any circumstances which constitute a Change and which are attributable to the matters identified in subparagraphs (a) through (g) below (each a “Required Change”):

(i) Due to Change in Law Applicable Law/Permit or Site Condition. If and to the extent that a change in any Requirement of Law or Permit after the Effective Date results in an increase in the cost of the Work or extends the Project Schedule, and in each case only to the extent that such increase or extension is greater than the threshold amounts identified in Section 13.1(f) above.

(ii) Change Order Due to Suspension of Work by Company. In the event that Company suspends the Work (i) in the circumstances with respect to which Contractor is entitled to a Change Order as set out in Section 13.1, or (ii) in the circumstances described in article 16.

(iii) Change Order Due to Non-Performance by Company. If Company fails to perform or is late in performing in any material way, any material obligation of Company under this Contract and the cost to Contractor is in excess of \$25,000 or a delay of more than 3 days. Neither Party shall game or otherwise manipulate the foregoing process, by aggregating or disaggregating cost and/or circumstances as the case may be (or otherwise), for the purpose of recovering or avoiding additional cost or time in accordance with the foregoing.

Contractor shall in all cases use or have used commercially reasonable efforts to mitigate potential delays to the Project Schedule and/or potential increases to the Contract Price (the cost of such mitigation efforts to be addressed in any applicable Change Order).

(d) Except in the circumstances as set out in this Section 13.2 and with respect to which an application is properly made in accordance with this Article 13, Contractor shall not be entitled to seek

either a Change, Change Order or extension of the Guaranteed Substantial Completion Date, nor to receive additional remuneration or reimbursement with respect to performance of the Work.

### **Section 13.3 Continued Performance Pending Resolution of Disputes**

Notwithstanding and pending the resolution of any dispute with respect to a Change or Change Order, Contractor must proceed with the Work and the performance of any Change ordered by Company or any Required Change, unless Company directs Contractor not to so proceed, provided that Contractor is being paid on a current basis for all undisputed Work and for all disputed Work which has been ordered to be paid through a Claim proceeding dispute resolution relating thereto in accordance with this Contract.

### **Section 13.4 Preservation of Schedule and Contract Price**

Where any proposed Change or Change Order Request may give rise to an extension of the Project Schedule or an increase in the Contract Price, then Company reserves the right, in its sole discretion and to the extent possible, to require Contractor to vary, amend or effect such Change to the Work in such a manner as will mitigate or avoid the requirement for such extension of time or increase in price.

## **ARTICLE 14**

### **WORKMANSHIP AND MATERIALS**

#### **Section 14.1 Manner of Execution**

The Work to be supplied, including all materials, manufactured components and labor and services to be performed, shall be designed and executed in the manner set out in this Contract. Except where the manner of design, manufacture and execution is otherwise specifically set out in this Contract, the Work shall be designed and executed in a proper and workmanlike manner, all in accordance with accepted industry standards and Prudent Industry Practice.

#### **Section 14.2 Condition of Materials**

The materials, Equipment (including any rented Equipment), fixtures, software, any related items of personal property and other tangible personal property of Contractor, any Subcontractor or Contractor constituting the Project shall be OEM Certified, and shall be suitable for their current use in the generation of energy and the transportation of natural gas in accordance with the Specifications. All Equipment shall be procured solely for use in connection with the Project. Contractor shall not allow any Equipment to be placed into storage for more than one year prior to shipping to the Site, nor utilize any Equipment in the Project that has been so stored.

#### **Section 14.3 Inspection**

(a) In addition to the inspection rights of Company under Section 7.8 (“Authority for Access for Inspection”), within sixty (60) days after the Effective Date, Contractor shall submit to Company a schedule (the “Witness Point Schedule”), including but not limited to those tests, inspections and other events identified in Appendix T of tests and inspections (the “Witness Point

Events”) that is reasonably acceptable to Company, and which shall include locations where the Equipment shall be manufactured or tested and the location at which such tests and inspections can be attended by Company. Contractor shall provide no less than three (3) Business Days’ advance confirmation of the actual date of each Witness Point Event identified on the Witness Point Schedule. Company shall be entitled to attend and witness all Witness Point Events. To the extent that any Witness Point Events have been completed prior to the date on which the Witness Point Schedule is submitted to Company, at Company’s sole discretion, Contractor shall (i) allow Company to observe the materials and workmanship of the Project and to review documentation which may be available in lieu of viewing or witnessing the Witness Point Event, or (ii) re-open the affected portion of the Project for inspection by Company and repair or correct (if necessary) and restore the affected portion of the Project at no additional cost to Company. All inspections shall take place at the Site, at a Contractor’s or a Subcontractor’s premises or such other reasonable site as the Parties may agree, as appropriate, during normal working hours. No such inspection or examination or witnessing of tests shall release Contractor from any obligation or liability under this Contract. Inspections under this Section 14.3 are solely for the benefit of Company and any inspection or failure to inspect and any objection or failure to object by Company shall not (i) relieve Contractor or any Subcontractor of any of their obligations under any Project Document or (ii) be used as evidence that Company agreed that either or both of Contractor or any Subcontractor had fulfilled any obligations under any Project Document or that Company had waived any of its rights under any Project Document.

(b) If, as a result of an inspection or examination referred to in Section 14.3(a) above, Company decides that any portion of the Work is nonconforming or otherwise not in accordance with this Contract, Company shall promptly notify Contractor thereof. Such notice shall state Company’s objections and its reasons therefor in reasonable detail. Contractor shall make good the nonconformity or ensure that any such portion of the Work complies with this Contract at no additional cost to Company.

(c) For purposes hereof, “nonconforming” means defective or not in conformity with the Specifications.

## **ARTICLE 15**

### **DRAWINGS**

#### **Section 15.1 Drawings**

(a) Within sixty (60) days following receipt and approval of the Project Schedule, Contractor shall prepare a drawing list identifying those key data, calculations (as required for regulatory purposes and consents), drawings, technical specifications and concepts required for review for conformance with this Contract.

(b) Contractor shall, within the time detailed in the Project Schedule or elsewhere in this Contract, submit to Company’s Representative in hard copy and electronic form (the specific form of which shall be agreed to by the Parties) such key data, calculations, drawings, technical specifications and concepts.



(c) Contractor shall timely submit to Company's Representative no later than sixty (60) days prior to commencement of construction activities at the Site, drawings of temporary and permanent buildings and structures and any other information required under the terms and conditions of consents, licenses and planning permissions obtained by Contractor or Company.

(d) Company's Representative may, in its sole discretion, disapprove any drawing; provided, however, it shall notify Contractor of any such disapproval within twenty (20) days after receipt, except for documents and information (including calculations) which are required by Company's Representative for consultation with Company's third party contractors for the purposes of the interconnections at terminal points, where the period shall be thirty (30) days. Contractor shall supply additional copies of documents or information (including calculations) in the form and numbers stated in this Contract. Without waiver of or prejudice to any rights of Company, Contractor shall bear all risk in relation to its performance of the Work arising from or in relation to all documents or information (including calculations).

### **Section 15.2 Consequences of Documents not in accordance with Contract**

Any documents or information (including calculations) which Company's Representative identifies as not being in accordance with this Contract shall be modified and resubmitted within thirty (30) days after notice to Contractor.

### **Section 15.3 Drawings Submitted**

Contractor shall not deviate from drawings accepted by Company or issued by Contractor as approved for construction, except with the prior written consent of Company.

### **Section 15.4 Inspection of Drawings**

Contractor shall maintain and provide to Company's Representative from time to time or upon request a complete list of drawings identifying which are approved for construction. Company shall have the right at all reasonable times to inspect all drawings of any part of the Work.

### **Section 15.5 Operating and Maintenance Instructions**

(a) Not less than six (6) months prior to the scheduled Guaranteed Substantial Completion Date, Contractor shall deliver to Company's Representative one (1) set of preliminary operating and maintenance manuals sufficiently complete that the Plant and Equipment may be safely commissioned and Company's personnel may be properly trained pursuant to Section 7.11 ("Training"). Contractor shall, at its sole cost and expense, continuously update such manuals so that, as of the Substantial Completion Date, such operating and maintenance manuals are substantively in their final form with all amendments made as necessary.

(b) Within three (3) months after the scheduled Substantial Completion Date, Contractor shall supply to Company three (3) copies of final operation and maintenance manuals and drawings of the Work as-built plus five (5) CD-ROMs incorporating any changes made during testing and/or Commissioning of the Work.

(c) All operating and maintenance manuals and drawings of the Work as-built, shall be in such detail as will enable Company to operate, maintain, dismantle, reassemble, adjust and repair all

parts of the Work. Where the employment of Contractor is terminated for default or in the case of a Material Adverse Change caused by Contractor prior to the Transfer of Possession and Control of Project to Company Date, Contractor shall provide to Company such information including copy drawings and Draft Manuals as reasonably necessary for Company to complete, operate and maintain the Work.

(d) Where the employment of Contractor is terminated for convenience, Contractor shall provide to Company such information, including copy drawings and Draft Manuals, in the state of completion at the date of such termination.

(e) The provision by Contractor of the final operation and maintenance manuals and drawings of the Work as-built in accordance with the provisions of this Section 15.5 shall be identified as a Milestone in Appendix C and the provisions of article 10 shall apply.

### **Section 15.6 Company's Use of Drawings**

(a) Drawings and information created by Contractor for purposes of designing, developing, constructing, commissioning and operating the Project constitute "work made for hire," and Contractor hereby transfers and assigns all rights in and to such drawings and information to Company.

(b) Drawings and information supplied by Contractor that are not created by Contractor specifically for or in connection with the Project, but that are necessary or useful for the operation and maintenance of the Project, the Work or any portion of them, may be used by Company for the purposes of completing, maintaining, operating, improving, adapting, renewing, enlarging, dismantling, re-assembling, adjusting and repairing the Work, and for any other legal purpose, pursuant to the license granted in this Section 15.6.

(c) Contractor grants to Company an irrevocable perpetual royalty free license to use all drawings and information for the foregoing purposes and Contractor shall provide Company with copies of such drawings and information.

### **Section 15.7 Manufacturing Drawings**

In the event of a Defect resulting in outage of the Plant in excess of two (2) days during the applicable Warranty Period, Contractor shall immediately give Company full, unimpeded, and unqualified access to all information, documents, processes and operations, processes or operations so as to enable Company to satisfy itself that the Plant and Equipment shall in all respects be properly and timely repaired and/or replaced and so as to be in full compliance with the requirements of this Contract.

### **Section 15.8 Errors in Drawings Supplied by Contractor**

(a) Contractor shall be responsible for the accuracy, completeness and suitability of all drawings, samples, patterns, models, calculations or information submitted by Contractor or any Subcontractor in connection with the Work. Notwithstanding Company's or Company's Representative's inspection or approval of drawings, samples, patterns, models, calculations or information submitted by Contractor, Contractor shall not be relieved of any responsibility or liability

imposed on it by any provisions of this Contract and shall be responsible for any errors, omissions or discrepancies therein.

(b) Contractor shall bear any and all costs Contractor or Company may incur as a result of delay in providing such drawings, samples, patterns, models, calculations or information or as a result of errors, omissions or discrepancies therein or for the correction thereof.

(c) Contractor shall, at its sole cost and expense, carry out or cause to be carried out any alterations or remedial work necessitated by such errors, omissions or discrepancies for which it is responsible and modify the drawings, samples, patterns, models, calculations or information accordingly.

## ARTICLE 16

### SUSPENSION OF WORKS, DELIVERY OR ERECTION

#### Section 16.1 Order to Suspend

(a) Company may, at its sole option, upon not less than seven (7) days' prior written notice to Contractor, suspend at any time (a) the performance of all or any portions of the Work, (b) delivery of a component of the Work, or (c) erection of any portion of the Work that has been delivered to the Site. Such notice shall specify the length of time that Company anticipates the Work shall be suspended.

(b) If the cumulative days of Work suspension totals One Hundred and Eighty (180) days, or if the Work is suspended four (4) or more separate times for a period of more than 45 days in any single instance or 180 days in the aggregate, Contractor may terminate this Contract by thirty (30) days' written notice to Company, unless the suspension is lifted within such 30-day period, and such termination shall be treated as a Company voluntary termination pursuant to Section 29.1(c) ("Voluntary Termination").

(c) Unless otherwise instructed by Company, Contractor shall during any suspension affecting the progress of the Work on Site, maintain its staff, labor and equipment on or near the Site ready to proceed with the Work upon receipt of the further instructions of Company.

(d) If Company desires to extend the period of suspension for a longer time than that specified in the original notice given by Company, Company shall so notify Contractor in writing and the same procedures described in article 10 ("Project Schedule") shall be followed to determine whether to actually extend the suspension and the amount of the costs and charges which shall be incurred as a result of any such extension.

#### Section 16.2 Protection of Work

(a) Contractor shall, during such suspension, store, preserve, protect and otherwise secure each of the Work, the Equipment and the Plant.

(b) If Company is unwilling or unable to receive any of the Equipment as a result of a suspension by Company under Section 16.1 ("Order to Suspend"), Contractor shall, upon notice to

Company and giving Company reasonable opportunity to designate a mutually acceptable destination, place such Equipment in storage. If any Equipment is placed into storage pursuant to this provision, delivery thereof shall not be deemed to occur until such Equipment is delivered to the Site or Company has notified Contractor that it is prepared to accept delivery at some other location.

### **Section 16.3 Resumption of Work**

(a) Following any suspension by Company under article 16, after receipt of notice to resume progress of the Work, Contractor shall examine the Work affected by the suspension. Contractor shall, within twenty-one (21) calendar days after receipt of notice to resume the suspended Work, submit to Company a written report detailing any deterioration, nonconformities and losses to the Project or any portion thereof and a Change Order Proposal related to such damages, losses and deterioration. Contractor shall, pursuant to a Change Order, correct, repair or replace any deterioration to, nonconformity in or loss of the Work that occurred during the suspension; provided, however, that no Change Order shall be required or issued for any deterioration, nonconformity or loss resulting from Contractor's negligence or wrongdoing during the period of suspension; and shall promptly resume performance on the suspended Work to the extent required in the notice.

(b) Any claims on the part of Contractor for extensions of time in connection with a suspension shall be made in accordance with the appropriate provisions of this Contract. Notwithstanding any other provision of this Contract, no compensation or extension of time shall be granted to the extent that suspension results from Contractor's non-compliance with the terms of this Contract.

### **Section 16.4 Change Order in Event of Suspension**

(a) Contractor may, at any time prior to thirty (30) days after receipt of notice to resume progress of the Work under Section 16.3 above, notify Company of its request for a Change Order as a result of suspension by Company under Section 16.1 ("Order to Suspend").

(b) Contractor shall, within seven (7) Business Days following receipt of any notice from Company indicating Company's intention to suspend the performance of all or any portion of the Work pursuant to Section 16.1, deliver to Company an itemized account of the estimated charges and costs which Contractor believes will be incurred by Company as a result of such suspension. Contractor shall make a good faith estimate of such charges and cost that will be accurate within a range of plus or minus five percent (5%). Following receipt of such estimate, Company shall have the right by written notice to Contractor at any time prior to the effective date of suspension specified in Company's suspension notice, to either (i) revoke its decision to suspend performance, in which event Contractor will not suspend performance of such Work, (ii) instruct Contractor to suspend performance in accordance with the terms of Company's suspension notice and to confirm that the charges and costs quoted by Contractor are acceptable, or (iii) instruct Contractor to suspend performance in accordance with the terms of Company's suspension notice, with Company reserving the right to contest the charges and costs quoted by Contractor.

(c) In the event of such suspension, Contractor shall, unless the notice requires otherwise:

(i) Discontinue the Work on the date and to the extent specified in the notice;

(ii) Place no further orders or subcontracts for Equipment, Plant or services with respect to the suspended Work, other than to the extent required in the notice;

(iii) Promptly make every reasonable effort to obtain suspension, upon terms reasonably satisfactory to Company, of all orders, subcontracts and rental agreements as necessary to the extent they relate to performance of the Work suspended; and

(iv) Unless otherwise specifically stated in the notice, continue to protect and maintain the Work theretofore completed, including the Work suspended hereunder.

(d) As full compensation for any such suspension, Contractor shall be reimbursed for the following costs, reasonably incurred, without duplication of any item, to the extent that such costs directly result from such suspension of Work, up to a maximum of one hundred and five percent (105%) of the estimate submitted by Contractor pursuant to this Contract hereof:

(i) If determined necessary by Company, a standby charge to Contractor during the period of suspension of the Work, which standby charge shall be sufficient to compensate Contractor for the reasonable costs of keeping, to the extent required in the notice, its personnel and equipment committed to the Work in a standby status;

(ii) Expenses reasonably and necessarily incurred by Contractor in connection with storage of Equipment pursuant to Section 16.2 (“Protection of Work”), including preparation for and placement into storage, handling, transportation, storage, inspection, preservation, taxes and insurance and any necessary rehabilitation prior to installation; and

(iii) Reasonable costs associated with demobilization of Contractor’s personnel and equipment to the extent such costs are not recovered by Contractor in using such personnel and equipment on other projects during the standby period; and an equitable amount to reimburse Contractor for the actual cost to Contractor, if any, of maintaining and protecting that portion of the Work upon which activities have been suspended;

Company shall have the right, upon reasonable advance written notice to Contractor, to inspect and audit Contractor’s books and records in order to verify the accuracy of and/or to determine the amount of any cost-based reimbursement associated with any suspension of the Work.

(e) Contractor shall not be entitled to be paid any additional amounts under this article 16 if and to the extent suspension is necessary by reason of default on the part of Contractor or persons for whom Contractor is responsible or for the proper execution or the safety of the Work, Equipment or Plant.

## **ARTICLE 17**

### **PERFORMANCE TESTING**

#### **Section 17.1 Performance Tests**

Contractor shall conduct or cause to be conducted the Performance Tests as soon as practicable in accordance with the Specifications, procedures and protocols of Appendix H and the other tests,

procedures and protocols to be developed by the Parties. At least nine (9) months prior to the Guaranteed Substantial Completion Date, Contractor shall deliver to Company a supplement to Appendix H further outlining the tests and procedures to be followed in conducting the Performance Tests criteria. Such supplement shall include, at a minimum, provisions addressing (a) testing procedures for each item of Equipment, (b) functional performance tests for starting up the Plant under different specified operating conditions and (c) any other activities that, in accordance with Prudent Industry Practices, should be included. Thereafter, the Parties shall promptly agree on modifications to such supplement so that Appendix H, as supplemented, is satisfactory to Company. Contractor shall provide Company with notice when the Plant is ready for Performance Testing.

### **Section 17.2 Emissions Guarantee**

Contractor shall conduct the Performance Tests in accordance with Appendix H and, as a condition of Substantial Completion, shall demonstrate that emissions from the Project meet the Guaranteed Emissions. If the Guaranteed Emissions are not met, either in whole or in part, Contractor shall, at its sole cost and expense, to diligently make such changes, modifications and/or additions to the Plant or any part thereof as may be necessary to achieve the Guaranteed Emissions. Contractor shall notify Company upon completion of the necessary changes, modifications or additions, and Contractor shall repeat the Performance Tests as necessary until the Guaranteed Emissions have been met. Nothing contained in this Section 17.2 shall relieve Contractor of Contractor's obligation to pay liquidated damages under this Contract.

### **Section 17.3 Cost and Direction**

(a) The Performance Tests shall be conducted by and under the direction of Contractor. Company will cooperate with Contractor's reasonable requests in connection with the Performance Tests, but shall not be required to provide any materials, electricity, fuel, water or stores.

(b) Contractor shall provide all materials, electricity, fuel, water and stores, and all personnel necessary to supervise startup and the conducting of the Performance Tests and shall provide all necessary technical assistance and advice in connection with the Performance Tests. Except as approved by Company in writing, Contractor shall not use personnel in excess of the normal contingent of Plant operations staff to operate the Plant during the performance tests. During training and conducting the Performance Tests Company's operating personnel shall be working under the technical direction and instruction of Contractor and Contractor shall be responsible for the accuracy of its instructions/directions provided to Company's operating personnel.

### **Section 17.4 Company's Right to Validate**

Company and Company's Representative, in connection with the performance of this Contract by Contractor, shall have the right and opportunity to be present and observe the Performance Tests and shall have the right and opportunity in advance or during the Performance Tests to inspect and validate all meters, meter readings and other pertinent data necessary to verify the results of the Performance Tests. Company shall provide reasonable notice to Contractor of any such observation and inspection, including the specific information desired and method of obtaining such information. Contractor and Company shall coordinate such observation, inspection and validation so as not to

interfere with the Performance Tests yet provide for a verifiable result. Company shall have the same rights with respect to any other Performance Tests conducted by Contractor as set forth above.

### **Section 17.5 Additional Tests; Test Energy**

(a) After the Substantial Completion Date with respect to the Work, Contractor may, unless Company reasonably objects, make any additional tests which Contractor considers desirable at its own risk and cost; provided, however,

(i) if such tests require any change in Company's dispatch schedule for the Project, then Contractor shall reimburse Company for all costs and Claims associated with such change in dispatch;

(ii) if such tests damage the Project in any way, then Contractor shall bear all costs of making good such damage and of all Claims resulting from such damage; and

(iii) if such test may cause the Project to no longer meet the Performance Guarantees, then Contractor shall, at its sole cost, re-conduct the Performance Tests and compensate Company for all costs and Claims associated with reconducting the Performance Tests.

(b) Company shall have the exclusive right to all electric energy generated by the Plant during any Performance Tests.

### **Section 17.6 Timing**

Contractor shall give Company at least ninety (90) days' prior notice of the date on which the first Performance Tests will begin and at least five (5) days' prior notice of a change in the Performance Test schedule. Company may request that Contractor conduct the Performance Tests at another time more convenient to Company, which request shall set forth the reasons therefor.

### **Section 17.7 Test Reports**

(a) Contractor shall deliver to Company a preliminary test report, including the test data sheets and calculated results for each Performance Test or retest (the "Preliminary Performance Test Report"), promptly after completion of each Performance Test, together with a notice to Company certifying completion of the Performance Tests in accordance with this Contract and results of such Performance Tests. Promptly after receipt of such Preliminary Performance Test Report, Company and Contractor shall consult concerning the results of such tests, and within three (3) days thereafter, Company shall (i) state it concurs with the results of the Performance Tests or (ii) state it disputes the results of the Performance Tests and stating in detail the reasons therefor.

Within fifteen (15) Business Days following completion of the Performance Tests, Contractor shall provide to Company a final test report, including test data sheets and calculated results of each Performance Test or retest (the "Final Performance Test Report") and a final notice to Company certifying completion of the Performance Tests. Within fifteen (15) days of receipt of such documentation from Contractor, Company shall either (i) accept the Performance Test results or (ii) state it disputes the results of the Performance Tests and the reasons therefor. If Company disputes

the accuracy of the Performance Tests results in the Final Performance Test Report, then Contractor shall re-perform the applicable Performance Tests (or part thereof) in accordance with the procedures set forth in Appendix H. If the results of the re-test confirm the accuracy of the initial test, then Company shall pay the increased costs directly resulting from the re-test. If the results of the re-test do not confirm the accuracy of the initial test, then Contractor shall pay for the costs of the re-test and any subsequent tests necessary to confirm compliance with all Performance Guarantees.

### **Section 17.8 Failure on Tests or Inspection**

If after inspection, examination or witnessing the testing of any of the Work, Company decides, in its sole discretion, that such Work or any part thereof is defective or not in accordance with this Contract, it may reject the said Work or part thereof by giving to Contractor, within ten (10) Days, notice of such rejection, stating therein the grounds upon which the said decision is based. Following any such rejection, Contractor shall replace or repair the Equipment, the Plant or part thereof rejected and re-submit the same for test or inspection in accordance with this Clause. All expenses reasonably incurred by Company in attending or in consequence of such re-testing or inspection and Company's or Company's Representative's attendance and that of entities providing finance in connection with the Project and their representatives' attendance shall be deducted from the Contract Price.

### **Section 17.9 Duty to Advise of Defects, Errors and Omissions in Plant and Equipment**

Contractor shall advise promptly Company forthwith upon it becoming aware of any design, engineering, manufacturing or other Defect, error or omission that might effect the Work and its operability, operational life and maintenance and warrants and represents that, prior to the acceptance of any certificate by Company or Company's Representative and except in relation to such matters that have been notified to or by Company in Writing, there are no such Defects, errors and/or omissions to the best of its knowledge and belief.

## **ARTICLE 18**

### **DEFECTS BEFORE TRANSFER OF POSSESSION AND CONTROL OF WORK**

#### **Section 18.1 Identification of Defects**

(a) If, in respect of any part of the Work not already transferred and under the control of Company, and in all cases prior to Substantial Completion Date, Company's Representative, at any time: (i) determines, in its sole discretion, that any Work done or Equipment or Plant supplied or materials used by Contractor, Contractor or any Subcontractor is or are defective or otherwise not in accordance with the Specifications or this Contract (each a "Defect"), or that any part thereof is defective or does not fulfill the requirements of this Contract and (ii) as soon as reasonably practicable notifies Contractor of such determination, specifying particulars of the alleged Defects and of where the same are alleged to exist or to have occurred, then Contractor shall promptly, at its sole cost and expense, remedy the Defects so specified.

(b) If Contractor fails to remedy such Defect, Company may take, at the sole cost and expense of Contractor, such steps as may be reasonably necessary or convenient to remedy such



Defects. The cost of remedying such Defect may be deducted from any payment due under this Contract and be recoverable as a debt.

### **Section 18.2 Replacement of Defects**

All Equipment or Plant provided or Work done by Company to replace defective Equipment or Plant shall comply with this Contract and shall be obtained at reasonable prices and where reasonably practicable under competitive conditions. Contractor shall be entitled at its own expense to remove and retain all defective Equipment or Plant that Company may have replaced. Nothing contained in this Section 18.2 shall affect any Claim by Company under article 31 (Claims, Claim Notice and Dispute Resolution).

## **ARTICLE 19 NOTICE OF SUBSTANTIAL COMPLETION, NOTICE OF FINAL ACCEPTANCE AND TRANSFER OF CARE, CUSTODY AND CONTROL**

### **Section 19.1 Notice of Substantial Completion of Work**

(a) When the Work meets the Substantial Completion Criteria set forth in Appendix H, Contractor shall so notify Company and provide Company a certificate of an Authorized Officer of Contractor certifying that the Substantial Completion Criteria have been met and the date thereof (such notice and affidavit, the “Request for Substantial Completion”).

(b) Within five (5) days after receipt of the Request for Substantial Completion, Company shall by notice (“Notice of Substantial Completion”) either: (i) reject such Request for Substantial Completion and refuse to issue the Notice of Substantial Completion and state what Substantial Completion Criteria Contractor failed to achieve; or (ii) accept the Request for Substantial Completion as given or with punch list items, and issue the Notice of Substantial Completion with Substantial Completion deemed to occur on the date set forth in said Request for Substantial Completion.

(c) If Company rejects the Request for Substantial Completion, Contractor shall promptly provide to Company a plan and schedule for remedying the deficiencies specified in Company’s rejection, shall carry out such plan at its own cost and expense, and, upon completion thereof, shall issue a new Request for Substantial Completion.

(d) The foregoing procedure shall apply again and successively thereafter until Substantial Completion Criteria have been achieved. Disputes as to whether Contractor has achieved Substantial Completion shall be resolved pursuant to article 31 (“Claims, Claim Notice and Dispute Resolution”).

### **Section 19.2 Care, Custody and Control; Punch List Items**

(a) Contractor shall be responsible for care, custody, control and risk of loss of the Work and shall make good at Contractor’s own cost any loss or damage that may occur to the Work or any part thereof from any cause whatsoever until the Substantial Completion Date. Contractor shall also be responsible for loss or damage thereto caused by Subcontractors in the course of any work carried out under the Project Documents or in connection with the Project until Final Acceptance. Contractor

hereby waives any and all claims or causes of action it might have now or in the future against Company, whether by way of affirmative action, offset, cross claim or otherwise, resulting from any negligence of Company for any loss or damage that may occur to the Work or any part thereof caused by Company in the course of any work, to the extent carried out by Company at Contractor's direction or with Contractor's consent in connection with the Project. Contractor shall be liable for any loss or damage to any Materials.

(b) Care, custody and control of the Work shall be transferred to Company as of the Substantial Completion Date. Company shall begin to compile a preliminary punch list as the Work progresses (with Contractor and Company in good faith mutually determining the Dollar value of such list). Company shall submit to Contractor the completed preliminary punch list at least ten (10) Business Days prior to the anticipated Substantial Completion Date. Within five (5) Business Days following the Substantial Completion Date, Company shall issue to Contractor a final punch list (the "Final Punch List"). After receipt thereof, Contractor and Company shall mutually agree on the punch list items, the value related thereto and on a schedule for completion of such items. Company shall withhold from its final payment an amount equal to 1.5 times the agreed upon value of the Final Punch List, but shall make periodic pro-rata payments as Contractor demonstrates completion of the items on the Final Punch List to Company. All of the items on the Final Punch List shall be completed expeditiously after the Substantial Completion Date. Company shall provide to Contractor for such purpose reasonable access to the Work for such purpose.

### **Section 19.3 Dispatch Coordination**

During the startup, testing and commissioning of the Plant, Contractor shall coordinate with Company's Representative and Company's operating personnel the orderly startup and shut-down of the Plant. Ninety (90) days prior to the initial startup of the Plant, Contractor shall provide to Company a schedule of dispatch for the Plant during the commissioning period, including expected net plant output, duration of the commissioning activity and expected fuel usage. Within thirty (30) days of the initial startup of the Plant, Contractor shall provide to Company an update to this schedule and thereafter on a weekly basis until Substantial Completion is achieved. Contractor shall also provide 72 hours' advance notice to Company of the planned Plant dispatch profile including net plant output, duration of the commissioning period and expected fuel usage.

### **Section 19.4 Use Before Acceptance Date**

Company shall not operate or assume control of all or a portion of the Work prior to the Substantial Completion Date; provided, however, that in no event shall Company be limited in its operation of any joint facilities or facilities adjacent to the Work or the Project, except as may expressly be provided in the Construction Coordination Agreement.

### **Section 19.5 Title and Risk of Loss**

(a) Risk of loss with respect to the Project and the Work shall remain with Contractor until the Substantial Completion Date, whereupon the same shall pass to Company.

(b) The Equipment and Plant to be supplied pursuant to this Contract shall become the property of Company at whichever is the earlier of the following times:

- (i) the Substantial Completion Date;
- (ii) when Contractor becomes entitled to have the contract value of the Equipment and Plant in question included in an Interim Certificate of Payment, or
- (iii) when the Equipment and Plant is appropriated for the purpose of the Project.

Contractor shall indemnify and keep Company indemnified against any claims, losses or damages arising from any defect in title or encumbrances or charge upon any of the Equipment and Plant supplied pursuant to this Contract.

### **Section 19.6 Marking of Equipment and Plant**

(a) Where, prior to delivery, the title in Equipment and Plant passes to Company, Contractor shall, so far as is practicable, set the Equipment and Plant aside and mark it as Company's property in a manner reasonably required by Company.

(b) Until the Equipment and Plant has been so set aside and marked, Company shall be entitled to withhold any interim Progress Payment to which Contractor might otherwise be entitled.

(c) Contractor shall permit Company at any time upon reasonable notice to inspect any Equipment or Plant which has become the property of Company and shall grant Company or procure the grant of access to Contractor's premises for such purposes or any other premises where such Equipment and Plant may be located. Such inspection shall not constitute acceptance of the Equipment and Plant.

(d) All such Equipment and Plant shall be in the care and possession of Contractor solely for the purposes of this Contract and shall not be within the ownership or disposition of Contractor.

(e) No Progress Payment or interim Certificate of Payment issued by Company shall prejudice its right to reject Equipment or Plant which is not in accordance with the Specifications or this Contract. Upon any such rejection the title in the rejected Equipment or Plant shall immediately revert to Contractor.

(f) Contractor shall transfer title to the Work to Company at the earliest to occur of (i) when the Equipment and/or the Materials are brought onto the Site; (ii) the specific Equipment and/or Materials are included in a request for a Progress Payment; and (iii) when the Equipment and/or Materials are appropriated for use in the Project. Contractor shall cause Contractors to transfer the Work supplied and performed by Contractors to Company (x) prior to the Substantial Completion Date, free and clear of all Liens other than (A) mechanics liens relating to the Work supplied and performed by Contractors' Subcontractors that have not yet been paid and (B) amounts payable to Contractors' Subcontractors that are being disputed in good faith provided that Contractors have posted a bond against such Liens with a bonding company or other surety acceptable to Company in its reasonable judgment, and (y) upon the Substantial Completion Date, free and clear of all Liens. Contractor shall indemnify and keep the Company indemnified against any claims, losses or damage arising from any defect in title or encumbrances or charge upon any of the Equipment and Plant supplied pursuant to this Contract.

(g) Where, prior to delivery, the property in Equipment and Plant passes to Company, Contractor shall, so far as is practicable, set the Equipment and Plant aside and mark it as Company's property in a manner reasonably required by Company. Until the Equipment and Plant has been so set aside and marked, Company shall be entitled to withhold any Progress Payment to which Contractor might otherwise be entitled. Contractor shall permit Company at any time upon reasonable notice to inspect any Equipment or Plant which has become the property of Company and shall grant Company or procure the grant of access to Contractor's premises for such purposes or any other premises where such Equipment and Plant may be located. Such inspection shall not constitute acceptance of the Equipment and Plant.

(h) All such Equipment and Plant shall be in the care and possession of Contractor solely for the purposes of this Contract and shall not be within the ownership or disposition of Contractor.

(i) With respect to any Lien or Claim relating to the Project other than Permitted Liens (i) arising through Contractor or any Subcontractor, Contractor agrees to cause Contractor or Subcontractor to promptly remove or cause, or cause to be removed, any such Lien or Claim and (ii) Contractor agrees promptly to remove or cause, or caused to be removed, any such other Liens or Claims not covered by the immediately preceding clause (a).

(j) Ownership of the Non-Company Materials used in connection with the Work shall remain with Contractor or the Subcontractors. Notwithstanding the transfer of title of the Work pursuant to Section 21.5 the responsibility for care, custody and control thereof, together with the risk of loss or damage thereto shall remain with Contractor until the Substantial Completion Date.

### **Section 19.7 Removal of Equipment**

Prior to Final Acceptance, Contractor shall remove from the Site all equipment, materials, temporary structures constructed by or on behalf of Contractor or other items of any nature required for execution or completion of the Work, but excluding equipment, materials, appliances or other items intended to form or forming part of the Work. Prior to disposition of such items, Contractor shall make a written offer to sell items to Company which Contractor or any Contractor desires to sell. Contractor shall leave the Site in good order and in neat and presentable condition. Any surplus items will become the property of Company if not removed by Contractor or its Contractors within thirty (30) days after Final Acceptance (or such later date contemplated in any completion and demobilization procedure mutually agreed upon by Company and the Project Parties). All costs to dispose of any such items not removed by Contractor within the thirty (30) days following Final Acceptance (or such later date contemplated in any completion and demobilization procedure mutually agreed upon by Company and the Project Parties) and which Company does not wish to keep shall be for the account of Contractor. Prior to removing any equipment from the Site Contractor shall provide to Company a detailed list of Contractor Equipment to be removed. No equipment shall be Contractor Equipment unless it is included in the then-current list approved pursuant to Section 12.1 ("Contractor's Equipment").

### **Section 19.8 Notice of Final Acceptance of Work**

Upon completion of all the criteria for Final Acceptance set forth in Appendix H, Contractor shall give notice to Company by request for Final Acceptance, together with an affidavit that all

requirements for Final Acceptance set forth in Appendix H have been met. Thereafter, the same procedures as specified in Section 13.1 (“Change Orders”) shall apply until Company issues notice to Contractor accepting Contractor’s request for Final Acceptance (“Notice of Final Acceptance”), at which time the Project shall be deemed completed (“Final Completion”). Disputes as to whether Contractor has achieved Final Acceptance shall be resolved pursuant to Article 31 (“Claims, Claim Notice and Dispute Resolution”).

## **ARTICLE 20**

### **CODES AND STANDARDS**

#### **Section 20.1 Comparable Quality**

Appendix B sets forth all major Equipment, systems, sub-systems and components which will be supplied in connection with performance of the Work. Notwithstanding the foregoing, the Parties recognize that Appendix B is not all inclusive and does not specify all Equipment or components required for Plant completion. Therefore, the Parties agree that for Equipment or components not specifically set forth in Appendix B, the quality standards of such unspecified Equipment or components shall be consistent with the requirements of Article 14 (“Workmanship and Materials.”).

## **ARTICLE 21**

### **ENVIRONMENTAL MATTERS**

#### **Section 21.1 General**

Contractor shall prepare and submit to Company appropriate materials management and emergency response procedures covering any Regulated Materials Contractor expects to be used in the completion and testing of the Work, which procedures shall be satisfactory to Company. Contractor shall comply, and shall cause all Subcontractors to comply, at all times with such materials management and emergency response procedures, all Environmental Laws and all Governmental Approvals applicable to the Work and the Site. No Regulated Materials and shall be improperly released, disposed of or buried on the Site.

#### **Section 21.2 Release On-Site**

Contractor shall immediately notify Company and applicable Governmental Authorities of any Release by Contractor or any Subcontractor of Regulated Materials at the Site which is reportable to Governmental Authorities under applicable Environmental Laws and take such emergency measures as are prudent and necessary to protect the environment consistent with the materials management and emergency response procedures referred to above and Applicable Law. Contractor shall take all appropriate steps consistent with the materials management and emergency response procedures referred to above and Applicable Law for immediate containment of any such Release and Remediation of the affected area.

### **Section 21.3 Release Off-Site**

In the event of a Release by Contractor or any Subcontractor of a Regulated Material off the Site but related to the Work which is reportable to Governmental Authorities under applicable Environmental Laws, Contractor shall be responsible for notifying all applicable federal, state and local regulatory agencies in accordance with Applicable Law or for causing such notification to occur by the party responsible for such action. To the extent required, Contractor shall take all appropriate steps consistent with the materials management and emergency response procedures referred to above and Applicable Law for immediate containment of any such Release and Remediation of the affected area.

### **Section 21.4 Liability**

To the extent any Release referred to in Sections 21.2 and 21.3 above is caused by an act or omission of Contractor, Contractors or any Subcontractor, Contractor shall be responsible for all Liabilities with respect to such Release and the indemnification provisions set forth in Section 27.1 (“Indemnification for Third Party Claims”) shall apply.

### **Section 21.5 Pre-existing Regulated Materials**

(a) Contractor shall develop a contingency plan to address contaminated soils or groundwater that Contractor may encounter during construction of the Project. The purpose of the contingency plan is to avoid any delays in construction of the Project by planning in advance how to respond to unexpected pre-existing environmental conditions that could impact the Project Schedule or the Guaranteed Substantial Completion Date. The contingency plan shall, at a minimum, provide for:

(i) a contaminated soils staging area so that construction of the Project can continue without delays. Such contaminated soils (that must be removed for construction purposes) can be placed in the staging area while testing and subsequent disposal decisions are made;

(ii) the handling of any contaminated groundwater that might be extracted, including the prospective procurement of a UPDES permit in the event the contingency plan calls for such extracted water being discharged into an area that is subject to the Clean Water Act jurisdiction;

(b) Contractor shall be responsible for implementing any recommendations relating to pre-existing Regulated Materials contained in any environmental surveys or reports.

### **Section 21.6 Notice**

Contractor shall immediately notify Company of the occurrence of any event that would or could reasonably be expected to result in any violation or noncompliance or potential violation or noncompliance of any Environmental Law relating to the Work, the Plant, or the Site, or otherwise constitutes either a Material Adverse Change or Material Adverse Effect under this Contract.

## ARTICLE 22

### WARRANTIES OF WORK

#### Section 22.1 Warranties

(a) Contractor warrants that, for the duration of the Warranty Period, the Work shall be (i) free from Defects in design, engineering, workmanship materials and operations, (ii) in accordance with this Contract, and (iii) in compliance with Applicable Law. Contractor further warrants that all Equipment and Plant shall be new and of standard quality, free of Defects and deficiencies in design, material, workmanship and title (the “Warranty”).

(b) The Warranty shall not extend to Defects or deficiencies to the extent resulting from (i) operation by Company’s personnel in a manner inconsistent with or contrary to instructions contained in the Operation and Maintenance Manuals, (ii) repairs or alterations by Company’s personnel in a manner inconsistent with or contrary to instructions provided by Contractor or as contained in the Operation and Maintenance Manuals provided by Contractor, or (iii) normal wear and tear.

#### Section 22.2 Warranty Period

Subject to the provisions in this Article 22, the Warranty shall remain in full force and effect regarding all phases of the Work for a period beginning on the Substantial Completion Date and ending eighteen (18) months thereafter (such period, the “Warranty Period”). In no event shall any Warranty terminate less than eighteen (18) months following the Substantial Completion Date.

#### Section 22.3 Repair of Defects

If Company or Contractor discovers that the Work, or any portion thereof, fails to meet the Warranty, the it shall notify the other Party of such failure promptly upon discovery, along with the reasonable basis therefore. Upon receipt of such notice, or upon Contractor’s own discovery thereof, Contractor shall promptly (i) cure such failure in accordance with the Warranty and (ii) perform such tests as Company may reasonably require to demonstrate the cure of such failure. Contractor shall coordinate repairing, replacing or re-performing any of the Work with Company so as to minimize any adverse effects on the operation of the Project.

#### Section 22.4 Warranty Period Extension

(a) Extension for Corrected Work. Any Work re-performed and any part of the Site that is reworked, repaired or replaced in satisfaction of Contractor’s obligations in connection with the Warranty will be re-warranted by Contractor pursuant to the same Warranty set forth in this Article 22, and Contractor will have the same obligations in relation thereto as set forth in this Article 22 for a period equal to eighteen (18) months from the date such re-performance, rework, repair or replacement is completed.

(b) Extension for Total Shutdown. If, during the Warranty Period, the Site is shut down (other than for the purpose of scheduled or routine maintenance) and such shutdown is caused by a defect or failure covered by the Warranty, then the Warranty Period will be extended by a period equal to the duration of the shutdown required to repair such defect or failure.

## **Section 22.5 Contractor and Subcontractor Warranties**

Contractor will procure from Contractor and each Subcontractor warranties with respect to services, Plant and Equipment provided by such entity for a period of no less than eighteen (18) months after the Substantial Completion Date and for a further eighteen (18) months after any warranty repair with respect to the subject of the repair. Contractor shall obtain and maintain all such warranties in full force and effect.

## **Section 22.6 Delay in Remedying Defects**

If any such Defect or damage is not remedied by Contractor within a reasonable time or requires prompt remediation as a result of an emergency situation existing at the Site, Company may proceed to do the Work at Contractor's risk and expense provided that it does so in a reasonable manner and notifies Contractor of Company's intention so to do. All Costs incurred by Company shall be deducted from the Contract Price or be paid by Contractor to Company.

## **Section 22.7 Removal of Defective Work**

Contractor may, with the consent of Company, remove from the Site any part of the Work which is defective or damaged, if the nature of the Defect or damage is such that repairs cannot be expeditiously carried out on the Site.

## **Section 22.8 Further Tests**

If repairs or replacements are of such a character as may affect the operation of the Work or any part thereof, Company may, within one (1) month after such repair or replacement, give to Contractor notice requiring further testing to be conducted, in which case such tests shall be carried out at Contractor's cost and as provided in Article 17 ("Performance Testing").

## **Section 22.9 Contractor to Diagnose**

Contractor shall, if required by Company's Representative in writing and under the direction of Company's Representative, diagnose the cause of any Defect. Unless such Defect or its cause shall be one which Contractor would otherwise be responsible for repairing, the costs incurred by Contractor in diagnosing such Defect shall, subject to this Article 22, be borne by Company and added to the Contract Price.

## **Section 22.10 Latent Defects**

(a) Latent Defects Liability Period. Contractor's liability for latent defects shall remain in full force and effect during all phases of the Work for a period beginning on the Substantial Completion Date and ending five (5) years thereafter (the "Latent Defects Liability Period").

(b) If any latent Defect shall appear in any part of the Work, during the Latent Defects Liability Period, such latent Defect shall be Repaired by Contractor at Contractor's option, promptly and at Contractor's sole cost, provided that the latent Defect existed and would not have been disclosed by a reasonable examination conducted in accordance with Best Recognized Practice prior to the expiration of the Defects Liability Period.



(c) Contractor agrees that any examination of the Work undertaken by Company at a relevant time shall, in respect of that part of the Work examined, constitute a reasonable examination conducted in accordance with Best Recognized Practice within the meaning of this Article 22.

(d) During Latent Defects Liability Period, in the event Contractor's OEM issues any notice, including technical information letters, service bulletins or similar notices recommending replacement or repair of one or more parts of the Equipment and such repair or replacement is necessary for continued safe operation of the Equipment or is issued to address a defect in material, or workmanship, Contractor shall repair or replace the affected parts in accordance with and subject to all the terms of the Warranty provided that Company shall make the affected Work reasonably available for performance of the repairs or modifications and Contractor shall cooperate with Company in scheduling such modifications or repairs in order to avoid disruption to Company's operations.

### **Section 22.11 Significant Defects**

(a) Contractor warrants and guarantees to Company that there will be no Significant Defects.

(b) Consequences of Significant Defects. In the event that a Significant Defect occurs, Contractor shall make good the Significant Defect.

## **ARTICLE 23**

### **LIQUIDATED DAMAGES**

#### **Section 23.1 General**

The Parties agree that it is difficult or impossible to determine with precision the amount of damages that would be incurred by Company as a result of Contractor's failure to timely complete the Project or to meet the Guaranteed Substantial Completion Date or Performance Guarantees. Accordingly, the Parties expressly agree that if Contractor fails to timely complete the Project or to meet the Guaranteed Substantial Completion Date or the Performance Guarantees, any sums which would be payable under this Article 23 because of such failures are liquidated damages and not a penalty, and are fair and reasonable and any such sums represent a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failures.

#### **Section 23.2 Critical Milestone Guarantee Liquidated Damages**

(a) The Project Schedule designates certain times as critical milestones (each a "Critical Milestone") by which Contractor represents that each such Critical Milestone will occur by its respective Target Date. While timely completion of each step in the Project Schedule is important to the success of the Project, the occurrence of each Critical Milestone by its respective Target Date is of critical importance to completion of the Project in a timely manner consistent with Company's vital business interests.

(b) The Parties agree that it will be very difficult to determine the cost to Company for late delivery of Critical Milestones; therefore, the Parties agree upon the amounts set forth below, as liquidated damages for such late delivery and not a penalty, as consideration for delay in delivery and

the resulting loss of beneficial use of the Work associated with each Critical Milestone. Such amounts being Critical Milestones Liquidated Damages (“Critical Milestone LDs”).

(c) For each day of delay after the relevant Target Date in achieving any Critical Milestone, the amounts otherwise payable to Contractor pursuant to this Contract shall be reduced by \$[\_\_\_] per day for each day of delay beyond the relevant Target Date in achieving any Critical Milestone (“Reduction Amount”).

(d) The Reduction Amount (i) shall arise independently with respect to each such delay and (ii) shall arise independently with respect to Late Substantial Completion LDs as defined in Section 23.3. At Company’s option and in its sole discretion, Company may either require Contractor to pay to Company the Reduction Amount or may deduct the Reduction Amount from any monies subsequently payable to Contractor.

### **Section 23.3 Liquidated Damages for Delay in Substantial Completion**

If Contractor fails to achieve Substantial Completion prior to the Substantial Completion LD Commencement Date, then commencing on the Substantial Completion LD Commencement Date, Contractor shall pay Company liquidated damages, for each day until Contractor achieves Substantial Completion, in an amount equal to (a) one hundred seventy-five thousand Dollars (\$175,000.00) per day if the Project is Dispatchable and (b) three hundred fifty thousand Dollars (\$350,000.00) per day if the Project is not Dispatchable (collectively “Late Substantial Completion LDs”)

### **Section 23.4 Liquidated Damages for Net Capacity and Net Heat Rate**

Contractor shall pay liquidated damages in accordance with the terms and conditions set forth in Section 14 of Appendix H as a result of the failure of the Work to achieve the Guaranteed Net Capacity, the Guaranteed Incremental Net Capacity or the Guaranteed Net Heat Rate and the Guaranteed Incremental Net Heat Rate in accordance with the Performance Guarantees. Contractor shall be granted the Cure Period to allow remedial actions to be taken to achieve the Guaranteed Net Capacity and the Guaranteed Incremental Net Capacity or the Guaranteed Net Heat Rate and the Guaranteed Incremental Net Capacity, prior to Contractor’s being liable for payment of the liquidated damages as provided in Section 14 of Appendix H.

### **Section 23.5 Liquidated Damages for Startup and Commissioning**

If in connection with startup, commissioning and Performance Testing Contractor exceeds ninety (90) Equivalent Starts and/or three hundred (300) Fired Hours per Combustion Turbine, then Contractor shall pay to Company, in addition to any other Liquidated Damages, and amount equal to (a) Twelve Thousand Dollars (\$12,000) per Equivalent Start in excess of ninety (90) Equivalent Starts for either Combustion Turbine; plus (b) Three Hundred Dollars (\$300) per Fired Hour in excess of three hundred (300) Fired Hours for either Combustion Turbine.

### **Section 23.6 Calculations and Payments of Liquidated Damages**

(a) Unless otherwise set forth in this Article 23, all calculations with respect to amounts payable as liquidated damages under this Article 23 shall be made by Contractor and provided to Company within (i) in the case of Section 23.2 and Section 23.3, ten (10) Business Days after the final

day of each month during which amounts become payable thereunder; and (ii) in the case of Section 23.4 and Section 23.5, ten (10) Business Days after Company's receipt of the Final Performance Test Report, but no later than ten (10) Business Days after the end of any applicable cure period. Company shall have the right to audit such calculations. Contractor shall itemize such calculations and such calculations shall include supporting documentation as Company shall reasonably request and shall be in sufficient detail to permit Company to verify each calculation. Company shall notify Contractor as soon as reasonably possible of any portion of the calculations with which Company disagrees.

(b) Liquidated damages shall bear interest at the Late Payment Rate, compounded daily from the date such amount was due, but not to exceed the maximum rate of interest permitted by Applicable Law.

## **ARTICLE 24**

### **LIMITATIONS OF LIABILITY**

#### **Section 24.1 Duty to Mitigate**

In all cases, but subject to any right or remedy which the Party may have under or by virtue of this Contract, the Party establishing or alleging a breach of Contract or a right to recover pursuant to any provision of this Contract or a right to be indemnified in accordance with this Contract shall be under a duty to take all necessary measures to mitigate the loss which has occurred, provided that the Party can do so without unreasonable inconvenience or cost.

#### **Section 24.2 Limitation of Company's Liability**

SUBJECT TO THE OBLIGATION OF CONTRACTOR TO PAY LIQUIDATED DAMAGES TO COMPANY UNDER THIS CONTRACT, NEITHER CONTRACTOR NOR COMPANY SHALL BE LIABLE TO THE OTHER FOR ANY LOSS OF PROFIT OR INCOME, LOSS OF USE, LOSS OF PRODUCTION, LOSS OF CONTRACTS OR FOR ANY INDIRECT OR CONSEQUENTIAL, MULTIPLE, PUNITIVE OR EXEMPLARY DAMAGES THAT MAY BE SUFFERED BY THE OTHER.

#### **Section 24.3 Enforceability of Liquidated Damages**

(a) Enforceability of Liquidated Damages. If the provisions for the payment of Liquidated Damages in this Contract are held to be unenforceable, Contractor agrees to pay to Company all actual damages suffered by Company due to the circumstances giving rise to the liability to pay Liquidated Damages (had they been enforceable) including loss of profit or income, loss of use, loss of production, loss of contracts and indirect and consequential damages, but subject to the maximum amounts which would have been payable if the Liquidated Damages provisions had been enforceable.

(b) If, however, the provisions for the payment of Liquidated Damages in this Contract are held to be unenforceable as a result of a claim, objection, defense, dispute or proceedings raised or brought by Contractor as part of or during the hearing of which Contractor argues that the said provisions are unenforceable on the grounds that such liquidated damages should be construed at law as a penalty (as opposed to an argument or suggestion that Contractor is not liable to pay Liquidated Damages pursuant to this Contract), Contractor expressly agrees to pay to Company all costs, losses

and damages whatsoever (including loss of profit, loss of use and loss of production, loss of contracts and indirect and consequential damages) incurred or payable by Company arising from or in connection with the circumstances giving rise to the claim for the payment of Liquidated Damages which has been made by Company, WHICH PAYMENTS SHALL NOT BE SUBJECT TO ANY CAPS ON LIABILITY.

#### **Section 24.4 Limitations on Liquidated Damages**

(a) The aggregate amount of liquidated damages payable by Contractor as Reduction Amounts under Section 23.2 shall not exceed, in the aggregate, an amount equal to 5% of the Contract Price set forth in Section 3.1(a).

(b) The amount of liquidated damages payable by Contractor for delays in achieving Substantial Completion under Section 23.3 shall not exceed, in the aggregate, an amount equal to 30% of the Contract Price set forth in Section 3.1(a).

(c) The amount of liquidated damages payable by Contractor attributable to failure to meet the Guaranteed Net Capacity pursuant to Section 23.4 shall not exceed, in the aggregate, an amount equal to 15% of the Contract Price.

(d) The amount of liquidated damages payable by Contractor attributable to failure to meet the Guaranteed Net Heat Rate pursuant to Section 23.4 shall not exceed, in the aggregate, an amount equal to 20% of the Contract Price.

(e) The amount of liquidated damages payable by Contractor attributable to failure to meet the startup and commissioning requirements pursuant to Section 23.5 shall not exceed, in the aggregate, an amount equal to 15% of the Contract Price.

(f) The amount of liquidated damages under paragraphs (a) through (e) of this Section 24.4 shall not exceed, in the aggregate, an amount equal to 50% of the Contract Price.

(g) Without prejudice to or limitation of Contractor's liabilities and obligations set forth under paragraphs (a) through (e) of this Section 24.4, all of which shall be in excess of and not subject to the limitation contained in this Section 24.4(g), the aggregate liability of Contractor to Company shall not exceed one hundred percent (100%) of the amount of the Contract Price.

(e) In calculating the unexpended amounts of Contractor's limitations of liability under this Section 24.4, no account shall be taken of any insurance proceeds payable to Contractor (whether payable directly to Contractor or payable to Contractor through Company) until such time as such proceeds are actually paid to Company. The limitations of liability set out in this Article 24 shall not apply in relation to any failure by Contractor to fulfill its obligations due to its gross negligence or willful misconduct under this Contract.

## ARTICLE 25

### INDEMNIFICATION

#### Section 25.1 Indemnification for Third Party Claims

(a) Contractor shall defend, indemnify and hold harmless Company, its shareholders and Affiliates, and their respective directors, officers, employees and agents, from and against all third party Claims and Liabilities for injury, including death, and property damage caused by, arising out of, or in connection with the performance by any Project Party of the Project Documents, to the extent any of such Claims or Liabilities were caused by the negligence, gross negligence or willful misconduct of Contractor, any Subcontractor, or any of their respective employees or agents.

(b) Company shall defend, indemnify and hold harmless Contractor and its managers, officers, employees and agents, from and against all third party Claims and Liabilities for injury, including death, and property damage caused by, arising out of, or in connection with Company's performance under this Contract to the extent any of such Claims or Liabilities were caused by the negligence, gross negligence or willful misconduct of Company, its employees or agents.

(c) Either Party seeking indemnification under this Contract (the "Indemnified Party") shall give notice to the Party required to provide indemnification hereunder (the "Indemnifying Party") promptly after the Indemnified Party has actual knowledge of any Claim as to which indemnity may be sought hereunder, and the Indemnified Party shall permit the Indemnifying Party (at the expense of the Indemnifying Party) to assume the defense of any Claim or litigation resulting therefrom; provided that:

(i) counsel for the Indemnifying Party who shall conduct the defense of such Claim or litigation shall be reasonably satisfactory to the Indemnified Party;

(ii) the Indemnified Party may participate in such defense at its own expense, except the Indemnifying Party shall reimburse the Indemnified Party for its participation in such defense to the extent that the Indemnifying Party requests the Indemnified Party to participate in its own defense; and

(iii) the omission by the Indemnified Party to give notice as provided herein shall not relieve the Indemnifying Party of its indemnification obligations hereunder except to the extent that such omission results in a failure of actual notice to the Indemnifying Party and Indemnifying Party is damaged as a result of such failure to give notice.

Notwithstanding the foregoing, the Indemnifying Party may not settle any Claim related to the indemnity being provided hereunder without the consent of the Indemnified Party, such consent not to be unreasonably withheld.

(d) With regard to any Claim or Liability which is the result of the joint or concurrent fault or negligence of Contractor and Company, the Parties agree to jointly defend any Claim with respect thereto that is based on such joint or concurrent fault or negligence of Company and Contractor. Any Claim of contribution or indemnification between Company and Contractor relating to such Claims shall be resolved on the basis of the percentage of fault or negligence attributable to the Parties and the

Parties agree to reserve the determination of such percentage until after resolution of such Claim. Such pro rata share shall be based upon a final judicial determination of the Parties' comparative fault or negligence or, in the absence of such determination, by mutual agreement.

(e) Nothing in this Section 25.1 is intended to allow any Indemnified Party to be indemnified from and against any third party Claims and Liabilities caused by, arising out of, or in connection with the performance of this Contract to the extent any of such Claims or Liabilities were caused by, arose out of, or were in any way incidental to or in connection with its own negligence or intentional misconduct.

## **Section 25.2 Title Indemnity and Liens**

(a) Contractor shall promptly pay when due all obligations for labor and material in connection with the Work. Contractor shall discharge at once, or bond with a bonding company or surety acceptable to Company or otherwise secure against all Liens and attachments which are filed in connection with the Work.

(b) Contractor shall keep the Work free and clear of and shall promptly release or cause the release of all Liens, recorded notices, Claims for nonpayment and lis pendens filed of record by Contractor or any Subcontractor.

(c) Contractor shall (i) indemnify, defend, and hold harmless Company from all laborers', materialmen's and mechanics' liens, or claims made or filed upon the Work, or the property on which the Work is located on account of any labor performed or labor, services, equipment, and materials furnished by Subcontractors of any tier and all laborers, materialmen, mechanics, and other persons in connection with the work, and (ii) keep the Work, the Site and all related property free and clear of all liens or claims arising from the performance of any Work covered by this Contract by Contractor, its Subcontractors of any tier, and all laborers, materialmen, mechanics and other such persons.

(d) If any Lien arising out of this Contract is filed before or after Work is completed, Contractor, within ten (10) calendar days after receiving from Company written notice of such lien, shall obtain release or provide financial assurance satisfactory to Company to protect Company from, or otherwise satisfy, such lien. If Contractor fails to do so, Company may take such steps and make such expenditures as in its discretion it deems advisable to obtain release of or otherwise satisfy any such lien or liens, and Contractor shall upon demand, reimburse Company for all costs incurred and expenditures made by Company in obtaining such release or satisfaction.

(e) Contractor's obligation to indemnify, defend and hold harmless Company from liens shall not in any way be rendered unenforceable, or altered, amended, eliminated or otherwise conditioned by any laws and regulations related to processing such liens, including any obligation to deliver a copy of any notice of claim or right to a lien to Contractor or any other person or entity.

(f) If Contractor shall default in discharging any Liens, Claims or encumbrances filed or asserted against the Work, Company shall promptly provide notice to Contractor, and Contractor shall then satisfy or defend any such Liens, Claims or encumbrances. If Contractor either does not promptly satisfy such Liens, Claims or encumbrances or does not give Company reasons satisfactory to Company for not paying such Liens, Claims or encumbrances, within fifteen (15) days of Contractor's receipt of such notice, Company shall have the right, at its option, after providing notice to Contractor, to pay or settle such Liens, Claims or encumbrances by agreement, and Contractor shall, within fifteen

(15) days of request by Company, reimburse Company for all costs incurred by Company to discharge such Liens, Claims or encumbrances, including administrative costs, attorneys' fees and other expenses or Company shall have the right to deduct the amount of such costs from the amount payable to Contractor. Contractor shall have the right to contest any such Lien, Claim or encumbrance, provided that Contractor first provide to Company financial assurances in amount, form and substance satisfactory to Company and otherwise complies with Applicable Law with respect to removal of Liens.

(g) Contractor shall at its own expense, defend any suit or proceeding based on any Claim for which Contractor is responsible under this Section 25.2. Company shall give Contractor such assistance as Contractor may reasonably require in the defense of such suit, and Company shall have the right to be represented herein by counsel of its own choosing at its own expense. If Contractor fails to defend diligently any such suit or proceeding, Company may, in its reasonable discretion, either defend the suit or proceeding or settle the Claim which is the basis thereof without the consent of Contractor and without relieving Contractor of the obligation to indemnify as provided herein. In such a case, Contractor's obligation to defend shall include reimbursement of Company's reasonable legal fees and related costs incurred in defending or settling the suit.

### **Section 25.3 Indemnity Period**

Contractor's obligation to indemnify Company consistent with the provisions of this Article 25 shall continue after the Substantial Completion Date in accordance with the following (collectively, the "Indemnity Period"):

(a) With respect to Claims and Liabilities brought by third parties or Claims and Liabilities relating to the title of the Site, the Project, or the Work, Contractor's obligation to indemnify Company shall continue indefinitely.

(b) With respect to all other Claims and Liabilities, Contractor's obligation to indemnify Company shall continue for a period of three (3) years following the Substantial Completion Date.

## **ARTICLE 26**

### **INSURANCE**

#### **Section 26.1 Contractor's and Subcontractors' Insurance Coverage**

Contractor shall maintain at all times prior to Final Acceptance Builder's All-Risk Insurance in the amount of the Contract Price.

In addition to the foregoing, Contractor shall maintain and shall require and cause Contractors and all Subcontractors, while performing work on the Site, to provide, pay for and continuously maintain in full force and effect with insurers having an A.M. Best Insurance Reports rating of A-:VII or better the following insurance coverages:

(a) Employers' Liability insurance with a minimum limit of \$1,000,000.

(b) Commercial General Liability insurance, to include contractual liability, with a minimum single limit of \$1,000,000 with \$3,000,000 annual aggregate to protect against and from all

loss by reason of injury to persons or damage to property based upon and arising out of the work performed under this Contract.

(c) Umbrella or Excess Liability insurance with minimum limits of \$10,000,000 per occurrence and \$10,000,000 annual aggregate to cover claims in excess of the underlying limits for Employer's Liability, General Liability, and Automobile Liability.

(d) Business Automobile Liability insurance with a minimum single limit of \$1,000,000 for bodily injury and property damage with respect to Contractor's vehicles whether owned, hired or non-owned, assigned to or used by Contractor in the performance of the work.

(e) Professional Liability insurance (Errors and Omissions) with a minimum single limit of \$1,000,000 to cover claims arising out of Consultant's professional services hereunder. This policy shall be maintained until one year after Company's acceptance of Consultant's work.

(f) Transit and Installation insurance with a minimum single limit of \$500,000 to cover damage to property and other claims arising out of the loading, unloading, transportation, lifting, lowering, or other handling of such property.

(g) For Commercial General Liability insurance, the policy shall include:

(i) Provisions or endorsements naming Company, its Board of Directors, officers and employees as additional insured;

(ii) Cross liability coverage so that the insurance applies separately to each insured against whom claim is made or suit is brought, even in instances where one insured claims against or sues another insured.

(h) All policies, except professional liability and transit and installation, shall include provisions that such insurance is primary insurance with respect to the interests of Company and that any other insurance maintained by Company is excess and not contributory insurance with the insurance required hereunder, and provisions that such policies shall not be canceled or their limits of liability reduced without:

(i) Ten (10) days' prior written notice to Company if canceled for nonpayment of premium

(ii) Thirty (30) days' prior written notice to Company if canceled for any other reason.

(iii) A certificate in a form satisfactory to Company certifying to the issuance of such insurance shall be furnished to Company and included at Exhibit H.

(i) Commercial general liability coverage written on a "claims-made" basis, if any, shall be specifically identified on the certificate.

(j) If requested by Company, a copy of each insurance policy, certified as a true copy by an authorized representative of the issuing insurance company, shall be furnished to Company.



(k) Insurance coverage provided on a “claims-made” basis shall be maintained by Contractor for a minimum period of five (5) years after the completion of any award and for such other length of time necessary to cover liabilities arising out of the work.

(l) Insurance coverage provided on a “claims-made” basis shall be maintained by Contractor for a minimum period of five (5) years after the completion of this Contract and for such other length of time necessary to cover liabilities arising out of the Work.

(m) Contractor shall ensure that Contractor and each and every Subcontractor maintains in full force and effect the insurance coverage and limits required under this Section 27.1 (“Contractors’ Insurance”) at all times on and after the commencement of the Work and continuing until the Substantial Completion Date, unless otherwise indicated herein. The coverage under Contractors’ Insurance shall be primary to the extent of Contractors’ obligations to indemnify Contractor and Company without regard to other insurance available to Company. Within thirty (30) days prior to the commencement of the Work at the Site, Contractor shall provide Company applicable insurance certificates of such coverage completed by duly authorized representatives of the insurer certifying that (a) the coverages required hereunder are in effect, and (b) the coverages will not be canceled, nonrenewed or materially changed by endorsement or through issuance of other policies of insurance without thirty (30) days’ prior notice to Contractor and Company. The acceptance by Company of Contractor’s delivery of any certificate of insurance evidencing the insurance coverages and limits required hereunder shall not be deemed to constitute approval or agreement that (i) the insured party has satisfied the insurance requirements set forth herein or (ii) the insurance policies described in such certificates of insurance comply with such requirements.

(n) If Contractor fails to require Contractors and the Subcontractors to maintain the insurance required hereunder, Company shall have the right, but not the obligation, to purchase such insurance at Contractor’s expense.

(o) Contractor’s insurance carrier and the Subcontractors or Subcontractors’ insurance carriers shall use commercially reasonable efforts to provide Contractor and Contractor will provide Company written notice of cancellation, termination or material alteration.

(p) Anything in this Contract to the contrary notwithstanding, the occurrence of any of the following shall in no way relieve Contractor from any of its obligations under this Contract; (a) failure by Contractors or any Subcontractor to procure the insurance required by this Contract; (b) failure by Contractor or any Subcontractor to comply fully with any of the insurance provisions of this Contract; (c) failure by Contractor or any Subcontractor to secure such endorsements on the policies as may be necessary to carry out the terms and provisions of this Contract; (d) the insolvency, bankruptcy or failure of any insurance company providing insurance to Contractor or any Subcontractor; or (e) failure of any insurance company to pay any claim accruing under its policy.

(q) In the event that liability for any loss or damage is denied by the underwriter or underwriters in whole or in part due to the breach of said insurance by Contractor or any Subcontractors, or for any other reason attributable to Contractor or any Subcontractor, or if Contractor or any Subcontractor fails to maintain any of the insurance herein required, then Contractor shall defend, indemnify and hold Company harmless against all losses which would otherwise have been covered by said insurance.

## **Section 26.2 Waiver of Rights**

In regards to any property insurance maintained by any Party, each such Party shall waive all rights of recovery and subrogation against the other Party.

## **Section 26.3 Contractor's Cooperation with Company**

(a) Contractor agrees to cooperate with and assist Company, as reasonably requested by Company, in Company's procurement of any insurance required by this Contract or otherwise to be procured in connection with the Project.

(b) Contractor agrees to provide such assistance and documentation as Company may request in connection with Claims Company may make under its insurance policies purchased in connection with the Project for damage or events that occur after the Effective Date and prior to the expiration of the applicable Warranty Period.

## **ARTICLE 27**

### **FORCE MAJEURE**

#### **Section 27.1 Effect of Force Majeure**

Neither Party shall be considered to be in default or in breach of its obligations under this Contract to the extent that performance of such obligations is prevented by any event of Force Majeure arising after the Effective Date. In no event may Contractor claim a Force Majeure for economic reasons or for changes in Contractor's costs or the costs of Subcontractors, including, but not limited to, commodity price changes, changes in labor markets, increased cost of labor or transportation, or due to changes in scope due to changes in engineering design or applied engineering not requested by Company.

#### **Section 27.2 Notice of Occurrence**

If either Party considers that any event of Force Majeure has occurred which may affect performance of its respective obligations under this Contract, it shall promptly notify the other Party thereof stating the full particulars and anticipated duration of the event and the performance and/or obligations that will be affected by the event.

#### **Section 27.3 Performance to Continue**

Upon the occurrence of any event of Force Majeure, Contractor shall use commercially reasonable efforts to continue to perform its obligations under this Contract. Contractor shall notify Company of the steps Contractor proposes to take, including any reasonable alternative means for performance which is not prevented by Force Majeure. In any such case, Contractor shall use reasonable efforts to mitigate all such costs and impacts on the Project Schedule and on the Guaranteed Substantial Completion Date.

## **Section 27.4 Termination in Consequence of Force Majeure**

If circumstances of Force Majeure have occurred that have materially affected the Work and have continued for a period of forty-five (45) days in the aggregate, and there is a corresponding delay in the schedule for performance and the Guaranteed Substantial Completion Date of forty-five (45) days in the aggregate caused by the Force Majeure, then, notwithstanding that Contractor may by reason thereof have been granted an extension of the Project Schedule and the Guaranteed Substantial Completion Date, by Change Order, Company shall be entitled to provide notice of its intent to terminate this Contract upon thirty (30) days notice to Contractor. If at the expiration of such thirty (30)-day period such Force Majeure shall still continue, Company may elect to terminate this Contract.

## **Section 27.5 Risk of Loss**

Prior to termination of this Contract, nothing in this Article 27 shall change the allocation to Contractor of the risk of loss or damage prior to the Substantial Completion Date, and any Change Order or payment to Contractor resulting from a Force Majeure shall take into account such allocation of the risk of loss or damage.

# **ARTICLE 28**

## **DEFAULT**

### **Section 28.1 Contractor's Default**

Contractor shall be in default ("Contractor Default") hereunder if:

- (a) A Project Party fails in any material respect to comply with its obligations under the Project Documents; provided, however, that if all material adverse consequences of a breach of an obligation can be cured or remedied by Contractor within a period of thirty (30) days after such breach, such breach shall not become a Contractor Default until thirty (30) days after such breach;
- (b) A Project Party assigns the Project Documents to which it is a party other than as permitted both hereunder and thereunder;
- (c) A Project Party shall commence a voluntary case under the Bankruptcy Code; file a petition seeking to take advantage of any other laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts; consent to or fail to contest in a timely and appropriate manner any petition filed against it in an insolvency case under such bankruptcy laws or other laws; apply for, or consent to or fail to contest in a timely and appropriate manner, the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator or the like of itself or of a substantial part of its assets; admit in writing its inability to pay, or generally not be paying, its debts (other than those that are the subject of bona fide disputes) as they become due; make a general assignment for the benefit of creditors; take any action for the purpose of effecting any of the foregoing; or a case or other proceeding shall be commenced by a third party against a Project Party seeking (i) relief under the Bankruptcy Code or under any other laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts or (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of

such Project Party of all or any substantial part of its assets, and such case or proceeding shall continue undismissed or unstayed for a period of sixty (60) days;

(d) any representation or warranty made by Contractor for which an express remedy is not provided shall prove to have been false in any material respect as of the date made;

(e) any Judgment shall be entered against any Project Party (i) decreeing such Person's involuntary dissolution or split up or (ii) any (x) such Judgment shall award non monetary relief which results in a Material Adverse Change or (y) such Judgment shall award monetary damages in an amount of (I) \$\_\_\_\_\_ with respect to Contractor or (II) with respect to Project Parties other than Contractor, such Judgment shall award monetary damages in an amount that would cause a Material Adverse Change;

(f) as a result of an act or omission of any Project Party, any of the Security Documents shall for any reason cease to be in full force and effect, or shall cease to give Company the Liens, rights, powers and privileges purported to be created thereby in any material respect. At any time, as a result of an act or omission of any Project Party, Company shall fail to have a first priority perfected security interest in all the Collateral;

(g) a Material Adverse Change shall have occurred and be continuing, unless such Material Adverse Change is a result of an act or omission of Company; or

(h) Contractor fails to pay liquidated damages to Company or to the Substantial Completion LD Delay Account when due, except to the extent such payments are being disputed in good faith.

## **Section 28.2 Company's Default**

Company shall be in default ("Company's Default") hereunder if:

(a) Company fails to pay Contractor any undisputed amount due Contractor under Article 2 ("Project Commencement and Completion") or Article 3 ("Consideration and Payment");

(b) Company has failed in any material respect to comply with its other material obligations under this Contract; provided, however, that if all material adverse consequences of a breach of an obligation can be cured or remedied by Company within a period of thirty (30) Business Days after such breach, such breach shall not become a Company's Default until thirty (30) Business Days after such breach;

(c) Company shall commence a voluntary case under the Bankruptcy Code; file a petition seeking to take advantage of any other laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts; consent to or fail to contest in a timely and appropriate manner any petition filed against it in an insolvency case under such bankruptcy laws or other laws; apply for, or consent to or fail to contest in a timely and appropriate manner, the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator or the like of itself or of a substantial part of its assets; admit in writing its inability to pay, or generally not be paying, its debts (other than those that are the subject of bona fide disputes) as they become due; make a general assignment for the benefit of creditors; take any action for the purpose of effecting any of the foregoing; or a case or other proceeding shall be commenced by a third party against Company

seeking (i) relief under the Federal bankruptcy laws (as now or hereafter in effect) or under any other laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts or (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of Company of all or any substantial part of its assets, and such case or proceeding shall continue undismissed or unstayed for a period of sixty (60) days;

(d) any representation or warranty made by Company in this Contract for which an express remedy is not provided shall have been false in any material respect as of the date made;

(e) any suspension of the Work requested by Company continues for more than forty-five (45) days, and Company and Contractor are unable to agree on a Change Order, unless such dispute is being prosecuted under article 31 (“Claims, Claim Notice and Dispute Resolution”).

### **Section 28.3 Removal of Contractor’s Equipment**

Upon such termination due to Company’s default, Contractor shall be entitled to remove during normal working hours all Contractor Equipment which is on the Site. Prior to removing any Contractor Equipment from the Site, Contractor shall provide to Company a detailed list of Contractor Equipment to be removed. No equipment shall be Contractor Equipment unless it is included in the then-current list approved pursuant to Section 12.1 (“Contractor’s Equipment”).

### **Section 28.4 Remedies Upon Default**

(a) Step-In Rights. During the occurrence and continuance of any Contractor Default or occurrence of any event described in Section 29.1(b) (“Termination by Company”), and in addition to any other rights Company may have hereunder or at law or in equity, Company shall have the right, but not the obligation, to take all actions necessary to perform any and all work and labor it deems necessary to complete, operate or maintain the Project in accordance with the terms of this Contract, including causing Contractor to vacate the Project and surrender possession of the Project and all proprietary information, Equipment, spare parts and other supplies located at the Project to Company. If Company at any time exercises its rights under this Section 28.4(a), Company shall be relieved of its obligations of payment during such time as it is exercising its right under this Section, and shall be entitled to recover all costs incurred by Company, plus 20% for general and administrative costs in connection with work performed during that time. Notwithstanding the foregoing, nothing set forth in this Section 28.4 shall excuse Contractor of its obligations to remedy its default and perform its obligations hereunder.

(b) Cure Rights. During the occurrence and continuance of any Contractor Default or occurrence of any event described in Section 29.1 (“Termination by Company”) and upon receipt of any notice that Contractor is in default of any of its obligations under any of the Project Documents, and in addition to any other rights Company may have hereunder or at law or in equity, Company shall have the right, but not the obligation, to cure any default of Contractor under any Project Document. If Company at any time exercises its right under this Section 28.4(b), Company shall be relieved of its obligations of payment during such time as it is exercising its right under this Section. Notwithstanding the foregoing, nothing set forth in this Section 28 shall excuse Contractor of its obligations to remedy its default and perform its obligations hereunder.

(c) Company Rights Following Termination due to a Contractor Default. Upon termination of this Contract pursuant to Section 29.1(b) (“Termination by Company”) hereof, Company may, but shall not be obligated to:

(i) remove Contractor from the Site with risk of loss of the Work transferring to Company. In addition, Company may, but shall not be obligated to, require Contractor, at no additional cost to Company, to take all steps necessary or requested by Company to assign Contractor’s rights and obligations under the Project Documents and Governmental Approvals identified by Company to Company and to transfer to Company all other property, whether tangible or intangible, in which Contractor has rights which is necessary or desirable for the development, construction ownership or operation of the Project at Contractor’s actual cost;

(ii) in addition to the foregoing, upon the occurrence and during the continuance of any Contractor Default, Company may exercise all of its rights as a secured party, under the Security Documents or under Applicable Law or otherwise (and all remedial provisions in the Security Documents are hereby incorporated by reference); and

(iii) pursue any and all remedies available at law or in equity.

## ARTICLE 29

### TERMINATION

#### Section 29.1 Termination by Company

(a) Company’s Termination Right for Failure to Obtain the CCN. (i) Company may elect to terminate this Contract at any time prior to and including \_\_\_\_\_, without any further liability to Contractor other than with respect to unpaid Progress Payments accruing prior to the date of such termination, in the event that Company does not reasonably expect to obtain or has not obtained the CCN on or prior to such date. In the event that (i) Company has not obtained the CCN prior to and including \_\_\_\_\_, and (ii) Company has not elected to terminate this Contract, the provisions of Article 16 shall apply.

(b) Default Termination Rights. Upon the occurrence or continuation of a Contractor Default, Company may elect to terminate this Contract as follows:

(i) with respect to a Contractor Default described in subsection 28.1(c), immediately terminate this Contract and remove Contractor from the Site with risk of loss of the Work transferring to Company as provided in Section 28.4(c) hereof; and

(ii) with respect to a Contractor Default described in any subsection other than subsection 28.1(c), after having given notice to Contractor of such Contractor Default and Contractor’s having failed to cure such Contractor Default within the cure period specified in such subsection, or, if no cure period is specified, then fourteen (14) days after such notice, terminate this Contract

(c) Voluntary Termination. Following the achievement by Contractor of the Notice to Proceed Milestone, Company may elect to terminate this Contract at any time without cause upon not less than thirty (30) days' notice to Contractor.

## **Section 29.2 Termination by Contractor**

(a) Default Termination Rights. Upon the occurrence or continuance of a Company Default, Contractor may elect to terminate this Contract as provided in Section 30.2.

(i) with respect to a Company's Default described in Section 28.2(c), immediately terminate this Contract; and

(ii) with respect to a Company's Default described in any subsection other than subsection 28.2(c), after having given notice to Company of such default and Company having failed to cure such Company's Default within the cure period specified in such subsection, or, if no cure period is specified, then fourteen (14) Business Days after such notice, terminate this Contract.

(b) Suspension Termination Rights. Contractor may elect to terminate this Contract due to Suspension of the Work as provided in Section 16.1(b).

## **Section 29.3 Procedures Following Termination by Contractor or due to Force Majeure**

(a) Upon any termination of this Contract pursuant to Section 27.4 ("Termination in Consequence of Force Majeure"), Section 29.1(a) ("Company's Termination Right for Failure to Obtain the CCN"), Section 29.1(c) ("Voluntary Termination") or Section 29.2(a) ("Default Termination Rights"), the following provisions shall apply: (i) Company shall pay to Contractor the amount, if any, by which the applicable termination amount set forth in Appendix I corresponding to the effective date of the termination (partial month to be appropriately pro-rated) exceeds the cumulative payments made by Company prior to such date; (ii) at Company's option, title (to the extent not already transferred) and risk of loss to the Equipment, the Site and the Materials shall transfer to Company; and (iii) Company shall be responsible for, as applicable, any transportation, storage and insurance of and for the Equipment and the Materials for which Company has elected to take title.

(b) In addition to the foregoing, upon such termination of this Contract pursuant to Section 27.4 ("Termination in Consequence of Force Majeure"), Section 29.1(a) ("Company's Termination Right for Failure to Obtain the CCN"), Section 29.1(c) ("Voluntary Termination") or Section 29.2(a) ("Default Termination Rights"), the following provisions shall apply: Company may, but shall not be obligated to, at no additional cost to Company (i) require that Contractor take all steps necessary or requested by Company to assign its rights and obligations under the Project Documents and Governmental Approvals identified by Company to Company and to transfer to Company all other property, whether tangible or intangible, in which Contractor has rights which is necessary or desirable for the development, construction ownership or operation of the Project and (ii) exercise all of Contractor's rights including the right to request performance under and to enforce any and all rights to, the Collateral, as provided in the Security Documents (and all remedial provisions in the Security Documents are hereby incorporated by reference); and (iv) enter onto the Site and to remove all Equipment and Materials for which it has elected to take title.

## **Section 29.4 Exclusivity**

THE RIGHTS AND REMEDIES OF CONTRACTOR SET FORTH HEREIN FOR DEFAULT AND TERMINATION ARE EXCLUSIVE AND NO OTHER REMEDIES OF ANY KIND WHATSOEVER SHALL APPLY IN THE EVENT OF SUCH DEFAULT AND TERMINATION.

## **ARTICLE 30**

### **TAXES**

#### **Section 30.1 Company's Obligation**

In addition to the Contract Price, Company shall be obligated to pay the amount of any property, privilege, license, sales, use, excise, gross receipts, value added, privilege or similar taxes or assessments applicable to the sale of the Work or to the use of the Work. Contractor shall use all reasonable efforts to minimize the amount of such taxes and assessments payable by Company. All real or personal property taxes related to the Project shall be paid by Company and shall not be apportioned at the Substantial Completion Date.

#### **Section 30.2 Contractor's Obligation**

Contractor have included in the Contract Price the amount of any customs duties, and related customs broker fees and charges or similar charges, for delivery of any components to the United States from countries outside of the United States and transportation to the Site. Contractor shall be liable for all payroll and other employee related taxes and costs, for all property taxes related to the Site prior to Substantial Completion Date and for all taxes based on its income. Contractor shall cooperate with Company's reasonable requests with respect to any challenge that Company elects to make with respect to any taxes imposed in connection with the Project.

## **ARTICLE 31**

### **CLAIMS, CLAIM NOTICE AND DISPUTE RESOLUTION**

#### **Section 31.1 Claims**

(a) Submission of Claims

(i) In the event Contractor has a claim or request for a time extension, additional compensation, any other adjustment of the terms and conditions of this Contract, or any dispute arising out of the Work (each a "Claim"), Contractor shall notify Company in writing within five (5) Business Days following the occurrence of the event giving rise to the Claim. Contractor's failure to give notice as required will constitute a waiver of all of Contractor's rights with respect to the Claim.

(ii) As soon as practicable, but in no event longer than sixty (60) days after after Claim notification, Contractor shall submit the Claim to Company with all supporting



information and documentation. Contractor shall respond promptly to all Company inquiries about the Claim and its basis.

(iii) Any Claim which is not disposed of by mutual agreement between the Parties shall be decided by Company, which shall provide a written decision to Contractor. Such decision shall be final unless Contractor, within thirty (30) days after such receipt of Company's decision, provides to Company a written protest, stating clearly and in detail the basis thereof, and such protest shall be resolved in accordance with Section 31.2. It is agreed that Contractor's failure to protest Company's decision shall constitute a waiver by Contractor of its Claim.

(iv) Contractor shall continue its performance of this Contract notwithstanding the submission of any Claim.

(b) Notification Prior to Incurring Costs. In any circumstances which might give rise to a claim pursuant to this Article 31, Contractor shall, before incurring any cost or expense, first give Company every opportunity to determine whether the cost or expense should be incurred or whether any act or forbearance shall or might mitigate the cost of any such claim.

(c) Company's Liability to Pay Claims. Company shall not be liable to make payment in respect of any claim for an additional payment unless Contractor has complied with each and all of the requirements of this Article 31, whether as to the time within which claims must be made and/or information provided or otherwise, it being acknowledged and agreed that the absence of complete compliance herewith will involve significant prejudice to Company.

## **Section 31.2 Dispute Resolution**

All disputes in connection with this Contract between Company and Contractor or between Company and any Project Party shall be settled, if possible, by negotiation between Company's Representative and Contractor's Representative. If the matter is not resolved by such negotiations, either Party may, by giving written notice to the other Party, cause the matter to be referred to a meeting of a Company Senior Procurement Representative and Contractor's Management Representative. Such meeting shall be held within fifteen (15) days following the giving of the written notice. If the matter is not resolved by such negotiations, either Party may, by giving written notice to the other Party, cause the matter to be referred to a meeting of appropriate higher management representatives of the Parties. Such meeting shall be held within thirty (30) days following the giving of the written notice. If the matter is not resolved within thirty (30) days after the date of the notice referring the matter to the appropriate high management or such later date as may be mutually agreed upon, the Parties may then, subject to the terms of this Contract, commence legal action in court of competent jurisdiction in order to resolve the dispute.

## ARTICLE 32

### ASSIGNMENT

#### Section 32.1 Assignment of Contractor's Interests

Contractor shall not assign any of its rights and obligations hereunder, except with Company's prior written consent.

## ARTICLE 33

### CONFIDENTIALITY

#### Section 33.1 Confidentiality

(a) It is understood that certain information may be exchanged among Company and Contractor that the disclosing Party considers proprietary and confidential. Each Party agrees that it shall (and shall cause its Affiliates and its and their officers, directors, consultants, employees, legal counsel, agents and representatives (together with the Affiliates, the "Confidentiality Affiliates") to): (i) hold confidential and not disclose other than to its Confidentiality Affiliates having a reasonable need to know in connection with the permitted purposes hereunder, without the prior consent of the other Party, all confidential or proprietary written information which is marked confidential or proprietary or oral information or data which is reduced to writing within five (5) days of such disclosure and marked as confidential or proprietary (including sources of equity and/or other financing, development strategy, competitor information, cost and pricing data, warranties, technical information, research, developmental, engineering, manufacturing, marketing, sales, financial, operating, performance, business and process information or data, know how and computer programming and other software techniques) provided or developed by the other Party or its Confidentiality Affiliates in connection herewith or the Work ("Confidential Information"); and (ii) use such Confidential Information only for the purposes of performing its obligations hereunder or where reasonably necessary to enjoy the benefits of this Contract. In no event shall any Confidential Information be disclosed to any competitor of Contractor or Company.

(b) The obligations contained in Section 33.1(a) shall not apply, or shall cease to apply, to Confidential Information if or when, and to the extent that, such Confidential Information (i) was known to the receiving Party or its Confidentiality Affiliates prior to receipt from the disclosing Party or its Confidentiality Affiliates; (ii) was, or becomes through no breach of the receiving Party's obligations hereunder, known to the public; (iii) becomes known to the receiving Party or its Confidentiality Affiliates from other sources under circumstances not involving any breach of any confidentiality obligation between such source and the disclosing Party's or discloser's Confidentiality Affiliates or a third party; (iv) is independently developed by the receiving Party or its Confidentiality Affiliates; or (v) is required to be disclosed by law, governmental regulation or applicable legal process. Contractor acknowledges that Company is subject to regulation as a public utility, and as such may be required to disclose all or substantially all information provided by Contractor pursuant to this Contract by order of state and federal regulators, and that such disclosure shall in no event be deemed a violation of this Section 33.1. As to Confidential Information that is not a trade secret under

Applicable Law, the foregoing obligations shall expire three (3) years after the Substantial Completion Date.

(c) When required by the appropriate Governmental Authority, a Party may disclose the Confidential Information of the other Party to such Governmental Authority provided, however, that prior to making any such disclosure, such Party shall: (i) provide the owning Party with timely advance notice of the Confidential Information requested by such Governmental Authority and the intent of such Party to so disclose; (ii) minimize the amount of Confidential Information to be provided consonant with the interest of the owning Party, Contractor, Contractor, and each and every Subcontractor and the requirements of the Governmental Authority involved; and (iii) make every reasonable effort (which shall include participation by the owning Party, Contractor, Contractor or any Subcontractor, as applicable in discussions with the Governmental Authority involved) to secure confidential treatment and minimization of the Confidential Information to be provided. In the event that efforts to secure confidential treatment are unsuccessful, the owning Party shall have the prior right to revise such information to minimize the disclosure of such Confidential Information in a manner consonant with its interest and the requirements of the Governmental Authority involved.

(d) Company's disclosure of Contractor Drawings and Manuals to third parties in accordance with its obligations hereunder shall not be a breach of this Article 33.

## **ARTICLE 34**

### **MISCELLANEOUS PROVISIONS**

#### **Section 34.1 Notices, Consents and Approvals**

Contact information for notices, requests, demands and other communications required or permitted hereunder is as follows:

(a) if to Contractor, to:

*with copies to:*

or to such other person or address as Contractor shall furnish to Company;

(b) if to Company, to:

PacifiCorp

825 NE Multnomah, Suite 600  
Portland, Oregon 97232-2315  
Attn: \_\_\_\_\_

Tel: \_\_\_\_\_  
Fax: \_\_\_\_\_

with copies, in connection with default notices, to:

or to such other person(s) or address(es) as Company furnishes to Contractor from time to time.

(c) All notices, including, acceptances, consents, approvals, agreements, deliveries of information, designations, requests, demands and other communications required or permitted hereunder shall be in writing, properly addressed as provided in paragraph (a) above, and given by (i) hand delivery, (ii) a national overnight courier service, (iii) confirmed facsimile transmission, followed by a hard copy, or (iv) certified or registered mail, return receipt requested, and postage prepaid. Any such notice or other communication shall be deemed to have been duly given as of the date delivered if by hand delivery, national overnight courier service or confirmed facsimile transmission (provided a hard copy promptly follows by other means provided herein), or five (5) calendar days after mailing if by certified or registered mail.

### **Section 34.2 Entire Contract**

This Contract, together with the Appendices and Exhibits delivered in connection with it, contains the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral, of the Parties relating to the subject matter hereof. Any oral or written representation, warranty, course of dealing or trade usage not contained or referenced herein shall not be binding on either Party.

### **Section 34.3 Amendment; Waiver**

No amendment or other modification of any provision of this Contract shall be valid or binding unless it is signed by each of the Parties. No waiver of any provision of this Contract shall be valid or binding unless it signed by the Party waiving compliance with such provision. No delay on the part of either Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any waiver or any partial exercise of any such right, power or privilege preclude any further exercise thereof or the exercise of any other such right, power or privilege. No waiver of any breach, term or condition of this Contract by any Party shall constitute a subsequent waiver of the same or any other breach, term or condition.

### **Section 34.4 Successors and Assigns**

Each and all of the covenants, terms, provisions and agreements herein contained shall be binding upon and inure to the benefit of the Parties hereto and, to the extent permitted by this Contract, their respective successors and assigns.

### **Section 34.5 Third Party Beneficiaries**

The provisions of this Contract shall only be for the benefit of, and enforceable by, the Parties hereto and shall not inure to the benefit of or be enforceable by any third party.

### **Section 34.6 Severability**

In the event any one or more of the provisions contained in this Contract should be held invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

### **Section 34.7 Further Assurances**

Each Party shall, at the request of the other, execute and deliver or cause to be executed and delivered such documents and instruments not otherwise specified herein, and take or cause to be taken all such other reasonable actions, as may be necessary or desirable to more fully and effectively carry out the intent and purposes of this Contract.

### **Section 34.8 Publicity**

Except as required by law, Contractor agrees that Contractor will not issue or release for external publication any press release, article, advertising or other publicity matter in any form (including print, electronic, or interview) relating to the Project, or to this Contract without first consulting with and obtaining the prior consent of Company, which consent shall not be unreasonably withheld or delayed.

### **Section 34.9 Independent Contractor**

Contractor is an independent contractor with respect to the Work, and each part thereof, and in respect of all work to be performed hereunder. Neither Contractor, nor any Subcontractor, nor the employees of any of such entities, employed in connection with the Work shall be deemed to be agents, representatives, joint ventures, employees or servants of Company by reason of their performance hereunder or in any manner dealt with herein. Neither Party shall perform any act or make any representation to any Person to the effect that Contractor, or any of its agents, representatives or Subcontractors, is the agent of Company.

### **Section 34.10 Survival**

The provisions of Article 4 (“Representations and Warranties of Contractor”), Article 12 (“Contractor’s Equipment”), Article 22 (“Warranties”), Article 23 (“Liquidated Damages”), Article 24 (“Limitations of Liability”), Article 25 (“Indemnification”), Article 26 (“Insurance”), Article 30 (“Claims, Claim Notice and Dispute Resolution”), and Article 33 (“Confidentiality”), and Section 3.7 (“Payment Lien and Claim Release”), Section 6.2 (“Security”), Section 7.10 (“Contractor Drawings and Manuals”), Section 7.18 (“Intellectual Property Rights and Computer Program Licenses”), Section 7.24 (“Liens”), Section 7.27 (“Environmental Matters”), Section 7.28 (“Records and Accounts”), Section 7.31 (“Construction Coordination Agreement”), Section 9.1 (“Site Regulations”), Section 9.2 (“Site Security”), Section 9.9 (“Cleanup”), Section 15.6 (“Company’s Use of Drawings”), Section 15.7 (“Manufacturing Drawings”), Section 21.4 (“Liability”), Section 28.3 (“Removal of Contractor’s

Equipment”), and Section 34.11 (“Governing Law; Waiver of Jury Trial”) of this Contract shall survive the expiration or earlier termination of this Contract indefinitely, provided that the foregoing enumeration shall not be interpreted to bar survival of any other provision hereof which would otherwise be deemed to survive by operation of law.

#### **Section 34.11 Governing Law; Waiver of Jury Trial**

(a) THIS CONTRACT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF UTAH (WITHOUT GIVING EFFECT TO THE PRINCIPLES THEREOF RELATING TO CONFLICTS OF LAW).

(b) EACH PARTY HEREBY IRREVOCABLY WAIVES ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT OR ANY OTHER PROJECT DOCUMENT OR ANY MATTER ARISING HEREUNDER OR THEREUNDER. EACH PARTY HEREBY WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT OR ANY OTHER PROJECT DOCUMENT OR ANY MATTER ARISING HEREUNDER OR THEREUNDER IN WHICH A JURY TRIAL HAS NOT OR CANNOT BE WAIVED.

#### **Section 34.12 Counterparts**

This Contract may be executed by the Parties in two or more separate counterparts (including by facsimile transmission), each of which shall be deemed an original, and all of said counterparts taken together shall be deemed to constitute one and the same instrument.

#### **Section 34.13 Captions**

The captions for Articles and Sections contained in this Contract are for convenience of reference only and in no way define, describe, extend or limit the scope or intent of this Contract or the intent of any provision contained herein.

#### **Section 34.14 Consent Contracts**

Contractor agrees to cooperate with Company’s efforts to obtain on a timely basis such direct agreements, consents, opinions and related documents from Project Parties or any of Contractor’s counterparties to any Additional Project Document as may be reasonably requested by Company, its financing parties, or any entity that is Controlled by or is under common Control with Company.

**[THE NEXT PAGE IS THE SIGNATURE PAGE]**

IN WITNESS WHEREOF, the authorized representatives of the Parties have executed this Contract as of the first date set forth above:

**PACIFICORP,**  
as Company

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

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

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

\_\_\_\_\_,  
as Contractor

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

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

Title:

**Appendix A:**  
**Glossary of Terms**  
**(EPC Contract)**

“Additional Project Documents” means any contract, agreement, letter of intent, understanding, or instrument related to the ownership, construction, testing, maintenance, repair, operation, financing or use of the Project entered into by the Contractor and any other Person subsequent to the Effective Date and prior to the Closing Date; provided, however, that such contract or agreement shall not constitute an Additional Project Document if it (i) is entered into by the Contractor in the ordinary course of business in connection with the procurement of goods or the performance of services related to the Work and (ii) can be readily replaced by other contracts or agreements having substantially similar terms and conditions.

“Affiliate” means with respect to any Person, any other Person who, directly or indirectly, Controls such first Person or is Controlled by said Person or is under common Control with said Person.

“Agreement” shall have the meaning set forth in the preamble hereof.

“Approval Order” shall mean the approval order, if any, to be issued by UDAQ to Contractor in connection with the Project.

“Applicable Law” means all applicable laws (including applicable Environmental Laws), statutes, codes, acts, ordinances, orders, judgments, decrees, injunctions, rules, regulations, permits, licenses, authorizations, directions and requirements of any Governmental Authority having the force and effect of law, and as to any Person, the certificate of incorporation and bylaws or other organizational or governing documents of such Person.

“Approved/Preferred Suppliers” shall mean suppliers identified in Appendix Q attached hereto.

“ASME” means American Society of Mechanical Engineers.

“Assignment and Security Agreement” means the Assignment and Security Agreement, to be entered into by and between the Company and the Contractor.

“Authorized Officer” means for the Contractor, any [SPECIFY TITLES]. No Person shall be deemed to be an Authorized Officer unless named on a certificate of incumbency of such Person delivered to the Company as set forth in this Agreement.

“Bankruptcy Code” means the United States Bankruptcy Code, as in effect from time to time.

“Base Reference Conditions” means those conditions set forth in Appendix H.

“Business Day” means any day other than a Saturday, Sunday or other day on which banks are authorized or required to be closed in Salt Lake City, Utah.



“CCN” means a Certificate of Convenience and Necessity issued by the PSCU relating to the Project that is acceptable to the Company in its sole discretion.

“Change” means any alteration of the Work whether by way of addition, deletion, modification, substitution or omission as instructed by the Company but shall not include any instruction to the extent that such instruction is issued as a result of any breach by the Contractor of this Agreement or otherwise to require the Contractor to fulfill its obligations under this Agreement. Changes shall include but not be limited to changes to Scope of Work, Project Schedule, Payment Schedule, total price, changes to total cost of ownership, performance, efficiency, reliability and any Specification or Work, as defined in this Agreement. Re-performance of any Work required to rectify or recover Work that is necessary due to the Contractor’s (or its Contractor’s or any Subcontractor’s) negligence or breach of this Agreement shall not constitute a Change.

“Change Order” means any order identified as a “Change Order” and issued to the Contractor by the Company pursuant to Article 13 and Appendix J, substantially in the form set forth in Exhibit D.

“Claim” means any indemnity, demand, demand letter, claim, cause of action, notice of noncompliance or violation, or other proceeding relating to the Project.

“Clean Water Act” shall mean the Federal Water Pollution Control Act, 33 U.S.C. §§1531 et seq., as amended, and the Utah Water Quality Act, Utah Code 19-5-101 et seq.

“Collateral” means all property and interests in property (including the Site and intangible property) now owned or hereafter acquired by the Contractor prior to the Closing Date, including any property or interest in or upon which a Lien has been or is purported or intended to have been granted to the Company under any of the Security Documents.

“Company” shall have the meaning set forth in the preamble hereof, and includes any of the Company’s successors and permitted assigns.

“Company Governmental Approvals” shall have the meaning set forth in Section 4.5 (“Governmental Approvals and Consents”).

“Company-Initiated Change” shall have the meaning set forth in Section 13.2 (“Procedure For Changes”).

“Company Senior Procurement Representative” shall mean the designated representative from Buyer’s Procurement and Materials Planning Department responsible for the Project.

“Company’s Default” shall have the meaning set forth in Section 28.2 (“Company’s Default”).

“Company’s Drawings” or means all the drawings and information provided by the Company to the Contractor under this Agreement or in connection with any Request for Proposals issued by Company in anticipation of this Agreement, other than any drawings and information provided by or through PacifiCorp Transmission.

“Company’s Representative” means the natural person designated as such by the Company pursuant to Section 8.5 (“Company’s Representative”).

“Computer Program” means a sequence of instructions, data, or equations in any form, and explanations thereof, intended to cause a computer, a control data processor or the like to perform any kind of operations. Computer Programs may at times be referred to herein generally as software or firmware.

“Computer Program License” means the license to use certain Computer Programs as contemplated by Section 7.13 (“Intellectual Property Rights and Computer Program Licenses”).

“Condemnation Proceeding” shall have the meaning set forth in Section 7.29 (“Condemnation, Eminent Domain, Casualty Events”).

“Confidential Information” shall have the meaning set forth in Section 34.1 (“Confidentiality”).

“Confidentiality Affiliates” shall have the meaning set forth in Section 32.1(a) (“Confidentiality”).

“Consents” means all authorizations and approvals required to be obtained by Contractor or Company, as the case may be, under the Project Documents, each of which shall be delivered to Company or Contractor, as the case may be, prior to or at the Closing or as required under this Contract.

“Contractor Initiated Change” [To Come]

“Construction Coordination Agreement” means the document to be entered into between the Contractor and the Company, substantially in the form attached hereto as Appendix S.

“Construction/Site Manager” means a representative of Contractor designated as such pursuant to Section 7.14 (“Contractor’s Representatives”).

“Contingent Obligation” means, with respect to any Person, (i) any indemnity or similar obligation of such Person under any agreement or instrument and (ii) any obligation of such Person guaranteeing or intended to guarantee any Indebtedness, leases, dividends or other obligations (“primary obligations”) of any other Person (the “primary obligor”) in any manner, whether directly or indirectly, including any obligation of such Person, whether or not contingent, (a) to purchase any such primary obligation or any property constituting direct or indirect security therefor, (b) to advance or supply funds (1) for the purchase or payment of any such primary obligation or (2) to maintain working capital or equity capital of the primary obligor or otherwise to maintain the net worth or solvency of the primary obligor, (c) to purchase property, securities or services primarily for the purpose of assuring the owner of any such primary obligation of the ability of the primary obligor to make payment of such primary obligation or (d) otherwise to assure or hold harmless the owner of such primary obligation against loss in respect thereof.

“Contract” shall have the meaning set forth in the preamble.

“Contract Price” shall have the meaning set forth in Section 3.1 (“Payment Milestones”).

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

“Contractor Drawings and Manuals” means all drawings and information developed by the Contractor or provided to the Contractor in connection with the Contractor’s and any Subcontractor’s obligations under the Primary Construction Contracts as set forth in Appendix D.

“Contractor Guaranties” means the collective guarantees provided by any Equipment supplier, Subcontractor, or Contractor in connection with the Work and the Plant.

“Contractor’s Insurance” shall have the meaning set forth in Section 26.1 (“Effect of Force Majeure”).

“Contractor Default” means any of the events specified in Section 28.1 (“Company’s Obligation”).

“Contractor-Initiated Change” shall have the meaning set forth in Section 13.2 (“Procedure For Changes”).

“Contractor’s Representative” means the natural person designated as such by the Contractor.

“Control” means the possession or ownership, directly or indirectly, of the following: (a) in the case of a corporation, 50% or more of the outstanding voting securities thereof; (b) in the case of a limited liability company, partnership, limited partnership or venture, manager, managing member or general partner status and the right to 50% or more of the distributions therefrom (including liquidating distributions); (c) in the case of a trust or estate, trustee, successor trustee or alternate trustee, or 50% or more of the beneficial interest therein; (d) in the case of any entity, 50% or more of the economic or beneficial interest therein; or (e) in the case of any entity, the power or authority, through the ownership of voting securities, by agreement or otherwise, to direct the management, activities or policies of the entity.

“Costs” means, insofar as each of the following is directly related to the Project, (i) the wages, salaries and related payroll burdens, direct and applied material costs, related handling and transportation charges, travel, outside services and other direct expenses, plus the applicable mark-up for allocated overheads and (ii) general and administrative expenses as set forth in Appendix J and not already included in the immediately preceding clause (i). All such Costs shall be recorded and applied consistent with GAAP.

“Critical Milestone” shall have the meaning set forth in Section 23.2(a) (“Critical Milestone Guarantee Liquidated Damages”).

“Cure Period” means a period of 12 months following the Substantial Completion Date.

“Default Security” shall have the meaning set forth in Section 6.2 (“Security”).

“Defect” means any defect in design, materials, Plant, manufacture or workmanship which adversely affects the operation, use or performance of the Work or any part thereof, or causes any increase in costs of maintenance or operation or any decrease in life expectancy or efficiency.

“Deferred Governmental Approvals” means, as of any date, all Governmental Approvals, other than the Company Governmental Approvals, (i) the procurement of which is not a Milestone that is scheduled to have occurred on or before such date and (ii) as to which there is a reasonable expectation on the part of a Contractor that such Governmental Approvals will be obtained in the ordinary course of business and the failure to procure such Governmental Approvals on or before such date would not result in a Material Adverse Change.

“Deposit Account Control Agreement” means the Deposit Account Control Agreement to be entered into by and among the Company, the Contractor and a banking or other financial institution acceptable to the Company.

“Dispatchable” means that the Project (i) is in a condition of readiness to generate power as demonstrated by, the most recent Preliminary Performance Test Report not disputed by the Company, (ii) has attained (x) at least 90% of the 1x1 Net Capacity but is otherwise meeting the Guaranteed Emissions and (y) 110% of the heat rate set forth in Section 3, Case 3 of Appendix H for purposes of calculating liquidated damages under Section 17.3 (“Company’s Request for Earlier Completion”), (iii) the Project can be operated in accordance with Prudent Industry Practice and all applicable Requirements of Law, including the Emissions Approvals and (iv) the “Functional Tests” identified in the Substantial Completion Criteria shall have been performed based on the Project operating in a 1x1 configuration and such tests shall have demonstrated that the 1x1 Net Capacity achieved the Substantial Completion Criteria that would be applicable to the Project when operating in a 1x1 configuration.

“Dollars” and the “\$” symbol means the lawful currency of the United States of America.

“Draft Manuals” shall have the meaning set forth in Section 7.10(d) (“Contractor Drawings and Manuals”).

“Effective Date” shall have the meaning set forth in the introductory paragraph

“Emissions Approvals” means the air emissions permits, if any, required for construction and operation of the Plant, including those Governmental Approvals identified in Appendix E, as “Emissions Approvals.”

“Emission Reduction Credits” or “ERCs” means emission reduction credits to be used as emission offsets for the Project that are registered in the State Emissions Registry by UDAQ pursuant to Section R-307-403-8 of the Utah Administrative Code more specifically set forth on Appendix M.

“Environmental Health and Safety Program” means a corporate program maintained by or on behalf of the Contractor that (i) provides a safe and healthful working environment for all employees, (ii) promotes the commitment to achievement of safety and health excellence, (iii) encourages employee and management involvement, (iv) is designed to prevent occupational injuries, illness, and damages to equipment, property, and the environment through implementation of cost effective safety and health plans that meet applicable Requirements of Law and consensus standards relating thereto including ASME, ANSI, NEC, and NFPA and is based on standards no less stringent than the Company’s own safety and health policies.

“Environmental Law” means any federal, state or local law including statutes, regulations, rulings, orders, administrative interpretations and other governmental restrictions and requirements having the force and effect of law relating to (i) the discharge or disposal of any substance into the air, soil or water, including pollutants, water pollutants or process waste water, (ii) storage, emissions transportation or disposal of any Regulated Material, (iii) the environment or hazardous substances, all as amended from time to time, (iv) land use requirements pertaining to Regulated Materials, including laws requiring environmental impact studies or other similar evaluations, and (v) environmental issues pertaining to the development, construction or operation of the Project.

“Equipment” means the equipment relating to the Project as described in Appendix B, and, where indicated in Appendix B, manufactured or provided by Approved/Preferred Suppliers.

“Equivalent Operating Hours” or “EOH” means the number of hours of operation equivalent to continuous loading at rated capacity, including actual operating hours adjusted for loading plus a set number of equivalent hours for each start/stop, rapid start/stop, water/steam injection, and all other adjustments pursuant to this Agreement all as set forth in Appendix H.

“Equivalent Starts” shall have the meaning assigned thereto in the technical documentation issued by the manufacturer of the Gas Turbines.

“ERC” [To Come]

“Final Acceptance” means the completion of all items set forth as conditions of Final Acceptance in Appendix H and completion of the Final Punch List.

“Final Completion” shall have the meaning set forth in Section 19.8 (“Notice of Final Acceptance of Work”).

“Final Payment” means the final payment of the Contract Price made upon Final Acceptance.

“Final Performance Guarantees” means the (i) Guaranteed Net Heat Rate and the Guaranteed Incremental Net Heat Rate and (ii) Guaranteed Net Capacity and the Guaranteed Incremental Net Capacity that are required to be demonstrated during the Performance Tests as a condition to Final Acceptance, all set forth in Appendix H.

“Final Performance Test Report” shall have the meaning set forth in Section 17.7(b) (“Timing”).

“Final Punch List” means the list of items and schedule for completion of the Project required to be completed by the Contractor following the Substantial Completion Date, which list shall be issued to the Contractor by the Company no later than five (5) Business Days after the Substantial Completion Date, all in accordance with Section 19.2 (“Care, Custody and Control; Punch List Items”).

“Fired Hours” means the time, rounded up to the next whole hour, from the opening of the natural gas supply valve to a Combustion Turbine and natural gas begins to flow, until such valve is closed and natural gas no longer flows.

“Force Majeure” means an event not reasonably anticipated as of the date of this Agreement, which is not within the reasonable control of the party affected thereby, could not have been avoided by the exercise of due diligence or operation in accordance with Prudent Industry Practices, is not the result of the failure to act or the negligence of such party, and which by the exercise of due diligence, the affected party is unable to overcome or obtain or cause to be obtained a commercially reasonable substitute therefor. To the extent that such event satisfies the test set forth in the preceding sentence, Force Majeure includes: acts of God, fire, flood, explosion, civil disturbance, sabotage, terrorism, hurricanes, tornadoes, lightning, earthquakes, war, action or restraint by court order or public or Governmental Authority; provided that none of the following constitute Force Majeure: (i) strikes or labor disturbances occurring at the Site or Contractor’s facilities, except to the extent such strikes or labor disturbances at the Site or Contractor’s facilities are directly related to strikes or labor disturbances that are simultaneously disrupting other business operations in the geographic region covered by the WECC; (ii) shortages (real or perceived) of labor available for on-site Work; (iii) delay or failure by the Contractor to obtain any Governmental Approval, all of which should have been anticipated by the Contractor in connection with Contractor’s reply to the RFP, other than the delay or failure to obtain Governmental Approvals occasioned by (x) revocation, stay, or similar action by a Governmental Authority of a Governmental Approval after issuance thereof by a Governmental Authority, (y) the failure of a Governmental Authority to comply with rules, procedures or Requirements of Law applicable to such Governmental Authority or (z) another Force Majeure; or (iv) economic hardship including lack of money or credit and changes in exchanges rates (v) utility interruptions; (vi) shipping accidents or unavailability of preferred shipping methods.

“GAAP” means United States generally accepted accounting principles. “Gas Turbines” or “GTs” means the gas turbines described in Appendix B to this Agreement.

“Governmental Approval” means any authorization, approval, consent, waiver, exception, variance, order, publication, license, filing, registration, ruling, permit, tariff, certification, exemption and other action, requirement by or with, and notice to and declarations of or with, any Governmental Authority that are required in connection with the development, construction, ownership and operation of the Project.

“Governmental Authority” means any supranational, federal, state or other political subdivision thereof, having jurisdiction over the Contractor, the Company, the Project or this Agreement, including any municipality, township and county, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including any corporation or other entity owned or controlled by any of the foregoing.

“Guaranteed Emissions” means the emissions guarantees when fired on natural gas in accordance with [*insert applicable Equipment manufacturer’s specification*], adjusted to Base Reference Conditions, all in accordance with the Performance Tests all as more fully described in Appendix H.

“Guaranteed Net Capacity” means the continuous steady-state full load Plant net electrical power output produced when operating in a 2x1 configuration (two Gas Turbines operating at full load at normal firing temperatures with the steam produced by

the heat recovery steam generators (HRSG) supplied to the steam turbine generator), with no duct firing in the HRSGs, corrected to the Base Reference Conditions as specified in Section \_\_\_\_\_ in Appendix H while meeting the emissions requirements under Section 12.2 (“Contractor’s Equipment on Site”). The net power output is the electrical power measured at the generator terminals, minus the Plant’s auxiliary power consumption of the Equipment, including the transformer and isophase bus losses, fired with natural gas fuel in accordance with [*insert Equipment manufacturer’s gas fuel specification*], corrected to the Base Reference Conditions.

“Guaranteed Net Heat Rate” means the net heat rate of the Plant when operated at the “Guaranteed Net Capacity”, as further specified in Appendix H.

“Guaranteed Substantial Completion Date” means May 1, 2012, 2013 or 2014.

“Guaranty” means that certain Guaranty, if required by Company pursuant to Section 6.2 (“Security”), by and among Company, Contractor, and Guarantor under which Guarantor guarantees each and every obligation of Contractor under the Transaction Documents.

“Guarantor” means an entity meeting the credit criteria set forth in Section 6.1 (“Credit Requirements”) that guarantees, pursuant to a Guaranty acceptable to Company in its sole discretion, each and every obligation of Contractor under the Transaction Documents.

“ID Tag” shall have the meaning set forth in Section 9.2 (“Site Security”).

“Indemnified Party” shall have the meaning set forth in Section 25.1 (“Indemnification for Third Party Claims”).

“Indemnifying Party” shall have the meaning set forth in Section 25.1 (“Indemnification for Third Party Claims”).

“Indemnity Period” shall have the meaning set forth in Section 25.3 (“Indemnification for Third Party Claims”).

“Indebtedness” means, with respect to any Person, without duplication, (i) all obligations of such Person for borrowed money, or with respect to deposits or advances of any kind, (ii) all obligations of such Person evidenced by bonds, debentures, notes or similar instruments, (iii) all obligations of such Person upon which interest charges are customarily paid (other than trade payables incurred in the ordinary course of business consistent with past practice), (iv) all obligations of such Person under conditional sale or other title retention agreements relating to property purchased by such Person, (v) all obligations of such Person issued or assumed as the deferred purchase price of property or services (excluding obligations of such Person to creditors for raw materials, inventory, services and supplies incurred in the ordinary course of such Person’s business), (vi) all lease obligations of such Person capitalized on the books and records of such Person, (vii) all obligations of others secured by a Lien on property or assets owned or acquired by such Person, whether or not the obligations secured thereby have been assumed, (viii) all obligations of such Person under interest rate or currency hedging transactions (valued at the termination value thereof, other than forward or spot foreign currency exchange contracts entered into in the ordinary course of business consistent with past practice), (ix) all letters of credit issued for the account of such Person

(excluding letters of credit issued for the benefit of suppliers to support accounts payable to suppliers incurred in the ordinary course of business) and (x) all guarantees and arrangements having the economic effect of a guarantee of such Person of any Indebtedness of any other Person.

“Intellectual Property” means all patents, trademarks, copyrights and all computer software including the Computer Programs whether or not subject to statutory registration or protection, that are owned, used, filed by or licensed to the Contractor for the Project.

“Interface” means those physical interconnections and interfaces at the Site described in Appendix B.

“Judgment” means any judgment, order, award, injunction, writ or decree of any Governmental Authority.

“Late Payment Rate” means an amount equal to the Prime Rate of Interest plus 500 basis points.

“Latent Defects” shall have the meaning set forth in Section 22.10 (“Latent Defects”).

“Latent Defects Liability Period” means the period which is five years calculated from the Substantial Completion date, subject in each case to Section 22.10 (“Latent Defects”).

“Lead Electrical” shall mean a representative of Contractor designated as such pursuant to Section 7.14 (“Contractor’s Representatives”).

“Lead Mechanical” shall mean a representative of Contractor designated as such pursuant to Section 7.14 (“Contractor’s Representatives”).

“Letter of Credit” means an irrevocable standby letter of credit in a form reasonably acceptable to Company, naming Company as the party entitled to demand payment and present draw requests thereunder, which letter of credit:

(1) is issued by a U.S. commercial bank or a foreign bank with a U.S. branch, with such bank having a net worth of at least \$1,000,000,000 and a credit rating on its senior unsecured debt of:

- (a) “A2” or higher from Moody’s; or
- (b) “A” or higher from S&P;

(2) on the terms provided in the letter of credit, permits Company to draw up to the face amount thereof for the purpose of paying any and all amounts owing by Contractor hereunder;

(3) if a letter of credit is issued by a foreign bank with a U.S. branch, permits Company to draw upon a U.S. branch;



(4) permits Company to draw the entire amount available thereunder if such letter of credit is not renewed or replaced at least thirty (30) Business Days prior to its stated expiration date;

(5) permits Company to draw the entire amount available thereunder if such letter of credit is not increased, replaced or replenished as and when provided in Section 6.2 (“Security”);

(6) is transferable by Company to any party to which Company may assign this Agreement; and

(7) shall remain in effect for at least ninety (90) days after the end of the Term.

“Liabilities” means all Claims including those relating to Environmental Laws, demands, damages, losses, liabilities or judgments, including all interest, penalties, fines and other sanctions, and any reasonable costs or expenses in connection therewith, including attorneys’ and consultants’ fees and expenses.

“Lien” means any mortgage, pledge, security interest, encumbrance, option, defect, lien, charge or other similar right of any Person of any kind, including any lien or charge arising by statute or other law.

“Liquidated Damages” has the meaning set forth in Section 2.4.

“Material Adverse Change” means any change in condition that actually has, or is reasonably likely to have, a significant adverse effect on (i) the Company’s ability to own, control, or operate the Project (financial or otherwise), (ii) the Project’s ability to operate and deliver energy to the System, (iii) the Contractor’s ability, the Contractor’s ability, any Subcontractor’s ability or the Guarantors’ ability, to perform its respective obligations in accordance with the Transaction Documents to which it is, respectively, a party, (iv) the Contractor’s and any Subcontractor’s ability to perform its respective obligations in accordance with the Transaction Documents, (v) the validity, perfection and enforceability of the Liens granted to the Company under the Security Documents, (vi) the ability of the Company to enforce any of the Secured Obligations or any of its material rights and remedies under the Transaction Documents; or (vi) Contractor fails to meet the requirements of Section 6.1 (“Credit Requirements”).

“Materials” means the Intellectual Property, the Equipment and other equipment, machinery, apparatus, materials, articles and things of all kinds to be provided and incorporated into the Project by the Contractor and the Contractors under this Agreement (including spare parts to be supplied hereunder) other than Non-Company Materials.

“Member” means each Person to whom Membership Interests have been issued, as identified on Schedule 4.2.

“Membership Interests” shall have the meaning set forth in Section 4.2(a) (“Capital Structure”).

“Merit Shop” means the construction philosophy which encourages open competition and a free-market approach that awards contracts to the lowest cost

responsible bidder based solely on merit as determined by the Contractor, regardless of labor affiliation.

“Milestone” means a milestone for the development and construction of the Project as so designated on the list of schedule milestones set forth on Appendix I.

“Milestone Dates” means the date opposite each Milestone on or prior to which each such Milestone is anticipated to be achieved.

“MW” means megawatt.

“Necessary Governmental Approvals” means, as of any date, all Governmental Approvals, required under Requirements of Law in connection with (i) the due execution, delivery and performance by any Project Party of the Transaction Documents to which it is a party and (ii) the development, construction, operation and ownership of the Project as contemplated by the Transaction Documents on or prior to such date.

“Non-Company Materials” means any equipment, machinery, apparatus, materials, articles and things of all kinds that are not permanently incorporated into the Project.

“Notice of Final Acceptance” shall have the meaning set forth in Section 19.8 (“Notice of Final Acceptance of Work”).

“Notice of Request for Progress Payment” shall mean a Notice of Request for Progress Payment in the form attached hereto as Exhibit A.

“Notice to Proceed” means the Notice to Proceed to be issued in accordance with Section 2.1 (“Notice to Proceed”) in the form attached hereto as Exhibit C.

“OEM” means the original manufacturer of any Equipment comprising a portion of the Project.

“OEM Certified” means that the Equipment in question is certified by the manufacturer thereof as new and clean, not in need of repair, carrying full manufacturer’s warranties and guarantees applicable to newly-manufactured equipment of that type, and all reliability and design technical notices have been implemented.

“1x1 Net Capacity” means the continuous steady-state full load Plant net electrical power output produced when operating in a 1x1 configuration (one Gas Turbine operating at full load at normal firing temperatures with the steam produced by one heat recovery steam generator (HRSG) supplied to the steam turbine generator, with no duct firing in the such HRSG, corrected to the Base Reference Conditions as specified in Section 3, Case 3 of Appendix H while meeting the emissions requirements under Section 17.2 (“Emissions Guarantee”). The net power output is the electrical power measured at the generator terminals, minus the Plant’s auxiliary power consumption of the Contractor’s supplied equipment and facilities, including the transformer and isophase bus losses, fired with natural gas fuel in accordance with [*insert Equipment manufacturer’s specifications*], corrected to the Base Reference Conditions.

“PacifiCorp Hazard Communication Program” means Company’s hazard communication program designated as such.

“PacifiCorp Transmission” means PacifiCorp, an Oregon corporation, acting in its transmission function capacity and any successor thereto.

“PacifiCorp Transmission Interconnection Agreement” means the interconnection agreement between the Contractor and PacifiCorp Transmission that is in conformance with the requirements of PacifiCorp’s Open Access Transmission Tariff filed with the Federal Energy Regulatory Commission (or any successor thereto), as the same may be amended.

“Parties” shall have the meaning set forth in the preamble hereof.

“Payment Date” [To Come]

“Payment Milestone” [To Come]

“Performance Curves” means the performance correction curves described in Appendix H to this Agreement, as the same shall be adjusted to reflect the capability of the Plant expressed in terms of capacity as of the Substantial Completion Date and in terms of capacity and heat rate for the Performance Tests.

“Performance Guarantees” means the (i) Guaranteed Emissions, (ii) Guaranteed Net Heat Rate and (iii) Guaranteed Net Capacity that are required to be demonstrated during the Performance Tests as a condition to Substantial Completion, all set forth in Appendix H.

“Performance Test” or “Performance Tests” means the tests specified in Appendix H.

“Permits” shall have the meaning set forth in Section 7.36 (“Permits”).

“Person” means any natural person, corporation, general or limited partnership, limited liability company, firm, joint venture, estate, association, trust, government, governmental agency or any other entity, whether acting in an individual, fiduciary or other capacity.

“Plant” means the combined-cycle electric generating facility, to be located on the Site and to be constructed in accordance with this Agreement, as described more fully in Appendix B.

“Preliminary Performance Test Report” shall have the meaning set forth in Section 17.7(a) (“Test Reports”).

“Primary Construction Contracts” means the EPC Contract, any contract or agreement between the Contractor and any Subcontractor, and all agreements and documents referenced therein.

“Prime Rate” means the rate per annum (rounded upwards to the nearest 1/100th of 1% per annum) equal to the rate of interest which JP Morgan Chase in New York, New York or its successor announces from time to time as its “prime lending rate” or equivalent rate or if such rate is not available, another rate published as the “prime rate” as agreed by the Company and a Contractor, with each change in such rate to be effective on the day on which such change is effective.

“Progress Report” shall have the meaning set forth in Section 10.8 (“Progress Reports”).

“Project” means (i) the Plant, (ii) the Site, and (iii) those certain tangible and intangible rights and assets required to own and operate the Plant (including without limitation Project Water Rights and Emission Reduction Credits), all in accordance with the Project Documents, all Requirements of Law and Prudent Industry Practices following construction of the Plant in accordance with the Specifications and upon the Plant having attained the Performance Guarantees.

“Project Documents” means once executed and in full force and effect, the Primary Construction Contracts, the PacifiCorp Interconnection Agreement and any Additional Project Document.

“Project Engineer” means a representative of Contractor designated as such pursuant to Section 7.14 (“Contractor’s Representatives”).

“Project Manager” shall mean a representative of Contractor designated as such pursuant to Section 7.14 (“Contractor’s Representatives”).

“Project Party” means each of the Contractor, any Subcontractor, and the Guarantor.

“Project Schedule” means the schedule for performance of the Work relating to the Project set forth in Appendix F, and any modification thereof made pursuant to this Agreement.

“Project Water Rights” means the Water Rights necessary and sufficient to operate the Project consistent with the Specifications, providing not less than \_\_\_\_\_ acre-feet of water annually.

“Prudent Industry Practice” means any of the practices, methods and acts engaged in or approved by a significant portion of the electrical utility industry in the geographic region covered by the WECC, or its successor for gas-fired combined cycle electric generation facilities which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, would have been expected to accomplish the desired result in a cost-efficient manner consistent with good business practices and reliability criteria, safety considerations and expediency. Prudent Industry Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others but, rather, to be acceptable industry practices, methods or acts for gas-fired combined cycle electric generating facilities in the geographic region covered by the WECC.

“PSCU” means the Public Service Commission of Utah.

“Real Property” means all real property and interests in real property required in connection with the Project, other than the Water Rights.

“Reduction Amount” shall have the meaning set forth in Section 23.2(c) (“Critical Milestone Guarantee Liquidated Damages”).

“Regulated Materials” means any substance, material, or waste which is now or hereafter becomes listed, defined, or regulated in any manner by any United States

federal, state or local law and includes any oil, petroleum, petroleum products and polychlorinated biphenyls.

“Release” with respect to any Regulated Materials and includes any release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of Regulated Materials.

“Remediation” includes any response, remedial, removal, or corrective action, any activity to cleanup, detoxify, decontaminate, contain or otherwise remediate any Regulated Material, any actions to prevent, cure or mitigate any Release of any Regulated Material, any action to comply with any Environmental Laws or with any permits issued pursuant thereto, any inspection, investigation, study, monitoring, assessment, audit, sampling and testing, laboratory or other analysis, or evaluation relating to any Regulated Material.

“Required Change Order” shall have the meaning set forth in Section 13.1 (“Change”).

“Required Changes” [To Come]

“RFP” has the meaning assigned in the Recitals hereof.

“Safety Manager” means a representative of Contractor designated as such pursuant to Section 7.14 (“Contractor’s Representatives”).

“Scope of Work” means the scope of work presented by Company by Contractor in response to the RFP, on which the Purchase Price is based.

“Secured Obligations” means those obligations of the Contractor secured by the Liens granted in favor of the Company pursuant to the Security Documents.

“Security Documents” means (i) the Deposit Account Control Agreement, (ii) the Assignment and Security Agreement and (iii) any other documents or filings determined by Company, in its sole discretion, to be necessary to grant or maintain the Liens granted by the Contractor under the Assignment and Security Agreement that would affect the validity, perfection and enforceability thereof or for the exercise by the Company of its rights and remedies to enforce such Liens.

“Significant Defect” means a single or recurring Defect which occurs at any time within two years of Substantial Completion which results in the cessation of operation of the Plant or will not, unless corrected, allow the Company to operated the Plant within air quality or other emission limits or within parameters required to comply with any Requirements of Law for a period of either three (3) consecutive days or an aggregate of five (5) days in the case of a recurring Defect.

“Site” means the premises on which the Project is to be located in \_\_\_\_\_ Utah, together with all easements appurtenant thereto or required for the operation of the Facility, the legal description of all of which is set forth on Appendix A.

“Specifications” means the specifications for the Works set forth in Appendix B and Appendix H and any modifications thereof made pursuant to the terms hereof.

“[STATE ORGANIZATIONAL LAW]” shall have the meaning set forth in Section 4.3(b) (“Authority; Execution and Delivery; Enforceability”).

“Startup or Commissioning Manager” means a representative of Contractor designated as such pursuant to Section 7.14 (“Contractor’s Representatives”).

“Subcontractor” means any Person retained by Contractor to perform a part of Contractor’s obligations under any Project Document.

“Subsidiary” means, with respect to any Person, any corporation, limited liability company, partnership, association or other business entity of which (i) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof is at the time owned or Controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (ii) if a limited liability company, partnership, association or other business entity, a majority of the partnership or other similar ownership interest thereof is at the time owned or Controlled, directly or indirectly, by any Person or one or more Subsidiaries of that Person or a combination thereof. For purposes hereof, a Person or Persons shall be deemed to have a majority ownership interest in a limited liability company, partnership, association or other business entity if such Person or Persons shall be allocated a majority of limited liability company, partnership, association or other business entity gains or losses or shall be or Control any director, managing member, manager, general partner, trustee or other controlling Person or member of such entity's governing body of such limited liability company, partnership, association or other business entity.

“Substantial Completion” means the Plant demonstrates the Substantial Completion Criteria.

“Substantial Completion LD Commencement Date” means the calendar day immediately following the Guaranteed Substantial Completion Date.

“Substantial Completion Criteria” shall have the meaning set forth in Appendix H.

“Substantial Completion Date” means the date on which Substantial Completion is demonstrated.

“Supplier” means any supplier of Equipment or Materials which (i) has a right to place a Lien on the Project and (ii) provided notice of such right to Seller.

“System” means the electric transmission sub-station and distribution facilities owned, operated or maintained by PacifiCorp Transmission, which shall include, after construction and installation of the Project, the circuit reinforcements, extensions, and associated terminal facility reinforcements or additions required to complete the Project, all as set forth in the PacifiCorp Transmission Interconnection Agreement.

“Target Date” means a date on which a Critical Milestone is to occur, as set forth in the Project Schedule.

“Tax” or “Taxes” means any United States federal, state or local income tax, ad valorem tax, excise tax, sales tax, use tax, franchise tax, real or personal property tax, transfer tax, gross receipts tax or other tax assessment, fee, levy or other governmental

charge, together with and including any and all interest, fines, penalties, assessments and additions to the Tax resulting from, relating to, or incurred in connection with any of the foregoing or any contest or dispute thereof.

“Time for Completion” means that period between the Effective Date and the Substantial Completion Date.

“Title Company” means \_\_\_\_\_, or such other title company acceptable to the Company, in its sole discretion.

“Title Policy” means a title insurance policy issued by Title Company covering the Real Property interests comprising the Property to be transferred by Contractor at Closing.

“Total Plant Capacity” means the Guaranteed Net Capacity. “Transaction Documents” means, once executed and in full force and effect, each of the following agreements: this Agreement, the Project Documents, the Security Documents and the Consents. “UDAQ” means the Division of Air Quality of the Utah Department of Environmental Quality.

“Unidentified Project Problem” shall have the meaning set forth in Section 10.8 (“Progress Reports”).

“UPDES” means Utah Pollutant Discharge Elimination System and all Requirements of Law relating thereto.

“UST” means underground storage tanks.

“Water Rights” means the water rights acquired for use in connection with the Project and acceptable to the Company, designated by the Company as “Project Water Rights.”

“WECC” means the Western Electricity Coordinating Council.

“Witness Point Events” shall have the meaning set forth in Section 14.3 (“Inspection”).

“Witness Point Schedule” shall have the meaning set forth in Section 14.3 (“Inspection”).

“Work” means the Materials to be supplied and the entire works and services to be performed, or caused to be performed, by the Contractor under this Agreement, together with any modifications thereto in accordance with the terms hereof.

“Year” means a calendar year.