**2019R Utah RFP**

**Pro Forma**

|  |
| --- |
| **THIS DRAFT DOES NOT CONSTITUTE A BINDING OFFER AND SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE. ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS SET FORTH IN THIS DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS DRAFT SHALL BE AT THAT PARTY’S OWN RISK. UNTIL THE PARTIES HAVE COMPLETED THEIR DUE DILIGENCE AND THIS AGREEMENT IS NEGOTIATED, APPROVED, EXECUTED AND DELIVERED, NO PARTY SHALL HAVE ANY LEGAL OBLIGATIONS, EXPRESSED OR IMPLIED, OR ARISING IN ANY OTHER MANNER UNDER THIS DRAFT OR IN THE COURSE OF ANY NEGOTIATIONS.** |
| **ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT[[1]](#footnote-1)**  **([\_\_\_] PV Solar Project)** |
| **by and between**  **[\_\_\_\_\_\_\_\_\_\_]**  **Contractor’s License No. [\_\_\_\_\_\_\_\_]**[[2]](#footnote-2)  **and**  **[\_\_\_\_\_\_\_\_\_\_]** |
|  |
| Dated as of [\_\_] |

ARTICLE 1 CONTRACT INTERPRETATION AND EFFECTIVENESS 2

1.1 Rules of Interpretation 2

1.2 Defined Terms 3

1.3 Order of Precedence 20

1.4 Entire Agreement 20

1.5 No Agency 20

1.6 Invalidity 20

1.7 Binding Effect 21

1.8 Counterparts 21

1.9 Effective Date 21

1.10 Time is of the Essence 21

ARTICLE 2 REPRESENTATIONS AND WARRANTIES 21

2.1 Representations and Warranties of Contractor 21

2.2 Representations and Warranties of Owner 23

ARTICLE 3 CONTRACTOR’S OBLIGATIONS 23

3.1 Performance of Work 23

3.2 Scope of Work 24

3.3 Properly Licensed; Sufficient Qualified Personnel 24

3.4 Utilities 25

3.5 Contract Documents 25

3.6 Record-Keeping 25

3.7 Materials and Equipment 25

3.8 Compliance and Cooperation with EITC Requirements, Applicable Laws, Applicable Permits, Applicable Codes and Prudent Utility Practice 25

3.9 Contractor Acquired Permits; Other Approvals 25

3.10 Spare Parts 26

3.11 Construction Schedule; Progress Reports; Meetings 26

3.12 Transportation 27

3.13 Security 27

3.14 Safety; Quality Assurance 27

3.15 Clean-Up 27

3.16 Suppliers and Subcontractors 27

3.17 Insurance 28

3.18 Contractor’s Key Personnel 28

3.19 Hazardous Materials 29

3.20 Contractor Performance Security 29

3.21 FERC Electrical Plant Chart of Accounts 29

3.22 Delay Response Plan 29

3.23 Project Labor Agreement; Employees 29

3.24 Notification 30

3.25 Site Conditions 31

3.26 Other Reports and Quality Control Documents 31

3.27 Construction Methods 31

3.28 Cooperation; Access 32

3.29 Business Ethics 32

3.30 Real Property Rights 32

3.31 Tax Abatement Requirements 33

3.32 Training of Personnel 33

3.33 Taxes 34

ARTICLE 4 OWNER’S OBLIGATIONS 34

4.1 Access 34

4.2 Compliance with Laws and Permits 35

4.3 Owner Scope 35

4.4 Owner’s Representative 35

4.5 Insurance 35

4.6 Cooperation 35

4.7 Owner-Provided Information 35

4.8 Conditions Precedent to Owner’s Obligations 35

ARTICLE 5 REPRESENTATIVES; KEY PERSONNEL 36

5.1 Owner’s Representative 36

5.2 Contractor’s Key Personnel and Contractor’s Representative 36

5.3 Power to Bind 36

5.4 Notices 36

ARTICLE 6 INSPECTION 36

6.1 Inspection 36

6.2 Off-Site Inspections 37

ARTICLE 7 CONTRACT PRICE 37

7.1 Contract Price 37

ARTICLE 8 PAYMENT PROCESS & PERFORMANCE SECURITY 38

8.1 Payments 38

8.2 Milestone Assessment 38

8.3 Application for Payment 38

8.4 Lien Releases 39

8.5 Release of Liability 39

8.6 Overdue Payments 40

8.7 Disputed Payments 40

8.8 Contractor Performance Security 40

8.9 Holdback 40

8.10 Setoff 41

ARTICLE 9 TAXES 41

9.1 Taxes 41

ARTICLE 10 CHANGES AND EXTRA WORK 42

10.1 Owner Requested Change Order 42

10.2 Contractor Requested Change Order 42

10.3 Mandatory Change Order 43

10.4 Limitation on Change Orders 43

10.5 Determining Change Order 43

10.6 Change Order Must Be in Writing 43

ARTICLE 11 FORCE MAJEURE EVENT; OWNER-CAUSED DELAY 44

11.1 Certain Events 44

11.2 Notice of Force Majeure Event and Owner-Caused Delay 44

11.3 Force Majeure Event and Owner-Caused Delay Conditions 45

11.4 Contractor’s Remedies 45

ARTICLE 12 HAZARDOUS MATERIALS 45

12.1 Use by Contractor 45

12.2 Remediation by Contractor 46

12.3 Hazardous Materials File 46

12.4 Notice of Hazardous Materials 46

12.5 Hazardous Materials Disposal System 47

12.6 Scope of Contractor Environmental Indemnification 47

12.7 Scope of Owner Environmental Indemnification 48

ARTICLE 13 TITLE AND RISK OF LOSS 48

13.1 Equipment – Risk of Loss Before Substantial Completion 48

13.2 Equipment – Risk of Loss After Substantial Completion 48

13.3 Title 48

ARTICLE 14 INTELLECTUAL PROPERTY 49

14.1 Title to Plans and Specifications 49

14.2 Intellectual Property 49

14.3 Procurement of Proprietary Rights 49

14.4 Intellectual Property Infringement 50

ARTICLE 15 START-UP, COMMISSIONING & TESTING 51

15.1 Start-up and Commissioning 51

15.2 Facility Tests 51

15.3 Availability and Capacity Test Notice 51

15.4 Availability and Capacity Test Acceptance 51

15.5 Capacity Test Rejection 52

15.6 Correction of Defects 52

15.7 Serial Defects 53

ARTICLE 16 SUBSTANTIAL COMPLETION 53

16.1 Generally 53

16.2 Substantial Completion Defined 53

16.3 Notice and Certificate of Substantial Completion 54

16.4 Punch List 55

ARTICLE 17 STAGES OF COMPLETION; DELAY AND CAPACITY LIQUIDATED DAMAGES; EITC AND DEPRECIATION LOSS 56

17.1 Guaranteed Substantial Completion Delay Liquidated Damages 56

17.2 Final Capacity Liquidated Damages 56

17.3 Payment 56

17.4 Liquidated Damages Reasonable 56

17.5 Energy and Revenues of the Facility 57

17.6 EITC and Depreciation Loss 57

17.7 Enforceability 59

ARTICLE 18 FINAL COMPLETION 59

18.1 Generally 59

18.2 Certificate of Final Completion 60

18.3 Failure to Achieve Final Completion 60

ARTICLE 19 SUSPENSION OF THE WORK 60

19.1 Owner-Directed Suspension 60

19.2 Costs and Schedule Relief for Contractor-Caused Suspension 61

ARTICLE 20 DEFAULTS AND REMEDIES 61

20.1 Contractor Events of Default 61

20.2 Owner Rights and Remedies 62

20.3 Owner Events of Default 64

20.4 Contractor Rights and Remedies 64

20.5 Termination Payment 64

20.6 Termination Right Not Exclusive 65

20.7 Owner Termination for Convenience 65

20.8 Contractor Conduct 65

ARTICLE 21 WARRANTIES 65

21.1 Sole Warranty 65

21.2 No Liens or Encumbrances 65

21.3 Defect Warranty 66

21.4 Warranty Period 66

21.5 Exclusions 67

21.6 Correction of Defects 67

21.7 Limitations On Warranties 69

ARTICLE 22 PUBLICITY 69

22.1 Press Releases 69

ARTICLE 23 INSURANCE 69

23.1 Contractor’s Insurance 69

23.2 Owner’s Insurance 70

23.3 Ratings 70

23.4 Policy Requirements 70

23.5 No Limitation and Release 70

23.6 Reduction or Ceasing to be Maintained 70

23.7 Expiration 70

ARTICLE 24 INDEMNITY 71

24.1 Contractor Indemnity 71

24.2 Owner Indemnity 72

24.3 Patent Infringement and Other Indemnification Rights 73

24.4 Environmental Indemnification 74

24.5 Right to Defend 74

24.6 Comparative Fault 75

24.7 Survival of Indemnity Obligations 75

ARTICLE 25 CONFIDENTIALITY 75

25.1 Dissemination of Confidential Information 75

25.2 SCADA System Information 76

25.3 Return of Confidential Information 77

ARTICLE 26 ASSIGNMENT 77

26.1 Prohibition on Assignment 77

26.2 Exceptions 77

26.3 Indemnitees; Successors and Assigns 78

26.4 Assignment to Owner Affiliate; Assignment With Consent 78

26.5 Assignment to Financing Parties 79

ARTICLE 27 NOTICES 79

27.1 Notices 79

27.2 Effective Time 80

ARTICLE 28 DISPUTE RESOLUTION; GOVERNING LAW 80

28.1 Good faith negotiations 80

28.2 Technical Disputes; Optional Arbitration 80

28.3 Governing Law/Litigation/Choice of Forum/Waiver of Jury Trial 82

28.4 Work to Continue 83

ARTICLE 29 LIMITATION OF LIABILITY 83

29.1 Consequential Damages 83

29.2 Overall Limitation of Liability 83

ARTICLE 30 SURVIVAL 84

30.1 Survival 84

ARTICLE 31 MISCELLANEOUS 84

31.1 Terms in Subcontracts 84

31.2 Third Party Beneficiaries 85

31.3 Further Assurances 85

31.4 No Waiver 85

31.5 Amendments in Writing 85

31.6 Books and Record; Retention 85

31.7 Attorneys’ Fees 85

31.8 Inspection, Review and Approval 85

31.9 Independent Engineer 86

31.10 Financing Matters 86

31.11 Fees and Expenses 87

31.12 Related Contracts 87

31.13 Audit Rights 87

**EXHIBITS**

Exhibit 1 – Scope of Work and Facility Specifications

Exhibit 2 – Site Description

Exhibit 3 – Technical Specifications

Exhibit 3A – Substation Specifications

Exhibit 3B – Transmission Specifications

Exhibit 3C – O&M Building Specification

Exhibit 3D – Security Specifications

Exhibit 3E – Telecommunications Specifications

Exhibit 4 – Milestone Schedule

Exhibit 5 – Key Personnel and Contractor’s Representative

Exhibit 6A – Contractor Acquired Permits

Exhibit 6B – Owner Acquired Permits

Exhibit 7 – Contractor Submittals

Exhibit 8A – Form of Monthly Progress Report

Exhibit 8B – Form of Weekly Progress Report

Exhibit 9 – Schedule of Values

Exhibit 10 – Form of Application for Payment

Exhibit 11 – Form of Contractor Performance Security

Exhibit 12A – Form of Conditional Partial Lien Release

Exhibit 12B – Form of Conditional Final Lien Release

Exhibit 13 – Insurance Requirements

Exhibit 14A – Reserved

Exhibit 14B – Facility Power Plant Controller Acceptance Test

Exhibit 14C – Capacity Test

Exhibit 14D – Guaranteed Capacity and Performance Criteria

Exhibit 15A – Form of Availability Test Certificate

Exhibit 15B – Form of Capacity Test Certificate

Exhibit 16 – Disputed Change Order Methodology

Exhibit 17 – Reserved

Exhibit 18 – Form of Substantial Completion Certificate

Exhibit 19 – Form of Final Completion Certificate

Exhibit 20 – Site Safety Plan

Exhibit 21 – Form of Quality Assurance Plan

Exhibit 22 – Qualified Major Subcontractors

Exhibit 23 – EITC and Depreciation Exhibit

Exhibit 24 – Reserved

Exhibit 25 Functional Test

Exhibit 26 – Reserved

Exhibit 27 – Spare Parts

Exhibit 28 – FERC Electrical Plant Chart of Accounts

Exhibit 29 – Owner’s Code of Business Conduct

Exhibit 30 – Major Facility Equipment Warranties

ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT

This ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT, dated as of [\_\_] (this “Agreement”), is entered into by and between [\_\_\_\_\_\_\_\_\_\_\_], a [\_\_\_\_\_\_\_\_\_\_] doing business as (“Owner”), and [\_\_\_\_\_\_\_], a [\_\_\_\_\_] formed under the laws of the State of [\_\_\_\_\_\_\_] (“Contractor”). Owner and Contractor are each hereinafter sometimes referred to as a “Party” and collectively as the “Parties.”

RECITALS

**WHEREAS**, Owner intends to develop a [\_\_\_] MW AC at the Delivery Point (approximately [\_\_\_] MW DC nameplate capacity) solar photovoltaic power plant (the “Facility”)[[3]](#footnote-3) located in [\_\_\_\_\_], Utah, as more fully described in and including all of the components set forth in Exhibit 1, Exhibit 3, Exhibit 3A, Exhibit 3B, Exhibit 3C, Exhibit 3D, and Exhibit 3E (collectively, the “Technical Specifications”), on the real property more fully described in Exhibit 2 (the “Site”); and

**WHEREAS**, Contractor designs, engineers, supplies, constructs and installs photovoltaic systems such as the Facility on a turn-key basis, to make available electrical energy to a transmission interconnection facility; and

**WHEREAS**, Owner desires to engage Contractor to design, engineer, supply, construct, install, test and commission the Facility at the Site and perform all other Work under this Agreement and Contractor desires to carry out such work or services, all as further defined by and in accordance with the terms and conditions set forth in this Agreement; and

**WHEREAS**, Owner is an Affiliate of [\_\_\_\_\_\_\_\_\_\_\_\_\_\_], a [\_\_\_\_\_\_\_\_\_\_\_\_\_] [limited liability company] (“Project Company”), after the Full Notice to Proceed, Owner will assign all of its rights, title and interest in, and obligations under, the Agreement to the Project Company and the Project Company will accept such assignment of all such rights, title, and interest and assumes all such obligations of Owner under the Agreement in each case so that the Project Company, as of the effective date of such assignment, is the Owner under the Agreement; and

**WHEREAS**, after the Full Notice to Proceed, the Project Company as Owner may assign all of its rights, title and interest in, and obligations under, the Agreement to a prospective or actual purchaser of the Project assets and such prospective or actual purchaser will accept such assignment of all such rights, title, and interest and assumes all such obligations of Owner (except for payment obligations) under the Agreement in each case so that such prospective or actual purchaser of the Project assets, as of the effective date of such assignment, is the Owner under the Agreement.

**NOW THEREFORE**, in consideration of the mutual promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. CONTRACT INTERPRETATION AND EFFECTIVENESS
   1. **Rules of Interpretation**. Unless the context requires otherwise or unless otherwise stated: (a) the singular includes the plural and vice versa, (b) terms defined in a given number, tense or form shall have the corresponding meanings when used with initial capitals in another number, tense or form, (c) words in the Exhibits which have well known technical or construction industry meanings are used in accordance with such recognized meanings, (d) the words “include”, “includes” and “including” shall be deemed to be followed by the words “without limitation” and unless otherwise specified shall not be deemed limited by the specific enumeration of items, (e) references to “Sections”, “Schedules” and “Exhibits” are to sections, schedules and exhibits to this Agreement, (f) the words “herein”, “hereof”, “hereto”, “hereinafter” “hereunder” and other terms of like import refer to this Agreement as a whole and not to any particular section or subsection of this Agreement, (g) a reference to a Person in this Agreement or any other agreement or document shall include such Person’s successors and permitted assigns, (h) references to this Agreement include a reference to all schedules and exhibits hereto, as the same may be amended, modified, supplemented or replaced from time to time, (i) references to Applicable Law or Applicable Permit are references to the Applicable Law or Applicable Permit, as applicable, as now or at any time hereafter may be in effect, together with all amendments and supplements thereto and any Applicable Law or Applicable Permit substituted for or superseding such statute or regulation, (j) without adversely impacting the rights of either Party with respect to the amendment, restatement or replacement of any agreement under which such Party shall be liable hereunder, references to agreements, certificates, documents and other legal instruments include all subsequent amendments thereto, and changes to, and restatements or replacements of, such agreements, certificates or instruments that are duly entered into and effective against the parties thereto or their successors and permitted assigns, (k) a reference to a Governmental Authority includes an entity or officer that or who succeeds to substantially the same functions as performed by such Governmental Authority as of the date hereof, (l) “shall” and “will” mean “must” and have equal force and effect and express an obligation, (m) this Agreement will be construed as if drafted jointly by the Parties and no presumption or burden of proof will arise favoring or disfavoring any Party by virtue of the authorship of any provision in this Agreement, (n) the word “or” in this Agreement is disjunctive but not necessarily exclusive, (o) references in this Agreement to time periods in terms of a certain number of Days mean calendar Days unless expressly stated herein to be Business Days, (p) headings used in this Agreement are for ease of reference only and shall not be taken into account in the interpretation or construction of the provisions of this Agreement, and (q) the words “dollar”, “dollars” or “money” and the symbol “$” each mean United States Dollars.
   2. **Defined Terms**. Unless otherwise stated in this Agreement, capitalized terms used in this Agreement have the following meanings:

“AAA” means the American Arbitration Association.

“Abandons” means, other than in the event of a Force Majeure Event or an Owner-Caused Delay, that Contractor abandons, ceases to perform the Work or leaves the Site for a period longer than thirty (30) consecutive Days.

“AC” means alternating current.

“Actual Delay” has the meaning set forth in Section 10.3.

“Affiliate” means, when used with reference to a specified Person, any Person directly or indirectly Controlling, Controlled by, or under common Control with such specified Person. Notwithstanding the foregoing, for purposes of this Agreement (i) Transmission Provider shall not be deemed to be an Affiliate of Owner; and (ii) Affiliates of Owner shall extend only to Berkshire Hathaway Energy Company and such subsidiaries it directly or indirectly Controls.

“Agreement” has the meaning set forth in the preamble, including all Exhibits hereto, as the same may be modified, amended or supplemented from time to time in accordance with the terms hereof.

“Applicable Codes” means codes, standards or criteria, such as the National Electric Code and those codes, standards or criteria promulgated by the American Society of Mechanical Engineers, Underwriters Laboratories and Institute of Electrical and Electronics Engineers, and other standards institutions which are generally recognized as applicable to the Work or the Facility.

“Applicable Laws” means any constitutional provision, law, statute, rule, regulation, ordinance, treaty, order, decree, judgment, decision, certificate, injunction, registration, license, permit, authorization, guideline, governmental approval, consent or requirement of any Governmental Authority, as construed from time to time by such Governmental Authority, including Environmental Laws.

“Applicable Permits” means each and every national, regional and local license, authorization, consent, ruling, exemption, variance, order, judgment, certification, filing, recording, permit or other approval with or of any Governmental Authority, including each and every environmental, construction or operating permit and any agreement, consent or approval from or with any other Person that is required by any Applicable Law or that is otherwise necessary for the performance of, in connection with, or related to, the Work or the design, construction or operation of the Facility, including those set forth on Exhibit 6A and Exhibit 6B.

“Applicable Tax Basis” means the actual tax basis (or as applicable the actual EITC eligible tax basis) of the Facility as reasonably determined by Owner consistent with the values reflected in Exhibit 23.

“Application for Payment” means an application for payment in the form attached hereto as Exhibit 10.

“Arbitration Rules” has the meaning set forth in Section 28.2(c).

“Availability Completion” has the meaning set forth in Section 15.4.[[4]](#footnote-4)

“Availability Completion Date” has the meaning set forth in Section 15.4.

“Availability Test” means the pre functional test of the Facility as described in Exhibit 25.

“Availability Test Certificate” means the certificate in the form of Exhibit 15A to be issued by Contractor after completion of the Availability Test.

“BCP” has the meaning set forth in Section 25.1.

“Business Day” means a Day, other than a Saturday or Sunday or a public holiday, on which banks are generally open for business in the State of Utah.

“Capacity Shortfall” means the difference between the Guaranteed Capacity and the Facility Capacity.

“Capacity Test” means the test and commissioning of the Facility as described in Exhibit 14C.

“Capacity Test Certificate” means the certificate in the form of Exhibit 15B to be issued by Contractor after completion of the Capacity Test.

“Cancellation Cost Cap” means the maximum applicable payment amount as set forth in the Cancellation Cost Cap column of the Schedule of Values that is due to Contractor in any given period should Owner terminate this Contract for convenience pursuant to Section 20.7 or should Contractor terminate this Contract pursuant to Section 20.4(b).

“Cash Flow Curve” means the periodic cash flow curve set forth in the Schedule of Values that constitutes the cumulative maximum payment obligation Owner will have to Contractor under this Agreement for any given period during the performance of the Work.

“Certificate of Final Completion” means a certificate delivered by Contractor pursuant to Section 18.2 and substantially in the form attached as Exhibit 19.

“Certificate of Substantial Completion” means a certificate delivered by Contractor pursuant to Section 16.3 and substantially in the form attached as Exhibit 18.

“Change Order” means a written document signed by Owner and Contractor in accordance with Article 10, authorizing an addition, deletion or revision to the Work, an adjustment of the Contract Price or Construction Schedule, and/or any other obligation of Owner or Contractor under this Agreement, which document is issued after execution of this Agreement.

“Claim Notice” has the meaning set forth in Section 24.5.

“Code” means the Internal Revenue Code of 1986, as amended.

“Confidential Information” has the meaning set forth in Section 25.1.

“Construction Equipment” means all equipment, machinery, tools, consumables, temporary structures or other items as may be required for Contractor to complete the Work but which will not become a permanent part of the Facility.

“Construction Schedule” means the critical path method construction schedule based on and consistent with the provisions set forth in Exhibit 4 for the progression of the Work by Contractor (including the achievement of the Guaranteed Substantial Completion Date and the Guaranteed Final Completion Date), created in accordance with Section 3.11 and as updated from time to time pursuant to the terms of this Agreement.

“Construction Start Date” means the date on which Contractor begins construction of the Facility as defined under the Code.

“Contract Documents” means this Agreement, the exhibits and schedules hereto, and the Contractor Submittals.

“Contract Price” means the sum of [\_\_\_\_\_\_\_\_\_\_\_\_\_] ($\_\_\_\_\_\_\_\_\_\_), as the same may be modified from time to time in accordance with the terms of this Agreement.

“Contractor” has the meaning set forth in the preamble.

“Contractor Acquired Permits” means those Applicable Permits to be acquired by Contractor and designated on Exhibit 6A and any other Applicable Permits, other than Owner Acquired Permits.

“Contractor Critical Path Items” means those items that are designated as “Contractor Critical Path Items” in the Construction Schedule.

“Contractor Event of Default” has the meaning set forth in Section 20.1.

“Contractor Lien” means any right of retention, mortgage, pledge, assessment, security interest, lease, advance claim, levy, claim, lien, charge or encumbrance on the Work, the Facility Equipment, the Facility, the Site or any part thereof directly or indirectly created, incurred, assumed or suffered to be created by any Contractor Party (other than in accordance with any other Project Transaction Document), any Subcontractor, or any of their respective employees, laborers or materialmen.

“Contractor Party” or “Contractor Parties” means each of Contractor, Contractor’s Guarantor and any of their respective present and future Affiliates and their respective directors, officers, employees, shareholders, agents, representatives, successors and permitted assigns.

“Contractor Performance Security” means a corporate guaranty from Contractor’s Guarantor in the form attached hereto as Exhibit 11.[[5]](#footnote-5)

“Contractor Submittals” means the drawings, specifications, plans, calculations, model, designs and other deliverables described in Exhibit 7.

“Contractor’s Guarantor” means [\_\_\_\_\_].

“Contractor’s Insurance” has the meaning set forth in Section 23.1, as further described in Part I of Exhibit 13.

“Contractor’s Representative” has the meaning set forth in Section 5.2.

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

“Credit Rating” of a Person means the credit rating then assigned by a Relevant Rating Agency to the long-term, senior, unsecured, non-credit-enhanced indebtedness of that Person.

“Day” means a calendar day unless it is specified that it means a Business Day.

“DC” means direct current.

“Defect Warranty” has the meaning given in Section 21.3(a).

“Defect Warranty Period” has the meaning given in Section 21.4(a).

“Defective” means, unless otherwise defined elsewhere in this Agreement as to a specific aspect of the Work, any designs, engineering, Equipment, installation or other Work which, in Owner’s reasonable judgment:

1. does not conform to Exhibit 1, the Technical Specifications, or the Contractor Submittals that have been reviewed by Owner;
2. is of improper or inferior workmanship or quality;
3. includes a Serial Defect; or
4. is inconsistent with Prudent Utility Practice.

“Delay Response Plan” has the meaning set forth in Section 3.22.

“Delivery Point” means [\_\_\_\_\_].

“Depreciation Benefit” means the most accelerated depreciation available under Sections 167 and 168 of the Code, assuming the utilization of the shortest available recovery period, the most accelerated depreciation method available, the half-year convention and a full first taxable year (however, in no event shall the depreciation be more accelerated than five (5) year two hundred percent (200%) declining balance depreciation (without application of Section 168(k) of the Code or any successor thereto)). The recovery periods applicable to the Facility shall be determined using the depreciation class percentage allocations derived from costs by class divided by the total costs for the Facility listed on Exhibit 23. In determining the Depreciation Benefit, a thirty-five percent (35%)[[6]](#footnote-6) tax rate shall be applied. Further, in accordance with Section 50(c) of the Code tax basis for purposes of calculating depreciation shall be deemed to be reduced by fifty percent (50%) of the Maximum EITCs.

“Design Warranty” has the meaning given in Section 21.3(b).

“Design Warranty Period” has the meaning given in Section 21.4(b).

“Direct Costs” means the actual and substantiated costs (without mark-up) that are reasonably incurred by Contractor as a result of the event requiring the Change Order for the following items: (a) payroll wages paid for labor in the direct employ of Contractor at the Site; (b) cost of materials and permanent equipment; (c) payments made by Contractor to Subcontractors (such payments excluding any mark-ups by Contractor); (d) rental charges of machinery and equipment for the Work; (e) permit fees; (f) costs of mobilization and/or demobilization; (g) associated standard indirect field costs; and (h) associated engineering costs, if any, directly related to Work implemented under the Change Order. Direct Costs exclude any home-office, overhead or other indirect costs.

“Disclosing Party” has the meaning set forth in Section 25.1.

“Dispute” has the meaning set forth in Section 28.1.

“Dispute Initiator” has the meaning set forth in Section 28.2(a).

“Documentation” shall mean all Contractor Submittals, design documents, Monthly Progress Reports, Weekly Progress Reports engineering change notices (ECNs), requests for information (RFIs), as-built drawings, system turnover packages, isometrics, specifications (including the Technical Specifications), studies, system descriptions, lists, diagrams, procedures, instructions, reports, test results, calculations, manuals, and project schedules required by or referenced in the Technical Specifications or elsewhere in this Agreement, including all electronically originated and stored information and other data and information originated by Contractor or any Subcontractor in connection with Contractor’s obligations under this Agreement.

“Dollar” and “$” means the lawful currency of the United States of America.

“Effective Date” has the meaning set forth in Section 1.9.

“EITC” means the investment tax credit for energy property described in Section 48(a)(3)(A)(i) of the Code.

“EITC Applicable Percentage” means, for any period, the federal investment tax credit (or successor thereto) percentage for utility scale solar available under then Applicable Law.

“EITC Liquidated Damages” the meaning set forth in Section 17.6(b).

“EITC Timing Determinate” means the time value difference between when the Maximum EITCs were contemplated to be reflected in Owner’s estimated tax and when the EITCs are ultimately reflected in Owner’s estimated tax payments. It is determined assuming Owner will pay its estimated taxes based on the annualized income installment method of Section 6655(e)(2) of the Code (using the annualization periods set forth in Sections 6655(e)(2)(A) and (B) of the Code), and using as the interest rate the Wall Street Journal “prime rate” as of the first Business Day preceding the date of such first estimated tax installment payment.

“Emergency” means an event occurring at the Site or any adjoining property that poses actual or imminent risk of serious personal injury to any Person or material physical damage to the Facility requiring immediate preventative or remedial action, as reasonably determined by the Party assessing the subject event.

“Environmental Laws”means any federal, Indian tribe (including any agency, council or political subdivision thereof), state, or local law, regulation, ordinance, standard, guidance, or order pertaining to the protection of the environment and human health, including the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. 6901, et seq.; the Toxic Substances Control Act, 15 U.S.C. 2601, et seq.; the Clean Air Act, 42 U.S.C. 7401, et seq.; the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq.; the Occupational Safety and Health Act, 29 U.S.C. 651 et seq.; and any other law that governs: (a) the existence, removal, or remediation of Hazardous Materials on real property; (b) the emission, discharge, release, or control of Hazardous Materials into or in the environment; or (c) the use, generation, handling, transport, treatment, storage, disposal, or recovery of Hazardous Materials.

“Equipment” means, collectively, Construction Equipment and Facility Equipment.

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

“Expected EITCs” means, as of any determination date, the amount of EITCs available for the Facility using the EITC Applicable Percentage multiplied by the Facility’s Applicable Tax Basis. Further, it shall be assumed that Substantial Completion is equivalent to Placed in Service for the Facility (assuming the Construction Start Date occurred on or prior to the Guaranteed Construction Start Date.)

“Facility” has the meaning set forth in the Recitals.

“Facility Capacity” means, with respect to the Facility, the Final Test Results pursuant to the Capacity Test.

“Facility Delay Liquidated Damages” means an amount equal to: (a) with respect to the first (1st) through and including the sixtieth (60th) day subsequent to the Guaranteed Substantial Completion Date, [\_\_\_\_\_] U.S. Dollars ($[\_\_\_\_\_]) per MW of Guaranteed Capacity per Day; (b) with respect to the sixty-first (61st) through and including the one-hundred-twentieth day subsequent to the Guaranteed Substantial Completion Date, [\_\_\_\_\_] U.S. Dollars ($[\_\_\_\_\_\_]) per MW of Guaranteed Capacity per Day; and (c) with respect to the one-hundred-twenty-first (121st) day subsequent to the Guaranteed Substantial Completion Date and thereafter, [\_\_\_\_\_] U.S. Dollars ($[\_\_\_\_\_]) per MW of Guaranteed Capacity per Day.[[7]](#footnote-7)

“Facility Equipment” means the modules, inverters, trackers and all other equipment, fixtures, materials, supplies, devices, machinery, tools, parts, components, instruments, appliances and other items that are required to complete the Facility and will become a permanent part of the Facility, as well as Spare Parts, whether provided by Contractor or any Subcontractor, and all special tools required to operate and maintain the Facility.

“Facility Tests” means, collectively, the Availability Test, the Functional Test, the Power Plant Controller Test, and the Capacity Test.

“FERC Electrical Plant Chart of Accounts” shall have the meaning set forth in Exhibit 28.

“FERC Unit of Plant Cost Allocation Book” shall have the meaning set forth in Exhibit 28.

“Final Capacity Liquidated Damages” has the meaning set forth in Section 17.2(a).

“Final Completion” means satisfaction or waiver of all of the conditions for completion of the Facility as set forth in Section 18.1.

“Final Completion Date” means the actual date on which the Facility has achieved Final Completion in accordance with Section 18.2.

“Final Test Results” means (i) with respect to the Availability Test, the final test results determined pursuant to the pre functional test set forth in Exhibit 25 and certified by Contractor pursuant to Section 15.4, (ii) with respect to the Power Plant Controller Test pursuant to Exhibit 14B, and (iii) with respect to the Capacity Test, the final test determined pursuant to Exhibit 14C and certified by Contractor pursuant to Section 15.4.

“Financing Parties” means any and all lenders, security holders, note or bond holders, lessors, lien holders, investors, equity providers, holders of indentures, security agreements, mortgages, deeds of trust, pledge agreements and providers of swap agreements, interest rate hedging agreements, letters of credit and other documents evidencing, securing or otherwise relating to the construction, interim or long-term financing or refinancing of the Facility or a portfolio of projects including the Facility, and their successors and permitted assigns, and any trustees or agents acting on their behalf. The term “Financing Party” includes, for the avoidance of doubt, any Person or Persons that owns the Facility and leases the Facility to Owner or an Affiliate of Owner, as applicable, under a lease, sale-leaseback or synthetic lease structure.

“Force Majeure Event” means, when used in connection with the performance of a Party’s obligations under this Agreement, any act, condition or event occurring after the Effective Date which renders said Party unable to perform or comply with its obligations under this Agreement, but only if and to the extent (a) such event is not within the reasonable control, directly or indirectly, of the Party (or in the case of Contractor, any Affiliate thereof) seeking to have its performance obligation(s) excused thereby, (b) the Party seeking to have its performance obligation(s) excused thereby (or in the case of Contractor, any Affiliate thereof) has taken all reasonable precautions and measures in order to prevent or avoid such event or mitigate the effect thereof on its ability to perform its obligations under this Agreement and which by the exercise of due diligence such Party could not reasonably have been expected to avoid and which by the exercise of due diligence it has been unable to overcome, (c) such event is not the direct or indirect result of the negligence or the failure of, or caused by, the Party seeking to have its performance obligations excused thereby (or in the case of Contractor, any Affiliate thereof) and (d) the Party seeking to have its performance obligations excused thereby (or in the case of Contractor, any Affiliate thereof) had no actual or constructive prior knowledge of such event.

1. Without limiting the meaning of but subject to the preceding sentence, the following events constitute Force Majeure Events to the extent that they render a Party unable to perform or comply with its obligations under this Agreement:

war (whether or not war is declared), hostilities, revolution, rebellion, insurrection against any Governmental Authority, riot, terrorism, acts of a public enemy or other civil disturbance;

acts of God, including storms, floods, lightning, earthquakes, hailstorms, ice storms, tornados, typhoons, hurricanes, landslides, volcanic eruptions, fires, objects striking the earth from space (such as meteorites), or any other naturally occurring event for the location of the Site, or at such location in which Contractor performs the Work or Owner performs its obligations under this Agreement, that impacts the ability of the affected Party to perform its obligations under this Agreement;

sabotage or destruction by a third party (other than any contractor retained by or on behalf of the invoking Party) of plants, facilities and equipment located in the continental United States of America necessary for the performance by the affected Party of its obligations under this Agreement; and

except as set forth in subsections (ii)(C) and (ii)(D) below, industrial action, work stoppage, labor strike, boycott, or labor shortage in the continental United States of America.

1. Notwithstanding anything to the contrary in this definition, the term Force Majeure Event shall not be based on or include any of the following:

economic hardship of either Party;

Owner’s inability to pay;

a strike, work stoppage or labor dispute limited only to any one or more of Owner, Owner’s Affiliates, Contractor or subcontractors thereof, or any other third party employed by a Party to work on the Facility including strikes of Contractor or Subcontractor personnel at the Site or at Contractor’s or Subcontractor’s facilities;

any labor shortages involving Contractor or a Subcontractor;

Contractor’s compliance or inability to comply with the Project Labor Agreement, except if Contractor’s inability to comply is caused solely by a Force Majeure Event of the specific type described in subsection (i)(D) above;

Site Conditions, except if Contractor’s inability to comply is caused solely by a Force Majeure Event of the specific type described in subsection (i)(B) above;

a Party’s inability to obtain sufficient labor, materials, equipment or other resources to build the Facility and perform the Work, except if such Party’s inability to obtain sufficient labor, materials, equipment or other resources to build the Facility and perform the Work is caused solely by a Force Majeure Event of the specific type described in any of subsections (i)(A) through (i)(D) above;

the lack of sun or other fuel source of an inherently intermittent nature, except to the extent it is of the specific type described in subsection (i)(B) above;

reductions in generation from the Facility resulting from ordinary wear and tear, deferred maintenance or operator error;

curtailment or reduction in deliveries at the direction of a Transmission Provider;

a Party’s inability to obtain permits or approvals of any type for the construction, operation or maintenance of the Facility and necessary interconnection agreements or approvals, including, without limitation, approvals by any Governmental Authority that are subject to pre-decisional analysis under the federal National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d;

an Equipment failure, except if such Equipment failure is caused solely by a Force Majeure Event of the specific type described in any of subsections (i)(A) through (i)(D) above;

utility interruptions;

transportation or shipping accidents; or

unavailability of preferred shipping methods.

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

“Functional Test” means the test to determine the functionality of the Facility and equipment and components incorporated therein, as described in Exhibit 25.

“Governmental Authority” means any national, federal, Indian tribe (including any agency, council or political subdivision thereof), state, regional, province, town, city, county, local or municipal government, whether domestic or foreign or other administrative, regulatory or judicial body of any of the foregoing and all agencies, authorities, departments, instrumentalities, courts and other authorities lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, or other subdivisions of any of the foregoing. For clarity, each of the Western Electricity Coordinating Council and the UPSC shall be a Governmental Authority.

“Guaranteed Capacity” means, with respect to the Facility, the MW values set forth in Exhibit 14D.

“Guaranteed Construction Start Date” means [\_\_\_\_\_].[[8]](#footnote-8)

“Guaranteed Date” means each of the Guaranteed Construction Start Date, Guaranteed Substantial Completion Date and the Guaranteed Final Completion Date.

“Guaranteed Final Completion Date” has the meaning set forth in Section 18.1, as may be extended only in accordance with the express terms of this Agreement.

“Guaranteed Substantial Completion Date” means the corresponding date set forth in Exhibit 4.

“Hazardous Materials” means (a) any regulated substance, hazardous constituent, hazardous materials, hazardous wastes, hazardous substances, toxic wastes, radioactive substance, contaminant, pollutant, toxic pollutant, pesticide, solid wastes, and toxic substances as those or similar terms are defined under any Environmental Laws; (b) any friable asbestos or friable asbestos-containing material; (c) polychlorinated biphenyls (“PCBs”), or PCB-containing materials or fluids; (d) any petroleum, petroleum hydrocarbons, petroleum products, crude oil and any fractions or derivatives thereof; and (e) any other hazardous, radioactive, toxic or noxious substance, material, pollutant, or contaminant that, whether by its nature or its use, is subject to regulation or giving rise to liability under any Environmental Laws.

“Indemnifying Party” means, with respect to an indemnification obligation under this Agreement, the Party providing such indemnification.

“Indemnitee” means an Owner Party or a Contractor Party, as the context may require, being indemnified pursuant to Section 24.5.

“Independent Engineer” has the meaning set forth in Section 31.9.

“Independent Expert” means an independent third-party engineer mutually agreed upon by the Parties.

“Insolvency Event” means, with respect to a Person, such Person becomes insolvent, institutes or has instituted against it a case under Title 11 of the United States Code or is unable to pay its debts as they mature or makes a general assignment for the benefit of its creditors, or a receiver is appointed for the benefit of its creditors or on account of its insolvency.

“Intellectual Property Claim” means an allegation, claim or legal action asserted by a third party against an Owner Party alleging unauthorized use, disclosure, misappropriation, infringement, or other violation of such third party’s Intellectual Property Rights arising from (a) Owner Party’s use of the Licensed Technology to the extent used in accordance with the license granted pursuant to Section 14.1 or (b) Contractor’s performance (or that of its Affiliates or Subcontractors) under this Agreement asserted against Owner that (i) concerns any Facility Equipment or other goods, materials, supplies, items or services provided by Contractor (or its Affiliates or Subcontractors) under this Agreement, (ii) is based upon or arises out of the performance of the Work by Contractor (or its Affiliates or Subcontractors), including the use of any tools or other implements of construction by Contractor (or its Affiliates or Subcontractors) or (iii) is based upon or arises out of the design or construction of any item by Contractor (or its Affiliates or Subcontractors) under this Agreement or the use, or operation, of any item according to directions embodied in Contractor’s (or its Affiliates’ or Subcontractors’) Contractor Submittals, or any revision thereof, prepared or provided by Contractor.

“Intellectual Property Rights” means all intellectual property rights throughout the world, including all rights in patents and inventions (whether or not patentable); registered and unregistered copyrights, trademarks, database rights, semiconductor mask work rights; proprietary rights, trade secrets, know-how and confidential information.

“Interconnection Agreement” means [\_\_\_\_\_].

“IRS” means the Internal Revenue Service.

“Key Personnel” has the meaning set forth in Section 5.2.

“Licensed Technology” has the meaning set forth in Section 14.1.

“Liquidated Damages” means, collectively, the Facility Delay Liquidated Damages and the Final Capacity Liquidated Damages and the EITC Liquidated Damages.

“Losses” means any and all claims, actions, suits, proceedings, losses, liabilities, penalties, damages, costs or expenses (including attorneys’ fees and disbursements) of any kind.

“Major Facility Equipment Warranties” has the meaning set forth in Section 21.6(c)(i).

“Major Subcontract” means a Subcontract with a Major Subcontractor.

“Major Subcontractor” means (a) a Supplier of the distribution transformers, step-up transformers, inverters, racking and Modules for the Facility, (b) Contractor’s electrical installation Subcontractors, Site preparation/grading Subcontractors and Facility substation design and construction Subcontractors and (c) any other Subcontractor or Supplier for the Facility with Subcontracts having an aggregate value in excess of Two Hundred Thousand Dollars ($200,000) for performance of any part of the Work.

“Maximum EITCs” means the maximum amount of EITCs for which the Facility could have qualified, assuming (i) the Construction Start Date occurred on or prior to the Guaranteed Construction Start Date[[9]](#footnote-9) (ii) that the Facility achieved Substantial Completion by its Guaranteed Substantial Completion Date (as in effect on the Effective Date and without giving effect to any extensions thereof under this Agreement) and (iii) Substantial Completion is equivalent to Placed in Service (assuming construction began as set forth in subsection (i) above).

“Milestone” means any milestone for the Work listed on Exhibit 4.

“Milestone Schedule” means the schedule attached hereto as Exhibit 4.

“Minimum Capacity Level” means ninety-seven percent (97%) of the Guaranteed Capacity of the Facility, calculated in accordance with Exhibit 14D.

“Minimum Credit Rating” of a Person means that the Credit Rating of that Person is at least (a) BBB- (or its equivalent) as determined by Standard & Poor’s and (b) Baa3 (or its equivalent) as determined by Moody’s.

“Modules” means solar photovoltaic modules with an expected electrical output of [\_\_\_] watts of electric power (expressed as DC) as determined under the Standard Test Conditions.

“Monthly Progress Report” means a progress report prepared by Contractor setting forth the detail required in Exhibit 8A.

“MW” means 1,000,000 watts of electric power (expressed as AC).

“Notice of Dispute” has the meaning set forth in Section 28.1.

“Operator” means [\_\_\_\_\_\_\_\_].

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

“Owner Acquired Permits” means those Applicable Permits to be acquired by Owner, as designated on Exhibit 6B.

“Owner-Caused Delay” means (a) any Owner suspension of the Work designated as an Owned-Caused Delay pursuant to Section 19.1 or (b) a failure by Owner (which failure is not otherwise excused by a Force Majeure Event or otherwise in accordance with this Agreement) to perform any of its material obligations under this Agreement including any failure by Owner to timely approve Contractor’s Submittals delivered in connection with this Agreement on or prior to the applicable date as provided in this Agreement (unless a deemed response to such notice is provided for hereunder); provided, however, that any actions by Transmission Provider shall in no event constitute an Owner-Caused Delay.

“Owner Event of Default” has the meaning set forth in Section 20.3.

“Owner Inspection Parties” has the meaning set forth in Section 6.1.

“Owner Party” or “Owner Parties” means Owner and its present and future Affiliates and their respective directors, officers, employees, shareholders, agents, representatives, successors and permitted assigns. Notwithstanding the foregoing, for purposes of this Agreement, Transmission Provider shall not be deemed to be an Owner Party.

“Owner Taxes” means all Utah sales and use taxes with regard to any tangible personal property purchased or leased for, used in the permanent construction of, or incorporated into the Facility.

“Owner’s Code of Business Conduct” means the Owner’s Code of Business Conduct set forth on Exhibit 29.

“Owner’s Engineer” means any engineering firm or firms or other engineer or engineers selected and designated by Owner, which may include an employee or employees of an Owner Party.

“Owner’s Insurance” has the meaning set forth in Section 23.2, as further described in Part II of Exhibit 13.

“Owner’s Representative” means the individual designated by Owner in accordance with Section 5.1.

“Party” and “Parties” have the meanings set forth in the preamble.

“Performance Criteria” means the relevant performance criteria for the Facility identified in Exhibit 14D.

“Permit Fees” means the actual costs payable to a Governmental Authority and all other reasonable third-party costs and expenses incurred in connection with the application for and issuance of an Applicable Permit.

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

“Placed in Service” means “placed in service” for purposes of Sections 45, 48 and 168 of the Code.

“Progress Payment” has the meaning set forth in Section 8.3.

“Project Labor Agreement” means that certain Project Labor Agreement among Contractor and [\_\_\_\_\_\_\_].[[10]](#footnote-10)

“Project Transaction Documents” means this Agreement, the Contractor Performance Security, and any other agreements between Contractor or any Affiliate of Contractor and Owner relating to the engineering, procurement, construction, development, acquisition, ownership, operation or maintenance of the Facility.[[11]](#footnote-11)

“Proposed Punch List” has the meaning set forth in Section 16.4(a).

“Prudent Utility Practice” means those standards of design, engineering, construction, workmanship, care and diligence and those practices, methods and acts that would be implemented and normally practiced or followed by prudent solar engineering, construction, and installation firms in the design, engineering, procurement, installation, construction, testing and commissioning (and operation associated therewith) of rate-based, utility-scale photovoltaic facilities in the Western United States and otherwise performing services of a similar nature in the jurisdiction in which the Work will be performed and in accordance with which practices, methods and acts, in the exercise of prudent and responsible professional judgment by those experienced in the industry in light of the facts known (or that reasonably should have been known) at the time the decision was made, could reasonably have been expected to accomplish the desired result consistent with good business practices, good engineering design practices, safety, reliability, Applicable Codes, Applicable Laws, and Applicable Permits. Solely with respect to Section 21.5(a), “Prudent Utility Practice” shall mean those standards of care and diligence normally practiced by entities that operate and maintain rate-based, utility-scale photovoltaic power plants.

“Punch List” has the meaning set forth in Section 16.4(a).

“Punch List Amount” means the cost or estimated cost reasonably determined by Owner to complete any Punch List Item in connection with the approval of the Proposed Punch List or Proposed Punch List in accordance with Section 16.4, as applicable.

“Punch List Estimate” means Contractor’s cost estimate for completing the Punch List Items.

“Punch List Holdback” means an amount equal to one hundred fifty percent (150%) of the Punch List Amount for each Punch List Item.

“Punch List Items” means those non-critical finishing items with respect to the Facility (a) that consistent with Prudent Utility Practice do not affect the operability, reliability, safety, or mechanical, civil or electrical integrity of the Facility, (b) that Owner or Contractor identifies as requiring completion or containing non-material defects, and (c) the completion of which will not adversely affect the performance of the Facility, so long as the Facility is nonetheless ready for commercial operations in a safe and continuous manner and in accordance with Applicable Law and Applicable Permits.

“Real Property Rights” means all rights in or to real property necessary to perform the Work and to develop, construct, complete, operate, maintain and access the Facility and the Site, including those rights set forth in deeds, leases, option agreements, co-tenancy and shared facility agreements, Applicable Permits, easements, licenses, private rights-of-way agreements and crossing agreements that exist as of the Effective Date, including as set forth on Exhibit 2.

“Receiving Party” has the meaning set forth in Section 25.1.

“Release” means the release, threatened release, discharge, deposit, injection, dumping, spilling, leaking or placing of any Hazardous Material into the environment so that such Hazardous Material or any constituent thereof may enter the environment, or be emitted into the air or discharged into any waters, including ground waters under Applicable Law and Applicable Permits.

“Relevant Rating Agency” means Moody’s or S&P.

“Required Manuals” means the manuals (including any Spare Parts manuals), instructions and training aids, whether created by Contractor, Subcontractor or Supplier, reasonably necessary for the safe and efficient operation, maintenance, curtailment, start-up and shut down of the Facility and Facility Equipment as reasonably determined by Owner or Operator, including those identified in Exhibit 7.

“Retainage” means an amount equal to ten percent (10%) of the amount payable pursuant to each Progress Payment (other than the payment to be made in connection with Final Completion).

“SCADA System” means the supervisory control and data acquisition system installed by Contractor in the Facility, as more specifically described in the Technical Specifications under “SCADA System”.

“Schedule of Values” means the schedule of values attached hereto as Exhibit 9 which allocates the Contract Price to different separately identifiable portions of the Work and includes the Cancellation Cost Cap and Cash Flow Curve.

“Scope of Work” means the scope of the work to be performed by Contractor under this Agreement, as further described in the Exhibits.

“Serial Defect” means any failure or non-conformance has occurred with respect to five percent (5%) or more units of any particular item of Facility Equipment, and such failure or non-conformance could reasonably be expected to result from the same cause.

“Site” has the meaning set forth in the Recitals.

“Site Condition” has the meaning set forth in Section 3.25.

“Site Safety Plan” means the site safety plan attached hereto as Exhibit 20.

“Spare Parts” means the spare parts provided by Contractor to Owner in accordance with Exhibit 27.

“Standard Test Conditions” has the meaning set forth in Exhibit 14C.

“Start-up and Commissioning” means the energization and Functional Testing of the Facility, including verifying completeness and readiness for operations and testing of the Facility.

“Subcontract” means any purchase order, agreement or subcontract with a Subcontractor.

“Subcontractors” means any Person (including a Supplier) that, directly or indirectly, and of any tier (other than Contractor but including any Affiliate of Contractor) supplies any items or performs any portion of the Work in furtherance of Contractor’s obligations under this Agreement.

“Substantial Completion” has the meaning set forth in Section 16.2.

“Substantial Completion Date” has the meaning set forth in Section 16.3.

“Supplier” means any Equipment supplier with which Contractor or Subcontractor contracts in furtherance of Contractor’s obligations under this Agreement.

“Survival Period” has the meaning set forth in Section 24.7.

“Taxes” means any and all taxes, charges, duties, imposts, levies and withholdings imposed by any Governmental Authority, including sales tax, use tax, property tax, transfer tax, income tax, withholding taxes, corporation tax, franchise taxes, margin tax, capital gains tax, capital transfer tax, inheritance tax, value added tax, customs duties, capital duty, excise duties, betterment levy, stamp duty, stamp duty reserve tax, national insurance, social security or other similar contributions, and any interest, penalty, fine or other amount due in connection therewith.

“Technical Dispute” has the meaning set forth in Section 28.2(a).

“Technical Specifications” has the meaning set forth in the Recitals.

“Termination Payment” means (a) with respect to a termination by Contractor for an Owner Event of Default in accordance with Section 20.5(a) or a termination by Owner for convenience pursuant to Section 20.7, an amount equal to the Direct Costs incurred by Contractor (and not previously paid by Owner) through the effective date of the termination, which amount shall not in the aggregate exceed the Cancellation Cost Cap; and (b) with respect to a termination by Owner for a Contractor Event of Default, such amount determined in accordance with Section 20.5(b).

“Title Company” means [\_\_\_\_\_\_].

“Transmission Provider” means the transmission function of PacifiCorp d/b/a Rocky Mountain Power. Notwithstanding the foregoing, for purposes of this Agreement, Transmission Provider shall not be deemed to be Owner, an Owner Party or an Affiliate of Owner.

“UPSC” has the meaning set forth in Section 25.1.

“UTC” means the Utah Code.

“Warranty” means, as applicable, the Defect Warranty or the Design Warranty.

“Warranty Period” means, as applicable, the Defect Warranty Period or the Design Warranty Period.

“Weekly Progress Report” means a weekly progress report prepared by Contractor setting forth the detail required in Exhibit 8B.

“Work” means all obligations, duties, and responsibilities assigned to or undertaken by Contractor under this Agreement, as further described in Exhibit 1, with respect to the Facility, including any of the foregoing obligations performed prior to the Effective Date, which shall be deemed to be Work performed by Contractor under this Agreement, notwithstanding the fact that it was performed in whole or in part prior to the Effective Date.

* 1. **Order of Precedence**. In the event of a conflict or inconsistency between any of the Contract Documents forming part of this Agreement, the following order of precedence shall apply: (a) any duly executed amendment or Change Order to this Agreement (and between them, the most recently executed amendment or Change Order shall take precedence); (b) this Agreement (to the extent not superseded by a subsequent amendment); (c) Exhibit 1, Exhibit 16, the Technical Specifications, Exhibit 7, Exhibit 20 and Exhibit 21 to this Agreement in the order indicated; (d) the Exhibits to this Agreement not otherwise specified in subclause (c) above; and (e) any other Contract Documents not previously noted.
  2. **Entire Agreement**. This Agreement and the exhibits attached hereto constitute the complete and entire agreement between the Parties with respect to the engineering, procurement, construction, testing and commissioning of the Facility and supersedes any previous communications, negotiations, representations or agreements, whether oral or in writing, with respect to the subject matter addressed herein. NO PRIOR COURSE OF DEALING BETWEEN THE PARTIES SHALL FORM PART OF, OR SHALL BE USED IN THE INTERPRETATION OR CONSTRUCTION OF, THIS AGREEMENT. For the avoidance of doubt, this Agreement shall not supersede the other Project Transaction Documents, which shall remain in full force and effect.
  3. **No Agency**. The Parties are independent contractors. Nothing in this Agreement is intended, or shall be construed, to create any association, joint venture, agency relationship or partnership between the Parties or to impose any such obligation or liability upon either Party (except and solely to the extent expressly provided in this Agreement pursuant to which Owner appoints Contractor as Owner’s agent). Nothing in this Agreement shall be construed to give either Party any right, power or authority to enter into any agreement or undertaking for, or act as an agent or representative of, or otherwise bind, the other Party. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner.
  4. **Invalidity**. Whenever possible, each provision or portion of any provision of this Agreement shall be interpreted in such manner as to be effective and valid under Applicable Law, but, to the extent permitted by law, if for any reason any provision which is not essential to the effectuation of the basic purpose of this Agreement is determined to be invalid, illegal or unenforceable, in whole or in part, such invalidity, illegality or unenforceability shall not affect the validity or enforceability of any other provision of this Agreement or this Agreement as a whole. Any such invalid, illegal or unenforceable portion or provision shall be deemed severed from this Agreement and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain such invalid, illegal or unenforceable portion or provision. If any such provision of this Agreement is so declared invalid, illegal or unenforceable, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity, illegality or unenforceability and to restore this Agreement as near as possible to its original intent and effect (including economic effect).
  5. **Binding Effect**. This Agreement shall be binding upon the Parties hereto and their respective successors, heirs and assigns and shall inure to the benefit of the Parties hereto and their respective permitted successors, heirs and assigns.
  6. **Counterparts**. This Agreement may be signed in counterparts, each of which when executed and delivered shall constitute one and the same instrument. The Parties agree that the delivery of this Agreement may be effected by means of an exchange of facsimile, .pdf or emailed signatures, which shall be deemed to be an original and shall be as effective for all purposes as delivery of a manually executed counterpart.
  7. **Effective Date**. The effective date of this Agreement is the date when this Agreement has been signed by both Parties (the “Effective Date”), and Owner shall be deemed to have issued a full notice to proceed as of the Effective Date.
  8. **Time is of the Essence**. To the extent that there is not a specific time period specified in this Agreement, time is of the essence with respect to a Party’s performance of its obligations under this Agreement.

1. REPRESENTATIONS AND WARRANTIES
   1. **Representations and Warranties of Contractor**. Contractor represents and warrants to Owner that as of the Effective Date:
      * 1. Organization, Standing and Qualification. Contractor is a [\_\_\_\_\_\_\_], duly organized, validly existing, and in good standing under the laws of the State of [\_\_\_\_\_\_\_], and has full power to execute, deliver and perform its obligations hereunder to own, lease and operate its properties and to engage in the business it presently conducts and contemplates conducting under this Agreement, and is and will be duly licensed or qualified and in good standing under the laws of the State of Utah and in each other jurisdiction in which the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to execute and deliver this Agreement or perform its obligations hereunder.
        2. Due Authorization; Enforceability. This Agreement has been duly authorized, executed and delivered by or on behalf of Contractor and is, upon execution and delivery by each of the Parties hereto, the legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors’ rights generally and by general equitable principles.
        3. No Conflict. The execution, delivery and performance by Contractor of this Agreement will not (i) violate or conflict with or cause a default under any covenant, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected, or its organizational documents, (ii) violate or conflict with any Applicable Law or (iii) subject the Facility or any component part thereof to any lien other than as contemplated or permitted by this Agreement.
        4. Government Approvals. Other than with respect to the Applicable Permits, neither the execution nor the delivery by Contractor of this Agreement requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority. Contractor represents and warrants that all Contractor Acquired Permits either have been obtained by Contractor and are in full force and effect or Contractor has no knowledge of any reason that any Contractor Acquired Permit cannot be obtained in the ordinary course of business and within the timeframe necessary so as to permit Contractor to timely commence and perform the Work to completion in accordance with the terms and conditions of this Agreement.
        5. Violation of Laws; No Suits; Proceedings. Contractor is not in violation of any Applicable Laws or judgment entered by any Governmental Authority, which violations, individually or in the aggregate, would materially and adversely affect its performance of any obligations under this Agreement. There are no actions, suits, proceedings, patent or license infringements or investigations pending or, to Contractor’s knowledge after due inquiry, threatened against it before any court, arbitrator or Governmental Authority that individually or in the aggregate could result in any materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Contractor or in any impairment of its ability to perform its obligations under this Agreement. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.
        6. Business Practices. Neither Contractor nor any Subcontractor, or their respective employees, officers, representatives, or other agents of Contractor have made or will make any payment or have given or will give anything of value, in either case to any government official (including any officer or employee of any Governmental Authority) to influence his, her or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Contractor is in compliance with the requirements set forth in Section 3.29.
        7. Licenses. All Persons who will perform any portion of the Work have or will have all business and professional certifications and licenses if and as required by the terms and conditions of this Agreement, Applicable Codes, Applicable Law and Applicable Permits to perform such portion of the Work under this Agreement and Contractor has no knowledge of any reason that any such certifications and licenses cannot be obtained in the ordinary course of business and within the timeframe necessary so as to permit such Persons to timely commence and perform any portion of the Work to completion in accordance with the terms and conditions of this Agreement.
        8. Financial Condition and Adequate Resources. Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Agreement. Contractor has or will procure adequate resources and is qualified, in each case directly or through its Subcontractors, to perform the Work in accordance with the terms and conditions of this Agreement.
        9. Intellectual Property. Contractor owns or has the right to use, or will be able to secure from its Affiliates or Subcontractors the right to use, all Intellectual Property Rights necessary to perform the Work without infringing on the rights of others and to enable Owner to use the Intellectual Property Rights in connection with the ownership, operation, use, maintenance, modification, altering, commissioning, de-commissioning, disposal of or removal of the Facility without infringement on the rights of others. The Licensed Technology (and the use thereof to the extent used in accordance with the license granted under Section 14.1) do not and shall not infringe, or cause the infringement of, the Intellectual Property Rights of a third party.
   2. **Representations and Warranties of Owner**. Owner represents and warrants to Contractor that as of the Effective Date:
      * 1. Organization, Standing and Qualification. Owner is a corporation, duly organized, validly existing, and in good standing under the laws of the State of Utah, and has the full power to execute, deliver and perform its obligations hereunder and engage in the business it presently conducts and contemplates conducting under this Agreement, and Owner is and will be duly licensed or qualified and in good standing under the laws of the State of Utah and in each other jurisdiction in which the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.
        2. Due Authorization; Enforceability. This Agreement has been duly authorized, executed and delivered by or on behalf of Owner and is, upon execution and delivery by each of the Parties hereto, the legal, valid and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors’ rights generally and by general equitable principles.
        3. No Conflict. The execution, delivery and performance by Owner of this Agreement will not violate or conflict with or cause a default under any Applicable Law or any covenant, agreement or understanding to which it is a party or by which it or any of its properties or assets is bound or affected, or its organizational documents.
2. CONTRACTOR’S OBLIGATIONS
   1. **Performance of Work**. Contractor shall diligently, duly and properly perform and complete the Work in accordance with the Scope of Work and the terms of this Agreement in order to construct the Facility according to the Construction Schedule and Milestone Schedule, place it into operation in conformance with the Contract Documents and the Technical Specifications, and achieve Final Completion of the Facility. Contractor acknowledges and agrees that it is obligated to perform the Work on a “turnkey basis” which means that Contractor is obligated to supply all of the Equipment, labor and design services and to supply and perform all of the Work, in each case as may reasonably be required, necessary, or appropriate (whether or not specifically set forth in this Agreement) to complete the Work such that the Facility satisfies the applicable terms and conditions set forth in this Agreement for the Contract Price, including, but not limited to any such work that would be required of a turnkey contractor of a rate-based, utility-operated solar photovoltaic generation project of comparable size and design in the Western United States and/or be included in the engineering, procurement and construction contract for the construction of such comparable project in accordance with the Contract Documents, all Applicable Laws, Applicable Codes and Prudent Utility Practices. Where this Agreement describes a portion of the Work in general, but not in complete detail, the Parties acknowledge and agree that the Work includes any incidental work reasonably inferred or required to complete the Work in accordance with this Agreement. Contractor shall execute the entire Work under this Agreement, including work not specifically delineated in this Section 3.1 or elsewhere in this Agreement to the extent necessary to complete the Facility in accordance with Prudent Utility Practice or to comply with Applicable Law and such Work shall be deemed included herein. Except as otherwise expressly specified herein, Contractor shall provide all facilities and services required for a complete photovoltaic solar power plant facility, including all balance-of-system facilities set forth in the Scope of Work and the Technical Specifications, for the Contract Price.
   2. **Scope of Work**. Contractor shall perform the Scope of Work to the extent necessary (a) for the proper execution and completion of the Work under this Agreement; (b) to supervise and direct the Work in a safe manner and perform all Work in accordance with this Agreement, Applicable Law, Applicable Permits and Prudent Utility Practice; (c) to achieve Final Completion of the Facility; and (d) to place the Facility into operation in conformance with the Contract Documents and the Exhibits and such that the Facility is in compliance with the Interconnection Agreement, Prudent Utility Practice, Applicable Codes, Applicable Laws and Applicable Permits. Subject to Owner’s right to review and comment, Contractor shall have sole control over the engineering, design and construction means, methods, techniques, sequences, and procedures and for coordination of all portions of the Work under this Agreement. To that end, Contractor may, in its sole discretion, accelerate the Work and cause Milestones to be completed prior to the scheduled date therefor in the Construction Schedule; provided that Owner shall have no obligation to pay any Application for Payment in amounts in excess of the amount to which Contractor is entitled under Article 8 based upon the Schedule of Values.
   3. **Properly Licensed; Sufficient Qualified Personnel**. Contractor shall use, and shall require each of its Subcontractors to use, only personnel who are qualified and properly trained and who possess every license, permit, registration, certificate or other approval required by Applicable Law or Applicable Permits to enable such persons to perform work forming part of the Work.
   4. **Utilities**. As part of the Work, Contractor shall arrange and pay for construction power and water (including all water used for dust control) and the installation of construction telecommunication lines and utilities, but only to the extent necessary for Contractor to perform its Work hereunder, and pay when due all such utility usage charges. For all permanent utilities, such as backfeed power, permanent water and power (i.e., for operations and maintenance facilities), permanent telecommunication lines, grid telemetry, and infrastructure necessary (including internet access) to transmit data gathered by the SCADA System, Contractor shall arrange and pay for such permanent utilities prior to the Substantial Completion Date and Owner shall pay for such permanent utilities after the Substantial Completion Date.
   5. **Contract Documents**. Contractor shall deliver to Owner all Contract Documents as and when required pursuant to the terms of this Agreement, including Exhibit 7.
   6. **Record-Keeping**. All Documentation relating to the Facility shall be kept by Contractor in an organized fashion for reference by Owner during the performance by Contractor of the Work. Contractor shall also maintain at the Site at least one (1) copy of all Contractor Submittals, Change Orders and other modifications.
   7. **Materials and Equipment**. As part of the Work, Contractor shall procure all Facility Equipment (including Modules) and shall provide or cause to be provided, at its own expense, all Construction Equipment, machinery, tools, consumables, temporary structures (including temporary facilities for Owner at the Site) or other items as may be required for Contractor to complete the Work. Contractor shall not incorporate any Facility Equipment that (a) constitutes “prototype” equipment pursuant to the risk ratings standards customarily employed by the commercial insurance industry and (b) on account of being deemed “prototype” equipment, would not be insurable under the insurance policies to be obtained by the Parties pursuant to Article 23.
   8. **Compliance and Cooperation with EITC Requirements, Applicable Laws, Applicable Permits, Applicable Codes and Prudent Utility Practices**. Whether or not expressly set forth in any specific section or exhibit, Contractor shall comply with all Applicable Laws, Applicable Permits, Applicable Codes and Prudent Utility Practices in the course of performing the Work and cause the Facility to comply with all Applicable Laws and Applicable Permits prior to the Substantial Completion Date. Contractor shall provide to Owner such information, reports, and documents and take such other actions as may be reasonably requested by Owner to assist Owner in performing its notification and submittal responsibilities as set forth in any Applicable Permit, including as set forth in Section 3.24, and in connection with Owner’s claiming of EITCs and sales and property tax abatements with respect to the Facility. The Facility shall be designed and constructed in compliance with all of the requirements for a renewable energy system as may be provided under the Utah Code, including Title 54, Chapter 17, Part 8, Section 801 *et. al.*, any regulations promulgated thereunder, and the associated implementing rules and regulations of the UPSC.
   9. **Contractor Acquired Permits; Other Approvals**. Contractor shall obtain and maintain in full force and effect the Contractor Acquired Permits and shall file on a timely basis any documents as are required to obtain and maintain the Contractor Acquired Permits in full force and effect. Contractor shall also be responsible for obtaining and maintaining in Contractor’s or Owner’s name in connection with the Work, as applicable, all construction permits, transportation permits, road use agreements, crossing rights with respect to electrical distribution lines, cable TV lines, drain tiles, rural water lines, telecommunication lines, and other licenses and, with respect to rights-of-way, those necessary to build the Facility, all of which, as necessary for operation of the Facility, shall be included as Contractor Submittals as a condition of Final Completion. The Contract Price includes consideration for Contractor to obtain the Contractor Acquired Permits and such other approvals. Any Taxes, Permit Fees and other costs required for the procurement or maintenance of the Contractor Acquired Permits and such other approvals shall be at Contractor’s sole expense. Additionally, Contractor shall provide reasonably requested assistance to Owner in obtaining any Owner Acquired Permit.
   10. **Spare Parts**. Contractor shall (i) no later than three (3) months prior to the Guaranteed Substantial Completion Date, provide a list of recommended Spare Parts as required pursuant to Exhibit 27 and specifically incorporating any spare parts determined by Operator to be in keeping with Prudent Utility Practice and (ii) on or before the Substantial Completion Date, provide the Spare Parts required pursuant to Exhibit 27 and this Section 3.10 to Owner. Such Spare Parts delivered to Owner by Contractor pursuant to this Section 3.10 or Exhibit 27 shall be delivered to the location directed by Owner, at Contractor’s sole cost and expense, and free and clear of any liens.
   11. **Construction Schedule; Progress Reports; Meetings**.
       * 1. Within thirty (30) Days after the Effective Date, Contractor shall deliver to Owner the Construction Schedule, which shall (i) be a Gantt chart developed using Primavera, (ii) designate appropriate Contractor Critical Path Items utilizing the critical path method and (iii) be consistent with Exhibit 4 and inclusive of all Milestones set forth therein and shall provide necessary data about the timing for Owner decisions and all Owner milestones. The Construction Schedule shall contain Milestones and include details to support all major engineering, procurement, construction, commissioning and testing activities of the Facility. The Construction Schedule shall form the basis for progress reporting through the course of the performance of the Work. The Construction Schedule shall be subject to Owner’s approval, such approval not to be unreasonably withheld or delayed. The Construction Schedule and any revisions thereto shall be submitted in both written and electronic format to Owner on at least a monthly basis.
         2. Contractor shall prepare and submit to Owner (i) through the Final Completion Date, Monthly Progress Reports in the format required under Exhibit 8A (which shall include a summary of any material deviations from the prior Construction Schedule and the reasons for such deviation) on the sooner of (x) delivery of an Application for Payment and (y) ten (10) Days after the end of each calendar month and (ii) through the Substantial Completion Date, Weekly Progress Reports in the format required under Exhibit 8B delivered on a weekly basis. In addition, Owner or any Affiliate of Owner shall be entitled to attend and participate in meetings convened by Contractor on the Site and other regularly scheduled meetings with respect to the progress and performance of the Facility.
   12. **Transportation**. Contractor shall provide transportation and shipping with respect to all Equipment hereunder and shall be responsible for all necessary Applicable Permits and documentation relating thereto. All transportation and shipping services, including quality assurance, shipping, loading, unloading, customs clearance (and payment of any customs duties in connection therewith), receiving, and any required storage and claims shall be included in the Contract Price.
   13. **Security**. Contractor shall be responsible for the proper security and protection of the Site and all Equipment and materials furnished by Contractor and the Work performed until Substantial Completion. Contractor shall prepare and maintain accurate reports of incidents of loss, theft, or vandalism and shall furnish these reports to Owner in a timely manner.
   14. **Safety; Quality Assurance**. Contractor shall take all precautions for the safety of all Persons present at the Site and to prevent accidents or injury to individuals or damage to property on, about, or adjacent to the Site. Contractor shall provide to all such Persons, at its own expense, safety equipment required to protect against injuries during the performance of the Work and shall provide (or cause to be provided) appropriate safety training to its employees, Subcontractors and Suppliers. Contractor and Owner hereby agree that the Site Safety Plan shall be implemented by Contractor to secure the Facility and the Site during the execution of the Work, both before and after transfer of custody and control to Owner, including any remedial or warranty Work. Contractor shall notify all Persons accessing the Site of the Site Safety Plan, which shall apply to all such Persons. During the performance of the Work, Contractor shall be responsible for the oversight of all Persons at the Site and for the performance of the Work in accordance with the Site Safety Plan and with all Applicable Laws governing occupational health and safety, Applicable Permits and Prudent Utility Practices. Contractor shall require that any employee or personnel of Contractor or any Subcontractor or Supplier shall have passed a drug test within ten (10) Days prior to first coming on to the Site. Contractor and Owner further agree that the Quality Assurance Plan attached hereto as Exhibit 21 shall be implemented by Contractor.
   15. **Clean-Up**. Contractor shall keep the part of the Site where the Facility is to be located and surrounding areas free from accumulation of debris, waste materials or rubbish caused by the Work throughout all phases of the Work, and as a condition of Final Completion or as soon as practicable after termination of this Agreement by Owner, all of Contractor’s and Subcontractors’ personnel shall have left the Site and Contractor shall remove from the part of the Site where the Facility is located and surrounding areas all debris, waste materials, rubbish, tools, Construction Equipment, machinery and surplus materials arising from or due to the Work. Should Contractor fail to comply with its obligations under this Section 3.15, Owner may undertake same and charge the cost thereof to Contractor.
   16. **Suppliers and Subcontractors**.
       * 1. Set forth in Exhibit 22 is a schedule of qualified Major Subcontractors who, notwithstanding anything to the contrary herein, Contractor shall be entitled to engage in furtherance of Contractor’s obligations under this Agreement without the consent of Owner. Contractor shall notify Owner of any proposed additional Major Subcontractors or replacements thereof with whom Contractor anticipates engaging. Owner shall have the right to review and approve such engagement, such approval not to be unreasonably withheld or delayed. Contractor shall update and amend Exhibit 22 by notice to Owner from time to time as necessary to reflect approved additions or changes thereto, provided Contractor may not change the supplier of Modules without Owner’s express written consent in its sole discretion.
         2. No Subcontract shall bind or purport to bind Owner, but each Major Subcontract shall (i) provide that the Subcontractor expressly agrees, upon Owner’s request if this Agreement is terminated, to the assignment of such Major Subcontract to, at Owner’s request, Owner, a Financing Party or any successor EPC contractor to Contractor, (ii) incorporate by reference and flow down the provisions of this Agreement to the work or services performed by such Subcontractor, irrespective of whether such provisions are expressly made to so apply, including any provisions related to standards of performance, safety, insurance, indemnification, liability, choice of law and dispute resolution (iii) provide that Owner, any Financing Party or any successor EPC contractor are a third-party beneficiary under such Major Subcontract.
         3. The use by Contractor of any Subcontractor shall not (i) constitute any approval of the Work undertaken by any such Subcontractor, (ii) relieve Contractor of its duties, responsibilities, obligations or liabilities hereunder, (iii) relieve Contractor of its responsibility for the performance of any work rendered by any such Subcontractor or (iv) create any relationship between Owner, on the one hand, and any such Subcontractor, on the other hand, or cause Owner to have any responsibility for the actions or payment of such Subcontractor. As between Owner and Contractor, Contractor shall be solely responsible for the acts, omissions or defaults of its Subcontractors and any other Persons for which Contractor or any such Subcontractor is responsible (with the acts, omissions and defaults of its Subcontractors and any such other Person being attributable to Contractor).
         4. In no event shall any act or omission by any Subcontractor constitute a Force Majeure Event except to the extent caused by an event or circumstance that itself constituted a Force Majeure Event.
         5. Until the Final Completion Date, Contractor shall furnish Owner with (i) claims, notices of claim, and other information relating to disputes with any Subcontractor and (ii) such information with respect to any Subcontractor as Owner may reasonably request; it being understood and agreed that information that Owner may reasonably request may include technical specifications, drawings, operating and maintenance manuals, Spare Parts lists, sourcing information for Spare Parts and consumables, inspection and test reports and training materials relative to the Work. Until the expiry of the Defect Warranty Period, Contractor shall furnish Owner with reports received from the Subcontractors or other Persons relating to recall notices, defect notices or other similar product communications.
   17. **Insurance**. Contractor and each Subcontractor shall obtain and maintain insurance required in accordance with Article 23 and Exhibit 13.
   18. **Contractor’s Key Personnel**. Contractor shall appoint Contractor’s Key Personnel in accordance with Section 5.2.
   19. **Hazardous Materials**. Contractor shall comply with the provisions of Article 12 with respect to Hazardous Materials as part of and in connection with the Work.
   20. **Contractor Performance Security**. Contractor shall provide to Owner and maintain until expiry of the Warranty Period the Contractor Performance Security in accordance with Section 8.8.
   21. **FERC Electrical Plant Chart of Accounts**. Within thirty (30) Days after the Final Completion Date, Contractor shall deliver to Owner a FERC Unit of Plant Cost Allocation Book, including a FERC Electrical Plant Chart of Accounts, containing the information described in Exhibit 28 and otherwise in form and substance acceptable to Owner. Owner shall have thirty (30) Days to review such FERC Unit of Plant Cost Allocation Book and provide comments to Contractor, and Contractor shall incorporate Owner's comments therein and provide the final FERC Unit of Plant Cost Allocation Book to Owner not later than seventy-five (75) Days after the Final Completion Date.
   22. **Delay Response Plan**. If, at any time during the performance of the Work, the updated, detailed schedule reflecting actual progress to date included in a Monthly Progress Report delivered under Section 3.11(b) shows that the critical path of the Work is delayed such that (i) the Construction Start Date is reasonably expected to occur later than the Guaranteed Construction Start Date or (ii) Substantial Completion is reasonably expected to occur later than the Guaranteed Substantial Completion Date, Contractor shall, in any such instance, prepare and submit to Owner within ten (10) Business Days a plan which specifies in reasonable detail the actions to be taken by Contractor and the associated schedule to explain and display how Contractor intends to recover from such delay (the “Delay Response Plan”). The corrective actions described in the Delay Response Plan that Contractor proposes to undertake with respect to the Work shall be (a) undertaken at Contractor’s sole cost and expense and (b) designed and intended to recover the schedule for the Facility as promptly as reasonably practicable. Contractor shall promptly and diligently perform the Work in accordance with the Delay Response Plan until the Work is progressing in compliance with the Construction Schedule and the critical path of the Work. Unless set forth in a Change Order executed by the Parties, the implementation of any Delay Response Plan shall not change the Guaranteed Dates.
   23. **Project Labor Agreement; Employees**.
       * 1. Contractor shall comply in all material respects with the terms and conditions of the Project Labor Agreement; provided, however that Contractor is solely responsible for such compliance, and the Project Labor Agreement and compliance thereunder are not obligations of Owner and do not excuse Contractor from, or entitle Contractor to any schedule or cost relief with respect to, its performance of Work and other obligations under this Agreement.
         2. Contractor shall remove from any performance of the Work, and cause any Subcontractor to remove from any performance of the Work, as soon as reasonably practicable, any Person performing the Work (including any Key Personnel) who is creating a risk of bodily harm or injury to themselves or others or whose actions create a risk of material property damage. Additionally, as soon as practicable after receiving a request by Owner Contractor shall remove such Person (including any Key Personnel) from the Site, and cause any Subcontractor to remove such Person (including any Key Personnel) from the Site.
         3. Contractor shall also remove, and cause its Subcontractors and agents to remove, any employee, agent or other Person engaged in the performance of the Work for Contractor (including any Key Personnel) or such Subcontractor, as the case may be, whose off-Site conduct violates any Applicable Laws or Applicable Permits. If a Person is harming or having a negative effect on the perception of the Facility or Owner’s relationship with the surrounding community based on two or more documented incidents, Owner may provide notice to Contractor and Contractor and Owner will meet to discuss an appropriate response. If the Parties cannot otherwise agree Contractor shall remove and cause its Subcontractors and agents to remove such Person.
   24. **Notification**. To the extent not prohibited by Applicable Law, with respect to the Facility, Contractor shall provide Owner, promptly and in any event within five (5) Business Days (or such other time period set forth below) following (a) Contractor’s actual knowledge of its occurrence or (b) Contractor’s receipt of the relevant documentation, with written:
       * + 1. Notification of all events requiring the submission by Contractor of a report to any Governmental Authority pursuant to the Occupational Safety and Health Act;
           2. Notifications and copies of all citations by Governmental Authorities concerning accidents or safety violations at the Site and, within five (5) Business Days of such written notice, a follow up report containing a description of any steps Contractor is taking and proposes to take, if any, with respect to such accident or safety violations;
           3. Notifications and copies of all written communication to or from any Governmental Authority, relating to any breach or violation or alleged breach or violation of any Applicable Law, any Applicable Permit, Applicable Codes or any provision of the Interconnection Agreement;
           4. Updates of status of communications with insurance companies related to claims with respect to an accident, incident or occurrence at the Site or in the performance of Work;
           5. Notifications and copies of any actions, suits, proceedings, patent or license infringements, or investigations pending or threatened against it at law or in equity before any court or before any Governmental Authority (whether or not covered by insurance) that (A) if determined adversely to Contractor would have a material adverse effect on Contractor’s ability to perform its obligations under this Agreement or (B) relates to the Facility; and
           6. Notifications within (A) (x) one (1) Business Day after Contractor has actual knowledge of any accident related to the Work that has a material and adverse impact on the environment or on human health (including any accident resulting in the loss of life) and (y) within three (3) Business Days after Contractor has actual knowledge of any recordable, lost-time injury related to the Work and (B) ten (10) Business Days thereafter, a report describing such accident or injury, the impact of such accident or injury and the remedial efforts required and (as and when taken) implemented with respect thereto.
   25. **Site Conditions**. Contractor has inspected the Site, including both surface and subsurface conditions, and has satisfied itself as to all matters regarding the geotechnical and physical condition thereof, including those matters related to the environment, availability and quality of water, heat and other weather conditions at the Site, physical conditions at the Site, topography and ground surface conditions (including as such conditions may impact surface water runoff), any underground utilities, sound attenuation conditions, subsurface geology and conditions, nature and quality of surface and subsurface materials to be encountered (collectively, “Site Conditions”), and shall be responsible at its sole expense for all necessary works in relation to, or because of, such Site Conditions both below and above ground (including (subject to Article 12 and Article 24) the existence of Hazardous Materials, archeological or religious sites, and monuments) on the Site in connection with Contractor’s performance of the Work. Contractor shall be solely responsible for performing any preliminary Work on the Site necessary for the commencement of construction to occur, including removal of all physical impediments to performing Work on the Site, above and below ground, and preparing the Site for the Work. Contractor specifically acknowledges and accepts the Site Conditions and agrees that no claims by Contractor for additional payment or extensions of time shall be permitted with respect to the Site Conditions on the ground of any misunderstanding or misapprehension of the matters referred to in this Section 3.25 or on the ground of incorrect or insufficient information in respect of the Site or the Site Conditions, and Contractor specifically waives any right to seek a Change Order relating to any of the foregoing. Contractor acknowledges and agrees that none of Owner, any of its Affiliates or any of its agents or representatives have made, nor shall they make, any express or implied warranty to Contractor as to Site Conditions. Additionally, Contractor shall install the piles necessary for the Facility as part of the Scope of Work. If additional soil samples, other geotechnical information or information about Site Conditions are needed before the piles can be installed, this additional sampling or gathering of additional information is the sole responsibility of Contractor.
   26. **Other Reports and Quality Control Documents**. Contractor shall provide Owner with other reports and quality control documentation relating to the Work, the Facility Equipment, the Facility and the Subcontractors as Owner may reasonably request.
   27. **Construction Methods**. Contractor shall make itself and its Subcontractors available to discuss and shall promptly respond to any reasonable questions from Owner, Owner’s Engineer, any Financing Parties or the Independent Engineer regarding construction methods or procedures used during construction of the Facility.
   28. **Cooperation; Access**. Contractor shall, and shall cause the other Contractor Parties and any Subcontractor and their respective hired personnel to, cooperate with Owner and its contractors and other hired personnel in coordinating the work of Owner’s contractors and personnel who may be working at the Site with the Work being performed by any Contractor Party or Subcontractor at the Site. Contractor shall take reasonable efforts to accomplish any necessary modification, repairs or additional work with respect to the Facility after Substantial Completion with minimal interference with commercial operation of the Facility or any portion thereof and that reductions in and shut-downs of all or part of the Facility’s operations will be required only when necessary, taking into consideration the length of the proposed reduction or shut-down, and any impact on Owner’s native load or other contractual obligations. Contractor acknowledges that Owner may schedule such reduction or shut-down at any time including off-peak hours, nights, weekends and holiday.
   29. **Business Ethics**. Contractor, its employees, officers, agents, representatives and Subcontractors shall at all times maintain the highest ethical standards and avoid conflicts of interest in the performance of Contractor’s obligations under this Agreement and shall comply with the Owner’s Code of Business Conduct as it may be revised, updated or amended from time to time. In conjunction with its performance of the Work, Contractor and its employees, officers, agents and representatives shall comply with, and cause its subcontractor and its employees, officers, agents and representatives to comply with, all Applicable Laws, statutes, regulations and codes prohibiting bribery, corruption, kick-backs or similar unethical practices including, without limitation, the United States Foreign Corrupt Practices Act and the United Kingdom Bribery Act 2010. Without limiting the generality of the foregoing, Contractor specifically represents and warrants that neither Contractor nor any Subcontractor, employees, officers, representatives or other agents of Contractor have made or will make any payment, or have given or will give anything of value, in either case to any government official (including any officer or employee of any governmental authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Contractor shall maintain and cause to be maintained effective accounting procedures and internal controls necessary to record all expenditures in connection with this Agreement and to verify Contractor’s compliance with this Section 3.29. Owner shall be permitted to audit such records as reasonably necessary to confirm Contractor’s compliance with this Section 3.29. Contractor shall immediately provide notice to Owner of any facts, circumstances or allegations that constitute or might constitute a breach of this Section 3.29 and shall cooperate with Owner’s subsequent investigation of such matters. Contractor shall indemnify and hold Owner harmless for all fines, penalties, expenses or other losses sustained by Owner as a result of Contractor’s breach of this provision. The Parties specifically acknowledge that Contractor’s failure to comply with the requirements of this Section 3.29 shall constitute a condition of default under this Agreement.
   30. **Real Property Rights**.
       * 1. Compliance with Real Property Rights. Contractor shall comply with the terms of the Real Property Rights.
         2. Access to Site. If the Real Property Rights do not allow for the currently contemplated route of access to the Site, then obtaining any additional Real Property Rights needed for alternative routes of access and the construction and use of such alternative routes of access to the Site shall be at Contractor’s sole cost and expense. Contractor shall be responsible to ensure that the access to the Site is sufficient to permit cranes and other operating and rigging equipment that will be used in the performance of the Work, if any, freedom to maneuver on or about the Site.
         3. Relocation of Facilities. If any lack of necessary Real Property Rights or exercise by a counterparty of its rights under any agreement relating to the Real Property Rights requires relocation of any utilities, transmission lines or other facilities from their existing or currently planned location, Contractor shall bear the sole construction cost associated with relocating any such utilities, transmission lines or other facilities.
         4. Construction Real Property Rights. To the extent not already obtained, Contractor shall obtain any additional Real Property Rights and easements necessary for Contractor to perform the Work. Contractor shall notify Owner upon the occurrence, or potential occurrence, of a dispute, conflict, confrontation, or other similar problem, or potential problem, involving Real Property Rights or one or more owners or occupiers of land so situated as to potentially result in a situation that would reasonably be expected to have a material adverse effect upon the performance of the Work. Owner shall cooperate with Contractor in resolving all such problems.
         5. Damage from Construction. Contractor shall be required to reimburse Owner for any payment Owner is required to make to any other party to the agreements setting forth the Real Property Rights arising out of or in connection with Contractor’s performance of the Work.
         6. Acknowledgment. Contractor acknowledges that it has reviewed the Real Property Rights, confirmed adequacy of the Real Property Rights, and is satisfied that such Real Property Rights are sufficient for Contractor to perform the Work hereunder.
   31. **Tax Abatement Requirements**. Contractor acknowledges that Owner expects to obtain the sales and property tax abatements applicable to the Facility under Utah law and recognizes that such abatements place specific requirements on Contractor and the construction of the Facility. In connection therewith, Contractor agrees and warrants that all Work will be carried out in all respects necessary to fully comply with the requirements of Utah Code Chapter [*Chapter and Provision Numbers*], and any regulations promulgated thereunder, and Contractor agrees to cooperate with all requests by Owner in connection therewith.
   32. **Training of Personnel**.
       * 1. Design and Review of Training Program. Contractor shall design the training program (in accordance with the provisions of Exhibit 1) to be used for the training of Owner’s designated operating personnel in the requirements for the start up, shut-down, operation and maintenance of, and safety, general process understanding and emergency procedures for, the Facility and all of its sub-systems and shall submit such training program to Owner by no later than the date that is six (6) months prior to the Guaranteed Substantial Completion Date. Owner will review, comment on, and approve or disapprove such program in writing within twenty-five (25) Days after such submission by Contractor. If Owner conditions its approval on reasonable changes in the program submitted by Contractor, Contractor will effect such changes at no additional cost to Owner and resubmit the program to Owner within ten (10) Days after Contractor receives Owner’s conditional approval. Owner will then have ten (10) Days after such resubmission to review, comment on the original comments, and approve or disapprove the program as resubmitted by Contractor. Such procedure shall continue with the same ten (10) Day time periods until a program is approved by Owner.
         2. Commencement of Training. Commencing on the date that is six (6) months prior to the Guaranteed Substantial Completion Date, and in accordance with Section 3.2, Contractor shall train Owner’s designated operating personnel in the requirements for the startup, shut-down, operation and maintenance of, and safety, general process understanding and emergency procedures for, the Facility and all of its sub-systems pursuant to the training program approved by Owner as set forth in Section 3.32(a).
   33. **Taxes**. Contractor represents and warrants: (i) Contractor has not and will not claim production tax credits or investment tax credits under Code sections 45 or 48 with respect to any portion of the Facility, Facility Equipment, or Work; (ii) Contractor has not and will not claim depreciation deductions under Code sections 167 or 168 with respect to any portion of the Facility, Facility Equipment, or Work; (iii) No portion of the Facility, Facility Equipment, or Work as described in Code section 168(g)(1)(D); (iv) Contractor has acquired and held the Facility, Facility Equipment, and Work for sale in the normal course of its business of constructing and selling solar powered electrical generating facilities to third parties; (v) There has been no “original use” (within the meaning of Code section 48) of the Facility, Facility Equipment, or Work, other than original use by Owner; and (vi) No portion of the Facility, Facility Equipment, or Work has been or will be Placed in Service other than by Owner.
3. OWNER’S OBLIGATIONS
   1. **Access**.From the Effective Date until the Substantial Completion Date, Owner shall provide Contractor with reasonable access to the Site as suitable and necessary for Contractor to complete the Work and perform its obligations in accordance with this Agreement. From the Substantial Completion Date until the Final Completion Date, Owner shall provide Contractor with reasonable access to the Site as suitable and necessary for Contractor to complete the Punch List Items. Owner shall also provide Contractor with access to the SCADA System (consistent with Section 25.2). Owner shall provide reasonable access to the Site for Contractor to complete work in connection with the Warranties. Notwithstanding the foregoing, Contractor’s access shall be subject to the terms of the Real Property Rights and any lack of access due to Contractor’s failure to comply with the Real Property Rights or otherwise with the terms of this Agreement shall not be considered a breach by Owner.
   2. **Compliance with Laws and Permits**. Owner shall at all times fully comply with Applicable Laws and Applicable Permits. Owner shall obtain and maintain in full force and effect all Owner Acquired Permits.
   3. **Owner Scope**. Owner shall perform any obligations clearly identified as being Owner’s responsibility pursuant to Exhibit 1. In connection with Owner’s obligations under this Agreement, Owner shall be entitled to hire any third party quality consultants to advise Owner concerning the quality control and performance of the Facility.
   4. **Owner’s Representative**. Owner shall appoint an Owner’s Representative in accordance with Section 5.1.
   5. **Insurance**. Owner shall obtain and maintain insurance required in accordance with Article 23.
   6. **Cooperation**. Owner shall, and shall cause its contractors and their respective hired personnel to, cooperate with Contractor and Subcontractors in coordinating the work of Owner’s contractors and personnel who are working at or near the Site with the Work being performed by any Contractor Party or Subcontractor at or near the Site.
   7. **Owner-Provided Information**. Owner, or its Affiliates, or their respective employees, representative and agents (or Owner’s Engineer) may provide Contractor with opinions, recommendations and other statements or information and Contractor acknowledges that all such opinions, recommendations, statements and information have been or will be provided as background information and as an accommodation to Contractor. Contractor further acknowledges that neither Owner nor any of its Affiliates or their respective employees, representative or agents (nor Owner’s Engineer) makes any representations or warranties with respect to the accuracy of such information (including oral statements) or opinions expressed. Contractor further agrees, represents and warrants that it is not relying on Owner or Owner’s Affiliates, or any of their respective employees, representatives or agents (or Owner’s Engineer) for any information, data, inferences, conclusions, or other information with respect to Site Conditions, including the surface and sub-surface conditions of the Site and the surrounding areas, or the design of the Facility, the Work, or otherwise.
   8. **Conditions Precedent to Owner’s Obligations**. Owner’s obligations under this Agreement are subject to the fulfillment or waiver by Owner of each of the following conditions:
      * 1. Owner has issued a Full Notice to Proceed to Contractor hereunder; and
        2. Owner has received all required board and management approvals to authorize the issuance of such Full Notice to Proceed.

Contractor acknowledges that the decision whether or not to grant such approvals are in the sole, unreviewable discretion of Owner’s board of directors and management; provided, however, that Contractor is entitled to assume that if Owner issues a Full Notice to Proceed, Owner has obtained all board and management approvals necessary to authorize such issuance.

1. REPRESENTATIVES; KEY PERSONNEL
   1. **Owner’s Representative**. Owner designates, and Contractor agrees to accept, [\_\_\_\_\_\_\_\_\_\_\_] as Owner’s Representative for all matters relating to this Agreement and Contractor’s performance of the Work (except as otherwise stated in this Agreement). The acts and omissions of Owner’s Representative with respect to this Agreement are deemed to be the acts and omissions of Owner and shall be fully binding upon Owner. Owner may, upon written notice to Contractor pursuant to Article 27, change the designated Owner’s Representative.
   2. **Contractor’s Key Personnel and Contractor’s Representative**. Contractor designates, and Owner accepts, those individuals set forth on Exhibit 5 (the “Key Personnel”) for all matters relating to Contractor’s performance under this Agreement. The individual designated by Contractor on Exhibit 5 as “Contractor’s Representative” (the “Contractor’s Representative”) shall have full responsibility for the prosecution and scheduling of the Work and any issues relating to this Agreement. If Contractor elects to replace Key Personnel, it shall promptly deliver a notice to Owner with the name and résumé of the proposed replacement individual. Owner shall have the right to approve any such replacement of Key Personnel, provided, however, that such approval shall not be unreasonably withheld or delayed. The actions taken by Contractor’s Representative are deemed to be the acts of Contractor.
   3. **Power to Bind**. The Parties shall vest, respectively, Owner’s Representative and Contractor’s Representative with sufficient powers to enable them to assume the obligations and exercise the rights of each Party, as applicable, under this Agreement.
   4. **Notices**. Notwithstanding Section 5.1, Section 5.2, and Section 5.3, all amendments to this Agreement, Change Orders, notices and other communications between Contractor and Owner contemplated herein shall be delivered in writing and otherwise in accordance with Article 27.
2. INSPECTION
   1. **Inspection**. Owner, its Affiliates, its representatives (including Owner’s Engineer), any Financing Party, its representatives (including any Independent Engineer), and the Transmission Provider (collectively, “Owner Inspection Parties”) shall have the right to observe and inspect any item of Facility Equipment at the Site, including to witness any Facility Test, and the material, design, engineering, service, workmanship or any other portion of the Work at the Site; provided that (a) such observations and inspections shall be arranged at reasonable times and with reasonable advance notice to Contractor and (b) Owner has granted such Person access to the Site and Work for such purpose. Notwithstanding the foregoing, any personnel of such Owner Inspection Parties that have completed Contractor’s safety training and worker environmental training may observe and inspect the Work at the Site, including to witness Facility Tests, at any time subject to compliance with the Site Safety Plan. Prior to Substantial Completion, Contractor shall promptly correct or cause the correction of any part of the Work that is defective, deficient or is otherwise not in accordance with this Agreement, regardless of the stage of its completion or the time or place of discovery of such errors and regardless of whether Owner has previously reviewed or inspected or otherwise accepted such part of the Work in any way. Contractor shall bear the cost of re-performing any defective, deficient or non-conforming Work and removing any deficient Work from the Site. In the event that any part of the Work is discovered to be in a defective, deficient or non-conforming condition after Substantial Completion, correction of such defective, deficient or non-conforming condition shall be governed by Article 21.
   2. **Off-Site Inspections**. If requested by Owner, Contractor shall obtain access and arrange for Owner Inspection Parties to inspect the off-Site facilities of Contractor and any Supplier under a Major Subcontract, including to witness tests of the Facility Equipment being supplied by them and to partake in manufacturing facility tours, such inspections to be arranged at reasonable times and with reasonable advance notice. Contractor shall incorporate a forward-looking schedule into each Monthly Progress Report of the tests (if any) to be performed on such Facility Equipment. If any Owner Inspection Party desires to be present at any such test listed on the Monthly Progress Report, Owner shall give Contractor five (5) Business Days’ notice prior to the date of such test. If the Contractor proposes to conduct any testing on Facility Equipment that is not otherwise identified in a Monthly Progress Report, the Contractor must provide the Owner Inspection Parties no less than ten (10) Business Days’ notice of such proposed testing so that such Owner Inspection Parties may arrange to observe such testing.
3. CONTRACT PRICE
   1. **Contract Price.** As full compensation for the Work and all of Contractor’s obligations hereunder, Owner shall pay to Contractor, and Contractor agrees to accept as full compensation for the Work, the Contract Price. All payments due and payable to Contractor shall not exceed the applicable amount for such period in the Cash Flow Curve set forth in the Schedule of Values. The Contract Price shall be adjusted only as expressly provided under the terms of this Agreement and is otherwise firm and fixed and, except as otherwise indicated in Article 8 below, shall be deemed to include all expenses to be incurred by Contractor related to Contractor’s performance of its obligations under this Agreement. The Contract Price includes all Taxes except Owner Taxes as provided in Article 9, as well as all Permit Fees related to all Contractor Acquired Permits and assistance provided by Contractor in acquiring all Owner Acquired Permits and any other obligation of Contractor hereunder. The Contract Price shall be paid by Owner to Contractor in accordance with the terms of Article 8.
4. PAYMENT PROCESS & PERFORMANCE SECURITY
   1. **Payments**.
      * 1. Owner shall pay the Contract Price according to the Schedule of Values. Each Progress Payment shall be due and payable only to the extent it is supported by the completion of the corresponding Work set forth in the Schedule of Values for the payment of such Progress Payment. Subject to and in accordance with any mutually agreed upon Change Order, in no circumstance shall Owner have an obligation to pay any Application for Payment in amounts in excess of the Schedule of Values.
        2. Within thirty (30) Days after the acceptance of the Certificate of Substantial Completion, Owner shall release to Contractor the Retainage, less an amount equal to the Punch List Holdback for all Punch List Items that have not been completed at such time pursuant to the terms hereof. On the Final Completion Date, concurrent with the payment for the Final Completion, Owner shall release to Contractor any remaining Punch List Holdbacks then held by Owner. Any interest accruing on the Retainage shall accrue for the account of Owner and not Contractor.
        3. If Contractor fails to perform any Punch List Item on the Punch List within sixty (60) Days after the Substantial Completion Date, Owner may elect by written notice to Contractor to retain the Punch List Holdback applicable to such Punch List Item and complete such Punch List Item itself. Upon Owner making such election, Contractor shall forfeit any return of such portion of the Punch List Holdback and Contractor’s obligation to perform such Punch List Item shall be deemed satisfied.
   2. **Milestone Assessment**. Contractor and Owner shall periodically, and in any event at least once each month, review the Work completed and assess the progress of on-Site Work completed and completion of the relevant Milestone. Owner’s Engineer and any Independent Engineer may be present during such review and assessment of the Work.
   3. **Application for Payment**. On or before the tenth (10th) Day of each month during the performance of the Work, Contractor shall submit to Owner an Application for Payment with respect to that portion of the Work (including Punch List Items) which Contractor has satisfactorily completed during that month and for which Contractor has not been previously paid. Each Application for Payment shall set forth, as the amount of the Contract Price Contractor is entitled to be paid for such month, with respect to the items of Work set forth in the Schedule of Values, the aggregate of the amounts obtained by multiplying (x) the value of each item of Work set forth in the Schedule of Values and (y) that portion of such item of Work, expressed as a percentage, which has been satisfactorily completed during such month, as verified and approved by Owner, less (z) Retainage (for such month, the “Progress Payment”). The Application for Payment in respect to Substantial Completion shall be delivered when required under Section 16.3. Each Application for Payment shall be reasonably detailed and shall be accompanied by supporting Documentation evidencing the achievement of the Milestone pursuant to the Schedule of Values for which the Progress Payment is being requested, shall be accompanied by lien waivers required to be delivered pursuant to Section 8.4 and shall be sent by either (i) written notice, or (ii) electronic mail and confirmed by first class mail (with the date of receipt of the original by first class mail to be the date of receipt). In addition, as a condition precedent to Owner’s obligation to make payment, Contractor shall be current in its delivery of Monthly Progress Reports, Weekly Progress Reports and other Documentation required for all periods through the month for which payment is requested. In no event shall the aggregate amounts invoiced by Contractor or payable by Owner under each Application for Payment exceed the aggregate amount of the Contract Price payable cumulatively through such month according to the Cash Flow Curve. Owner shall make all payments of undisputed amounts when they become due, but in any event, no later than thirty (30) Days after receipt of the Application for Payment; provided that the payments in respect of any Application for Payment with respect to Substantial Completion shall be due within thirty (30) Days after Owner’s acceptance of the Certificate of Substantial Completion. If Owner disputes a portion of an Application for Payment, Owner shall notify Contractor of such Dispute and shall pay to Contractor the undisputed portion in accordance with this Section 8.3. If such dispute is resolved within thirty (30) Days after receipt of the Application for Payment, Owner shall make payment of such resolved amounts within thirty (30) Days after resolution of the dispute. No partial payment made under this Agreement shall be construed to be an acceptance or approval by Owner of any part of the Work or to relieve Contractor of any of its obligations under this Agreement. Contractor shall be responsible for paying or ensuring the payment of all Subcontractors in connection with the Work completed by the Subcontractors in accordance with the terms of their Subcontracts.
   4. **Lien Releases**. Contractor shall submit with each Application for Payment a conditional partial lien release in the form set forth in Exhibit 12A for the amount requested in the current Application for Payment in respect of work performed or materials delivered on the Site during the period covered by such Application for Payment. Both Contractor and its Major Subcontractors shall provide Owner a conditional final lien release in the form set forth in Exhibit 12B as a condition precedent to payment by Owner of the final Application for Payment. In addition to the lien releases described in this Section 8.4, Contractor shall deliver to the Title Company, as and when required by the Title Company in order to issue title insurance to any Financing Party and to provide an endorsement thereto with respect to mechanic’s liens pending disbursement coverage, (a) Contractor’s sworn statement and (b) a mechanic’s lien subordination agreement, each executed by Contractor and in form and substance acceptable to the Title Company.
   5. **Release of Liability**. Contractor’s acceptance of payment of the Application for Payment for Final Completion shall constitute a release by Contractor of Owner from all liens (whether statutory or otherwise and including mechanics’ or suppliers’ liens), claims and liability with respect to the payment of the Contract Price or any event or circumstance that would entitle Contractor to request a Change Order in respect of any event that occurs prior to Final Completion, except claims for which Contractor has delivered a dispute notice to Owner, claims that are based on facts or circumstances arising after Final Completion and claims arising under Article 24. No payment by Owner shall be deemed a waiver by Owner of any obligation of Contractor under this Agreement.
   6. **Overdue Payments**. Overdue payment obligations of either Party hereunder shall bear interest from the date due until the date paid at a rate per annum equal to the lesser of (a) the rate published by the *Wall Street Journal* as the “prime rate” on the Business Day preceding the date on which such interest begins to accrue plus two percent (2%) and (b) the maximum rate allowed under Applicable Law.
   7. **Disputed Payments**. Failure by Owner to pay any invoiced amount disputed in good faith until such dispute has been resolved in accordance with Article 28 shall not alleviate, diminish, modify or excuse the performance of Contractor or relieve Contractor’s obligations to perform hereunder, subject to the provisions of such Article 28. Contractor’s acceptance of any payment, and Owner’s payment of any invoiced amount, shall not be deemed to constitute a waiver of amounts that are then in dispute. Contractor and Owner shall use reasonable efforts to resolve all disputed amounts expeditiously and in any case in accordance with the provisions of Article 28. No payment made hereunder shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder. If an Application for Payment was properly submitted in accordance with all of the provisions of this Agreement and amounts disputed by Owner with respect to such Application for Payment are later resolved in favor of Contractor, Owner shall pay interest on such disputed amounts due to Contractor, at the interest rate set forth in Section 8.6, from the date on which such payment was originally due under Section 8.3 until the date such payment is actually received by Contractor. If amounts disputed in good faith that have been paid by Owner are later resolved in favor of Owner, Contractor shall refund any such payment and pay interest on such payment at the interest rate set forth in Section 8.6, from the date on which the payment was originally made by Owner until such refunded payment is received by Owner.
   8. **Contractor Performance Security**. On the Effective Date, Contractor shall deliver to Owner and maintain in full force and effect the Contractor Performance Security in the form set forth in Exhibit 11. If Contractor fails to deliver the Contractor Performance Security or the issuer thereof repudiates or breaches its obligation to pay or perform thereunder, Owner shall be excused from paying any Progress Payments until such time as Contractor shall have delivered replacement contractor performance security in a form acceptable to Owner in its sole discretion.
   9. **Holdback**.
      * 1. Any provision hereof to the contrary notwithstanding, upon the occurrence and continuance of any of the following events, Owner, upon notice to Contractor, may, but shall have no obligation to, withhold or retain such portion (including all) of any payment due to Contractor under this Agreement as reasonably necessary to ensure the performance of the Work, to cover one hundred fifty percent (150%) of the Losses or reasonably anticipated Losses to Owner related to such event, or to otherwise protect fully Owner’s rights hereunder:
           1. A Contractor Event of Default shall have occurred;
           2. Contractor shall have failed to timely make undisputed payments to its Subcontractors for material or labor used in the Work and Owner is not in breach of its obligations to pay Contractor;
           3. Owner in good faith shall have determined based upon the Construction Schedule that Contractor cannot with prompt and reasonable acceleration of the Work achieve Substantial Completion before the Guaranteed Substantial Completion Date; provided, however, that amounts withheld or retained on account of this Section 8.9(a)(iii) shall not exceed the amount of any Facility Delay Liquidated Damages or EITC Liquidated Damages which would be payable under Section 17.1 or Section 17.6 on account of the then‑estimated delay in Substantial Completion (assuming the Construction Start Date occurred on or prior to the Guaranteed Construction Start Date); or
           4. Any part of such payment shall be attributable to Work that contains a defect or has not been performed in accordance with the terms of this Agreement.
        2. No payment made under this Section 8.9 shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder. Should any dispute arise with respect to Owner’s exercise of its rights under this Section 8.9, such dispute shall be subject to resolution in accordance with the expedited payment dispute procedures provided in Article 28. Contractor shall not have any rights of termination or suspension under Section 20.4 as a result of Owner’s exercise or attempted exercise of its rights under this Section 8.9.
   10. **Setoff**. Notwithstanding any other provision in this Agreement, Owner shall be entitled to set off against any amount it owes to Contractor under this Agreement, any undisputed amount(s) that either (a) Contractor owes to Owner under this Agreement or (b) Contractor or any Affiliate of Contractor owes to Owner under the Project Transaction Documents.
5. TAXES
   1. **Taxes**. The Contract Price includes any and all Taxes imposed under Applicable Law on Contractor, the Subcontractors, the Work, the construction or sale of Facility Equipment to Owner or installation of the Facility, except for Owner Taxes. In addition to the Contract Price, Owner assumes exclusive liability for and shall pay all Owner Taxes. Contractor and Owner agree to cooperate with each other to minimize the Tax liability of both Parties to the extent legally permissible and commercially reasonable for such Party. Contractor shall provide Owner with such assistance as may be reasonably requested by Owner in demonstrating eligibility for exemptions or exclusions from such Taxes (and any other Tax exemptions) to the relevant Governmental Authority, including as provided in Section 3.31. Contractor shall, in accordance with Applicable Law, timely administer and timely pay all Taxes that are included in the Contract Price and timely furnish to the appropriate taxing authorities all required information and reports in connection with such Taxes and furnish copies of such information and reports (other than information specifically pertaining to Contractor’s income and profit) to Owner as reasonably requested by Owner and within thirty (30) Days after any request from Owner, Contractor shall provide Owner with any other information regarding allocation of quantities, descriptions, and costs of property provided by Contractor and installed as part of the Facility that is necessary in connection with the preparation of Owner’s tax returns or as a result of an audit by a taxing authority. The Owner or its designee shall be entitled to all tax benefits associated with the Facility, and Contractor will have no claim with respect to such benefits.
6. CHANGES AND EXTRA WORK
   1. **Owner Requested Change Order**. Without invalidating this Agreement, Owner may request changes in the Work or the Facility. Owner shall request such changes in the Work or the Facility by delivering a written Change Order request to Contractor. As soon as practicable after receipt of a Change Order request, but in no event later than five (5) Days after receipt of a Change Order request, Contractor shall prepare and forward to Owner in writing: (i) a quotation for the price for the extra or changed Work and change to the Schedule of Values (if applicable); (ii) an estimate of any required adjustment to the Construction Schedule; (iii) any adjustment to Performance Criteria; and (iv) an estimate of any impact of the proposed change on any Applicable Permit, warranty and any other term or condition of this Agreement. The Parties shall negotiate in good faith to determine the adjustment to the Contract Price for Change Orders contemplated by this Section 10.1. If the Parties do not agree on the adjustment to the Contract Price in respect of this Section 10.1, then the adjustment to the Contract Price may be determined in accordance with Exhibit 16 but only if the Parties so agree. If the Parties do not agree either (A) to a fixed price Change Order, or (B) that an adjustment to the Contract Price shall be determined in accordance with Exhibit 16, then Owner may nonetheless direct Contractor to proceed with the Work that is the subject of the Change Order, in which case (1) for a deductive Change Order, the Contract Price shall be reduced by the amount of any reduction in Contractor’s Direct Costs and (2) in the case of an additive Change Order (or Change Order involving additive and deductive elements), Contractor shall be paid an amount equal to any net increase in its Direct Costs in performing the Change Order plus a markup of six percent (6%). Contractor shall submit Applications for Payment no more frequently than monthly with respect to Contractor’s Direct Costs in accordance with the preceding sentence and Owner shall be obligated to pay such undisputed amounts within thirty (30) Days after Owner’s receipt of Contractor’s Application for Payment.
   2. **Contractor Requested Change Order**. Contractor may propose a Change Order to Owner if the proposed changes improve the Facility or are otherwise advisable for the Work. Any such proposed Change Order shall not affect the obligation of Contractor to perform the Work and to deliver the Facility in accordance with this Agreement unless and until Owner executes a Change Order pursuant to Section 10.6. If the Parties do not agree on the adjustment to the Contract Price in respect of this Section 10.2, then the adjustment to the Contract Price may be determined in accordance with Exhibit 16 but only if the Parties so agree. If the Parties do not agree either (a) to a fixed price Change Order or (b) that an adjustment to the Contract Price shall be determined in accordance with Exhibit 16, then no Change Order shall be executed. If Contractor proceeds with a proposed change in the Work pursuant to this Section 10.2 without receiving the consent of Owner, Contractor shall be responsible for the removal of any such work if a Change Order request is not subsequently approved by Owner; provided, however, that in the event of any Emergency, Contractor shall act, in its good faith discretion, to prevent threatened damage, injury or loss to any Person or property.
   3. **Mandatory Change Order**. Contractor shall be entitled to an adjustment in the Contract Price in the event of an Owner-Caused Delay and an adjustment in the Construction Schedule (including to any Guaranteed Dates) as set forth below upon the occurrence of any of the following events: (a) an Owner-Caused Delay or (b) a Force Majeure Event, in each case as and only to the extent permitted by Article 11. Contractor shall only be entitled to a Change Order if and to the extent it can demonstrate that the occurrence of a preceding event had an actual and demonstrable adverse impact (i) on Contractor’s Direct Costs or (ii) when taken together with all other delays caused by the events described in (a) and (b) above of which Contractor has timely provided notice to Owner in accordance with this Agreement, on Contractor’s ability to perform any Contractor Critical Path Item necessary for the achievement of any Guaranteed Date and, in such event, the Contractor Critical Path Items shall be correspondingly extended by the period of time (if any) that Contractor is actually and demonstrably delayed in the performance of such Contractor Critical Path Item as a result of the impact of such event (such period, the “Actual Delay”).
   4. **Limitation on Change Orders**. Change Orders shall be limited to (i) changes requested by Owner in accordance with Section 10.1, (ii) changes requested by Contractor and mutually agreed to by the Parties in accordance with Section 10.2 and (iii) changes in connection with mandatory Change Orders in accordance with Section 10.3. Notwithstanding anything to the contrary, other than to the extent resulting from a Force Majeure Event occurring after the Effective Date, in no event shall any Site Condition give rise to a Change Order.
   5. **Determining Change Order**. Any adjustment of the Construction Schedule pursuant to a Change Order shall be determined in accordance with Section 10.3 as well as Article 11. Any adjustment of the Contract Price shall include all costs to Contractor associated with the performance of the extra Work or changes or a reduction of the Contract Price based on savings to Contractor associated with the changes, as applicable. Adjustments in the Contract Price shall be determined in accordance with Section 10.1, Section 10.2 and Section 10.3, as applicable, as well as Article 11.
   6. **Change Order Must Be in Writing**. No change in the Work or extra Work shall be valid and effective unless it is in writing in the form of a Change Order signed by the representatives of both Parties that includes a description of the amount of any adjustment of the Contract Price and any adjustment to the Construction Schedule, the Schedule of Values or the Performance Criteria due to the change.
7. FORCE MAJEURE EVENT; OWNER-CAUSED DELAY
   1. **Certain Events**. No failure or omission to carry out or observe any of the terms, provisions or conditions of this Agreement shall give rise to any claim against a Party, or be deemed to be a breach or an Event of Default under this Agreement, if such failure or omission shall be caused by or arise out of a Force Majeure Event or an Owner-Caused Delay; provided that the Party claiming relief strictly complies with the provisions of Article 11. Notwithstanding anything to the contrary in the foregoing, the obligation to pay money in a timely manner in accordance with the terms hereof shall not be subject to the Force Majeure Event or Owner-Caused Delay provisions hereof.
   2. **Notice of Force Majeure Event and Owner-Caused Delay.** If a Party’s ability to perform its obligations under this Agreement is affected by a Force Majeure Event or an Owner-Caused Delay (in the case of Contractor), the Party claiming relief shall provide prompt notice, but in any event not later than twenty-four (24) hours of when the Force Majeure Event or Owner-Caused Delay first prevents or delays performance under this Agreement, to Contractor’s Representative or Owner’s Representative, as applicable, of any delay or anticipated delay in the claiming Party’s performance of this Agreement due to such Force Majeure Event or Owner-Caused Delay, including a description of the event including reasonable details (to the extent available and known to the claiming Party, at such time) regarding the underlying facts and conditions pursuant to which such Party is claiming a Force Majeure Event or Owner-Caused Delay and the anticipated length of the delay. After such notice, the claiming Party shall deliver written notice as soon as practicable, but in any event not later than five (5) Business Days after the claiming Party becomes aware of the delay or anticipated delay, describing in detail the particulars of the occurrence giving rise to the claim, including what date the claiming Party became aware of the occurrence of such event and an estimate of the event’s anticipated duration and effect upon the performance of its obligations, any action being taken to avoid or minimize its effect, and a proposed recovery schedule (the “Delay Notice”). The Party claiming relief due to a Force Majeure Event or Owner-Caused Delay shall have a continuing obligation to deliver to the other Party regular updated reports and any additional documentation and analysis supporting its claim regarding a Force Majeure Event or an Owner-Caused Delay promptly after such information becomes available to such Party. IT IS A CONDITION TO CONTRACTOR’S RIGHT TO RECEIVE AN EXTENSION OF TIME, AN INCREASE TO THE CONTRACT PRICE AND OTHER ADJUSTMENTS TO THE CONSTRUCTION SCHEDULE THROUGH A CHANGE ORDER AS PROVIDED IN SECTION 10.3 THAT CONTRACTOR PROVIDE NOTICE TO OWNER WITHIN TWENTY-FOUR (24) HOURS OF THE TIME CONTRACTOR BECAME AWARE OR SHOULD HAVE BECOME AWARE OF THE FACTS OR CIRCUMSTANCES THAT PERMIT CONTRACTOR TO SEEK A CHANGE ORDER UNDER SECTION 10.3; IN THE EVENT CONTRACTOR DOES NOT PROVIDE NOTICE WITH SUFFICIENT DETAIL WITHIN TWENTY-FOUR (24) HOURS OF THE TIME CONTRACTOR BECAME AWARE OR SHOULD HAVE BECOME AWARE OF THE FACTS OR CIRCUMSTANCES THAT PERMIT CONTRACTOR TO SEEK A CHANGE ORDER UNDER SECTION 10.3, CONTRACTOR SHALL NOT BE ENTITLED TO A CHANGE ORDER UNDER ARTICLE 10 OR ANY OTHER RELIEF HEREUNDER.
   3. **Force Majeure Event and Owner-Caused Delay Conditions**. Upon the occurrence of a Force Majeure Event or an Owner-Caused Delay, the suspension of, or impact on, performance due to such Force Majeure Event or Owner-Caused Delay shall be of no greater scope and no longer duration than is required by such event (taking into account the obligations affected thereby). In addition, the claiming Party shall exercise reasonable efforts to (a) minimize and mitigate the effects of any delay caused by, and costs arising from said Force Majeure Event or Owner-Caused Delay, (b) continue to perform its obligations hereunder not affected by such event and (c) correct or cure the effect of such event. When the Party claiming relief due to such Force Majeure Event or Owner-Caused Delay is able to resume performance of its affected obligations, such Party shall provide prompt notice to the other Party to that effect and promptly resume performance of all of its obligations under this Agreement.
   4. **Contractor’s Remedies**.
      * 1. Force Majeure Event. As Contractor’s sole remedy for the occurrence of a Force Majeure Event, and provided that Contractor has otherwise materially complied with the applicable obligations it may have under Section 11.2 and Section 11.3, Contractor shall be entitled to an extension to the Construction Schedule (including to the Guaranteed Dates, other than the Guaranteed Construction Start Date or the Guaranteed Substantial Completion Date) to the extent of the Actual Delay in accordance with Section 10.3. Force Majeure Events shall not entitle Contractor to an adjustment in the Contract Price or otherwise be compensable.
        2. Owner-Caused Delay. As Contractor’s sole remedy for the occurrence of an Owner-Caused Delay, and provided that Contractor has otherwise materially complied with the applicable provisions of Section 11.2 and Section 11.3, Contractor shall be entitled to an extension to the Construction Schedule (including to the Guaranteed Dates) to the extent of the Actual Delay in accordance with Section 10.3. If Contractor’s costs increase despite Contractor’s reasonable efforts to mitigate any such increases pursuant to Section 11.3, the Contract Price shall be increased by the Direct Costs incurred by Contractor as a direct result of such Owner-Caused Delay**.**
        3. Changes Orders. Upon the occurrence of an event that entitles Contractor to relief under this Section 11.4, and subject to Contractor’s compliance with the applicable provisions of this Article 11 and Article 10 in all material respects, Contractor and Owner shall prepare a Change Order in accordance with Article 10. The remedies set forth in this Section 11.4 shall be Contractor’s sole remedies for any such event.
8. HAZARDOUS MATERIALS
   1. **Use by Contractor**. Contractor shall minimize and manage the use of Hazardous Materials in the performance of its obligations under this Agreement and shall not permit any of the Subcontractors, directly or indirectly, to cause any Release in, on or under the Facility, the Site or the adjacent area except to the extent required for the performance of the Work, in such case, in accordance with Applicable Laws and Applicable Permits (including the performance of investigatory, monitoring, or other remedial work upon the Facility, the Site or adjacent areas to the extent reasonably necessary to comply with Applicable Laws and Applicable Permits).
   2. **Remediation by Contractor**. Contractor shall conduct and complete all investigations, studies, sampling, testing and remediation of the Site as required by Applicable Laws and Applicable Permits in connection with any Release, disposal or the presence of Hazardous Materials, where existing prior to the Effective Date or brought onto or generated at the Site by any Contractor Party or Subcontractor or to the extent any such Release is caused by the negligent acts or omissions of any Contractor Party or Subcontractor, except to the extent such Release is caused by any Owner Party after the Effective Date. Contractor shall promptly comply with all lawful orders and directives of all Governmental Authorities regarding Applicable Laws and Applicable Permits relating to the use, transportation, storage, handling or presence of Hazardous Materials, or any Release, by any Contractor Party, Subcontractor or any Person acting on its or their behalf or under its or their control of any such Hazardous Materials brought onto or generated at the Site by any Contractor Party or Subcontractor, except to the extent any such orders or directives are being contested in good faith by appropriate proceedings in connection with the Work.
   3. **Hazardous Materials File**. During the performance of the Work, Contractor shall maintain and update a file of all safety data sheets for all Hazardous Materials used in connection with the Work hereunder, or used by or on behalf of any Contractor Party or Subcontractor at the Site and shall promptly deliver such file and any updates to Owner.
   4. **Notice of Hazardous Materials**. If Contractor discovers, encounters or is notified of any Release or exposure to Hazardous Materials at the Site:
      * 1. Contractor shall promptly notify Owner thereof and take all reasonable efforts, consistent with Applicable Law or Applicable Permits, to mitigate the impacts associated with such Hazardous Materials including, as appropriate, containing any Release and stopping Work in and restricting access to areas affected by such Hazardous Materials;
        2. if any Contractor Party or Subcontractor has brought such Hazardous Materials onto the Site or generated such Hazardous Materials, Contractor shall, as promptly as reasonably practicable, remove such Hazardous Materials from the Site and remediate the Site to the extent required by all Applicable Laws and Applicable Permits in each case at Contractor’s sole cost and expense, except where such materials were Released after the Effective Date by Owner, its Affiliates, or any third party other than any Contractor Party or Subcontractor; and
        3. if any Contractor Party or any Subcontractor has brought such Hazardous Materials onto the Site or generated such Hazardous Materials, Contractor shall not be entitled to any extension of time or additional compensation hereunder for any delay or costs incurred by Contractor as a result of the existence of such Hazardous Materials, except where such materials were Released after the Effective Date by Owner, its Affiliates, or any third party other than any Contractor Party or Subcontractor.
   5. **Hazardous Materials Disposal System**. Contractor shall, in consultation with Owner, arrange and contract with contractors (who are appropriately licensed and insured) for the transportation from the Site and the management or disposal in accordance with Applicable Law and Applicable Permits of Hazardous Materials generated by or produced in connection with Contractor’s performance of the Work. To the extent required by Applicable Law or Applicable Permits, Contractor shall (a) prepare and maintain accurate and complete documentation of all Hazardous Materials used by Contractor or Contractor Parties at the Site in connection with the Facility, and of the disposal of any such materials, including transportation documentation and the identity of all Subcontractors providing Hazardous Materials disposal services to Contractor at the Site and (b) prepare and deliver all required notifications and reports to Governmental Authorities in connection with the presence of Hazardous Materials at the Site that were brought onto the Site or generated by any Contractor Party or Subcontractor. Contractor shall comply with Owner’s reasonable requirements and procedures with respect to the disposal of such Hazardous Materials.
   6. **Scope of Contractor Environmental Indemnification**. Contractor hereby specifically agrees to indemnify, defend and hold Owner and the Owner Parties harmless from and against any and all losses, liabilities, claims (including relating to personal injury or bodily injury or death), demands, damages, causes of action, fines, penalties, costs and expenses (including all reasonable consulting, engineering, attorneys’ or other professional fees), whether or not involving damage to the Facility or the Site, that they may incur or suffer by reason of:
      * 1. any use of or introduction of Hazardous Materials to the Site by any Contractor Party or Subcontractor in connection with the performance of the Work, which use includes the storage, transportation, processing or disposal of such Hazardous Materials by Contractor or any of its Subcontractors, whether lawful or unlawful;
        2. any Release or disturbance of Hazardous Materials in connection with the performance of the Work by Contractor or any of its Subcontractors (except as provided in Section 12.7);
        3. any administrative, enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Environmental Law by any Contractor Party or any Subcontractor;
        4. any action reasonably necessary to abate or remediate Hazardous Materials described in paragraphs (a) or (b) above, or prevent a violation or threatened violation of any Environmental Law by any Contractor Party or Subcontractor; and
        5. any action required by Contractor to mitigate a situation created by the violation of any Applicable Law or Applicable Permit by any Contractor Party or Subcontractor.
   7. **Scope of Owner Environmental Indemnification**. Owner hereby specifically agrees to indemnify, defend and hold Contractor and Contractor Parties harmless from and against any and all losses, liabilities, claims (including relating to personal injury or bodily injury or death), demands, damages, causes of action, fines, penalties, costs and expenses (including, all reasonable consulting, engineering, attorneys’ or other professional fees), whether or not involving damage to the Facility or the Site, that they may incur or suffer by reason of:
      * 1. any Hazardous Materials present or used, brought upon, transported, stored, kept, discharged, or spilled by Owner or any Owner Party in, on, under or from the Site after the Effective Date including any Release by Owner or its Affiliates, in accordance with the terms of this Agreement and all Applicable Laws;
        2. any administrative, enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Environmental Law by Owner; and
        3. any action reasonably necessary to abate or remediate Hazardous Materials described in paragraphs (a) or (b) above, or to prevent a violation or threatened violation of any Environmental Law by Owner.
9. TITLE AND RISK OF LOSS
   1. **Equipment – Risk of Loss Before Substantial Completion**. From the Effective Date and until the Substantial Completion Date, subject to the provisions of this Article 13, Contractor has care, custody and control of all Facility Equipment and other items that become part of the Facility and shall exercise due care with respect thereto and assumes the risk of loss and full responsibility for the cost of replacing or repairing any damage to the Facility and all materials, Equipment, supplies and maintenance equipment (including temporary materials, equipment and supplies) that are purchased for permanent installation in or for use during construction of the Facility.
   2. **Equipment – Risk of Loss After Substantial Completion**. Owner shall take possession and control and shall assume and shall bear the risk of loss and responsibility in respect of the Facility completed and transferred to Owner upon the Substantial Completion Date or the earlier termination of this Agreement, unless the loss or damage to the Facility is (a) caused by any Contractor Party, Subcontractor or other Person over whom Contractor has control or (b) a defect covered by the Warranties provided by Contractor under this Agreement.
   3. **Title**.
      * 1. Contractor warrants good and marketable title, free and clear of all Contractor Liens (to the extent Owner’s payments to Contractor are made in accordance with this Agreement), to all Work, Facility Equipment and other items furnished by Contractor or any of the Subcontractors that become part of the Facility.
        2. Title to the Facility, and to any discrete and identifiable item or series of Facility Equipment, shall pass to Owner upon the earliest to occur of (i) receipt by Contractor of payment (less any Retainage) in full therefor, (ii) delivery of such Facility Equipment to the Site; (iii) Availability Completion, (iv) Substantial Completion and (v) with respect to any applicable Facility Equipment, incorporation of such Facility Equipment into the Facility.
10. INTELLECTUAL PROPERTY
    1. **Title to Plans and Specifications**. Upon Owner’s payment of the Contract Price as provided in this Agreement, the documentation prepared by Contractor shall become the exclusive property of Owner; provided, however, that Contractor’s intellectual property rights in any such documentation shall remain with Contractor and nothing in this Agreement shall be construed as limiting Contractor’s rights to use its know-how, experience and skills of its employees (excluding Owner confidential information), whether or not acquired during performance of the Work, or to perform any construction or other services for any other person. Notwithstanding the foregoing, Contractor agrees to grant, and hereby does grant, to Owner an irrevocable, fully paid-up, royalty-free, perpetual, non-exclusive, world-wide, transferable license to use such intellectual property rights as needed for installing, owning, operating, repairing, maintaining, replacing, modifying and expanding the Facility (the “Licensed Technology”).
    2. **Intellectual Property**. Contractor shall include, as a term or condition of each contract with a Major Subcontractor employed by it in the performance of the Work, an intellectual property indemnification provision (including patents, trademarks, copyrights and trade secrets) extending from the Major Subcontractor to Owner and Contractor, with similar obligations as those set forth in Section 14.4. Contractor shall enforce and render all assistance Owner may reasonably require on a reimbursable cost basis to enforce the terms of those indemnifications by such Major Subcontractors. This obligation shall not reduce or otherwise affect Contractor’s obligation to provide all Work to Owner free and clear of all intellectual property infringement or other violation claims.
    3. **Procurement of Proprietary Rights**.
       * 1. Contractor warrants that no infringement of any patents, trademark, registered design, copyright, design right or other registerable or proprietary intellectual property right of any kind will be caused by the performance of the Work, the ownership of confidential information or the Facility and the Facility’s operation in accordance with the Required Manuals.
         2. Contractor shall procure, as required, the appropriate proprietary rights, licenses, agreements and permissions for materials, methods, processes and systems incorporated into the Facility. In performing the Work, Contractor shall not incorporate into the Facility any materials, methods, processes or systems which involve the use of any confidential information or intellectual property rights that Owner or Contractor do not have the right to use in connection with the performance of the Work or the construction, ownership or operation of the Facility or which may cause any Losses to Owner or Contractor arising out of claims of infringement of any domestic intellectual proprietary rights, or applications for such rights, or use of confidential information.
    4. **Intellectual Property Infringement**.
       * 1. Contractor shall pay all royalties, license and other fees payable under or in respect of, and shall defend, indemnify and hold harmless the Owner Parties from and against any claim arising out of, resulting from, or reasonably incurred in contesting, (i) any unauthorized disclosure by Contractor or any Subcontractor or use of any trade secrets, (ii) any other intellectual property infringement (including patent, copyright or trademark infringement) caused by Contractor’s performance, or that of its Subcontractors, under this Agreement, or (iii) any claim asserted against such Owner Party that (A) concerns any equipment or other items provided by Contractor or any Subcontractor under this Agreement, (B) is based upon the performance of the Work by Contractor or any Subcontractor, including the use of any tools or implements for construction by Contractor or any Subcontractor, or (C) is based upon the design or construction of any item or unit specified by Contractor under this Agreement or upon the operation of any item or unit according to directions embodied in Contractor’s final process design, or any revision thereof, prepared or approved by Contractor unless to the extent that such claims relate, in whole or in part, to (a) Owner’s modification of such equipment or other items made without Contractor’s approval, (b) the combination of such item with other products, materials, equipment, parts or apparatus not approved by Contractor, unless such combination was done in accordance with this Agreement, any change order, the Technical Specifications, or otherwise agreed to by the Contractor, and provided that such claim could not be brought but for such combination and such claim is based on infringement by the other products, materials, equipment, parts or apparatus or (c) a failure to promptly install an update required by Contractor, provided such update does not reduce or potentially reduce the performance of the Facility as of such date or otherwise adversely affect the Facility in any way with respect to the Project Transaction Documents or otherwise.
         2. If such claim for infringement or other violation results in a suit against an Owner Party, Contractor shall, at its election and in the absence of a waiver of this indemnity by such Owner Party, have sole charge and direction of said suit on such Owner Party’s behalf so long as Contractor diligently prosecutes the same. If Contractor has charge of a suit brought against an Owner Party by a third party, such Owner Party shall render such assistance at Contractor’s expense as Contractor may reasonably require in the defense of such suit except that such Owner Party shall have the right to be represented therein by counsel of its own choice and at its own expense. If such Owner Party is enjoined from completion of the Facility or any part thereof, or from the use, operation or enjoyment of the Facility or any part thereof as a result of such claim or any litigation based thereon, Contractor shall promptly seek to have such injunction removed at no cost to any Owner Party. If in such claim any device is held to constitute an infringement or other violation and its use is enjoined, Contractor shall either secure for each of the Owner Parties the right to continue using such device by suspension of the injunction or by procuring for such Owner Party a license, or otherwise at Owner’s option and at Contractor’s expense, replace such device with a non-infringing or violating device of equivalent utility, performance and expected life, or modify it so that it becomes non-infringing or violating without impairing its utility, performance and expected life.
11. START-UP, COMMISSIONING & TESTING[[12]](#footnote-12)
    1. **Start-up and Commissioning**. Contractor shall conduct the Start-up and Commissioning of the Facility in accordance with the Start-up and Commissioning requirements set forth in the Technical Specifications and Exhibit 25.[[13]](#footnote-13)
    2. **Facility Tests**. Contractor shall conduct the Availability Test and Functional Test for the Facility in accordance with Exhibit 25, and when Contractor believes that the Facility can satisfy the Minimum Capacity Level, Contractor shall conduct the Power Plant Controller Test and the Capacity Test in accordance with Exhibit 14B or Exhibit 14C, as applicable. Contractor shall submit a test report for each Facility Test within five (5) Days after the completion thereof, which test report shall include a summary of such Facility Test and the results for such test. Owner and Contractor will negotiate in good faith to agree upon detailed testing procedures that comply with the protocols set forth in Exhibit 14B, Exhibit 14C and Exhibit 25.
    3. **Availability and Capacity Test Notice**. Contractor shall provide Owner with at least five (5) Business Days’ prior written notice of the commencement of the Availability Test and the Capacity Test, in order to permit Owner’s Representative to arrange attendance at such tests. Contractor shall give Owner’s Representative at least five (5) Business Days advance notice of the re-performance of the Availability Test or Capacity Test, as applicable. Owner’s Representative, and any Owner Inspection Party identified to Contractor by Owner in writing prior to the date of the Availability Test or Capacity Test, shall be entitled to attend and observe the Availability Test and Capacity Test and each re-performance thereof.
    4. **Availability and Capacity Test Acceptance**. Contractor shall, as soon as practicable following the successful completion of the Availability Test, submit to Owner’s Representative an Availability Test Certificate, signed by Contractor’s Representative and attaching the Final Test Results performed pursuant to such Availability Test. Subject to this Section 15.4, Owner shall, within thirty (30) Days after Owner’s receipt of an Availability Test Certificate from Contractor, either (y) approve the Availability Test results by countersigning and delivering to Contractor the fully executed Availability Test Certificate (which shall be deemed effective on the date the Availability Test Certificate was delivered); or (z) give Contractor written notice stating that Owner rejects the Availability Test results and describing the non-conformity on which the rejection is based. Acceptance of the Availability Test Certificate by Owner shall not affect any rights Owner may have with respect to the Capacity Test (and Substantial Completion) or under a Warranty for any Facility Equipment or the Facility pursuant to Article 21. Once the Availability Test Certificate is accepted by Owner as provided in this Section 15.4, such acceptance shall constitute “Availability Completion” and the date of Contractor’s submission of the corresponding Availability Test Certificate to Owner that was accepted shall constitute the “Availability Completion Date.” With respect to the Capacity Test, Contractor shall, as soon as practicable following the completion of a Capacity Test in which the Final Test Results reveal that the Minimum Capacity Level for the Facility has been achieved, submit to Owner’s Representative a Capacity Test Certificate, signed by Contractor’s Representative and attaching the Final Test Results performed pursuant to Exhibit 14C. Subject to this Section 15.4, Owner shall, within thirty (30) Days after Owner’s receipt of a Capacity Test Certificate from Contractor, either: (a) approve the Capacity Test results by countersigning and delivering to Contractor the fully executed Capacity Test Certificate (which shall be deemed effective on the date the Capacity Test Certificate was delivered); or (b) give Contractor written notice stating that Owner rejects the Capacity Test results and describing the non-conformity on which the rejection is based. A Capacity Test Certificate signed by Owner is deemed conclusive evidence that the Facility has met the Minimum Capacity Level required under this Agreement. Acceptance of the Capacity Test Certificate by Owner shall not affect any rights Owner may have under a Warranty for any Facility Equipment or the Facility pursuant to Article 21.
    5. **Capacity Test Rejection**. If the Final Test Results reveal that the Facility fails to meet the Minimum Capacity Level, Contractor shall repeat the Capacity Test as necessary until the Minimum Capacity Level has been met. Contractor shall take all corrective actions so that the Facility successfully completes the Capacity Test and meets the Minimum Capacity Level, without prejudice to Owner’s rights and remedies under this Agreement. If the Final Test Results reveal that the Facility has satisfied the Minimum Capacity Level but not the Guaranteed Capacity, Contractor may elect to perform additional Work (if it deems necessary) and repeat the Capacity Test. Any such additional Work shall be performed in compliance with the requirements of this Agreement. Prior to commencing any such additional Work, Contractor shall provide to Owner a detailed plan and schedule to perform such additional Work and shall not commence any such additional Work without Owner’s consent, not to be unreasonably withheld. The Capacity Test may be repeated pursuant to this Section 15.5 no more frequently than once per week; provided that in no event shall the Capacity Test continue beyond sixty (60) Days after the Guaranteed Substantial Completion Date.
    6. **Correction of Defects**. Prior to Substantial Completion, Contractor shall promptly correct or cause the correction of any part of the Work that is Defective, deficient or is otherwise not in accordance with this Agreement, regardless of the stage of its completion or the time or place of discovery of such errors and regardless of whether Owner has previously reviewed or inspected or otherwise accepted such part of the Work in any way. Contractor shall bear the cost of re-performing any Defective, deficient or non-conforming Work. All internal and third party costs reasonably incurred by Owner in attending or in consequence of any re-testing or inspection necessitated by any Work that is Defective, deficient or is otherwise not in accordance with this Agreement shall be deducted from the Contract Price. In the event that any part of the Work is discovered to be in a Defective, deficient or non-conforming condition after Substantial Completion, correction of such Defective, deficient or non-conforming condition shall be governed by Article 21. Acceptance of any Facility Test, Facility Equipment or Work by Owner shall not affect any rights Owner may have under a Warranty pursuant to Article 21.
    7. **Serial Defects**. Without limiting Section 15.6, if any Serial Defect arises at any time prior to Substantial Completion, Owner shall provide notice to Contractor of such Serial Defect or, if Contractor becomes aware of any such Serial Defect, Contractor shall provide written notice of the same to Owner. Contractor shall determine what changes, repairs or replacements to any affected items of Facility Equipment are necessary to correct such Serial Defect and to avoid further failures of the Facility Equipment at the Facility which may not have yet experienced such failures, and Contractor shall make such necessary changes, repairs or replacements to all the Facility Equipment installed at the Facility (whether or not such Facility Equipment is installed, has been tested or has experienced such failures) all at its own cost and expense. Contractor shall repeat such process on an iterative basis until such Serial Defect and the underlying cause thereof is corrected.
12. SUBSTANTIAL COMPLETION
    1. **Generally**. Subject to Article 17, Contractor shall perform the Work in accordance with the Construction Schedule, as may be amended from time to time in accordance with the terms of this Agreement, so as to achieve Substantial Completion by the Guaranteed Substantial Completion Date and Final Completion by the Guaranteed Final Completion Date.
    2. **Substantial Completion Defined**. Subject to Section 16.3, “Substantial Completion” means (excepting the completion of Punch List Items):
       * 1. if required by the terms of Section 17.1, Contractor has paid any Facility Delay Liquidated Damages;
         2. the design, engineering, procurement and construction of the Facility has been completed in accordance with this Agreement;
         3. the Facility as a whole is capable of continuous operation in a safe manner (with respect to damage to any portion or component of the Facility or injury to any Person) in accordance with Applicable Law, Applicable Permits, Applicable Codes, the Interconnection Agreement, manufacturers’ recommendations, Prudent Utility Practice, the Technical Specifications and the design criteria related to the Facility;
         4. installation of a minimum of [\_\_\_] MW of inverters as determined by aggregating the nameplate of inverters;[[14]](#footnote-14)
         5. the Facility is fully operational and can demonstrate that it produces power at the Delivery Point and Contractor has received the Capacity Test Certificate, substantially in the form of Exhibit 15B signed by Owner;
         6. the Facility is electrically interconnected to, has been synchronized with, and is capable of transmitting electric energy to, the Delivery Point, all in accordance with the Interconnection Agreement;
         7. Contractor has certified by written notice to Owner that it has administered the training required by Section 3.32;
         8. the most recent Functional Test has been completed in accordance with the requirements of Exhibit 25 and the Facility is ready to commence commercial operation;
         9. Contractor shall have received (i) the Availability Test Certificate, substantially in the form of Exhibit 15A signed by Owner and (ii) Owner has accepted the results of the completed Facility Power Plant Controller Test in accordance with the requirements set out in Exhibit 14B;
         10. the Guaranteed Capacity for the Facility has been achieved, or, if not so achieved, the Facility Capacity is greater than the Minimum Capacity Level and Contractor has paid the applicable Final Capacity Liquidated Damages;
         11. Contractor and Owner have agreed upon the list of Punch List Items;
         12. Owner has received all Contractor Submittals as required to be delivered by the Substantial Completion Date in accordance with Exhibit 7;
         13. all special tools and Spare Parts described on Exhibit 27 and required to be purchased and delivered to the Site by Contractor pursuant to Section 3.10 have been delivered to Owner at the Site free and clear of any liens;
         14. all construction and post-construction submittals required by the Contractor Acquired Permits for the Facility have been submitted to the appropriate Governmental Authorities; and
         15. Contractor has delivered the notice and certificate of Substantial Completion to Owner pursuant to Section 16.3.
    3. **Notice and Certificate of Substantial Completion**. When Contractor considers that Substantial Completion has been achieved in accordance with Section 16.2, Contractor shall deliver to Owner a Certificate of Substantial Completion signed by Contractor, together with supporting documentation evidencing the satisfaction of the provisions in Section 16.2 and the corresponding Application for Payment. Contractor shall provide Owner with a Punch List Estimate at such time. Upon receipt of a Certificate of Substantial Completion from Contractor together with supporting documentation, Owner shall confirm whether Substantial Completion has been achieved and as soon as practicable, but in no event later than twenty (20) Days from the date of receipt of Contractor’s notice, Owner shall either issue Contractor: (a) a countersignature to the Certificate of Substantial Completion, signed by Owner’s Representative and stating that the Substantial Completion Date is the date on which Contractor delivered the Certificate of Substantial Completion to Owner under this Section 16.3; or (b) a written notice stating why Owner does not consider that Substantial Completion has been achieved. The “Substantial Completion Date” shall be the date on which Contractor delivered the Certificate of Substantial Completion that is accepted by Owner; provided, however, in the event Owner rejects a Certificate of Substantial Completion and any dispute arising from such rejection is resolved in favor of Contractor, such date shall be the date of Contractor’s delivery of the Certificate of Substantial Completion or such later date as may be determined in connection with the resolution of such dispute under Article 28. If Contractor receives a notice under clause (b) above, Contractor shall take the necessary steps to achieve Substantial Completion and the procedures set forth under this Section 16.3 shall be repeated until such time as the Certificate of Substantial Completion has been accepted by Owner. Any disputes regarding the existence or correction of any alleged deficiencies shall be resolved under Article 28.
    4. **Punch List**.
       * 1. Creation of Punch List. Prior to Substantial Completion, Owner and Contractor shall agree upon the relevant Punch List Items to be completed by Contractor. Contractor and Owner shall jointly walk-down the Facility and confer together as to the items which should be included on the punch list for the Facility. Prior to Substantial Completion, Contractor shall prepare a proposed punch list for the Facility to reflect the result of such joint walk down and deliver the same to Owner for its review and approval, which submitted list shall be explicitly designated as the “Proposed Punch List” and shall set forth all Work remaining to be completed after the Substantial Completion Date. The Proposed Punch List may only contain Punch List Items, and shall include a Punch List Estimate for the completion or repair of each such Punch List Item and Contractor’s estimated schedule for completion therefor. The Proposed Punch List that is ultimately approved by Owner for the Facility shall be referred to as the “Punch List”. Contractor shall note on such Punch List the items under dispute. Any disputes regarding the existence or resolution of Punch List Items shall be resolved under Article 28.
         2. Completion of Punch List Items. Contractor shall proceed promptly to complete and correct the Punch List Items no later than thirty (30) Days after the Substantial Completion Date. On a weekly basis after the Substantial Completion Date, Contractor shall update the Punch List to include the date(s) that items listed on such Punch List are completed by Contractor and accepted by Owner. Notwithstanding the foregoing, the items listed on such Punch List shall not be considered complete until Owner shall have inspected such Punch List Items and acknowledged, by notation on the updated Punch List, that such item of Work is complete.
         3. Access Following Substantial Completion. After Owner takes possession and control of the Facility upon Substantial Completion, Owner shall provide Contractor with reasonable access to the Facility in order to complete the Work, including the Punch List Items and, if applicable, to attempt to achieve the Performance Guarantees pursuant to Section 15.5; provided, however, following Substantial Completion, Owner shall not be obligated hereunder to take an outage and/or de-rate, or otherwise interfere with its operation of the Facility as a direct or indirect result of allowing Contractor access pursuant to this Section 16.4(c). Any such access by Contractor shall be subject to Owner’s processes and requirements relating to Site access, including safety, lock and tag out and confined space. Contractor shall complete the Work and shall perform its obligations using its reasonable efforts to minimize interference to the operations of the Facility and only as scheduled by mutual agreement of the Parties. Contractor shall, except to the extent otherwise agreed by the Parties, use all reasonable efforts to promptly complete all Punch List Items after the Substantial Completion Date. The Parties expect that Contractor will accomplish any necessary modifications, repairs and Punch List Items with minimal interference with the commercial operation of the Facility. Notwithstanding the provisions of Article 29, Contractor shall reimburse Owner for all costs, expenses or damages, including lost revenues incurred by or on behalf of Owner or any other Persons which result from Contractor’s performance under Section 16.4(b) or Section 16.4(c).
13. STAGES OF COMPLETION; DELAY AND CAPACITY LIQUIDATED DAMAGES
    1. **Guaranteed Substantial Completion Delay Liquidated Damages**. If Contractor has not achieved Substantial Completion by the Guaranteed Substantial Completion Date for reasons not excused under the terms of this Agreement, then Contractor shall pay to Owner delay liquidated damages in an amount equal to, for each Day (or partial Day) after the Guaranteed Substantial Completion Date that the Facility has not achieved Substantial Completion, the Facility Delay Liquidated Damages.
    2. **Final Capacity Liquidated Damages**. Contractor agrees that if based on the Final Test Results of the Facility Capacity calculation performed in accordance with Exhibit 14C, the Facility shall have failed to achieve the Guaranteed Capacity, Contractor shall pay to Owner upon Substantial Completion an amount equal to the Contract Price multiplied by a fraction, the numerator of which is the Capacity Shortfall and the denominator of which is the Guaranteed Capacity (the “Final Capacity Liquidated Damages”).
    3. **Payment**. Payment of Liquidated Damages shall be made payable within thirty (30) Days after Contractor’s receipt of Owner’s invoice. Liquidated Damages shall bear interest at the interest rate set forth in Section 8.6. Amounts payable by Contractor to Owner pursuant to this Article 17 may be set off by Owner against the payment due for Final Completion under the final Application for Payment. Any amounts that Contractor is obligated to pay to Owner under this Article 17 are subject to the limitations set forth in Article 29.
    4. **Liquidated Damages Reasonable**. The Parties agree that the extent and amount of loss or damage to Owner as a result of Contractor’s failure (a) to achieve the Construction Start Date by the Guaranteed Constriction Start Date, (b) to achieve Substantial Completion by the Guaranteed Substantial Completion Date and (c) to achieve the Guaranteed Capacity for the Facility is impractical and difficult to determine with certainty. The Parties agree that Liquidated Damages are a genuine pre-estimate of the damages suffered by Owner by reason of Contractor’s failure to achieve, or failure to cause the Facility to satisfy, obtain or achieve, the Guaranteed Construction Start Date, Guaranteed Substantial Completion Date or the Guaranteed Capacity for the Facility and are not intended as a penalty. The amounts payable by Contractor to Owner under this Article 17 shall be Contractor’s sole and exclusive liability to Owner, and Owner’s sole and exclusive remedy, with respect to Contractor’s failure (i) to achieve the Constriction Start Date by the Guaranteed Construction Start Date, (ii) to achieve to achieve Substantial Completion by the Guaranteed Substantial Completion Date or (iii) to achieve the Guaranteed Capacity for the Facility. If Contractor fails to pay any Liquidated Damages owing under this Article 17, Owner may deduct the amount thereof from any payment due, or that may become due, to Contractor under this Agreement or, if no payment is due, Owner may invoice Contractor for such amount. Nothing in this Article 17 shall be construed as relieving Contractor of its obligation to achieve Substantial Completion or the Guaranteed Capacity for the Facility.
    5. **Energy and Revenues of the Facility**. Any energy, environmental attributes or revenues generated by the Facility at any time, including during the performance of any testing, shall be solely for the benefit of Owner.
    6. **EITC and Depreciation Loss**. Without limiting any other Liquidated Damages required to be paid under this Article 17, the following additional remedies shall apply:
       * 1. The Parties acknowledge that the Contract Price reflects, in part, the value to Owner of certain tax benefits (as specified below) and to obtain those tax benefits in accordance with the expected schedule for the construction and completion of the Facility.
         2. If Contractor fails to cause the Facility to achieve the Construction Start Date on or prior to the Guaranteed Construction Start Date or thereafter achieve Substantial Completion by the Guaranteed Substantial Completion Date for any reason other than, subject to Section 17.6(f), an Owner-Caused Delay or an Owner Event of Default, then Contractor shall pay Owner, as a Contract Price adjustment and not as a penalty, the following amounts (collectively, the “EITC Liquidated Damages”)[[15]](#footnote-15):
            1. an amount equal to the difference, if any, between the Maximum EITCs for the Facility and the Expected EITCs for the Facility, and
            2. an amount equal to the equivalent of interest (using the Wall Street Journal “prime rate” as of the dates specified below as an annual rate, compounded annually) on the following amounts, determined as follows: the sum of (A) interest on the amount paid pursuant to Section 17.6(b)(i) for the period from the applicable estimated tax installment payment dates on which Owner would have taken all or any part of the corresponding Maximum EITCs into account when paying its estimated taxes (assuming Owner will pay its estimated taxes based on the annualized income installment method of Section 6655(e)(2) of the Code (using the annualization periods set forth in Sections 6655(e)(2)(A) and (B) of the Code)) until such payment pursuant to Section 17.6(b)(i) is received by Owner, and using as the interest rate the Wall Street Journal “prime rate” as of the first Business Day preceding the date of such first estimated tax installment payment, plus (B) the time value of the deferred tax depreciation available to Owner with respect to the Facility based on the difference between the Depreciation Benefit that would have been available had Contractor achieved Substantial Completion on the Guaranteed Substantial Completion Date (assuming that the Facility is deemed Placed in Service upon achieving Substantial Completion) and the available depreciation deductions (determined based on the same principles and tax rates specified in the definition of Depreciation Benefit (utilizing in the last sentence thereof “Expected EITCs” rather than “Maximum EITCs”)) given the applicable actual Substantial Completion Date, assuming Owner pays estimated taxes when specified in Section 17.6(b)(ii)(A) and such time value is calculated based on the hypothetical estimated tax payments that would be made on each estimated tax installment payment date given the actual Substantial Completion Date, compared to the hypothetical payments that would have been made had Contractor achieved Substantial Completion as specified above in this Section 17.6(b)(ii)(B) and using as the interest rate the Wall Street Journal “prime rate” as of the first Business Day preceding the date of such first estimated tax installment payment that is affected by such depreciation or EITC, plus (C) the EITC Timing Determinate. For the avoidance of doubt, there is to be no “double counting” of the interest factors calculated under Sections 17.6(b)(ii)(A) and 17.6(b)(ii)(B) with respect to EITCs, and in the event the interest factor determined under Section 17.6(b)(ii)(A) includes with respect to the reduced EITCs reimbursed under Section 17.6(b)(i) a portion of the time value captured under Section 17.6(b)(ii)(B) with respect to the deferral of EITCs, then the amount due under Section 17.6(b)(ii)(B) shall be reduced by the amount of such overlap.
         3. Any EITC Liquidated Damages required by Section 17.6(b) shall be paid within thirty (30) Days of Owner providing Contractor a written request therefor setting forth the calculations thereof in reasonable detail.
         4. Within ten (10) Days of receipt of such request, Contractor may request that a nationally recognized independent accounting firm selected by Owner and reasonably acceptable to Contractor verify the calculation of the EITC Liquidated Damages. The fees and expenses of such accounting firm shall be borne by Contractor. Absent manifest error, the determination of such accounting firm shall be final and binding upon the Parties.
         5. The calculation of the EITC Liquidated Damages due pursuant to Section 17.6(b) is intended to be hypothetical. Therefore, the amount shall not be altered based on (i) Owner’s actual federal income tax posture or liability, (ii) any audit or adjustment by the Internal Revenue Service or the results of any cost segregation analysis that allocates tax basis in a manner different than that set forth in Exhibit 23, (iii) any transfer, merger, sale, reorganization, lease, financing or other transaction entered into by Owner or any Affiliate thereof, (iv) any tax election made by Owner or any Affiliate thereof, (v) any penalties or interest payable to any tax authority, and (vi) all state tax items shall be disregarded.
         6. Notwithstanding the foregoing, Contractor agrees that it shall not be entitled to claim an Owner-Caused Delay or Owner Event of Default as a defense to liability for Contractor’s failure to achieve Substantial Completion by the Guaranteed Substantial Completion Date, unless: (i) delays caused by such events exceed seventy-five (75) Days in the aggregate commencing on the Effective Date and (ii) Contractor demonstrates that such Owner-Caused Delay or Owner Event of Default had an actual and demonstrable adverse impact to the Contractor Critical Path Items set forth on the Construction Schedule and that Contractor has used reasonable efforts to minimize and mitigate the impacts of any such events.
         7. Contractor’s liability for the EITC Liquidated Damages shall survive any termination of this Agreement due to a Contractor Default, in which case such liability shall be determined by reference to the date that Substantial Completion is ultimately achieved by Owner or any replacement EPC contractor, and any EITC Liquidated Damages owing from Contractor shall be included in the Termination Payment calculated pursuant to Section 20.5(b).
    7. **Enforceability**. The Parties explicitly agree and intend that the provisions of this Article 17 shall be fully enforceable by any court exercising jurisdiction over any dispute between the Parties arising under this Agreement. Each Party hereby irrevocably waives any defenses available under law or equity relating to the enforceability of the liquidated damages provisions set forth in this Article 17 on the grounds that such liquidated damages provisions should not be enforced as constituting a penalty or forfeiture.
14. FINAL COMPLETION
    1. **Generally**. Contractor shall achieve Final Completion of the Facility within sixty (60) Days after the Substantial Completion Date (the “Guaranteed Final Completion Date”). Subject to Section 18.2 and Section 18.3, Final Completion of the Facility means that all of the following conditions have been met:
       * 1. Contractor shall have received the Substantial Completion Certificate, substantially in the form of Exhibit 18 signed by Owner;
         2. the performance of the Work for the Facility is fully-complete, including all Punch List Items or, pursuant to Section 8.1(c), Owner has withheld any remaining Punch List Holdback to complete any items on the Punch List not completed by Contractor in accordance with the terms hereof;
         3. Contractor has delivered all Contractor Submittals, including the final record as-built drawings;
         4. Contractor has paid all bills from its Subcontractors related to the Facility that are not in dispute;
         5. no Contractor Liens shall be outstanding against the Facility and Owner shall have received all required final lien waivers under Section 8.4;
         6. Contractor has complied with its clean-up obligations pursuant to Section 3.15;
         7. Contractor has paid all Liquidated Damages, if any, to the extent required in accordance with this Agreement; and
         8. Contractor shall have delivered the Certificate of Final Completion to Owner pursuant to Section 18.2.
    2. **Certificate of Final Completion**. When Contractor considers that the Facility has achieved Final Completion in accordance with Section 18.1, it shall deliver to Owner notice thereof by delivering to Owner a Certificate of Final Completion signed by Contractor, together with supporting documentation evidencing the satisfaction of the provisions in Section 18.1. Upon receipt of the Certificate of Final Completion from Contractor together with supporting documentation, Owner shall promptly, but in no event later than twenty (20) Business Days from the date of receipt of Contractor’s notice, either issue Contractor: (a) a countersignature to the Certificate of Final Completion, signed by Owner’s Representative and stating that the Final Completion Date for the Facility is the date on which Contractor gave its notice to Owner under this Section 18.2; or (b) a written notice stating why Owner does not consider that Final Completion of the Facility has been achieved.
    3. **Failure to Achieve Final Completion**. If Contractor receives a notice under Section 18.2(b) above, Contractor shall take the necessary steps to achieve Final Completion of the Facility at Contractor’s cost. Upon completion of such corrective action, Contractor shall provide a new Certificate of Final Completion and supporting documentation to Owner for approval and the procedures set forth under Section 18.2 and this Section 18.3 shall be repeated until such time as the Certificate of Final Completion has been accepted by Owner. Any disputes regarding the existence or correction of any alleged deficiencies shall be resolved under Article 28.
15. SUSPENSION OF THE WORK
    1. **Owner-Directed Suspension**. Owner may, upon five (5) Business Days’ prior written notice to Contractor, direct Contractor to suspend its performance of all or any portion of the Work; provided that no prior written notice shall be required if such suspension is due to an Emergency or is otherwise required by Applicable Law. Upon the commencement of the suspension, Contractor shall stop the performance of the suspended Work except as may be necessary to carry out the suspension and protect and preserve the Work completed prior to the suspension. Contractor shall thereafter resume any suspended Work upon receipt of a written direction from Owner to resume the Work. Except as otherwise provided in Section 19.2, any period of Owner-directed suspension that extends beyond thirty (30) Days shall constitute an Owner-Caused Delay.
    2. **Costs and Schedule Relief for Contractor-Caused Suspension**. Notwithstanding anything to the contrary, Contractor shall bear its own costs and delays incurred due to a suspension by Owner pursuant to Section 19.1 where such suspension is necessitated due to a breach of this Agreement by Contractor, any act or omission by any Contractor Party or Subcontractor, an Emergency or as otherwise required by Applicable Law, and Contractor shall not be entitled to a change to the Construction Schedule or an extension of time to the Guaranteed Dates in any of such cases.
16. DEFAULTS AND REMEDIES
    1. **Contractor Events of Default**. Contractor shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, a “Contractor Event of Default”):
       * 1. Contractor fails to pay any amount due and owing to Owner under this Agreement that is not disputed in good faith, and such failure remains outstanding for a period of twenty (20) Business Days or more after receipt of notice from Owner stating that if Contractor does not pay such amount Owner may terminate in accordance with Section 20.2;
         2. an Insolvency Event occurs with respect to Contractor or, while the Contractor Performance Security is required to be in place, Contractor’s Guarantor;
         3. Contractor fails to maintain any insurance coverages required of it in accordance with Article 23 and Contractor fails to remedy such breach within thirty (30) Days after the date on which Contractor first receives a notice from Owner with respect thereto;
         4. Contractor assigns or transfers this Agreement or any right or interest herein except in accordance with Article 26;
         5. prior to the Final Completion Date, Contractor or any Affiliate of Contractor defaults under any other Project Transaction Document, or any such document is invalid, no longer in effect or unenforceable for any reason;
         6. except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 10.3, Contractor fails to achieve Substantial Completion within sixty (60) Days of the Guaranteed Substantial Completion Date;
         7. except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 10.3, Contractor fails to achieve Final Completion within sixty (60) Days of the Guaranteed Final Completion Date;
         8. the total amount of Liquidated Damages or other damages owed by Contractor to Owner under this Agreement (including damages for any Losses incurred by Owner or Owner Parties pursuant to Article 24) exceed the applicable maximum liability thresholds set forth in Section 29.2;
         9. except as a result of an Owner Event of Default, a Force Majeure Event, an Owner-Caused Delay or such other event for which Contractor is entitled to schedule relief under Section 10.3, Contractor Abandons the Work and Contractor fails to remedy such breach within ten (10) Business Days after receipt of notice from Owner;
         10. Contractor violates in any material respect any of the provisions of this Agreement not otherwise addressed in this Section 20.1 (except for Sections 17.1 and 17.2, the exclusive remedy for which is provided in Article 17), which violation remains uncured for thirty (30) Days following Contractor’s receipt of written notice thereof from Owner; provided, that if such violation is capable of cure but cannot reasonably be cured within such thirty (30) Day period, then Contractor’s right to cure shall extend beyond for an additional period (not to exceed thirty (30) Days) so long as Contractor is diligently attempting to cure such violation;
         11. a representation or warranty made by Contractor in or pursuant to this Agreement was false or misleading in any material respect as of the date on which it was made and has not been cured within ten (10) Days after Contractor receives a notice from Owner with respect thereto; provided that such ten (10) Day limit shall be extended if: (i) such failure is reasonably capable of cure and curing such failure reasonably requires more than ten (10) Days; and (ii) Contractor commences such cure within such ten (10) Day period and diligently prosecutes and completes such cure within sixty (60) Days thereafter, in each case, after the date on which Contractor receives a notice from Owner with respect thereto;
         12. Contractor’s Guarantor defaults in the performance of its obligations under the Contractor Performance Security or the Contractor Performance Security ceases to be in full force and effect as required by Section 8.8 and, in either case, Contractor has failed to deliver a comparable replacement therefor within five (5) Business Days after such failure;
         13. the Transmission Provider terminates the Interconnection Agreement due to an event of default or termination right thereunder resulting from (i) the negligence or willful misconduct of any Contractor Party or any Subcontractor in connection with this Agreement or (ii) the failure of any Contractor Party or any Subcontractor to comply with any of its obligations or a breach under this Agreement; or
         14. Contractor fails to comply with the requirements of Section 3.29.
    2. **Owner Rights and Remedies**. If a Contractor Event of Default occurs, subject to Article 29 and without permitting double recovery, Owner shall have the following rights and remedies and may elect to pursue any or all of them, in addition to any other rights and remedies that may be available to Owner hereunder, and Contractor shall have the following obligations:
       * 1. Owner may terminate this Agreement by giving notice of such termination to Contractor and, upon such termination:
            1. Contractor shall withdraw from the Site, shall assign (to the extent such subcontract may be assigned) to Owner such of Contractor’s subcontracts or purchase orders (including any module supply agreement) as Owner may request (in which case Contractor shall execute all assignments or other reasonable documents and take all other reasonable steps requested by Owner which may be required to vest in Owner all rights, set-offs, benefits and titles necessary to effect such assumption by Owner), and shall license, in the manner provided herein, to Owner all Intellectual Property Rights (to the extent not previously licensed in accordance with the terms hereof) of Contractor related to the Work reasonably necessary to permit Owner to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner may reasonably direct, and Owner may take possession of any or all Contract Documents necessary for completion of the Work (whether or not such Contract Documents are complete); and
            2. Contractor shall be liable to Owner for damages as provided in Section 20.5 or as otherwise provided herein;
         2. Owner may direct Contractor to turn over to Owner all Facility Equipment and other materials paid for by Owner;
         3. Owner may proceed against the Contractor Performance Security in accordance with its terms;
         4. Subject to the dispute resolution procedures set forth in Article 28, Owner may seek equitable relief solely to cause Contractor to take action, or to refrain from taking action, pursuant to this Agreement;
         5. Owner may pursue the dispute resolution procedures set forth in Article 28 to enforce the provisions of this Agreement;
         6. Subject to the dispute resolution procedures set forth in Article 28 and without permitting double recovery, Owner may seek actual damages subject to the limitations of liability set out in this Agreement;
         7. Owner may pursue remedies under Section 8.9;
         8. Owner may pursue remedies in accordance with Section 20.6; and
         9. Without limiting Contractor’s right to assert any defenses with respect to such payment, Owner may make such payments, acting reasonably, that Contractor is failing to pay in connection with the relevant Contractor Event of Default and either offset the cost of such payment against payments otherwise due to Contractor under this Agreement or Contractor shall be otherwise liable to pay and reimburse such amounts to Owner.
    3. **Owner Events of Default**. Owner shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, an “Owner Event of Default”):
       * 1. Owner fails to pay any amount of the Contract Price owing under this Agreement that is not disputed in good faith, and such failure remains outstanding for a period of twenty (20) Business Days after Owner has received a notice of such payment default from Contractor stating that if Owner does not pay such amount Contractor may terminate this Agreement in accordance with Section 20.4; or
         2. An Insolvency Event occurs with respect to Owner.
    4. **Contractor Rights and Remedies**. If an Owner Event of Default occurs, subject to Article 29 and Section 20.5 and without permitting double recovery, Contractor shall have the following rights and remedies and may elect to pursue any or all of them, in addition to any other rights and remedies that may be available to Contractor hereunder:
       * 1. Contractor may suspend the Work by giving notice of such suspension to Owner concurrently with or at any time after Contractor gives Owner notice described in Section 20.3(a); and
         2. Contractor may terminate this Agreement upon providing notice of such termination to Owner and shall be entitled to the remedy set forth in Section 20.5(a).
    5. **Termination Payment**.
       * 1. Upon any termination of this Agreement by Contractor for an Owner Event of Default, Owner shall pay the applicable Termination Payment due to Contractor on the date that is thirty (30) Days after Owner’s receipt from Contractor of an Application for Payment for such Termination Payment. Such Termination Payment shall be Contractor’s sole and exclusive remedy with respect to an Owner Event of Default that results in termination of this Agreement.
         2. In addition to the remedies provided in Section 20.2, upon termination of this Agreement for a Contractor Event of Default, subject to Article 29, Owner shall be entitled to recover from Contractor promptly upon notice to Contractor, as damages for loss of bargain and not as a penalty, (and in addition to all other amounts Owner is entitled to recover under this Agreement, including any liquidated damages or indemnification obligations owing from Contractor) an amount equal to the reasonable and direct costs of completing the Work (taking into account the requirements of the Construction Schedule and including compensation for obtaining a replacement contractor required as a consequence of such Contractor Event of Default) minus those costs that would have been payable to Contractor but for such Contractor Event of Default (and after considering all other amounts Owner is entitled to recover under this Agreement, including any liquidated damages or indemnification obligations owing from Contractor). Upon determination of the total cost of such remaining Work, Owner shall notify Contractor in writing of the amount, if any, of the resulting Termination Payment that Contractor shall pay Owner.
    6. **Termination Right Not Exclusive**. Except as otherwise set forth in Section 20.5(a), a Party’s right to terminate this Agreement pursuant to this Article 20 is in addition to, and without derogation from, any other rights and remedies such Party may have against the other Party under this Agreement or any Applicable Law, and each Party expressly reserves all such rights and remedies it may have against the other Party, whether in contract, tort or otherwise.
    7. **Owner Termination for Convenience.** Owner may in its sole discretion terminate the Work and this Agreement for convenience and without cause at any time by giving notice of termination to Contractor to be effective upon the receipt of such notice by Contractor. In the event of such termination, as Contractor’s sole and exclusive remedy, Owner shall, on the date that is thirty (30) Days after Owner’s receipt of an Application for Payment therefor, pay the applicable Termination Payment due to Contractor.
    8. **Contractor Conduct**. Upon issuance of a notice of termination pursuant to this Article 20, Contractor shall: (a) cease operations as directed by Owner in the notice; (b) take action necessary, or that Owner may reasonably direct, for the protection and preservation of the Work; and (c) except for Work directed to be performed prior to the effective date of termination stated in such notice, or except as expressly requested by Owner or under Section 20.2(a)(i), terminate all existing subcontracts and purchase orders that are terminable without premium, penalty or termination charges and enter into no further subcontracts and purchase orders with respect to the Work or the Facility.
17. WARRANTIES
    1. **Sole Warranty**. Except as set forth in Section 2.1, Section 3.31, Section 4.7, Section 13.3(a) and Section 14.3(a), the Warranties provided in this Article 21 shall be Contractor’s sole warranties with respect to the Work and the Facility.
    2. **No Liens or Encumbrances**. To the extent Owner’s payments to Contractor are made in accordance with this Agreement, Contractor warrants that title to all Work, materials and Facility Equipment provided by Contractor and its Subcontractors hereunder shall pass to Owner free and clear of all Contractor Liens. Contractor shall diligently pursue the removal and discharge of any lien filings relating to Contractor Liens.
    3. **Defect Warranty**. Contractor warrants to Owner:
       * 1. Defect Warranty. That the Facility, all Facility Equipment furnished by Contractor and any of the Subcontractors and other Work, including installation, shall, upon the Substantial Completion Date: (i) be free from defects in materials, construction, fabrication and workmanship; (ii) be new and unused (except for use as part of the Facility); (iii) be of good quality and in good condition and (iv) conform to the applicable requirements of the Scope of Work in effect as of the Substantial Completion Date (collectively, the “Defect Warranty”).
         2. Design Warranty. That the design services included as part of the Work shall conform to the terms and conditions of the Contract Documents, including the Technical Specifications, Prudent Utility Practices, Applicable Codes, Applicable Laws and Applicable Permits, in each case in effect as of the Substantial Completion Date (the “Design Warranty”).
    4. **Warranty Period**.
       * 1. Defect Warranty Period. With respect to the Facility, any Facility Equipment furnished by Contractor and any of the Subcontractors and all other Work including installation services, the Defect Warranty shall commence on the Substantial Completion Date and end on the second (2nd) year anniversary of the Substantial Completion Date (such period, the “Defect Warranty Period”) and Contractor shall have no liability under the Defect Warranty for any Defect Warranty claims submitted by Owner from and after the expiration of the Defect Warranty Period;provided that a claim may be made by Owner within thirty (30) Days after the end of a Defect Warranty Period for a matter which arose within such Defect Warranty Period; provided*,* further, however*,* that the Defect Warranty Period for any item or part required to be re-performed, repaired, corrected or replaced following discovery of a defect during the applicable Defect Warranty Period shall continue until the end of the later of (i) the expiration of such Defect Warranty Period and (ii) one (1) year from the date of completion of such repair, re-performance, correction or replacement.
         2. Design Warranty Period. With respect to the Facility, any Facility Equipment furnished by Contractor and any of the Subcontractors and all other Work including installation services, the Design Warranty shall commence on the Substantial Completion Date and end on the second (2nd) year anniversary of the Substantial Completion Date (such period, the “Design Warranty Period”) and Contractor shall have no liability under the Design Warranty for any Design Warranty claims submitted by Owner from and after the expiration of the Design Warranty Period;provided that a claim may be made by Owner within thirty (30) Days after the end of a Design Warranty Period for a matter which arose within such Design Warranty Period; provided*,* further,however*,* that the Design Warranty Period for any item or part required to be re-performed, repaired, corrected or replaced following discovery of a defect during the applicable Design Warranty Period shall continue until the end of the later of (i) the expiration of such Design Warranty Period and (ii) one (1) year from the date of completion of such repair, re-performance, correction or replacement.
         3. Serial Defect. If any Serial Defect arises during the Warranty Period, Contractor shall follow the procedures set forth in Section 15.7 with respect to such Serial Defect.
    5. **Exclusions**. The Defect Warranty and the Design Warranty shall not apply to damage to or failure of any Work or Facility Equipment to the extent such damage or failure is caused by the following, provided that in no event shall the breach or fault of a Contractor Party or Subcontractor be the basis of an exclusion from the Defect Warranty or Design Warranty:
       * 1. a failure by Owner or its representatives, agents or contractors (other than any Contractor Party or Subcontractor) to maintain such Work or Facility Equipment in accordance with Prudent Utility Practice or in accordance with the recommendations set forth in the Required Manuals; or
         2. operation of such Work or Facility Equipment by Owner or its representatives, agents or contractors (other than any Contractor Party or Subcontractor) in excess of or outside of the operating parameters or specifications for such Work or Facility Equipment as set forth in the Required Manuals.
    6. **Correction of Defects**.
       * 1. Notice of Warranty Claim. If, during the applicable Warranty Period or within thirty (30) Days thereafter, Owner provides notice to Contractor within a reasonable period after discovery that the applicable portion of the Facility has manifested a defect during the Defect Warranty Period or that the Work fails to satisfy the Design Warranty during the Design Warranty Period, then Contractor as promptly as practicable, but in no event later than five (5) Days following receipt of such notice, shall inspect such claimed warranty defect or nonconformance, and at Contractor’s own cost and expense as promptly as practicable refinish, repair or replace, at its option, such non-conforming or defective part of the Facility or Work and resulting property damage to the Facility caused by such defective Work. Contractor shall pay the cost of removing any defective component, the costs of shipping and installation of replacement parts in respect of a defect, and the cost of re-performing, repairing, replacing or testing such item as shall be necessary to cause conformance with the Defect Warranty or Design Warranty. The timing of the work to be completed with respect to any such replacement or repair shall be subject to Owner’s approval. Such replacement or repair shall be considered complete when the applicable defect has been corrected by the affected equipment or parts being restored to Technical Specifications and the other requirements of this Agreement and the Contract Documents, and compliance with Applicable Laws, Prudent Utility Practices and Applicable Permits. Notwithstanding the foregoing, if the Facility shall fail to satisfy the applicable Warranty during the applicable Warranty Period, and such failure endangers human health or property or materially and adversely affects the operation of the Facility, Contractor shall correct the failure as soon as is practicable or, if Contractor does not so correct such failure, Owner shall be permitted to correct such failure at Contractor’s sole cost pursuant to Section 21.6(b). For the purposes of this Section 21.6(a), manifestation of a defect shall include failure to function and physical damage.
         2. Failure of Contractor to Perform Warranty Work. If after Substantial Completion, Contractor does not use its reasonable efforts to proceed to complete the applicable Warranty work, or cause any relevant Subcontractor to proceed to complete the Warranty work, required to satisfy any Warranty claim properly asserted under the terms of this Article 21 in accordance with the terms hereof, Owner shall, after giving Contractor notice of Owner’s intent to perform the remedial Warranty work itself at least three (3) Business Days prior to Owner’s commencement of any such remedial Warranty work, have the right to perform the necessary Warranty work to remedy the Warranty claim, or have third parties perform the necessary Warranty work and Contractor shall bear the costs thereof. If Contractor (or the relevant Subcontractor) implements a plan to diligently perform the Warranty work to satisfy such Warranty claim during such three (3) Business Day period, and thereafter diligently prosecutes the execution of such plan, Owner shall not perform, or cause any third party to perform, such Warranty work. If a defect or other nonconformance to the applicable Warranty arises during the applicable Warranty Period and such defect or nonconformance occurs under circumstances where there is an immediate need for repairs due to the endangerment of human health or property, Owner may perform such Warranty work for Contractor’s account. If Owner performs or causes third parties to perform such Warranty work as set forth above, Owner shall provide reasonable access to Contractor to the Facility to observe Owner’s and its Affiliates’ or any third party’s performance of the Warranty work. The performance of Warranty work, either performed by Owner or performed by third parties engaged by Owner which was performed in accordance with the applicable provisions of this Agreement related to such Warranty work that Contractor, had it performed the Warranty work itself, would have observed to comply with this Agreement, shall be deemed covered by the Warranties, and Contractor shall reimburse Owner for all reasonable costs, charges and expenses incurred by Owner in connection therewith, which shall include a ten percent (10%) mark-up. For clarity, Contractor may not rely upon the failure of any Subcontractor to honor its warranty obligations to excuse or limit Contractor’s Warranties. At Owner’s election, it may apply any Retainage being held under Section 8.1(c) toward any costs for which Contractor is responsible hereunder.
         3. Enforcement by Owner.
            1. Major Facility Equipment Warranties. Contractor shall obtain or has obtained warranties for the Equipment supplied by the Major Subcontractors (the “Major Facility Equipment Warranties”) including those set forth in U0. Upon Owner’s request, Contractor shall deliver to Owner copies of any other Major Facility Equipment Warranty.
            2. Assignment. All Major Facility Equipment Warranties shall be assignable to Owner. If this Agreement has been terminated in accordance with Article 20 or otherwise, at the end of each Defect Warranty Period, Contractor shall assign to Owner (unless previously assigned), or otherwise hold in trust on behalf of Owner until such assignment shall occur, at the request and direction of Owner, all unexpired Major Facility Equipment Warranties, subject to the terms and conditions of any such warranties; provided that, notwithstanding such assignment, Contractor shall be entitled to enforce each such warranty to the exclusion of Owner through the earlier of the termination of this Agreement in accordance with Article 20 and the end of the applicable Defect Warranty Period. Notwithstanding the foregoing, Contractor shall not be obligated to assign any claims of Contractor with respect to any Major Subcontractor then or thereafter existing so long as Contractor is performing its obligations under this Article 21. At Owner’s request, Contractor shall deliver to Owner, at the end of each Defect Warranty Period (unless previously provided), copies of all subcontracts containing such Major Facility Equipment Warranties.
    7. **Limitations On Warranties.** EXCEPT FOR THE EXPRESS WARRANTIES AND REPRESENTATIONS SET FORTH IN SECTION 2.1, SECTION 3.29, SECTION 3.31, SECTION 4.7, SECTION 13.3(a), SECTION 14.3(a) AND THIS ARTICLE 21, CONTRACTOR DOES NOT MAKE ANY EXPRESS WARRANTIES OR REPRESENTATIONS, OR ANY IMPLIED WARRANTIES OR REPRESENTATIONS, OF ANY KIND, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE. THE REMEDIES PROVIDED FOR IN THIS ARTICLE 21 WITH RESPECT TO ANY WORK WHICH FAILS TO SATISFY THE DEFECT WARRANTY DURING THE APPLICABLE DEFECT WARRANTY PERIOD OR THE DESIGN WARRANTY DURING THE APPLICABLE DESIGN WARRANTY PERIOD (AS THE CASE MAY BE) SHALL BE THE SOLE AND EXCLUSIVE REMEDIES OF OWNER AS A RESULT OF SUCH FAILURE. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT TO THE CONTRARY, THIS SECTION 21.7 DOES NOT OPERATE TO LIMIT ANY WARRANTIES OR GUARANTEES SET FORTH IN ANY OTHER PROJECT TRANSACTION DOCUMENT.
18. PUBLICITY
    1. **Press Releases**. Subject to Section 25.1, as applicable, the Parties shall jointly agree upon the necessity and content of any press release in connection with the matters contemplated by this Agreement. Contractor shall coordinate with Owner with respect to, and provide Owner advance copies of the text of, any proposed announcement or publication that may include any non-public information concerning the Work prior to the dissemination thereof to the public or to any Person other than Subcontractors or advisors of Contractor, in each case, who agree to keep such information confidential. Contractor shall not disseminate any such announcement or publication without Owner’s consent, which may be withheld in Owner’s sole and absolute discretion.
19. INSURANCE
    1. **Contractor’s Insurance**. Contractor shall, at its expense, procure or cause to be procured, and maintain or cause to be maintained, the policies of insurance and corresponding coverages specified in Part I of Exhibit 13 (“Contractor’s Insurance”). Unless otherwise specified in Exhibit 13, Contractor’s Insurance shall commence no later than the Effective Date and shall remain in full force and effect at all times from commencement of the Work until Substantial Completion, unless required for a longer or shorter period in accordance with Exhibit 13.
    2. **Owner’s Insurance**. Owner shall, at its expense, procure or cause to be procured, and maintain or cause to be maintained, the policies of insurance and corresponding coverages specified in Part II of Exhibit 13 (“Owner’s Insurance”). Owner’s Insurance shall commence on the Effective Date and shall remain in full force and effect at all times until Substantial Completion, unless required for a longer or shorter period in accordance with Exhibit 13. Subject to the prior agreement of the Parties and the affected insurers, Owner’s Insurance may be included, at Owner’s cost and responsibility, under one or more policies of Contractor’s Insurance.
    3. **Ratings**. All policies of insurances required or otherwise contemplated under this Agreement shall be provided by insurance companies having an A.M. Best Insurance Reports rating of A- X or better, and shall otherwise be in accordance with the requirements of this Article 23 and Exhibit 13.
    4. **Policy Requirements**. Contractor’s Commercial General Liability and Worker’s Compensation insurance policies shall: (a) provide for a waiver of subrogation rights against Owner and all Owner Parties and any Financing Parties, and of any right of the insurers to any set-off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of that policy; and (b) list Owner and the Owner Parties as “additional named insureds” with respect to liability arising out of or in connection with the Work by or on behalf of Contractor, excluding any contributory liability of Owner or any Owner Parties.
    5. **No Limitation and Release**. Unless otherwise expressly provided in this Agreement, the insurance policy limits set forth in Exhibit 13 shall not be construed to limit the liability of the insured Party under this Agreement. Notwithstanding the foregoing sentence, each Party releases and waives any and all rights of recovery against the other Party and all of its Affiliates, subsidiaries, employees, successors, permitted assigns, insurers and underwriters that the other Party may otherwise have or acquire in, or from, or in any way connected with, any loss covered by policies of insurance maintained or required to be maintained by that Party pursuant to this Agreement or because of deductible clauses in or inadequacy of limits of any such policies of insurance.
    6. **Reduction or Ceasing to be Maintained**. If at any time the insurance to be provided by Owner or Contractor hereunder shall be reduced or cease to be maintained, then (without limiting any other rights of the other Party set forth in this Agreement that arises as a result of such failure) the other Party may at its option take out and maintain the insurance required hereby and, in such event, (a) Owner may withhold the cost of insurance premiums expended for such replacement insurance from any payments to Contractor, or (b) Owner shall promptly reimburse Contractor for the premium of any such replacement insurance, as applicable.
    7. **Expiration**. With respect to any insurance carried by Contractor which may expire before the date specified in Section 23.1, Contractor shall, at least one (1) month prior to the relevant policy renewal date, submit to Owner certificates of insurance, insurer binders or other satisfactory evidence that coverage required by this Article 23 has been renewed.
20. INDEMNITY
    1. **Contractor Indemnity**. Contractor shall indemnify, hold harmless and defend Owner and all Owner Parties from and against the following:
       * 1. all Losses arising from third-party claims for property damage, personal injury or bodily injury or death to the extent caused by any negligent, willful, reckless or otherwise tortious act or omission (including strict liability) of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable during the performance of the Work or from performing or from a failure to perform any of its obligations under this Agreement, or any curative action under any Warranty following performance of the Work;
         2. all Losses associated with a take of a protected species if any are found on the Site during the performance of the Work;
         3. Losses sustained by Owner as a result of Contractor’s breach of Section 3.29;
         4. all Losses incurred by Owner as a result of a claim under the Project Labor Agreement against Owner arising from the construction of the Facility and performance of the Work;
         5. all Losses that directly arise out of or result from all claims for payment of compensation for Work performed hereunder, whether or not reduced to a lien or mechanic’s lien, filed by Contractor or any Subcontractors, or other persons performing any portion of the Work, including reasonable attorneys’ fees and expenses incurred by any Owner Party in discharging any Contractor Lien, except to the extent of a breach by Owner in relation to any obligation it has to make a payment under this Agreement;
         6. all Losses that directly arise out of or result from employers’ liability or workers’ compensation claims filed by any employees or agents of Contractor or any of the Subcontractors, regardless of negligence of Owner or any Owner Party contributing to such Losses;
         7. all Losses arising from third-party claims, including by Subcontractors, for property damage, personal injury or bodily injury or death that directly or indirectly arise out of or result from the failure of Contractor or any of the Subcontractors to comply with the terms and conditions of Applicable Laws during their performance of the Work;
         8. all fines or penalties issued by any Governmental Authority that directly arise out of or result from the failure of the Facility (or any portion thereof), as designed, constructed and completed by Contractor or any Subcontractor, to be capable of operating in compliance with all Applicable Laws or the conditions or provisions of all Applicable Permits;
         9. any and all fines, penalties or assessments issued by any Governmental Authority that Owner may incur as a result of executing any applications to any such Governmental Authority at Contractor’s request;
         10. all Losses arising from claims by any Governmental Authority that directly or indirectly arise out of or result from the failure of Contractor to pay, as and when due, all Taxes [(other than Owner Taxes)], fees or charges of any kind imposed by any Governmental Authority for which Contractor is obligated to pay pursuant to the terms of this Agreement;
         11. all Losses arising from claims by any Governmental Authority claiming Taxes [(other than Owner Taxes)] based on gross receipts or on income of Contractor, any of the Subcontractors, or any of their respective agents or employees with respect to any payment for the Work made to or earned by Contractor, any of the Subcontractors, or any of their respective agents or employees under this Agreement;
         12. all fines or penalties issued by, and other similar amounts payable to, any Governmental Authority that arise out of or result from the failure of Contractor, a Subcontractor or any of their respective agents or employees to comply with any Applicable Permit;
         13. all Losses arising from claims by any counterparties to the agreements setting forth the Real Property Rights arising out of or in connection with Contractor’s performance of the Work;
         14. all Losses, including claims for property damage, personal injury or bodily injury or death, whether or not involving damage to the Facility or the Site, that arise out of or result from:
             1. the use of Hazardous Materials by Contractor or any of its Subcontractors in connection with the performance of the Work, which use includes the storage, transportation, processing or disposal of such Hazardous Materials by Contractor or any of its Subcontractors, whether lawful or unlawful;
             2. any Release in connection with the performance of the Work by Contractor or any of its Subcontractors; or
             3. any enforcement or compliance proceeding commenced by or in the name of any Governmental Authority because of an alleged, threatened or actual violation of any Applicable Law by Contractor or any of its Subcontractors with respect to Hazardous Materials in connection with the performance of the Work.
    2. **Owner Indemnity**. Owner shall indemnify, hold harmless and defend Contractor and all Contractor Parties from and against the following:
       * 1. all Losses arising from third-party claims for property damage, personal injury or bodily injury or death to the extent caused by any grossly negligent or willful act or omission during the performance by Owner or any Affiliate, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, of their obligations or from a failure to perform any of their obligations under this Agreement;
         2. [all Losses arising from claims by any Governmental Authority that directly or indirectly arise out of or result from the failure of Owner to pay, as and when due, all Owner Taxes for which Owner is obligated to pay pursuant to the terms of this Agreement;]
         3. all Losses that directly arise out of or result from employers’ liability or workers’ compensation claims filed by any employees or agents of Owner, regardless of negligence of any Contractor Party or Subcontractor contributing to such Losses; and
         4. all fines or penalties issued by, and other similar amounts payable to, any Governmental Authority that arise out of or result from the failure of Owner, or any of its contractors, agents or employees, to comply with any Owner Acquired Permit.
    3. **Patent Infringement and Other Indemnification Rights**.
       * 1. Contractor shall defend, indemnify, and hold harmless the Owner Parties against all Losses arising from any Intellectual Property Claim. If Owner provides notice to Contractor of the receipt of any such claim, Contractor shall, at its own expense, settle or defend any such Intellectual Property Claim and pay all damages and costs, including reasonable attorneys’ fees, awarded against Owner. In addition to the indemnity set forth above, if Owner is enjoined from completing the Facility or any part thereof, or from the use, operation, or enjoyment of the Facility or any part thereof, as a result of a final, non-appealable judgment of a court of competent jurisdiction or as a result of injunctive relief provided by a court of competent jurisdiction, Contractor shall use its best efforts to have such injunction removed at no cost to Owner; and Contractor shall, at its own expense and without impairing the performance requirements set forth in this Agreement: (i) procure for Owner, or reimburse Owner for procuring, the right to continue using the infringing service, Facility Equipment or other Work; (ii) if the obligation set forth in subclause (i) is not commercially feasible, modify the infringing service, Facility Equipment or other Work with service, Facility Equipment or other Work, as applicable, with substantially the same performance, quality and expected life, so that the same becomes non-infringing; or (iii) if the obligations set forth in subclauses (i) and (ii) are not commercially feasible, replace the infringing service, Facility Equipment or other Work with non-infringing service, Facility Equipment or other Work, as applicable, of comparable functionality and quality; provided that in no case shall Contractor take any action which adversely affects Owner’s continued use and enjoyment of the applicable service, Facility Equipment, or other Work without the prior written consent of Owner.
         2. Notwithstanding anything set forth in Section 24.3(a) to the contrary, Contractor shall have no indemnity obligations under Section 24.3(a) for any Intellectual Property Claim to the extent arising from or in connection with (i) any modification of the Work by Owner or any third party (other than any Contractor Party or Subcontractor) of the Work, the Facility, any Module, the Equipment or other goods, materials, supplies, items or services provided by Contractor (or any of its Affiliates or Subcontractors) that was not, in either case, authorized by any Contractor Party or Subcontractor or (ii) Owner’s material variation from Contractor’s recommended written procedures for using the Work (unless otherwise authorized by any Contracting Party or Subcontractor).
         3. Owner’s acceptance of the supplied materials and equipment or other component of the Work shall not be construed to relieve Contractor of any obligation hereunder.
    4. **Environmental Indemnification**. The scope of Contractor’s and Owner’s indemnification obligations with respect to environmental matters are addressed in Section 24.1(n), Section 12.6 and Section 12.7.
    5. **Right to Defend**. An Indemnitee shall provide notice to the Indemnifying Party within thirty (30) Days after receiving notice of the commencement of any legal action or of any claims or threatened claims against such Indemnitee in respect of which indemnification may be sought pursuant to the foregoing provisions of this Article 24 or any other provision of this Agreement providing for an indemnity (such notice, a “Claim Notice”), and the Indemnifying Party shall thereafter promptly elect whether to assume such defense. The Indemnitee’s failure to give, or tardiness in giving, such Claim Notice will reduce the liability of the Indemnifying Party only by the amount of damages attributable and prejudicial to such failure or tardiness, but shall not otherwise relieve the Indemnifying Party from any liability that it may have under this Agreement. If the Indemnifying Party assumes the defense, (i) it shall retain counsel reasonably acceptable to the Indemnitee and (ii) the Indemnitee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such claim, and the fees and expenses of such special counsel shall be borne by the Indemnitee unless the Indemnifying Party agrees otherwise or except as set forth in the following sentence. If the Indemnifying Party does not assume the defense of the Indemnitee, does not diligently prosecute such defense, or if a conflict (including any actual or potential differing of interest between the Parties) precludes counsel for Indemnifying Party from providing the defense, then the Indemnitee shall have the absolute right to control the defense of such claim and the fees and expenses of such defense, including reasonable attorneys’ fees of the Indemnitee’s counsel, reasonable costs of investigation, court costs and other costs of suit, arbitration, dispute resolution or other proceeding, and any reasonable amount determined to be owed by Indemnitee pursuant to such claim, shall be borne by the Indemnifying Party, provided that the Indemnifying Party shall be entitled, at its expense, to participate in (but not control) such defense, and provided further that the Indemnifying Party shall reimburse the Indemnitee on a monthly basis for such costs and expenses. Subject to all of the foregoing provisions of this Section 24.5 as between the Parties, the Indemnifying Party shall control the settlement of all claims, in coordination with any insurer as required under the applicable insurance policies in Article 23 as to which it has assumed the defense; provided that to the extent the Indemnifying Party, in relation to such insurer, controls settlement: (a) such settlement shall include a dismissal of the claim and an explicit release from the party bringing such claim or other proceedings of all Indemnitees; and (b) the Indemnifying Party shall not conclude any settlement without the prior approval of the Indemnitee, which approval shall not be unreasonably withheld or delayed; provided further that, except as provided in the preceding sentence concerning the Indemnifying Party’s failure to assume or to diligently prosecute the defense of any claim, no Indemnitee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the Indemnifying Party, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any action, claim, suit, investigation or proceeding for which indemnity is afforded hereunder unless such Indemnitee reasonably believes that the matter in question involves potential criminal liability against such Indemnitee. Other than as provided in this Section 24.5, the Indemnifying Party shall not settle any claim without the prior written approval of the Indemnitee, which approval shall not be unreasonably withheld, delayed or conditioned. The Indemnitee shall provide reasonable assistance to the Indemnifying Party when the Indemnifying Party so requests, at the Indemnifying Party’s expense, in connection with such legal action or claim, including executing any powers-of-attorney or other documents required by the Indemnifying Party with regard to the defense or indemnity obligations.
    6. **Comparative Fault**. Except as expressly provided to the contrary herein, it is the intent of the Parties that where fault is determined to have been joint or contributory, principles of comparative fault will be followed and each Party shall bear the proportionate cost of any Losses attributable to such Party’s fault.
    7. **Survival of Indemnity Obligations**. The indemnities set forth in this Article 24 shall survive the Final Completion Date or the earlier termination of this Agreement for a period expiring five (5) years following the Final Completion Date or said termination, whichever first occurs; provided that (i) with respect to indemnities arising out of or related to the Warranties, the indemnities shall survive for a period of five (5) years after the last Day of the applicable Warranty Period; (ii) indemnities arising out of or related to environmental matters (including as set forth in Article 12) shall survive for a period equal to the applicable statute of limitations; (iii) the indemnities arising out of Section 24.3 shall survive for a period expiring ten (10) years following the Final Completion Date or the earlier termination of this Agreement; and (iv) indemnities arising out of or related to Tax shall survive for a period equal to the later of (A) five (5) years following the Final Completion Date and (B) the applicable statute of limitations plus one hundred twenty (120) Days (such period, as applicable, the “Survival Period”). All Claim Notices must be delivered, if at all, to the applicable Party prior to the expiration of such applicable Survival Period. If any Claim Notice is made within such Survival Period, then the indemnifying period with respect to all claims identified in such Claim Notice (and the indemnity obligation of the Parties hereunder with respect to such claim) shall extend through the final, non-appealable resolution of such claims. For purposes of clarification hereunder, without limiting the other rights granted hereunder to either Party, a Party may enforce the indemnity provisions hereunder pursuant to the provisions of this Article 24 without having to declare an Owner Event of Default or a Contractor Event of Default, as applicable.
21. CONFIDENTIALITY
    1. **Dissemination of Confidential Information**. Neither Party (the “Receiving Party”) shall (1) use for any purpose other than (i) performing its obligations under this Agreement or (ii) within the scope of the license and rights granted pursuant to Section 14.1 or (2) divulge, disclose, produce, publish, or permit access to, without the prior written consent of the other Party (the “Disclosing Party”), any Confidential Information of the Disclosing Party. “Confidential Information” means proprietary information concerning the business operations or assets of Owner or Contractor (as the case may be), and may include this Agreement and exhibits hereto, all information or materials prepared in connection with the Work performed under this Agreement, designs, drawings, specifications, techniques, models, data, documentation, source code, object code, diagrams, flow charts, research, development, processes, procedures, know-how, manufacturing, development or marketing techniques and materials, development or marketing timetables, strategies and development plans, customer, supplier or personnel names and other information related to customers, suppliers or personnel, pricing policies and financial information, and other information of a similar nature, whether or not reduced to writing or other tangible form, and any other trade secrets. Confidential Information does not include (a) information known to the Receiving Party prior to obtaining the same from the Disclosing Party; (b) information in the public domain at the time of disclosure by the Receiving Party; (c) information obtained by the Receiving Party from a third party; (d) information approved for public release by express prior written consent of an authorized officer of the Disclosing Party or (e) information independently developed by the Receiving Party without use of the information provided by the Disclosing Party or in breach of this Article 25. Notwithstanding anything herein to the contrary, the Receiving Party has the right to disclose Confidential Information without the prior written consent of the Disclosing Party: (i) as required by any court or other Governmental Authority, or by any stock exchange on which the shares of any Party are listed, but only to the extent, that, based upon reasonable advice of counsel, Receiving Party is required to do so by the disclosure requirements of any Applicable Laws and prior to making or permitting any such disclosure, Receiving Party shall, to the extent legally permitted, provide Disclosing Party with prompt notice of any such requirement so that Disclosing Party (with Receiving Party’s assistance if requested) may seek a protective order or other appropriate remedy, (ii) as otherwise required by Applicable Law, (iii) in connection with any government or regulatory filings, including without limitation, filings with any state energy regulatory commission, (iv) to any power purchaser, transmission provider, or an Owner contractor or prospective contractor (or advisors retained on their behalf) or their successors and permitted assigns, any Financing Parties, Independent Engineer, Owner’s Engineer and its attorneys, accountants, financial advisors or other agents, in each case bound by confidentiality obligations, (v) to banks, investors and other financing sources and their advisors, in each case bound by confidentiality obligations or (vi) in connection with an actual or prospective merger or acquisition or similar transaction where the party receiving the Confidential Information is bound by the same or similar confidentiality obligations. The Parties acknowledge that the Utah Public Service Commission (“UPSC”) and the Utah [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] have the power to examine Owner’s books, records, minutes, papers and property and may, from time to time, request or require Owner to disclose or report to the UPSC and/or BCP (or any representatives thereof), as the case may be, any Confidential Information so requested or required without any requirement of notice to or consultation with Contractor.
    2. **SCADA System Information**. Notwithstanding any other provision of this Article 25, Contractor shall have the right to remotely access the SCADA System installed by Contractor in the Facility in order to collect all plant data for its own uses to the end of the Warranty Period; provided, however, that such access by Contractor shall be subject to any limitations Owner may impose that pertain to ensuring electric system reliability or infrastructure security. For the avoidance of doubt, this Agreement does not give Contractor any right to have operational control of the Facility. Information shall not be distributed outside Contractor’s organization without the express written consent of Owner.
    3. **Return of Confidential Information**.
       * 1. Except for Confidential Information necessary for Contractor to perform the Work and its obligations under this Agreement or as necessary for Owner in connection with the construction, operation or maintenance, use, modification, repair, disposal, removal or alteration of the Facility, and subject to and in accordance with Section 14.1, at any time upon the request of Disclosing Party, Receiving Party shall promptly deliver to Disclosing Party or destroy (as determined by Receiving Party) all documents (and all copies thereof, however stored) furnished to or prepared by Receiving Party that contain Confidential Information and all other documents in Receiving Party’s possession that contain any such Confidential Information; provided that the Receiving Party may retain one copy of such Confidential Information solely for the purpose of complying with its audit and document retention policies and may retain such Confidential Information if required by Applicable Law; and provided, further, that all such retained Confidential Information shall be held subject to the terms and conditions of this Agreement.
         2. Notwithstanding the return or destruction of all or any part of the Confidential Information, the confidentiality provisions set forth in this Agreement shall nevertheless remain in full force and effect with respect to Confidential Information until the date that is two (2) years after the earlier of (i) the Final Completion Date or (ii) the termination of this Agreement.
22. ASSIGNMENT
    1. **Prohibition on Assignment**. Except as set forth in Section 26.2, no Party shall be entitled to assign this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld.
    2. **Exceptions**. Notwithstanding the foregoing, (a) Owner, without the consent of the Contractor, shall be entitled to assign its right, title and interest in and to this Agreement to: (i) [PacifiCorp d/b/a Rocky Mountain Power], (ii) any successor to Owner provided such successor is a public utility holding a certificate of public convenience and necessity granted by the UPSC pursuant to [*Utah Code*], where such assignment does not occur by operation of Law, (iii) a Person (other than a natural person) providing retail electric service in Utah, (iv) a Person (other than a natural person) whose Credit Rating, as published by either Relevant Rating Agency, is equal or superior to the Minimum Credit Rating as of the time of assignment or (v) a Person (other than a natural person) as otherwise required by Law, (b) Owner shall be entitled to assign its right, title and interest in and to this Agreement to any Financing Parties by way of security for the performance of obligations to such Financing Parties without the consent of Contractor who, subject to any consent entered into by Contractor with the Financing Parties, may further assign such rights, title and interest under this Agreement upon exercise of remedies by a Financing Party following a default by Owner under the financing agreements entered into between Owner and the Financing Parties and (c) each Party shall be entitled to assign its right, obligation, title and interest in and to this Agreement to any of its Affiliates or in connection with a merger or acquisition of substantially all of the assets of such Party, subject, with respect to any such assignment by Contractor, to the Contractor Performance Security and the continued validity thereof. Contractor shall execute any consent and agreement or similar documents with respect to such an assignment described in subclause (b) as the Financing Parties may reasonably request and acknowledges that such consent and agreement or similar document may, among other things, require Contractor to give the Financing Parties notice of, and an opportunity to cure, any breach of this Agreement by Owner. Contractor shall reasonably cooperate with Owner in the negotiation and execution of any reasonable amendment or addition to this Agreement required by the Financing Parties. Contractor shall, at Owner’s cost and subject to the confidentiality provisions set forth in Article 25, make available to any Financing Parties and other Persons involved in the financing or refinancing of the Facility who have a need-to-know (e.g., counsel to a lender or any such other Person, Governmental Authority, underwriters, rating agencies, independent reviewers and feasibility consultants) such information in the control of Contractor (including financial information concerning Contractor) as may reasonably be requested by Owner on behalf of the Financing Parties or the Financing Parties’ engineer with respect to financing of the Facility. Contractor further agrees that, in connection with the financing or refinancing of the Facility, Contractor shall, at the request of Owner, provide an opinion of counsel as to the enforceability against Contractor of this Agreement until expiration of the last Warranty Period. Any authorized assignment of this Agreement by either Party shall relieve such Party of its obligations hereunder at such time as the authorized successor agrees in writing to be bound by such assigning Party’s obligations hereunder.
    3. **Indemnitees; Successors and Assigns**. Upon any assignment by either Party hereunder, with respect to indemnification obligations, the definition of “Owner Party” or “Contractor Party”, as applicable, shall be deemed modified to include the assignor and permitted assignee under such assignment and each of their respective employees, agents, partners, Affiliates, shareholders, officers, directors, members, managers, successors and permitted assigns.
    4. **Assignment to Owner Affiliate; Assignment With Consent**. This Agreement or any right or obligation contained herein may be assigned by Owner, without the prior consent of Contractor, to (i) PacifiCorp d/b/a Rocky Mountain Power, its Affiliates, or their Financing Parties as a collateral assignment, on the understanding that, on enforcement of such collateral assignment by PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or such Financing Parties, PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or such Financing Parties (or their respective designee) may assume, or cause any purchaser at any foreclosure sale or any assignee or transferee under any instrument of assignment or transfer in lieu of foreclosure to assume, all of the interests, rights and obligations of Owner hereunder, (ii) any of its Affiliates, including the Project Company, or (iii) to PacifiCorp d/b/a Rocky Mountain Power, its Affiliates or to any other actual or prospective purchaser or owner of the Project assets (and such purchaser or owner may assign its rights in this Agreement back to Owner or any of its Affiliates without the consent of Contractor); provided that such Affiliate, purchaser or owner of the Project assets assumes all of Owner’s obligations hereunder in such assignment (except for payment obligations that remain with the assigning Owner); and provided, further, that, in the case of an assignment of this Agreement by Owner to PacifiCorp d/b/a Rocky Mountain Power or its Affiliates, unless otherwise Notified by Owner to Contractor, Owner shall remain responsible for all payments of the Contract Price (and only such payments) not yet paid arising after such assignment through and including the Final Payment. Owner shall have the right to assign this Agreement to any other financially qualified party without Contractor’s prior written consent. Except as otherwise provided in this Section 26.4 or in Section 26.5, this Agreement may be otherwise assigned by the Parties only upon the prior written consent of the other Party. When duly assigned in accordance with the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the permitted assignee; any other assignment shall be void and without force or effect.
    5. **Assignment to Financing Parties**. Notwithstanding Section 26.4, Contractor agrees to (i) the assignment by Owner, without the consent of Contractor, of its rights and obligations under this Agreement to the Financing Parties in connection with the financing of the Project or to any designee of the Financing Parties, and (ii) the Financing Parties’ performance of Owner’s obligations under this Agreement after such assignment.
23. NOTICES
    1. **Notices**. Any notice, request, demand or other communication required or permitted under this Agreement shall be deemed to be properly given by the sender and received by the addressee if made in writing and sent: (a) by personal delivery; (b) in portable document format (PDF) attached to an email transmission, but only to the extent such transmission is promptly followed by overnight or certified mail, postage prepaid, return receipt requested; (c) by overnight or certified mail, postage prepaid, return receipt requested; or (d) by next day air courier service. Notices given pursuant to this Section 27.1 shall be addressed as follows to:

|  |  |
| --- | --- |
| Owner: | PacifiCorp d/b/a Rocky Mountain Power  1407 West N Temple, Suite 310  Salt Lake City, UT 84116  Attention: [\_\_\_\_\_\_\_\_\_]  Email: [\_\_\_\_\_\_\_\_\_] |
|  | |
|  |  |
| Contractor: | [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]  [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]  [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]  [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]  Attention: [\_\_\_\_\_\_\_\_\_]  Email: [\_\_\_\_\_\_\_\_\_] |

A Party, the Financing Parties or the Independent Engineer, by giving notice as provided in this Section 27.1, may, as to itself, change any of the details for the service of notice hereunder or designate a reasonable number of additional “with a copy to” recipients.

* 1. **Effective Time**. Any notice or notification given personally, through overnight mail or through certified letter shall be deemed to have been received on delivery, any notice given by express courier service shall be deemed to have been received the next Business Day after the same shall have been delivered to the relevant courier, and any notice given by PDF transmission shall be deemed to have been received on the date of delivery (but only to the extent such transmission was promptly followed by mail as provided in Section 27.1) if delivered prior to 5:00 pm Mountain Time; provided, that if such date of delivery is not a Business Day or is delivered after 5:00 pm Pacific Time, then the date of delivery shall be the immediately following Business Day.

1. DISPUTE RESOLUTION; GOVERNING LAW
   1. **Good faith negotiations**. In the event that any question, dispute, difference or claim arises out of or is in connection with this Agreement, including any question regarding its existence, validity, performance or termination (a “Dispute”), which either Party has notified to the other Party in a written notice stating that it is a “Notice of Dispute”, senior management personnel from both Contractor and Owner shall attempt to resolve the Dispute for a minimum period of thirty (30) Days following issuance of the Notice of Dispute, and such attempt shall include at least one in-person meeting between senior management personnel from both Contractor and Owner, each of whom has the authority to finally settle the Dispute on behalf of that Party. If the Dispute is not resolved by negotiation, the provisions of Section 28.2 and Section 28.3 below shall apply.
   2. **Technical Disputes; Optional Arbitration**.
      * 1. Technical Disputes. If a Notice of Dispute relates to a Dispute that is technical in nature (a “Technical Dispute”), such Dispute shall be submitted to an Independent Expert for expedited dispute resolution pursuant to the following provisions of this Section 28.2(a). The Parties shall negotiate in good faith to select an Independent Expert. If the Parties cannot agree within five (5) Business Days then the Party initiating the dispute (the “Dispute Initiator”) shall send notice to the other Party proposing two potential independent engineers set forth in the definition of “Independent Expert”. The other Party shall then have two (2) Business Days after receipt of such notice to select an Independent Expert from such two (2) potential independent engineers identified in such notice. If the other Party does not make a selection within such two (2)-Business Day period, the Dispute Initiator shall select an Independent Expert from such two (2) potential independent engineers identified in such notice. The Parties shall formalize their positions regarding the dispute in writing within four (4) Days of the submission of the Technical Dispute and submit such positions to the Independent Expert. The Parties and the Independent Expert shall meet at the Site within five (5) Business Days of the Independent Expert’s receipt of the materials referenced in the immediately preceding sentence and the Independent Expert shall issue a binding ruling that both Parties will obey within five (5) Business Days thereof. The Party that will pay for the Independent Expert and all costs related thereto shall be the losing Party, as determined by the Independent Expert.
        2. Any Dispute other than a Technical Dispute that is not settled to the mutual satisfaction of the Parties within the applicable notice or cure periods provided in this Agreement or pursuant to Section 28.1, may proceed to court pursuant to Section 28.3 unless the Parties mutually agree in writing to resolve such Dispute by arbitration as provided herein.
        3. If the Parties elect to pursue arbitration, upon the expiration of the thirty (30) Day negotiation period set forth in Section 28.1, either Party may submit such Dispute to arbitration by providing a written demand for arbitration to the other Party, and such arbitration shall be conducted in accordance with the Rules of the AAA for the Resolution of Construction Industry Disputes (the “Arbitration Rules”) in effect on the date that the submitting Party gives notice of its demand for arbitration under this Section 28.2. The arbitration shall be conducted at a location as agreed by the Parties, or if the Parties cannot so agree, the arbitration shall be conducted in Salt Lake County, Utah. Unless otherwise agreed by the Parties, discovery shall be conducted in accordance with the Federal Rules of Civil Procedure and the Parties shall be entitled to submit expert testimony or written documentation in the arbitration proceeding. The decision of the arbitrator(s) shall be final and binding upon Owner and Contractor and shall be set forth in a reasoned opinion, and any award may be enforced by Owner or Contractor, as applicable, in any court of competent jurisdiction. Any award of the arbitrator(s) shall include interest from the date of any damages incurred for breach of this Agreement, and from the date of the award until paid in full, at a rate equal to the lesser of (i) the rate published by the *Wall Street Journal* as the “prime rate” on the Business Day preceding the date on which such interest begins to accrue plus two percent (2%) and (ii) the maximum rate allowed under Applicable Law. Each of Owner and Contractor shall bear its own cost of preparing and presenting its case; however, the prevailing party in such arbitration shall be awarded its reasonable attorney’s fees, expert fees, expenses and costs incurred in connection with the Dispute. The fees and expenses of the arbitrator(s), and other similar expenses, shall initially be shared equally by Owner and Contractor, subject to reimbursement of such arbitration costs and attorney’s fees and costs to the prevailing party. The arbitrator(s) shall be instructed to establish procedures such that a decision can be rendered within ninety (90) Days after the appointment of the arbitrator(s). The arbitration may include, by consolidation or joinder or in any other manner, any additional persons or entities if (1) such persons or entities are materially involved in a common issue of law or fact in dispute and (2) such persons or entities are either contractually bound to arbitrate or otherwise consent to arbitration.
        4. Appointment of Arbitrator(s). All arbitrators appointed to hear a Dispute pursuant to paragraph (i) or paragraph (ii) below shall have significant construction contract resolution experience and experience and understanding of the contemporary solar photovoltaic power industry and photovoltaic systems.
           1. Where the amount in dispute is less than One Million Dollars ($1,000,000) the Dispute shall be heard by a single neutral arbitrator agreed by the Parties. If the Parties cannot agree on a single neutral arbitrator within fifteen (15) Business Days after the written demand for arbitration is provided, then the arbitrator shall be selected pursuant to the Arbitration Rules.
           2. Where the amount in dispute is for One Million Dollars ($1,000,000) or more, the Dispute shall be heard by a panel of three (3) arbitrators. Each Party shall select one neutral arbitrator to sit on the panel. The arbitrators selected by the Parties shall in turn nominate a third neutral arbitrator from a list of arbitrators mutually satisfactory to the Parties.
        5. Arbitrator Confidentiality Obligation. The Parties shall ensure that any arbitrator appointed to act under this Article 28 will agree to be bound to comply with the provisions of Article 25 with respect to the terms of this Agreement and any information obtained during the course of the arbitration proceedings.
   3. **Governing Law/Litigation/Choice of Forum/Waiver of Jury Trial**. THIS AGREEMENT SHALL BE GOVERNED BY THE INTERNAL LAWS OF THE STATE OF UTAH, EXCLUDING ANY OF ITS CONFLICT OF LAW PROVISIONS THAT WOULD REQUIRE THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION. SUBJECT TO THE OTHER PROVISIONS OF THIS ARTICLE 28 AND THE ARBITRATION OPTION DESCRIBED IN SECTION 28.2, FOR PURPOSES OF RESOLVING ANY DISPUTE ARISING UNDER THIS AGREEMENT, THE PARTIES HEREBY SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS (AND IN THE ABSENCE OF JURISDICTION THEREIN THE UTAH STATE COURTS IN SALT LAKE COUNTY) LOCATED IN THE STATE OF UTAH. THIS CONSENT TO JURISDICTION IS BEING GIVEN SOLELY FOR PURPOSES OF THIS AGREEMENT, AND IT IS NOT INTENDED TO, AND SHALL NOT, CONFER CONSENT TO JURISDICTION WITH RESPECT TO ANY OTHER DISPUTE IN WHICH A PARTY TO THIS AGREEMENT MAY BECOME INVOLVED. THE PARTIES ACKNOWLEDGE AND AGREE THAT TERMS AND CONDITIONS OF THIS AGREEMENT HAVE BEEN FREELY, FAIRLY AND THOROUGHLY NEGOTIATED. EACH PARTY HEREBY WAIVES ANY OBJECTION THAT IT MAY HAVE TO THE VENUE OF SUCH ACTION, SUIT OR PROCEEDING IN SUCH COURT OR THAT SUCH SUIT, ACTION OR PROCEEDING IN SUCH COURT WAS BROUGHT IN AN INCONVENIENT COURT AND AGREES NOT TO PLEAD OR CLAIM THE SAME. EACH PARTY FURTHER AGREES THAT SUCH COURT SHALL HAVE *IN PERSONAM* JURISDICTION OVER EACH OF THEM WITH RESPECT TO ANY SUCH DISPUTE, CONTROVERSY, OR PROCEEDING. THE PARTIES SUBMIT TO THE JURISDICTION OF SAID COURT AND WAIVE ANY DEFENSE OF *FORUM NON CONVENIENS*.  EACH PARTY, TO THE FULL EXTENT PERMITTED BY LAW, HEREBY KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL, WAIVES, RELINQUISHES AND FOREVER FORGOES THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF, OR IN ANY WAY RELATING TO THE RIGHTS OR OBLIGATIONS SET FORTH IN THIS AGREEMENT OR ANY CONDUCT, ACT OR OMISSION OF CONTRACTOR OR OWNER OR ANY OF THEIR RESPECTIVE DIRECTORS, OFFICERS, AFFILIATES, EMPLOYEES, AGENTS, ATTORNEYS, OR OTHER REPRESENTATIVES, OR ANY OTHER PERSONS AFFILIATED WITH OWNER OR CONTRACTOR, IN EACH OF THE FOREGOING CASES, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. EACH PARTY (I) CERTIFIES THAT NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 28.3. EACH PARTY FURTHER WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED.
   4. **Work to Continue**. During the pendency of any dispute proceedings, as required under the terms of this Agreement, Owner shall continue to make undisputed payments and each Party shall continue to perform its obligations under this Agreement.
2. LIMITATION OF LIABILITY
   1. **Consequential Damages**. Neither Contractor nor Owner shall be liable to the other for, nor shall a court or arbitrator assess, any consequential losses or damages, whether arising in contract, warranty, tort (including negligence), strict liability or otherwise, including losses of use, profits, business opportunity, reputation or financing, subject to the following exclusions which constitute amounts which shall not be deemed to be limited or waived by the foregoing restriction: (a) the Liquidated Damages; (b) claims made by, damages incurred by, or amounts payable pursuant to an indemnity given hereunder; (c) damages arising out of a breach of Article 25 by either Party; (d) claims arising out of fraud or willful misconduct; and (e) all Termination Payments.
   2. **Overall Limitation of Liability**. Notwithstanding any other provision of this Agreement, the cumulative maximum liability of a Party to the other Party under this Agreement shall not exceed one hundred percent (100%) of the Contract Price, the maximum liability of Contractor for Facility Delay Liquidated Damages shall not exceed twenty percent (20%) of the Contract Price and the maximum liability of Contractor for Final Capacity Liquidated Damages shall not exceed twenty percent (20%). The foregoing limitation of liability shall not apply with respect to claims made by, damages incurred by, or amounts payable to third parties pursuant to an indemnity given hereunder or claims arising out of such Party’s fraud or willful misconduct. To the extent any provision of this Agreement establishes a lower limit of liability of a Party with respect to a particular component or type of liability, such lower limit of liability shall control with respect to the relevant component or type of liability. Notwithstanding anything herein to the contrary, no liabilities of Contractor to Owner that are covered by insurance carried by Contractor pursuant to Article 23 (except deductibles paid by Contractor) shall count towards Contractor’s cumulative maximum liability to Owner pursuant to this Agreement.
3. SURVIVAL
   1. **Survival**. The provisions within the Articles with the following titles shall survive termination of this Agreement: Contract Interpretation and Effectiveness, Taxes, Force Majeure Event; Owner-Caused Delay, Hazardous Materials, Intellectual Property, Suspension of the Work, Defaults and Remedies, Warranties, Publicity, Indemnity, Confidentiality, Assignment, Dispute Resolution; Governing Law, Limitation of Liability, Miscellaneous and any other provision which expressly or by implication survives termination.
4. MISCELLANEOUS
   1. **Terms in Subcontracts**. All Subcontracts shall conform to the requirements of this Agreement, insofar as applicable. All Work performed for the Contractor by a Subcontractor shall be pursuant to an appropriate written agreement between Contractor and the Subcontractor which shall contain provisions that:
      * 1. reasonably preserve and protect all the rights of Owner under this Agreement and to the Work to be performed under the Subcontract, so that the subcontracting thereof will not prejudice such rights;
        2. require that such Work be performed in accordance with the applicable requirements of this Agreement;
        3. require such Subcontractor to make available a representative with whom the Owner may discuss questions regarding the progress of the Work being performed by the Subcontractor;
        4. require such Subcontractor to provide and maintain adequate insurance consistent with the insurance required pursuant to this Agreement;
        5. require such Subcontractor to remove any employee or independent contractor of such Subcontractor used in the Work or in such Subcontractor’s warranty obligations within two (2) Business Days after receiving notice from Owner to remove such employee or independent contractor if: (i) such employee or independent contractor, in Owner’s reasonable judgment, creates a safety or security hazard or a material risk of either: (A) non-achievement of Substantial Completion or Final Completion; or (B) material non-performance by Contractor in accordance with this Agreement; and (ii) Contractor has not corrected such safety or security hazard or other non-performance identified in clause (i) to the reasonable satisfaction of Owner during such two (2) Business Day period;
        6. provide that, if following any termination of this Agreement, the Subcontract shall be assigned from the Contractor to the Owner, the Owner shall not be liable for obligations that accrue under the Subcontract before the date of such assignment; and
        7. such other provisions as required by other provisions of this Agreement (including the exhibits hereto).
   2. **Third Party Beneficiaries**. The provisions of this Agreement are intended for the sole benefit of Owner and Contractor and there are no third-party beneficiaries hereof (except as expressly set forth herein).
   3. **Further Assurances**. Owner and Contractor will each use its reasonable efforts to implement the provisions of this Agreement, and for such purpose each, at the reasonable request of the other, will, without further consideration, promptly execute and deliver or cause to be executed and delivered to the other such assistance (including in connection with any financing involving the Facility by either Party), or assignments, consents or other instruments in addition to those required by this Agreement, in form and substance satisfactory to the other, as the other may reasonably deem necessary or desirable to implement any provision of this Agreement.
   4. **No Waiver**. A Party’s waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement at any time shall not in any way affect, limit, modify or waive that Party’s right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision hereof, any course of dealing or custom of the trade notwithstanding. All waivers must be in writing and signed on behalf of Owner and Contractor in accordance with Section 31.5.
   5. **Amendments in Writing**. Without limiting any provision of Article 10 with respect to mandatory Change Orders, no oral or written amendment or modification of this Agreement by any officer, agent, member, manager or employee of Contractor or Owner shall be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized representative of the Party to be bound thereby.
   6. **Books and Record; Retention**. Contractor agrees to retain for ten (10) years (or any longer Warranty Period) all material records relating to its performance of the Work or Contractor’s warranty obligations herein.
   7. **Attorneys’ Fees**. If any legal action or other proceeding is brought for the enforcement of this Agreement, the prevailing Party shall be entitled to be awarded its reasonable attorney’s fees, expert fees, expenses and costs incurred in connection with such action or proceeding.
   8. **Inspection, Review and Approval**. Notwithstanding Owner’s inspection, review, monitoring, observation, acknowledgement, comment or Owner’s approval of any items reviewed, inspected, monitored or observed in accordance with this Agreement, neither Owner nor any of its representatives or agents reviewing such items, including the Owner’s Engineer, shall have any liability for, under or in connection with the items such Person reviews or approves, and Contractor shall remain responsible for the quality and performance of the Work in accordance with this Agreement. Owner’s or its representative’s inspection, review, monitoring, observation, acknowledgement, comment or approval of any items shall not constitute a waiver of any claim or right that Owner may then or thereafter have against Contractor. Unless otherwise expressly provided herein, Owner shall not unreasonably delay its review of any item submitted by Contractor for review or approval for review or approval; provided, however, the foregoing shall not be used to decrease any express time limitation for such review or approval set forth herein. Any review, inspection, monitoring or observation by Owner or its representatives in accordance with this Agreement shall not constitute any approval of the Work undertaken by such Person, cause Owner to have any responsibility for the actions, the Work or payment of such Person (other than in respect of Owner’s obligations to pay Contractor in accordance with Article 8) or to be deemed to be in an employer-employee relationship with Contractor or any Subcontractor, or in any way relieve Contractor of its responsibilities and obligations under this Agreement or be deemed to be acceptance by Owner with respect to such Work.
   9. **Independent Engineer**. Contractor acknowledges that an independent engineer or engineering firm (the “Independent Engineer”) may be engaged by Owner for the purpose of providing to Owner or Financing Parties a neutral, third party overview of the Work. The Independent Engineer shall provide independent opinions and determinations, arrived at reasonably and in good faith, with respect to: (a) the status of the Work; (b) the performance of the Facility and equipment and the Facility Tests and the results and procedures related thereto; (c) invoices submitted by Contractor; (d) Contractor’s quality control procedures for the Work and major components thereof; and (e) the approval of Change Orders. Owner undertakes that it will use reasonable efforts to ensure that the Independent Engineer gives its countersignature or indicates that it is not willing to do so in relation to the relevant matter within the time specified in this Agreement for Owner to respond in relation to such matter; provided that any such unwillingness on the part of the Independent Engineer shall not affect or limit Owner’s obligations hereunder. The Independent Engineer may, at its option, attend any meetings between Owner and Contractor related to the progress of the Facility and shall approve all Contractor’s Applications for Payments prior to any payment being made by Owner thereunder; provided that any failure by the Independent Engineer to approve a Contractor’s Application for Payment shall not affect or limit Owner’s obligations hereunder. Notwithstanding anything else to the contrary contained herein, the Independent Engineer shall have no right to direct Contractor or any portion of the Work or to make any Change Order. Contractor shall maintain a complete, accurate and up-to-date log of all Change Orders and, upon request of the Independent Engineer, shall furnish copies of such log to the Independent Engineer. Contractor shall afford the Independent Engineer the same rights as Owner with respect to access to the Site.
   10. **Financing Matters**. In connection with any collateral assignment by Owner of its rights, title and interest under this Agreement to any Financing Party in accordance with Section 26.2, Contractor shall execute and deliver any usual and customary consent in accordance with Section 26.2 and use commercially reasonable efforts to cause Major Subcontractors to execute subordination agreements. Contractor agrees to make available, or to use commercially reasonable efforts to cause its Subcontractors to make available, to the Financing Parties and the Independent Engineer, subject to an appropriate confidentiality agreement, independent reviewers, feasibility consultants, and other financial institutions or parties involved in the financing process, such information in the control of Contractor, its Affiliates and Subcontractors (including financial information concerning Contractor, its Affiliates and the Subcontractors) as may be reasonably requested by Owner. Contractor acknowledges that the Financing Parties and the Independent Engineer may monitor, inspect and review the Work as permitted by Article 6.
   11. **Fees and Expenses**. Except as specifically set forth herein, each Party shall be responsible for any legal fees and expenses, financial advisory fees, accountant fees and any other fees and expenses incurred by such Party in connection with the negotiation, preparation and enforcement of this Agreement and the transactions contemplated hereby.
   12. **Related Contracts**. Services and work performed at any time by Contractor or its Affiliates under any other Project Transaction Document shall not constitute Work hereunder. Owner shall use reasonable efforts to make claims against Contractor and its Affiliates under the appropriate Project Transaction Document. Notwithstanding the foregoing, Contractor shall not contend that it is not liable for any claim of Owner under or arising out of this Agreement on the grounds that the loss or damage suffered by Owner was caused by an act or omission, or the failure to comply with the terms of any other Project Transaction Document by, any Contractor Party or Subcontractor, and Contractor irrevocably waives any such defense in any Dispute. Contractor shall inform Owner if it believes that Owner made a claim under the wrong Project Transaction Document. If Contractor and Owner do not agree that such claim should have been made under a different Project Transaction Document, Contractor and Owner shall resolve any such dispute regarding which Project Transaction Document a claim should have been made under by submitting such dispute to resolution in accordance with Article 28.
   13. **Audit Rights**. With respect to any Change Order which adjusts the Contract Price by compensating Contractor on a reimbursable cost or time and materials basis, Contractor shall maintain, in accordance with Prudent Utility Practice and generally accepted accounting principles consistently applied, records and books of account as may be necessary for substantiation of all Contractor claims for additional compensation. Owner, Owner’s Engineer, the Financing Parties, if any, and their authorized representatives shall be entitled to inspect and audit such records and books of account during normal business hours and upon reasonable advanced notice during the course of the Work and for a period of five (5) years after the Final Completion Date (or such longer period, where required by Applicable Law); provided, however, that the purpose of any such audit shall be only for verification of such costs, and Contractor shall not be required to keep records of or provide access to those of its costs covered by the fee, allowances, fixed rates, unit prices, lump sum amounts, or of costs which are expressed in terms of percentages of other costs. Contractor shall retain all such records and books of account for a period of at least five (5) years after the Final Completion Date (or such longer period, where required by Applicable Law). Contractor shall use commercially reasonable efforts to cause all Major Subcontractors engaged in connection with the Work or the performance by Contractor of its warranty obligations herein to retain for the same period all their records relating to the Work for the same purposes and subject to the same limitations set forth in this Section 31.13. Audit data shall not be released by the auditor to parties other than Contractor, Owner, Owner’s Engineer, and their respective officers, directors, members, managers, employees and agents in connection with any such audit, subject to the provisions of Article 25. If, as a result of any audit conducted pursuant to this Section 31.13, the results of such audit indicate that Contractor received more or less than the amount to which it was entitled under this Agreement, either Owner shall pay the additional amount owed to Contractor or Contractor shall refund any overpayment to Owner, as applicable, in either case within ten (10) Days of a written request therefor. Owner shall be responsible for all costs and expenses of such audit unless an overpayment by Owner of more than three percent (3%) of the subject payment is discovered, in which case Contractor shall be responsible for such costs and expenses.

[THE SIGNATURE PAGES IMMEDIATELY FOLLOW]

IN WITNESS WHEREOF, the Parties hereto have duly executed and delivered this Agreement as of the Effective Date.

|  |
| --- |
| **PacifiCorp,**  **an Oregon corporation**  By:  Name:  Title: |
|  |
|  |
| **[\_\_\_\_\_\_\_\_\_\_]**  By:  Name:  Title: |
|  |

1. Further conforming changes will be required for a geothermal Project. [↑](#footnote-ref-1)
2. Note to Bidders: A Utah contractor’s license is required prior to execution of the EPC agreement. [↑](#footnote-ref-2)
3. Note to Bidders: If there are multiple facilities, it is contemplated that a separate EPC Agreement will be entered into for each facility. [↑](#footnote-ref-3)
4. Note to Bidders: The timing, conditions and requirements of Availability Completion remain subject to further review and change by Owner’s tax advisors. [↑](#footnote-ref-4)
5. Note to Bidders**:** Subject to Contractor credit review, a letter of credit or other security may be required during the Term and the Warranty Period. [↑](#footnote-ref-5)
6. Note to Bidders: The rate will need to be updated in light of the Tax Cuts and Jobs Act. [↑](#footnote-ref-6)
7. Note to Bidders: Please provide liquidated damages to be included in definitive Solar EPC. [↑](#footnote-ref-7)
8. Note to Bidders: Please provide the proposed Guaranteed Construction Start Date and the assumed ITC value. [↑](#footnote-ref-8)
9. Note to Bidders: “Begun Construction” test could apply and should be analyzed; Placed in Service would still be required by 2023 in such event. [↑](#footnote-ref-9)
10. Note to Bidders: If the Site is on Tribal lands, any applicable Tribal labor requirements and related provisions will need to be addressed. [↑](#footnote-ref-10)
11. Note to Bidders: Project Transaction Documents should reference any O&M Agreement, Supply Agreement, Performance Guarantee or other agreements between Owner and Contractor or an Affiliate of Contractor, as applicable. [↑](#footnote-ref-11)
12. Note to Bidders:To the extent the approved Construction Schedule includes phased completion of the Facility on a block-by-block basis, the provisions of this Agreement relating to testing, delays, acceptance liquidated damages and related matters will be revised to reflect block completion milestones. [↑](#footnote-ref-12)
13. Note to Bidders: Article 15 will be modified to provide for achievement of “Closing Completion” as a pre-condition to the Start-up and Commissioning requirements set forth in the Technical Specifications and Exhibit 25. Closing Completion will occur before the Availability Test and Functional Test when material physical Work with respect to the Facility remains outstanding. [↑](#footnote-ref-13)
14. Note to Bidders: The minimum number of installed MWs will be based on the expected size of DC project. [↑](#footnote-ref-14)
15. Note to Bidders: missing the Guaranteed Construction Start Date could reduce percentage of ITC available (i.e. ITC stepdown – 30%/26%/22%) and missing Guaranteed Substantial Completion Date could lead to a 10% or 0% ITC depending on tax reform. [↑](#footnote-ref-15)