

Contract # 11-II-GL-1

Control # C0420

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**ANNE ARUNDEL COUNTY  
LANDFILL GAS TO ENERGY PROJECT**

**CONSTRUCTION, OPERATION AND MAINTENANCE  
AGREEMENT**

**BETWEEN**

**NORTHEAST MARYLAND WASTE  
DISPOSAL AUTHORITY**

**AND**

**LES OPERATIONS SERVICES, LLC**

**DATED AS OF**

\_\_\_\_\_

Bill No. 57-10  
Exhibit 2

Contract # 11-II-GL-1

Control # C0420

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## CONSTRUCTION, OPERATION AND MAINTENANCE AGREEMENT

THIS CONSTRUCTION, OPERATION AND MAINTENANCE AGREEMENT (this “**Agreement**”) is made and entered into as of this \_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between **the Northeast Maryland Waste Disposal Authority**, a body politic and corporate organized and existing under the laws of the State of Maryland (the “**Authority**”), and **LES Operations Services, LLC**, a limited liability company existing under the laws of the State of Delaware (“**Contractor**”).

### WITNESSETH:

WHEREAS, Anne Arundel County, Maryland (the “**County**”) owns the Millersville Landfill and Resource Recovery Facility (the “**MLFRRF**”) (as such terms are defined hereinafter);

WHEREAS, the Authority has been granted a license by the County to use the MLFRRF in accordance with the County Agreement (as such term is defined hereinafter);

WHEREAS, the Authority has obtained the County’s consent under the County Agreement for the Project;

WHEREAS, Contractor desires to design, engineer, procure materials and equipment, construct, start-up, conduct performance tests, and operate and maintain the Project for the Authority; and

WHEREAS, the Authority has selected Contractor in reliance upon Contractor’s skill, expertise and past experience to design, engineer, procure materials and equipment, supply, construct, start-up, conduct performance tests, and operate and maintain the Project in accordance with the terms hereof.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties hereto agree as follows:

### 1. DEFINITIONS

For purposes of this Agreement, the capitalized words and phrases used in this Agreement (including the Exhibits hereto) shall have the following meanings:

**Administrative Fee:** Has the meaning given in **Section 16.1.3.**

**Affected Party:** Has the meaning given in **Section 22.1.**

**Affiliate:** With respect to any person, means any other person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person. For purposes of this definition, the term “control” (including the correlative meanings of the terms “controlled by” and “under common control with”), as used with respect to any person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of such person, whether through the ownership of voting securities or by contract or otherwise.

**Agreement:** This Construction, Operation and Maintenance Agreement between the Authority and Contractor, including any subsequent written amendments, modifications and Changes In Work made in accordance with this Agreement.

**Authority:** Northeast Maryland Waste Disposal Authority, together with its successors and assigns permitted under this Agreement.

**Authority Indemnified Parties:** Has the meaning given in **Section 25.1.1**.

**Authority Rules:** Has the meaning given in **Exhibit T**.

**Authorized Representative:** shall mean the person who has executed this Agreement. The Authorized Person may delegate his or her authority in writing to a representative from that same party.

**Availability Damages:** Has the meaning given in **Section 14.4.1**.

**Availability Percentage:** Has the meaning given in **Section 14.4.2**.

**BGE:** shall mean **Baltimore Gas & Electric**

**Business Day:** A calendar day excluding Saturdays, Sundays and any other day that national banks located in the State of Maryland are not open for business. In the event that a payment obligation to be performed under this Agreement falls due on a Saturday, Sunday or a day on which national banks located in the State of Maryland are not open for business, the obligation shall be deemed due on the next Business Day thereafter.

**Buydown Amount:** Has the meaning given in **Section 14.3.1**.

**Change In Law:** Any change in Law after the date of this Agreement affecting or related to the obligations to be performed by the Parties hereunder, (including, without limitation, the imposition of any new or additional permit requirements, provided that such new or additional permit requirements require Contractor to incur additional costs or delays in excess of the costs or delays required to be incurred by Contractor to comply with the requirements of the Project Permits set forth in **Exhibit D**), which change in Law occurs after the date hereof, provided that any such change in Law that has been enacted prior to the date of this Agreement

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but that does not take effect until after the date hereof shall be deemed to be a requirement of existing Law, and not a Change In Law, for the purposes of this Agreement, and provided further, that a Change in Law affecting Taxes shall not be a Change In Law for the purposes of this Agreement. Change of Law does not include any federal or state regulation that has been added, interpreted, and/or enforced to offset any misinterpretation of the law.

**Change In Work:** Any modification, alteration, addition or deletion of the Work authorized in writing by the Authority pursuant to **Article 16** and performed in accordance with this Agreement.

**Change In Work Form:** Has the meaning given in **Section 16.1.2**.

**Claimant:** Has the meaning given in **Section 23.6.1**.

**Collection and Recovery System:** The Millersville Landfill Gas Collection and Recovery System.

**Confidential Information:** Has the meaning given in **Section 27.1**.

**Contract Deadline:** The date that is ninety (90) days after the Scheduled Substantial Completion Date.

**Contract Year:** means the twelve (12) month period following the Substantial Completion Date and each twelve (12) month period following the anniversary of the Substantial Completion Date.

**Contractor:** LES Operations Services, LLC, an LLC created by Landfill Energy Services, together with its successors and assigns permitted under this Agreement.

**County:** Anne Arundel County, Maryland.

**County Agreement:** The Millersville Landfill Gas to Electricity Project Services Agreement, dated as of \_\_\_\_\_, \_\_\_\_\_, between the Authority and the County.

**CPM:** Has the meaning given in **Section 3.19**.

**Day or day:** A calendar day, unless otherwise specified.

**Detailed Plans:** Has the meaning given in **Exhibit S**.

**Dispute:** Any claim, controversy, disagreement or other matter in question between the Parties that arises out of or relates to the terms and conditions of this Agreement or with respect to the performance by the Parties of their respective obligations under this Agreement, including any claim for breach or repudiation thereof.

**Documents for Approval:** Has the meaning given in **Exhibit S**.

**Dollars:** Dollar amounts in U.S. dollars.

**Event of Default:** Has the meaning given in **Article 19**.

**Final Completion:** Completion of the Project in accordance with **Article 15**.

**Final Completion Date:** The date on which Final Completion occurs as specified in the Notice of Final Completion issued pursuant to **Section 15.2**.

**First Arbitrator:** Has the meaning given in **Section 33.3**.

**Fixed Construction Price:** The amount set forth in **Section 6.1** to be paid by the Authority to Contractor as full compensation for design, engineering, procurement, construction, start-up and testing of the Project, as may be adjusted in accordance with this Agreement.

**Float:** Float or slack means the amount of time between the early start date and the late start date, or the early finish date and the late finish date, of any of the activities described in the Progress Schedule.

**Force Majeure:** Has the meaning given in **Article 22**.

**Good Faith:** Dealing with the other Party in a reasonable, honest and cooperative fashion. Good Faith shall include, without limitation, acting reasonably, acting diligently and timely, making commercially reasonable efforts and not withholding consents unreasonably.

**Governmental Approvals:** Any and all permits, clearances, licenses, authorizations, consents, filings, exemptions or approvals from or required by any Government Authority that are necessary for the performance of the Work.

**Government Authority:** Any and all national, federal, state, county, city, municipal, local or regional authorities, departments, bodies, commissions, corporations, branches, directorates, agencies, ministries, courts, tribunals, judicial authorities, legislative bodies, administrative bodies, regulatory bodies, autonomous or quasi-autonomous entities or taxing authorities or any department, municipality or other political subdivision thereof. Such Government Authority includes but is not limited to, MDE or other such federal, state or local entity having authority over the air permits and emission testing.

**Guaranteed Availability:** Has the meaning given in **Section 14.4.1**.

**Hazardous Materials:** Any element, compound, mixture, solution, particle or substance:

(i) which is or may become dangerous, harmful or potentially dangerous or harmful to the health and welfare of life or the physical environment, such as, but not limited to, explosives, petroleum products, radioactive materials, hazardous wastes, toxic substances and related materials, and including, without limitation (A) any substance or material included within the definitions of “hazardous substances”, “hazardous wastes”, “hazardous materials”, “toxic substances”, “hazardous pollutants” or “toxic pollutants” in all applicable Laws of the United States or the State of Maryland and all applicable judicial, administrative and regulatory decrees, judgments and orders relating to the protection of human health or the environment, including, but not limited to, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Sections 9601 *et seq.*, the (“**CERCLA**”), Resource, Conservation and Recovery Act, as amended, 42 U.S.C. Sections 6901 *et seq.* (“**RCRA**”), the Toxic Substances Control Act (“**TSCA**”), 15 U.S.C. Sections 2601 to 2671, the Clean Air Act (“**CAA**”), 42 U.S.C. Sections 7401 *et seq.*, and/or the Federal Water Pollution Control Act (“**WPCA**”), 33 U.S.C. Sections 1251 to 1387, as the foregoing may be amended from time to time (collectively, “**Environmental Laws**”) (B) any Polychlorinated Biphenyls “PCBs” or “PCB items” as defined in 40 CFR Section 761.3; and (C) any “asbestos”, as defined in 40 CFR Section 763.63;

(ii) the presence of which requires investigation or remediation under any federal, state or local Law, policy or common law;

(iii) which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic, or otherwise hazardous and is or becomes regulated as a “Hazardous Waste” or “Hazardous Material” by any Government Authority of the United States or the State of Maryland; or

(iv) the presence of which on a Project Site causes or threatens to cause a nuisance upon the Project Site or to the adjacent properties or poses or threatens to pose a hazard to the health or safety of persons on or about the Project Site or on or about the adjacent properties.

**Interconnection and Operating Agreements:** (a) the Interconnection Service Agreement to be entered into by the Authority, PJM and BGE, a form of which is attached hereto as **Exhibit X**; (b) the Construction Service Agreement to be entered into by the Authority, PJM and BGE, a form of which is attached hereto as **Exhibit X**; and (c) any agreements related thereto or otherwise entered into with PJM or BGE with respect to the interconnection and/or operation of the Projects.

**Interconnection Costs:** Has the meaning given in **Section 6.5**.

**Interim Notice to Proceed:** Has the meaning given in **Section 8.3**.

**Landfill:** an area in which refuse is buried at the Millersville Landfill and Resource Recovery Facility (MLFRRF).

**Landfill Gas (LFG):** Any and all gases resulting from the decomposition of refuse materials within the Landfill.

**Late Payment Rate:** The prime rate of interest (sometimes referred to as the base rate) for corporate loans published by The Wall Street Journal, in the money rates section (or if The Wall Street Journal ceases publication of such a rate, an equivalent rate) as such rate may be in effect from time to time during the period the delinquent amount remains outstanding, plus one percent (1.0%).

**Law(s):** All federal, state and local constitutions, charters, acts, statutes, laws (including Environmental Laws, as defined in the “Hazardous Materials” definition), ordinances, codes, rules, regulations, orders and Governmental Approvals (including, without limitation, the Project Permits), or other legislative or administrative action of any agency, department, authority, political subdivision or other instrumentality, or final decrees, judgments or orders of a court, and the requirements set forth in the engineering and construction codes in each case applicable to Contractor, the Authority, the Work, the Landfills, or the design, engineering, procurement, construction, start-up, testing, operation or maintenance of the Projects.

**Major Overhaul:** Has the meaning given in **Exhibit P**.

MDE: shall mean Maryland Department of the Environment or other such local governmental entity having authority over the air permit and emissions testing.

**Mechanical Completion:** Completion of the Project as described in **Section 12.3**.

**Mechanical Complete Date:** Has the meaning given in **Section 12.4**

**MFD Subcontractor Performance Plan:** The Minority-Female-Disabled Person Performance Plan set forth in **Exhibit O**.

**Millersville Landfill and Resource Recovery Facility (MLFRRF):** The property owned by the County and located at 389 Burns Crossing Road, Severn, Maryland, as shown in **Exhibit B**. The MLFRRF includes the landfill, convenience center and all appurtenant infrastructure owned by the County.

**Millersville Landfill Gas Collection and Recovery System:** The Millersville Landfill gas extraction, collection and recovery system located at the MLFRRF, as shown in **Exhibit B**, which the County shall continue to own, operate and maintain.

**Minimum Performance Guarantees:** Has the meaning given in **Exhibit L**.

**Notice:** A written communication between the Parties that is required or permitted by this Agreement and conforms to the requirements of **Article 34**.

**Notice of Final Completion:** Has the meaning given in **Section 15.2**.

**Notice of Mechanical Completion:** Has the meaning given in **Section 12.4**.

**Notice of Substantial Completion:** Has the meaning given in **Section 13.3.7**.

**Notice to Proceed:** A written notice executed by an authorized officer of the Authority and delivered to Contractor, in accordance with **Section 8.1**, authorizing Contractor to commence the design, engineering, procurement, construction, start-up and testing of the Project.

**O&M Staffing Plan:** The staffing requirements set forth in **Exhibit E** pursuant to which Contractor shall operate, maintain and repair the Project.

**Operation and Maintenance Manual:** A manual consisting of all plans, specifications, manuals, schedules, drawings and other documents (including, without limitation, copies of all warranties relating to equipment and all software access codes) required to be delivered hereunder and the materials described in **Exhibit R** that are necessary or customarily maintained for the ownership, operation and maintenance of the Project and the Collection and Recovery System.

**Party:** either the Authority or Contractor; **Parties** means both the Authority and Contractor.

**Payment Milestones:** The milestones set forth in **Exhibit H** for the purpose of verifying payments due to Contractor by the Authority.

**Performance Guarantee Liquidated Damages:** Has the meaning given in **Section 14.2.1**

**Performance Guarantees:** Has the meaning given in Part 1 of **Exhibit L**.

**Performance Test Plan:** Has the meaning given in **Section 13.1**.

**Performance Test Report:** Has the meaning given in **Section 13.2**.

**Performance Tests:** The tests to be conducted by Contractor to demonstrate the performance of the Project in accordance with the procedures set forth in **Article 13** as described in **Exhibit F**.

**PJM:** PJM Interconnection, L.L.C and any successor thereto.

**Power Purchase Agreement:** Any agreement entered into by the Authority or the County that provides for the purchase and sale of electricity, renewable energy credits and any other renewable energy benefits or attributes generated by the Project.

**Progress Payment Schedule:** The schedule submitted by Contractor setting forth the payments of the Fixed Construction Price. Any Progress Payment Schedule modifications must be approved in writing by the Authority. The initial Progress Payment Schedule is included as **Exhibit H**.

**Progress Schedule:** The schedule submitted by Contractor setting forth the dates of performance by Contractor of the components of the Work related to the design, engineering, permitting, procurement, construction, start-up and testing of the Projects, as modified from time to time by Contractor. Any Progress Schedule modifications to the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, or which substantially affects the Authority's obligations under this Agreement, must be approved in writing by the Authority. The initial Progress Schedule is set forth in **Exhibit G**.

**Project:** The Millersville Landfill Gas to Electricity Project, located at MLFRRF and as detailed in Exhibit A.

**Project Director:** Has the meaning given in **Section 3.15**.

**Project Manager:** Has the meaning given in **Section 2.2**.

**Project Permits:** All Governmental Approvals necessary for Contractor to perform the Work in accordance with applicable Laws, including, without limitation, those permits listed in **Exhibit D**.

**Project Requirements:** (A) Laws applicable to the performance of the Work, (B) this Agreement, (C) the Project Permits, (D) the O&M Staffing Plan, (E) written recommendations and requirements of Contractor's Subcontractors with respect to the installation of such Subcontractor's equipment incorporated into the Work, unless exceptions are consistent with the prevailing standards and practices of the industry under existing conditions, (F) all operating manuals required under this Agreement or the components thereof, (G) the MFD Subcontractor Performance Plan and (H) Prudent Industry Practices.

**Project Site:** The location at which the Project is to be constructed, as shown in **Exhibit B**.

**Proposed Settlement:** Has the meaning given in **Section 33.2.2.2**.

**Prudent Industry Practices:** The practices described in **Section 3.2**.

**Punchlist:** List of incomplete items required by the Work related to the design, engineering, procurement, construction, start-up and testing of the Project that do not affect the safe and commercial operation of the Project and which are to be completed by Contractor; provided, however, that the aggregate value of all Punchlist items, may not exceed two percent (2%) of the Fixed Construction Price. No Work exceeding the limitation described in this definition may be included on the Punchlist and must be completed or partially completed so as to fall within the limitations described in this definition before Substantial Completion is achieved.

**Punchlist Estimate(s):** Has the meaning given in **Section 7.7.1**.

**Rejecting Party:** Has the meaning given in **Section 33.2.2.2**.

**Replacement Contractor:** Has the meaning given in **Section 19.2.2**.

**Retainage Security:** Has the meaning given in **Section 7.6**.

**Scheduled Final Completion Date:** The date that is sixty (60) days after the Substantial Completion Date, as such date may be adjusted pursuant to the provisions of this Agreement.

**Scheduled Start-up Date:** The date identified for the initiation of start-up activities in the Progress Schedule, as such date may be adjusted pursuant to the provisions of this Agreement.

**Scheduled Substantial Completion Date:** The date identified as the scheduled Substantial Completion Date in the Progress Schedule, as such date may be adjusted pursuant to the provisions of this Agreement; provided, however, that such date shall only be adjusted pursuant to a Change In Work in accordance with the terms and conditions of this Agreement.

**Scope of Work:** Has the meaning given in **Exhibit A**.

**Second Arbitrator:** Has the meaning given in **Section 33.3**.

**Service Fee:** The amount set forth in **Section 6.2** to be paid by the Authority to Contractor as full compensation for the operation, maintenance, repair and replacement of the Project, as may be adjusted in accordance with this Agreement.

**Spare Parts:** Has the meaning given in **Section 5.1.1**.

**Specifications:** The technical specifications relating to the Projects set forth in **Exhibit A**, together with any additional specifications and drawings prepared by Contractor and submitted to the Authority for review and comment with respect to the Work, as described in **Article 12**, including, without limitation, all drawings, sketches, writings and calculations that define or describe the Work or the Project.

**Start-up Plan:** Has the meaning given in **Section 12.1**.

**Subcontractors:** Contractor's suppliers, vendors and subcontractors, of any tier, that perform the Work or otherwise assist Contractor in the performance of its obligations under this Agreement.

**Substantial Completion:** Substantial Completion of the Project in accordance with and to the extent set forth in **Article 13**.

**Substantial Completion Date:** With respect to the Project, the date on which Substantial Completion of the Project occurs pursuant to the terms and conditions of this Agreement.

**System Checkout Packages:** Has the meaning given in **Section 12.2.1**.

**Tax or Taxes:** All fees, taxes (including sales taxes, use taxes, stamp taxes, value-added taxes, ad valorem taxes and property taxes (personal and real, tangible and intangible), levies, assessments, withholdings and other charges and impositions of any nature, plus all related interest, penalties, fines and additions to tax, now or hereafter imposed by any Government Authority or other taxing authority.

**Third Arbiter:** Has the meaning given in **Section 33.3**.

**Warranties:** The warranties of Contractor under **Article 17**.

**Warranty Period:** Has the meaning given in **Section 17.3**.

**Work:** All work, activities and other obligations to be performed by Contractor under this Agreement, including, without limitation, (A) the design, engineering, procurement of equipment and materials, project management, construction, interconnection, interface engineering, start-up, supervision, testing, submittal of documentation, and other services, required by Contractor to achieve Final Completion of the Project in accordance with this Agreement, and (B) beginning on the Substantial Completion Date, the operation, maintenance, replacement and repair of the Project.

## 2. RESPONSIBILITIES OF THE AUTHORITY

### 2.1 Access to Project Site.

Upon the date that the Interim Notice to Proceed or the Notice to Proceed is issued to Contractor, as applicable, the Authority shall (A) grant Contractor a license to use the Project Site for the exclusive purpose of performing the Work and (B) permit Contractor and its Subcontractors unrestricted ingress and egress to and from the Project Site for the purpose of performance of the Work; provided, however, that such rights shall be consistent in all respects with the rights granted to the Authority under the County Agreement. Contractor shall not have exclusive use of the Project Site or the Landfill and shall not use or allow the Project Site or the Landfill (or any part thereof) to be used for any illegal, unlawful or improper purpose. Contractor shall be responsible for the maintenance and improvement of all means of ingress and egress to and from the Project Site and the Landfill for the purpose of performing the Work.

### 2.2 Project Manager.

The Authority shall designate a person (the “**Project Manager**”) authorized by the Authority to act as a single point of contact for Contractor with respect to the prosecution of the Work. The Project Manager shall have full authority to act on behalf of the Authority in connection with this Agreement (but not to modify or amend it) except as otherwise expressly stated herein or otherwise provided in a Notice from the Authority’s Authorized Representative to Contractor. The Authority may from time to time replace its Project Manager upon Notice thereof to Contractor. The Project Manager or the Authority may, by Notice to Contractor, appoint one (1) or more persons to act as the Project Manager’s representative and may from time to time by further Notice change such appointment.

### 2.3 Payments.

The Authority shall make, or cause to be made, payments to Contractor in respect of the Fixed Construction Price and the Service Fee in accordance with applicable provisions of this Agreement.

### 2.4 Actions by the Authority.

The Authority may cause any of its rights or obligations hereunder to be exercised or performed by one (1) or more designees or appointees specified in a Notice to Contractor, which Notice shall identify the specific designee or appointee, designate the scope of such person’s or entity’s authority and the matters concerning which such person shall have authority to act on behalf of the Authority. The Authority may amend, supplement or terminate any such appointment or designation, or the scope and authority thereof by Notice to Contractor. Such action may only be conducted by the Authorized Representative that has signed off on this agreement.

## 2.5 Prudent Industry Practices

In the exercise of its rights hereunder, the Authority shall exercise its discretion and otherwise act in accordance with Prudent Industry Practices. Subject to Contractor's fulfillment of its obligations hereunder, unless otherwise specifically set forth herein, all Authority approvals and responses required hereunder that materially impact the CPM schedule precedence relationship, as identified in Contractor's submission or request to Authority, shall be performed within fourteen (14) calendar days of the date of contractor's submission or request with respect thereto.

## 3. **RESPONSIBILITIES OF CONTRACTOR**

### 3.1 Scope of Work; Applicable Standards.

3.1.1 Contractor shall perform and prosecute all Work, and perform its obligations hereunder and exercise its rights hereunder, in Good Faith and in accordance with the Scope of Work, the Specifications and the other terms and provisions of this Agreement and in compliance with all Project Requirements, using methods and equipment that are accepted as Prudent Industry Practices. Contractor shall conduct the Performance Tests and achieve the Substantial Completion Date by the Scheduled Substantial Completion Date and the Final Completion Date by the Scheduled Final Completion Date. Contractor shall design, engineer, permit, procure, construct, start-up, test, operate and maintain the Project lawfully and safely, in each case, using qualified, competent and, where necessary, licensed personnel. Notwithstanding any other provision of this Agreement to the contrary, Contractor has reviewed and for all purposes adopted the information contained in the Scope of Work, Specifications and all other provisions of this Agreement as its own and shall not be entitled to any relief or recovery as a result of (A) any information contained therein having been provided by the Authority or, (B) any error or omission therein or (C) any design, engineering, material, facilities, suppliers or other materials or actions being required by the Authority as provided in the Scope of Work, Specifications and other provisions of this Agreement. Contractor shall provide directly or through Subcontractors all services, labor, tools, supplies, materials, testing, supervision and equipment required for the performance of the Work.

3.1.2 Contractor has included within the Fixed Construction Price and the Service Fee the cost to complete the entire Scope of Work. Items need not be specifically listed in this Agreement or the Exhibits in order to be deemed to be items within the Scope of Work. Any item indicated in this Agreement or the Exhibits, reasonably inferable therefrom or incidental thereto or required in accordance with the Project Requirements is to be considered as part of the Scope of Work. In addition, the Scope of Work includes all that should be properly included and all that would be customarily included within the general scope and magnitude of the Work in order to achieve the Performance Guarantees. As a result, Contractor hereby waives any and all claims for an increase in the Fixed Construction Price or Service Fee or an extension

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of the Scheduled Substantial Completion Date or the Scheduled Final Completion Date based, in whole or in part, upon an assertion that any certain license, technical assistance, engineering, assembly, construction, service, labor, material, equipment, operation or management is beyond the Scope of Work when such license, technical assistance, engineering, assembly, construction, service, labor, material, equipment, operation or management is indicated in this Agreement or the Exhibits or other instruments of service prepared in connection with this Agreement or the Exhibits, reasonably inferable therefrom or incidental thereto or required in accordance with the Project Requirements.

### 3.2 Project Requirements.

Contractor shall perform the Work so that it satisfies all Project Requirements, including applicable Laws and applicable design, engineering, construction, operation, maintenance and other standards of “**Prudent Industry Practices,**” which are defined as those practices, methods and equipment, in effect from time to time for performance of the Work that are commonly used to design, engineer, construct, operate and maintain electric generation facilities lawfully and with safety, dependability, efficiency and economy (provided that the requirements of dependability, efficiency and economy as described above are not intended to expand the Scope of Work). The Authority makes no acknowledgement that the design details specifically set forth in the Scope of Work satisfy Prudent Industry Practices or that the design details set forth in the Scope of Work constitute all or sufficient details necessary to satisfy Prudent Industry Practices.

### 3.3 Project Permits.

3.3.1 Contractor shall obtain all Project Permits (other than those listed in **Exhibit D-Section 2**) and shall use reasonable efforts to maintain all Project Permits (once the Project Permits have been obtained).

3.3.2 Contractor shall prepare and process applications for all Project Permits listed in **Exhibit D-Section 2**, and shall use reasonable efforts to maintain all such Project Permits (once such Project Permit has been obtained).

3.3.3 Prior to the submission of any Project Permit application to a Government Authority, contractor shall submit such application to the Authority for review and comment by the Authority and the County, and the applications detailed below shall be signed by an authorized representative of the Authority and County. The Maryland Department of the Environment Air Permit to Construct, the Maryland Department of the Environment Air Permit to Operate and any other Project Permits, as determined by the Authority and for which Notice of such determination is provided to Contractor, shall be applied for and issued in the names of the Authority and the County. The time required for reviews by the Authority of any item on the critical path will be added to the project schedule.

3.3.4 Contractor shall be responsible for all actions necessary to (a) obtain or prepare and process applications for Project Permits, as set forth in **Sections 3.3.2 and 3.3.3** above and (b) maintain the Project Permits.

3.3.5 Contractor shall be responsible for all damages, fines, and penalties that may arise (including, but not limited to, those that the Authority or the County pays or becomes liable to pay) because of (a) Contractor's failure to (i) obtain any Governmental Approval or Project Permit (other than those listed in **Exhibit D-Section 2**) or (ii) promptly prepare and process applications for Project Permits listed in **Exhibit D-Section 2** or (b) the noncompliance by Contractor with any Governmental Approval or Project Permit applicable to the Work, irrespective of the party that is required to obtain such Governmental Approval or Project Permit. The Work includes all Contractor activities necessary to engineer, design, procure, construct, start-up, test, operate and maintain the Project in accordance with the Project Permits and, except as may otherwise specifically be provided for herein, the Fixed Construction Price or Service Fee shall not be adjusted in respect of the requirements of such Project Permits.

3.3.6 Contractor shall notify the Authority within one (1) Business Day of any notice of violation or similar communication (any written or verbal communications related thereto) regarding the Project received from any Government Authority. Contractor shall provide the Authority with prompt notice of any site visits by representatives of any Government Authority (other than the County) by written or verbal communications.

3.3.7 In connection with the expiration or termination of this Agreement, Contractor shall cooperate with the Authority and the County, at Contractor's cost and expense, in effectuating the transfer or assignment of the Project Permits, as the Authority may request in a Notice to Contractor.

3.3.8 Contractor shall prepare and process all Project Permits in accordance with Prudent Industry Practices and the Project Schedule. Subject to the foregoing, if a Government Authority fails to timely issue a Project Permit or other required Governmental Approval by the late finish date for such Project Permit or Governmental Approval, as shown in the CPM schedule, then such event shall qualify as a Force Majeure if the requirements of **Section 22.2(E)** are satisfied.

#### 3.4 Hazardous Materials.

Contractor shall provide Notice to the Authority immediately upon encountering any Hazardous Materials in performing the Work. Contractor shall contain and remove all Hazardous Materials that were introduced to the Project Site by Contractor or its Subcontractors or as a result of the negligence, willful misconduct or failure of Contractor to perform its obligations hereunder and dispose of such Hazardous Materials in accordance with applicable Laws. All costs associated with the containment, removal, storage and disposal of such Hazardous Materials shall be paid by Contractor without reimbursement from the Authority or the County.

3.5 Utility Services and Operating Consumables.

Contractor shall provide and pay the costs for all utility services (including, without limitation, water and electricity) and all operating consumables necessary to perform the Work.

3.6 Sanitary Conditions.

Contractor shall maintain the Project Site free of waste material and rubbish and clear the Project Site of temporary structures, surplus material, equipment and tools upon completion of the design, engineering, procurement, construction, start-up and testing of the Project. Contractor shall return any areas of the Project Site disturbed by Contractor or its Subcontractors to a condition that is the same or better than the area's condition prior to such disturbance.

3.7 Price Breakdown.

Contractor shall provide a Fixed Construction Price breakdown as reasonably required by the Authority for its fixed asset records. The Authority shall maintain all information regarding Contractor's costs disclosed pursuant to this **Section 3.7** in accordance with **Section 27.1**.

3.8 Protection of Work.

Contractor shall provide all necessary safeguards for the protection and maintenance of the Work, the Project, the Collection and Recovery System and the Project Site and of all persons and other property related thereto.

3.9 Handling and Storage of Materials and Equipment.

Contractor shall arrange for complete and safe handling and storage of all materials, equipment and construction equipment required to accomplish the Work, including, but not limited to, inspection, expediting, shipping, unloading, receiving, customs clearance and claims.

3.10 Quality Assurance.

Contractor shall use effective quality assurance programs in performing the Work which reflect Prudent Industry Practices. Within thirty (30) days after the date that the Notice to Proceed is issued to Contractor, Contractor shall provide to the Authority a written program describing the quality assurance programs and procedures to be used by Contractor in the

performance of the Work. The Authority shall have the right to review and comment on such program within ten (10) Business Days following receipt of the complete program and all reasonable comments by or on behalf of the Authority shall be incorporated in Contractor's quality assurance program. The Authority's approval of contractor's quality assurance program shall not be unreasonably withheld, conditioned or delayed. Neither review, comment upon, approval or rejection of, nor the failure of the Authority to review, comment upon, approve, or reject all or any part of Contractor's quality assurance program shall (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

3.11 Compliance with Authority Rules.

Contractor and its Subcontractors and their respective employees, agents and representatives shall comply with the Authority Rules at all times regarding activities on the Project Site (including restrictions to ingress and egress) and coordinate its activities with any person performing work or undertaking activities at the Project Site, including, without limitation, contractors or subcontractors performing work for or on behalf of the Authority or the County.

3.12 Assistance with Government Authorities.

Contractor shall provide such reasonable assistance as is required by the Authority in dealing with the County and any other Government Authority in any and all matters relating to this Agreement, the Project, the Collection and Recovery System, the Project Site or the performance by Contractor of the Work.

3.13 Cooperation with Engineer and Consultants.

Contractor shall cooperate with any engineer or consultant retained by the Authority or the County to review design materials, information regarding costs, perform inspections or tests of the Work, witness tests and review test results, to perform any of the Authority's obligations hereunder, as the Authority may determine in its sole discretion, and any other matters hereunder relating to the Work.

3.14 Public Announcements.

Contractor shall obtain the Authority's prior written approval of the text of any announcement, publication, photograph or other type of communication concerning the Work prior to the dissemination or release of same by Contractor or its Subcontractors; provided, however, that the Authority's prior written approval shall not be required for any communication

regarding the Work that is required to be made by Contractor pursuant to applicable Law and Contractor shall notify the Authority of such communication as soon as practicable.

3.15 Contractor Staff.

Subject to the Authority's approval, which approval shall not be unreasonably withheld, conditioned or delayed, Contractor shall designate an individual (the "**Project Director**") who shall have overall responsibility for the prosecution of the Work and shall be authorized to act on behalf of Contractor. The Project Director shall act as a single point of contact in all matters on behalf of Contractor and shall oversee the design, engineering, procurement, construction, start-up, testing, operation and maintenance of the Project. The Project Director shall have full authority to act on behalf of Contractor in connection with this Agreement (but not to modify or amend it). The Project Director must provide notice to the Authority when a change in the Project Manager and /or Construction Manager are made and must provide resumes of personnel change to the Authority. Contractor may from time to time replace its Project Director upon Notice thereof to the Authority.

3.16 County Requirements.

Contractor shall perform the Work in accordance with the MFD Subcontractor Performance Plan and the County requirements set forth in **Exhibit C**.

3.17 Liens.

Contractor shall keep the Project and Collection and Recovery System and the Landfill and Project Site free of all mechanics' liens, suppliers' liens, materialmen's liens and all other liens or claims arising from, by or through Contractor's acts or arising out of the Work and make all payments due to Subcontractors performing any part of the Work on behalf of Contractor as and when due; provided, however, that Contractor shall have the right to cause any such liens to be vacated by posting bonds in the event that liens registered against the Project, Collection and Recovery System, Landfill or Project Site relate to claims which Contractor disputes.

3.18 Progress Reports and Meetings.

3.18.1 Prior to the Final Completion Date, Contractor shall issue to the Project Manager a monthly progress report regarding the development of the Projects in a format acceptable to the Project Manager.

3.18.2 Upon the Project Manager's request, Contractor shall attend periodic progress meetings with the Project Manager and others designated by the Authority and respond to inquiries at such meetings regarding progress of the Work. Contractor shall arrange for Subcontractors to attend such progress meetings, if requested by the Project Manager. In

addition to the reports described in **Section 3.18.1** and the other provisions of this Agreement, Contractor shall provide such additional information and reports concerning the Work as may be reasonably requested by the Authority.

3.19 CPM Schedule.

Contractor shall, within ten (10) Business Days after execution of this Agreement, submit to the Authority for review a Critical Path Method (“**CPM**”) schedule in Microsoft Project format for completion of the Work related to the design, engineering, procurement, construction, start-up and testing of the Project, including precedence relationship and Float for major activities and milestones in reasonable detail. The Authority shall provide comments to Contractor within ten (10) Business Days after receipt of the complete draft CPM schedule, and Contractor shall include in the final CPM schedule all reasonable comments of the Authority. Contractor shall submit such final CPM schedule to the Authority within ten (10) Business Days after receipt of comments on the draft CPM schedule from the Authority, and input from subcontractors, equipment vendors, MDE, PJM and BGE.

3.20 Performance Tests.

Contractor shall perform the Performance Tests in accordance with **Article 13**.

3.21 Security.

As of the earlier of the date that (A) Contractor begins on-site Work activities at a Project site or (B) has material or equipment delivered to a Project Site, Contractor shall provide reasonable and customary security for such Project Site to ensure that the Project Site is secure and to prevent vandalism, theft and damage to the Project, the Project Site or material, equipment and personnel located on the Project Site.

3.22 Geotechnical Conditions.

In the event that Contractor encounters any unknown surface, subsurface or latent physical conditions at a Project Site, such conditions shall be addressed in accordance with **Section 4.2**.

3.23 Operation and Maintenance Manual.

3.23.1 Contractor shall, at least forty-five (45) days before the start of the Performance Tests, prepare and make available to the Authority, for review and comment, two (2) copies of the Operation and Maintenance Manual (excluding Detailed Plans showing “record” conditions which must be made available before Final Completion). Within thirty (30) days after receipt of the complete draft Operation and Maintenance Manual, the Authority shall

provide Contractor with its written comments thereto and Contractor shall include any reasonable comments provided by the Authority in the final Operation and Maintenance Manual. Before the Final Completion Date, Contractor must furnish the Authority with copies of the Operation and Maintenance Manual.

3.23.2 Following the Final Completion Date, Contractor shall maintain and update the Operation and Maintenance Manual to reflect its experience in operating and maintaining the Project. Promptly following the request of the Authority, Contractor shall provide the Authority and/or the County with updated copies of the Operation and Maintenance Manual.

### 3.24 Notification of Potential Delays or Adverse Effects.

Contractor shall promptly provide Notice to the Authority of any occurrence that Contractor has reason to believe will adversely affect (A) the completion of the Project in accordance with the Progress Schedule, (B) the operation or maintenance of the Project, (C) the Project Site or (D) the Landfill. Contractor shall specify in such Notice the corrective action planned by Contractor to overcome the adverse effect(s).

### 3.25 Site Safety Program.

The safety of Contractor, Subcontractors and their employees, agents, representatives and invitees and any other person who enters the Project Site for any purpose relating to Contractor's carrying out its obligations under this Agreement shall be Contractor's responsibility. Contractor shall initiate and maintain safety precautions and programs to conform with applicable Laws to protect against and prevent injury to persons or damage to property on, about or adjacent to the Project Site and shall incorporate all such safety precautions and programs in a written safety program manual, which safety program manual shall be provided to the Authority for its review and comment within thirty (30) days after the date hereof and all reasonable comments by or on behalf of the Authority shall be incorporated in Contractor's safety program manual. The Authority's approval of contractor's safety program manual shall not be unreasonably withheld, conditioned or delayed. Neither review, comment upon, approval or rejection of, nor the failure of the Authority to review, comment upon, approve, or reject all or any part of Contractor's safety program manual shall (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by contractor and the Authority, (b) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee. Contractor shall exercise reasonable commercial efforts to eliminate or abate all reasonably foreseeable safety hazards created by or otherwise resulting from performance of the Work.

### 3.26 Compliance with Applicable Laws.

Contractor shall ensure that it, its employees, agents and invitees and its Subcontractors and their employees, agents and invitees, during performance of any of the Work, comply with all applicable Laws in effect from time to time.

### 3.27 Delays.

The Authority may provide Notice to Contractor if the rate of progress of completion of the Project is not in accordance with the Progress Schedule, to meet the Scheduled Substantial Completion Date or the Scheduled Final Completion Date. Following receipt of such Notice, Contractor shall take such steps as are necessary and as are approved by the Project Manager to remedy or mitigate the likely delay. Contractor acknowledges that the implementation of such steps may result in additional costs and expenditures and agrees that it shall not be entitled to any adjustment of the Fixed Construction Price or the Service Fee, the Scheduled Substantial Completion Date or the Scheduled Final Completion Date or other Change In Work for taking such steps; provided, however, that if Contractor Disputes the necessity of any such steps and the Dispute is resolved in favor of Contractor, then Contractor shall not be obligated to take such steps or, if Contractor has already taken such steps, Contractor shall be entitled to an adjustment in the Fixed Construction Price as though such steps were a Change In Work ordered by the Authority and, if applicable, an adjustment in the Scheduled Substantial Completion Date and/or the Scheduled Final Completion Date.

### 3.28 Insurance.

Contractor shall obtain and maintain insurance in accordance with **Article 23**.

### 3.29 Nondiscrimination.

Contractor agrees to comply with the non-discrimination in employment policies as required by the federal requirements as described in Exhibit C, as amended, as well as all other applicable Laws regarding employment discrimination. Contractor hereby agrees that in accordance with applicable Laws, it does not, and agrees that it will not discriminate in any manner on the basis of race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, sexual orientation, or genetic status.

### 3.30 Hiring Employees of the Authority or the County.

It is unlawful for any person transacting business with the County, to employ a public employee for employment contemporaneous with his or her public employment. Contractor hereby agrees not to hire any employee of the Authority or the County, whose duties include matters relating to or affecting this Agreement, while such employee is employed by the Authority or the County.

### 3.31 Operation and Maintenance of the Project.

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Contractor shall operate, maintain, repair and replace the Project in accordance with **Section 11.4**.

#### **4. CONTRACTOR REPRESENTATIONS CONCERNING THE WORK; PROJECT SITE**

##### 4.1 Skills, Expertise and Capacity.

Contractor represents and agrees that it has the required skills, expertise and capacity to perform, and shall diligently perform, the Work in a timely and professional manner utilizing sound engineering principles, project management procedures and supervisory procedures in accordance with this Agreement and all applicable Project Requirements.

##### 4.2 Project Site.

4.2.1 Contractor represents and agrees that it has inspected the Project Site, the Landfill and surrounding locations and has reviewed information provided by the Authority relating to the Project Site, the Landfill and surrounding locations, and is familiar with the conditions thereof and accepts the existing conditions of, the Project Site, the Landfill and surrounding locations for the performance of the Work. Except as provided for in **Section 4.2.4**, Contractor accepts the Project Site and all structures, facilities, improvements or fixtures located thereon on an “as is” basis and acknowledges that ongoing settlement and compaction of such areas is an inherent characteristic of such areas.

4.2.2 Contractor agrees to maintain the Project Site and all structures, facilities, improvements or fixtures located thereon in a condition and state of repair equal to or better than that, as of the date hereof. Contractor shall be responsible for any damage to the Project Site and all structures, facilities, improvements or fixtures located thereon due to the acts or omissions of Contractor, any Subcontractor or their assigns, employees, agents, officers and directors or anyone else acting for or on behalf of Contractor, any Subcontractor or their Affiliates, successors or assigns. In the event of such damage, Contractor shall make the necessary repairs or replacement to the satisfaction of the Authority. Contractor acknowledges and agrees that upon the expiration or termination of this Agreement, the Project Site and all structures, facilities, improvements or fixtures located thereon shall be returned to the County in the same condition as they were as of the date hereof, with reasonable wear and tear excepted.

4.2.3 In the event Contractor encounters unknown surface, subsurface or latent physical conditions at the Project Site (including, but not limited to, man-made obstructions, geotechnical conditions, Hazardous Materials and archeological remains), Contractor shall give immediate Notice of the nature and extent of such conditions to the Authority. The Authority shall promptly investigate the conditions and direct Contractor as to how it shall proceed.

4.2.4 Contractor has based its Fixed Construction Price, Scheduled Substantial Completion Date and the Scheduled Final Completion Date on the requirement of the Project Site to be native earth, free of waste with a minimum soil bearing pressure of 2,500 psf. Contractor is not entitled to an adjustment of the Fixed Construction Price or the Service Fee or an extension of the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, nor shall a Force Majeure occur (except in the circumstances described in this **Section 4.2.4**) because of (A) settlement or compaction of the Landfill or the Project Site, (B) the presence of Hazardous Materials at the Project Site which were introduced to the Project Site by Contractor or its Subcontractors or as a result of the negligence, willful misconduct or failure of Contractor to perform its obligations hereunder, nor (C) if any adverse surface condition at the Project Site or any adverse subsurface condition of or at the Project Site is discovered (which subsurface condition was reasonably foreseeable or identified by Contractor or its Subcontractors after inspection of the Project Site and surrounding locations and review of information provided by the Authority relating to the Project Site or does not have a material and adverse effect on Contractor's cost or time for performance of the Work). The discovery of any adverse subsurface geotechnical conditions at the Project Site (including, but not limited to, Hazardous Materials, which were not introduced to the Project Site by Contractor or its Subcontractors or as a result of the negligence, willful misconduct or failure of Contractor to perform its obligations hereunder, and archeological remains) that (1) were not reasonably foreseeable or identified by Contractor or its Subcontractors in accordance with the foregoing sentence and (2) have a demonstrated material and adverse effect on Contractor's cost or time for performance of the Work shall constitute an event of Force Majeure in accordance with the provisions of **Article 22**.

4.2.5 In the event that all or any part of the Project Site is taken by any governmental or quasi-governmental authority pursuant to its power of eminent domain or sold under threat thereof, Contractor shall not be entitled to (A) any condemnation award to the County as owner of the Project Site and (B) recover from the County or the Authority any capital expenditures for improvements or betterments made by Contractor, except payment owed for Work performed hereunder.

## **5. SPARE PARTS**

### **5.1 Primary Spare Parts.**

The Contractor shall be responsible for obtaining any spare parts required to operate and maintain the Project through the term of this agreement. As part of the Contractor's operation and maintenance plan, spare parts shall be utilized from other facilities the Contractor operates as required.

## 6. FIXED CONSTRUCTION PRICE AND SERVICE FEE

### 6.1 Fixed Construction Price.

As full compensation for the design, engineering, procurement, construction, start-up and testing of the Project by Contractor, the Authority shall pay, or cause to be paid, to Contractor the Fixed Construction Price of Five Million Nine Hundred Fifty-Five Thousand Dollars (\$5,955,000), as adjusted in accordance with the amount determined in accordance with **Section 6.5**, and as such amount may be further adjusted by a fully executed Change In Work Form or final arbiter's decision, in each case, in accordance with **Article 16**. The Fixed Construction Price set forth in this **Section 6.1**, as adjusted by any fully executed Change In Work Forms or final arbiter decisions, in each case, in accordance with **Article 16**, constitutes the total compensation to Contractor for the design, engineering, procurement, construction, start-up and testing of the Project under this Agreement. Subject to the provisions of this Agreement, Contractor's actual cost to perform such Work in accordance with this Agreement shall be at the risk of Contractor, who hereby acknowledges that it has obtained all information reasonably available and taken account of all circumstances reasonably foreseeable which may affect such cost before agreeing to the Fixed Construction Price.

### 6.2 Service Fee.

As full compensation for the operation, maintenance, repair and replacement of the Project, the Authority shall pay, or cause to be paid, to Contractor the Service Fee, which shall consist of:

- (a) From the Substantial Completion Date of the Project a monthly amount equal to \$49,655.00, for each month during the first year following such Date of Substantial completion, (the "**Initial Service Fee**");

(b) For each twelve (12) month period following the one (1) year anniversary of the Date of Substantial Completion of the Project, the Initial Service Fee for such Project shall be adjusted, as of the anniversary of such Date of Substantial Completion, on a cumulative basis, in accordance with the following formula:

$$\text{Adjusted Initial Service Fee for Year X} = \text{ISF} \times \left[ 1 + \frac{[\text{CPI}^{\text{Year X}} - \text{CPI}^{\text{Year (X-1)}}]}{\text{CPI}^{\text{Year (X-1)}}} \right]$$

where:

Year X = the twelve (12) month period following the anniversary of the Date of Substantial Completion of the Project

Year (X-1) = the twelve (12) month period preceding the anniversary of the Date of Substantial Completion of the Project

ISF - the Initial Service Fee for Year (X-1)

$CPI^{Year X}$  = the CPI for the first month in Year X.

$CPI^{Year (X-1)}$  = the CPI for the first month in Year (X-1).

CPI = the Consumer Price Index, All Urban Consumers, Washington-Baltimore Area, All Items, November 1996=100 (ID=CUURA311SA0), as published by the U.S. Department of Labor, Bureau of Labor Statistics, or if such index is no longer published, such replacement index as the Parties mutually agreed upon.

For example, assume (i) the current Initial Service Fee for the Millersville Project is \$52,240, (ii) the CPI for the first month in the twelve (12) month preceding the current anniversary of the Substantial Completion of the Millersville Project is 121 and (iii) the CPI for the month of the current anniversary of the Date of Substantial Completion of the Millersville Project is 126, then the adjusted Initial Service Fee for the next twelve (12) months would be:

$$\begin{aligned} & \$52,240 \times [1 + [126 - 121]/121] = \\ & \$52,240 \times [1 + .0412] = \\ & \$52,240 \times 1.0412 = \$54,392 \end{aligned}$$

The Service Fee may be adjusted by a fully executed Change In Work Form or final arbiter's decision, in each case, in accordance with **Article 16**. The Service Fee set forth in this **Section 6.2**, as adjusted by any fully executed Change In Work Forms or final arbiter decisions, in each case, in accordance with **Article 16**, constitutes the total compensation to Contractor for the Operation, maintenance, repair and replacement of the Project. Subject to the provisions of this Agreement, Contractor's actual cost to perform such Work in accordance with this Agreement shall be at the risk of Contractor, who hereby acknowledges that it has obtained all information reasonably available and taken account of all circumstances reasonably foreseeable which may affect such cost before agreeing to the Service Fee. The component of the Service Fee set forth in clauses (a) and (b) above shall be pro-rated for any partial months for which the Service Fee is owed to Contractor hereunder.

Contractor acknowledges and agrees that a significant portion of the Service Fee serves as compensation for the Major Overhauls of the engine/generator sets to be performed in

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accordance with **Exhibit P**. As a result, Contractor agrees to establish, with a financial institution reasonably acceptable to the Authority, a separate escrow account (the “Escrow Account”) into which the Authority shall deposit ten percent (10%) of each monthly Service Fee payment owed to Contractor hereunder, without accounting for any deductions or offsets permitted under this Agreement (the “Escrow Amount”). The Escrow Account shall be established pursuant to an escrow agreement agreed to and approved by the Authority. Such escrow agreement shall provide that funds in the Escrow Account, including earned interest, may only be withdrawn from the Escrow Account by (a) the Contractor for the payment of costs directly associated with Top End and Major Overhauls of the engine/generator sets in accordance with **Exhibit P** or (b) the Authority following any termination or expiration of this Agreement. The Parties acknowledge and agree that any funds remaining in the Escrow Account following the expiration or termination of this Agreement shall be solely for the Authority’s account. All third party costs and fees associated with establishing and maintaining this escrow account shall be reimbursed by Authority to Contractor. When Contractor performs a Top End or Major Overhaul, Contractor shall be entitled to withdraw escrowed funds as follows: (i) Top End Overhaul \$30,000.00 per engine; (ii) Major Overhaul \$80,000.00 per engine. These figures will be escalated per the escalation provisions listed above.

Contractor’s actual costs to perform such work in accordance with this Agreement shall be the at the risk of Contractor.

### 6.3 Taxes.

6.3.1 Contractor assumes the Fixed Construction Price shall be tax-free relating to resale and/or renewable energy facility and the Service Fee reflects the payment by Contractor of all Taxes incurred in connection with the Work. Notwithstanding anything herein to the contrary, the Fixed Construction Price and the Service Fee shall not be adjusted for a Change in Law affecting Taxes or for any Taxes imposed with respect to any design, equipment, testing, materials, labor or services that are part of the Work.

6.3.2 Contractor shall take all actions reasonably requested by the Authority to avail itself of and maximize any exemptions or discounts which are available with respect to any Taxes incurred in connection with the Work, the Project, or the Landfills, including, without limitation, completing required documentation and providing information related to the Work, the Fixed Construction Price or the Service Fee.

### 6.4 Adjustments to Scheduled Dates.

Any extensions of time or adjustment of the Scheduled Substantial Completion Date or the Scheduled Final Completion Date shall be granted only to the extent such extension is warranted as a result of a Change In Work, a suspension of Work or a Force Majeure occurrence as provided in this Agreement and then only for the actual period of time which an

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activity is delayed or suspended at the time Contractor was directed to proceed with a change, to suspend Work or was otherwise delayed, as shown on the most current CPM schedule.

#### 6.5 Interconnection Work

The Contractor has a great deal of experience negotiating interconnects. Budget for this section shall be provided once the Authority provides the Contractor with a final copy of the interconnection study; however, both parties acknowledge that actual costs are a pass-through and will be paid directly by the Authority. The Contractor will work to obtain lowest possible interconnection costs.

In the event of PJM invoices and/or Change of Work Orders, the Contractor shall ensure that PJM invoices and /or Change of Work Orders are submitted to the Authority in a timely manner. If scheduled Invoices and/or Change of Work Orders are not received in a timely manner, the Contractor will notify PJM and the Authority of this matter by certified mail.

Once the PJM Invoice and/or Change of Work Order are received the Contractor will review such documentation and provide their comments and/or concerns to the Authority. The Contractor is responsible in receiving and reviewing all documentation related to PJM's invoice in a timely manner.

If the Contractor has any concerns with the PJM Invoice, the Contractor shall notify the Authority of their concern and for direction on how to proceed with such a concern. The Authority may request that the Contractor file their concern or challenge to the Invoice directly to PJM in a timely manner.

If the Contractor has any concern with a PJM Change of Work Order, the Contractor shall notify the Authority of their concern and for direction on how to proceed with such a concern. The Authority may request that the Contractor file their concern or challenge to the Change of Work Order directly to PJM in a timely manner.

#### 6.6 Contractor's Review of Work and Cost Associated with the Fixed Construction Price

The Contractor hereby acknowledges that it has obtained all information reasonably available and taken account of all circumstances reasonably foreseeable which may affect cost in the fixed construction price, before agreeing to a fixed price. The Contractor's actual compensation for the design, engineering, procurement, construction, startup and testing of the project shall be at the risk if the estimated cost was not initially correct or if the cost escalated because of poor oversight of the project. Poor oversight shall include improper review of third part invoices, no submittal of weekly reports, inadequate notice to the Authority of cost increases, and failure to meet requirements established in this agreement.

The contractor hereby acknowledges that it has a great deal of professional experience negotiating and conducting interconnects and will be responsible for the day-to-day review and monitoring of all work and cost related to the Fixed Construction price, this will include and not be limited to a review of BGE's requirements for the interconnect. In doing so, the Contractor will ensure that equipment and BGE third party costs are commercially reasonable. The contractor will use such practices as are commercially reasonable and prudent in its industry. All neglected cost overlooked in the fixed price estimate, as well as, improper review of unexpected or escalated third party charges and cost shall be associated with the Contractor's risk. The Contractor will perform all of its work and guarantee the subcontractor's work within the fixed price, and will submit weekly progress reports that will monitor work and cost. Any and all unexpected cost and/or cost increases must be reported to the Authority in a timely weekly progress report. Failure to do so will put the Contractor at risk for all unexpected costs.

## 7. TERMS OF PAYMENT

### 7.1 Fixed Construction Price Invoices.

7.1.1 On or before the first Business Day of each month prior to the Final Completion Date, Contractor shall submit a Fixed Construction Price invoice to the Authority, with a copy to the County, in the form specified in **Exhibit I**. Such invoice shall properly represent the Payment Milestones that have been achieved during preceding months and which have not been the subject of a previous invoice. Such fixed construction price invoice must include both the estimated cost and actual cost of the Payment Milestone associated with the invoice. These costs may include the Contractor's and subcontractors and all third parties' costs related to the Fixed Construction Price. If the actual cost is 3% or more of the estimated cost, the Contractor must submit a letter to the Authority that explains the increase and how the Contractor will monitor and prevent these cost from increasing. Contractor shall not be entitled to invoice for Payment Milestones prior to the month in which such Payment Milestones are scheduled to be achieved according to the most recent Progress Payment Schedule, unless Contractor has advised the Authority at least ten (10) days in advance in writing that the Work is progressing ahead of schedule.

7.1.2 With each monthly Fixed Construction Price invoice, Contractor and each of its Subcontractors shall submit a lien waiver to the Authority in the form set forth in **Exhibits J-1** and **J-2** for all Work related to the design, engineering, procurement, construction, start-up and testing of the Project that has been completed and materials provided for which payment is requested. Such lien waivers shall be contingent upon receipt of the invoice amount

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from the Authority and represent that Contractor and each of its Subcontractors have made all payments due to all subcontractors for such Work and materials for which payment has previously been made to Contractor. If any Dispute arises with respect to the payment of any such subcontractors, then Contractor, or its Subcontractors, shall provide to the Authority evidence of the payments that have been made to such subcontractors. If Contractor or any Subcontractor is unable to provide the lien waiver with respect to any amount, Contractor, or such Subcontractor, may substitute evidence that a bond has been posted in court so as to vacate any such lien in respect of such amount.

## 7.2 Service Fee Invoices.

On or before the first Business Day of each month following the month in which earlier of the (a) the Operation Turnover Date occurs or (b) the Substantial Completion Date occurs, Contractor shall submit an invoice to the Authority, with a copy to the County, for the Service Fee for the preceding month. Each such invoice shall include (a) an account statement showing deposits, withdrawals and the current balance of the Escrow Account maintained in accordance with **Section 6.2**, (b) for the monthly invoice delivered two (2) months after the end of a Contract Year for the Project, the calculation of the Availability Percentage and any Availability Damages with supporting documentation) for the Project, and (c) any other documentation reasonably requested by the Authority.

## 7.3 Payment of Invoices.

7.3.1 The Authority shall, within fifteen (15) Business Days after receipt of a Fixed Construction Price invoice from Contractor pursuant to **Section 7.1.1**, determine whether (A) the Payment Milestones covered by the invoice have been met; (B) the Work performed conforms with the requirements of this Agreement; (C) the invoice and any required backup information have been properly submitted and are accompanied by the appropriate lien waivers or evidence that a bond has been posted in court so as to vacate any lien; and (D) the invoiced amount reflects the payment due under the Progress Payment Schedule. If the Authority determines that any of the foregoing requirements have not been satisfied with respect to a Fixed Construction Price invoice, the Authority shall provide Notice to Contractor of such determination within fifteen (15) Business Days after receipt of such invoice from Contractor. The Authority shall not have any obligation hereunder to pay, or cause to be paid, such Disputed portions of any invoice unless and until the Parties reach a mutual agreement regarding such Disputed portions or, in absence thereof, an arbitration award in accordance with **Article 33** is made in Contractor's favor. Notwithstanding the foregoing, in no event shall the Authority's determination described in this **Section 7.3.1** or payment of any amount hereunder constitute or be deemed a waiver of any provision of this Agreement, and the Authority shall have the right to enforce this Agreement against Contractor notwithstanding any such determination or payment if the Authority subsequently determines for any reason that any determination or payment of an invoice under this **Section 7.3.1** was erroneous. Subject to such determination, and except for Disputed portions of any Fixed Construction Price invoice, the Authority shall pay, or cause to be paid, to Contractor, within forty-five (45) days after receipt by the Authority of Contractor's

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invoice, one hundred percent (100%) of the invoiced amount minus the retainage percentage set forth in **Section 7.6** (unless Contractor has provided Retainage Security for such retainage) minus any Disputed portion of such invoice and minus any amounts that the Authority is entitled to withhold hereunder minus any amounts due from Contractor to the Authority that are outstanding hereunder. Late payments not resulting from any of the items listed in **Section 7.4** shall accrue interest at the Late Payment Rate from the date due until paid. Late payments resulting from any of the items listed in **Section 7.4** shall not accrue interest until the event described in **Section 7.4** has been remedied; provided, however, that if the Authority withholds funds due to any of the items listed in **Section 7.4** and it is later determined that such withholding was improper, then interest shall accrue at the Late Payment Rate on the amount so improperly withheld from the date such funds should have been paid until actual payment is received by Contractor.

7.3.2 The Authority shall, within ten (10) Business Days after receipt of an invoice from Contractor for the Service Fee pursuant to **Section 7.2**, determine whether the invoiced amount reflects the payment due Contractor hereunder. If the Authority determines that the invoiced amount does not reflect the payment due Contractor, the Authority shall provide Notice to Contractor of such determination within ten (10) Business Days after receipt of such invoice from Contractor. The Authority shall not have any obligation hereunder to pay, or cause to be paid, such Disputed portions of any Service Fee invoice unless and until the Parties reach a mutual agreement regarding such Disputed portions or, in absence thereof, an arbitration award in accordance with **Article 33** is made in Contractor's favor. Notwithstanding the foregoing, in no event shall the Authority's determination described in this **Section 7.3.2** or payment of any amount hereunder constitute or be deemed a waiver of any provision of this Agreement, and the Authority shall have the right to enforce this Agreement against Contractor notwithstanding any such determination or payment if the Authority subsequently determines for any reason that any determination or payment of an invoice under this **Section 7.3.2** was erroneous. Subject to such determination, and except for Disputed portions of any Service Fee invoice, the Authority shall pay, or cause to be paid, to Contractor, within forty-five (45) days after receipt by the Authority of Contractor's invoice, one hundred percent (100%) of the invoiced amount minus the Escrow Amount, which shall be deposited into the Escrow Account by the Authority minus any Disputed portion of such invoice minus any amounts that the Authority is entitled to withhold hereunder minus any amounts due from Contractor to the Authority that are outstanding hereunder. Late payments not resulting from any of the items listed in **Section 7.4** shall accrue interest at the Late Payment Rate from the date due until paid. Late payments resulting from any of the items listed in **Section 7.4** shall not accrue interest until the event described in **Section 7.4** has been remedied; provided, however, that if the Authority withholds funds due to any of the items listed in **Section 7.4** and it is later determined that such withholding was improper, then interest shall accrue at the Late Payment Rate on the amount so improperly withheld from the date such funds should have been paid until actual payment is received by Contractor.

#### 7.4 Withholding Payment.

To the extent that a claim might reasonably be expected to exceed the amount of available insurance coverage limits, the Authority, based upon a good-faith estimate, may withhold, or cause to be withheld, such portion of any payment to such extent as may be necessary to protect the Authority from loss due to Contractor's failure to comply with any of the items set forth in clauses (A), (B), (C) and (D) of **Section 7.3.1** and in respect of the following:

- (A) Defective Work not corrected;
- (B) Claims filed against the Authority, the County, the Project, the Collection and Recovery System, the Landfill or the Project Site (or reasonable evidence indicating probable filing of such claims) arising from Contractor's actions or inactions in connection with the performance of the Work, other than claims for which liens have been filed against the Project, the Collection and Recovery System, the Landfill or the Project Site that Contractor has bonded or otherwise secured or caused to be vacated in accordance with this Agreement and applicable Law;
- (C) Failure of Contractor to make payments that are due and owing in respect of material or labor or other obligations incurred as a result of activities covered by this Agreement, unless Contractor has Disputed such payments and, if any lien is filed with respect thereto, Contractor has posted a bond or other security against such lien or otherwise caused such lien to be vacated in accordance with this Agreement and applicable Law;
- (D) Evidence that the invoice (together with previously invoiced amounts) exceeds the amount payable with respect to the Payment Milestones achieved;
- (E) Damages or any other amounts owed by Contractor to the Authority under this Agreement for which the Authority has not been paid; and
- (F) Failure of Contractor to carry out the Work in accordance with the Progress Schedule and this Agreement; and
- (G) Failure of Contractor to oversee work, and work of subcontractor or third party.

#### 7.5 Notice of Delayed Payment.

The Authority shall use reasonable efforts to advise Contractor in writing within fifteen (15) Business Days after receipt of Contractor's invoice of any evidence leading to a possible delayed payment of any portion of an invoice. Upon receipt of such Notice, Contractor shall promptly take any and all steps available to remedy any condition identified by the Authority leading to such claims. Subject to a mutually agreed upon resolution of the

Authority's claims or, in the absence thereof, of an arbitration award as provided in **Article 33**, payment of the Disputed portion of Contractor's invoice shall be made by the Authority within ten (10) Business Days following the date of such agreement or award.

7.6 Retainage.

With respect to each Fixed Construction Price invoice, the Authority shall retain ten percent (10%) as retainage hereunder, which retainage shall be held by the Authority and paid and/or applied pursuant to **Section 7.7.1** or as provided in **Article 13**. Contractor may provide a letter of credit or other direct pay alternate security, in form and substance acceptable to the Authority in its sole discretion, as an alternative to the withholding of retainage by the Authority hereunder ("**Retainage Security**"), which Retainage Security shall be increased with respect to each Fixed Construction Price invoice in an amount determined in accordance with this **Section 7.6** and, in such event, any reference to the payment of retainage to Contractor hereunder shall be deemed to mean a reduction on a dollar for dollar basis of the amount of Retainage Security maintained for the benefit of the Authority.

7.7 Release of Retainage.

7.7.1 Upon achievement of Substantial Completion pursuant to **Article 13**, Contractor may submit to the Authority an invoice for the retainage described in **Section 7.6**, less an amount equal to two and one-half (2.5) times the total Punchlist Estimate plus any amounts owed by Contractor to the Authority hereunder. The Authority shall pay, or cause to be paid, such retainage amount to Contractor within twenty (20) Business Days after the submission of such an invoice for retainage by Contractor; provided, however, that the Authority shall not be obligated to make such payment, or cause such payment to be made, until and unless (A) the Authority has received from Contractor and each Subcontractor the data, drawings and materials specified in **Section 10.7** and final lien waivers in the form set forth in **Exhibits M-1** and **M-2**, and (B) Contractor has posted a bond against any liens then filed against the Project, the Landfill or the Project Site. The Authority shall have the right to apply any amount of such retainage or draws under Retainage Security (as the case may be) as an offset against any amount due from Contractor to the Authority in connection with any obligation of Contractor to the Authority under this Agreement. If Contractor is not entitled to full payment of the retainage at such time due to the existence of Punchlist items then the Authority shall estimate the cost to complete the Punchlist items ("**Punchlist Estimate**").

7.7.2 Contractor shall diligently pursue the completion of all Punchlist items in accordance with this Agreement. As Contractor completes Punchlist items, Contractor may submit an invoice to the Authority for retainage for such Punchlist items completed in the amount equal to the Punchlist Estimate applicable to such Punchlist items completed, multiplied by two and five tenths (2.5), which invoice shall be paid to Contractor within twenty (20) Business Days after the Authority's receipt thereof unless the Authority Disputes all or a part of such invoice, in which case the Authority shall pay the undisputed portion of such Work and seek resolution of the Disputed portion in accordance with this Agreement. After Contractor has

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provided notice of one or more Punchlist item(s) not completed on or before the Final Completion Date and only in the event that the failure to complete that Punchlist item has adversely affected the Authority, Retainage or Retainage Security provided for any Punchlist items not completed on or before the Final Completion Date may, at the Authority's sole option, be permanently retained or drawn upon and applied (as the case may be) by the Authority, and Final Completion shall be deemed to have occurred and Contractor shall be released from completion of such Punchlist items. Notwithstanding the foregoing, such release shall not relieve Contractor from fulfilling any other requirements for Final Completion, as set forth in **Section 15.1.2**, other than Punchlist items.

7.7.3 If there are outstanding Contractor claims against the Authority, such claims shall not delay or prevent the release of retainage or the reduction in the amount of Retainage Security (as the case may be) otherwise due as provided in **Section 7.7.2**, provided such claims have been made in writing and are outstanding at the time retainage release or the reduction in the amount of Retainage Security (as the case may be) is requested. If there are outstanding Authority claims against Contractor which have been made in writing at the time retainage release or the reduction in the amount of Retainage Security (as the case may be) is requested, then the Authority may retain all or a portion of such amount as necessary to ensure full recovery by the Authority of such claim.

7.8 Release of Liens.

In the event that any Subcontractor files a lien against the Project, the Landfill, the Project Site, the County or the Authority, at any time, including, without limitation, after the payment of the retainage or the reduction in the amount of Retainage Security (as the case may be) to Contractor as described in **Section 7.7**, then Contractor shall, within thirty (30) days of Notice thereof, post a bond against such lien or otherwise cause such lien to be vacated in accordance with applicable Law. As a condition to the release of any retainage or the reduction in the amount of Retainage Security (as the case may be), Contractor shall furnish final waivers of lien from each of its Subcontractors in the form set forth in **Exhibit M-2** and evidence that any liens previously filed by any Subcontractor have been vacated, satisfied or otherwise terminated without liability to the Authority or the County. Notwithstanding the foregoing, with respect to any lien against the Project, the Landfill, the Project Site, the County or the Authority, as to which Contractor cannot provide a lien waiver, Contractor shall furnish evidence that it has posted bonds in accordance with applicable Law so as to vacate such liens.

7.9 Authority's Right of Offset.

The Authority may offset any amount due and owing to the Authority by Contractor under this Agreement against any amount due or to become due from the Authority to Contractor under this Agreement; provided that the failure of the Authority to offset such liability against amounts due to it shall in no way limit or restrict the right of the Authority to recover such amounts due to it from Contractor.

7.10 No Effect on Scheduled Dates, Fixed Construction Price or Service Fee.

Subject to **Section 19.4**, unless specifically agreed to in writing by Contractor and the Authority, no action taken (or failed to be taken) by Contractor or the Authority pursuant to this **Article 7** shall (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date or (B) result in any adjustment of the Fixed Construction Price or the Service Fee.

**8. COMMENCEMENT OF THE WORK**

8.1 Notice to Proceed.

Prior to the issuance of any Interim Notice to Proceed or Notice to Proceed by the Authority, as applicable, Contractor shall (A) obtain the insurance policies required pursuant to **Article 23** and provide the Authority with insurance certificates thereof and (B) provide the Authority with any documents or agreements reasonably requested by the Authority pursuant to this Agreement.

8.2 Priority of Work.

Within three (3) Business Days after the date that the Interim Notice to Proceed or Notice to Proceed is issued to Contractor, as applicable, Contractor shall commence and diligently pursue the Work related to the design, engineering, procurement, construction, start-up and testing of the Project, assigning to it a priority that will permit such Work to be completed in accordance with the Progress Schedule and **Section 3.1.1**. Contractor shall commence and diligently pursue the operation, maintenance, replacement and repair of the Project (as of the Substantial Completion Date) assigning a priority that will permit such Work to be completed in accordance with **Section 3.1.1**. Contractor understands and agrees that time is of the essence with respect to execution of the Work.

8.3 Interim Notice to Proceed.

Notwithstanding anything contained herein to the contrary, the Authority may issue to Contractor an authorization for Contractor to begin a portion of the Work prior to the date that the Notice to Proceed is issued to Contractor (the “**Interim Notice to Proceed**”).

**9. SUBCONTRACTORS AND LABOR RELATIONS**

9.1 Subcontractors.

Subject to the terms hereof, Contractor shall have the right to have any portion of the Work performed by a Subcontractor qualified to perform such Work pursuant to written subcontracts or written purchase orders, provided that Contractor shall not be relieved from any liability or obligation under this Agreement as a result of entering into such subcontracts or purchase orders. Contractor shall require that all Work performed, and all equipment provided by Subcontractors is received, inspected and otherwise furnished in accordance with this Agreement, and Contractor shall be solely liable for all acts, omissions, liabilities and Work (including defects therein) of such Subcontractors. The Authority shall not have any obligation or liability to any Subcontractor. Each contract, subcontract and purchase order with a Subcontractor must provide that the rights thereunder are assignable to the Authority or its designee at any time. No Subcontractor is intended to be or shall be deemed a third-party beneficiary of this Agreement. If any Subcontractor is specifically identified in a Project Permit or the application therefor, then Contractor shall not use any other Subcontractor without the prior written approval of the Authority.

## 9.2 Purchase Orders and Subcontracts.

9.2.1 Prior to issuing the purchase order to the manufacturers for the engine/generator sets, Contractor shall provide a copy of each purchase order to the Authority for its review and comment. The Authority shall have the right to review and comment on such purchase orders within ten (10) Business Days following receipt thereof and Contractor shall use commercially reasonable efforts to incorporate all reasonable comments submitted by or on behalf of the Authority into the final purchase orders issued by contractor. For the avoidance of doubt, unless the parties mutually agree otherwise, the extent of the Authority's involvement in securing the purchase orders for the engine/generator sets shall be the Authority's right to review and comment on the purchase orders, as set forth in this **Section 9.2.1**.

9.2.2 In addition, Contractor shall submit to the Authority a copy of each unpriced purchase order and subcontract entered into with a Subcontractor for major equipment. Each such purchase order and subcontract shall show, where applicable, the Subcontractor's name, manufacturer's name, materials type, model number, size, quantity and lists of the equipment ordered, and shall be submitted to the Authority when issued for purchase. Each subcontract and purchase order shall require each Subcontractor to assume toward Contractor those terms and conditions of contracting which Contractor customarily includes in its subcontracts. At a minimum, all subcontracts shall require the Subcontractors to comply with applicable Laws and the Project Permits, shall provide that the Authority has the right of inspection as provided hereunder and require such Subcontractors to (A) be subject to the safety and security provisions of this Agreement, (B) provide guarantees and warranties with respect to its portion of the Work and the equipment, (C) provide certificates of insurance as set forth herein, and (D) be subject to the Dispute procedures as set forth herein. All subcontracts shall preserve and protect the rights of the Authority, shall not prejudice such rights and shall require each Subcontractor to enter into similar agreements with its subcontractors. In addition to the foregoing requirements, Contractor cannot guarantee that all vendors will accept the terms outlined herein, however Contractor shall make a good-faith effort with its subcontractors and

vendors to include in each subcontract and purchase order the following language to make the Authority an express third-party beneficiary of such subcontract or purchase order:

“The parties hereto agree and acknowledge that the services/work/equipment to be provided hereunder by [Subcontractor] will be incorporated into the project being developed by the Northeast Maryland Waste Disposal Authority. As such, the parties expressly agree that the Northeast Maryland Waste Disposal Authority is a third party beneficiary of this [agreement/purchase order] entitled, in its own name or in the name of [Contractor], to enforce this [agreement/purchase order] against [Subcontractor]

### 9.3 Labor Disputes.

Contractor shall advise the Authority promptly, in writing, of any actual, anticipated or threatened labor dispute that might affect the performance of the Work by Contractor or by any of its Subcontractors. Contractor shall promptly undertake all commercially reasonable efforts to prevent or resolve any strikes or other labor disputes among its employees or the employees of its Subcontractors, and to minimize any resulting disruption of the progress of the Work. As provided in **Article 22**, a labor strike or work stoppage shall not constitute a Force Majeure if such labor strike or work stoppage is lawful and results from Contractor’s or its Subcontractor’s breach of a valid collective bargaining agreement or violation of applicable labor Laws.

## **10. DETAILED PLANS; INSPECTION; EFFECT OF REVIEW AND COMMENT**

### 10.1 Detailed Plans; Documents for Approval.

10.1.1 Contractor shall prepare the Detailed Plans described in **Exhibit S** and shall submit Documents for Approval in the format described in **Section 10.7** and **Exhibit S** to the Authority at least thirty (30) days before the date on which the Work described in them is to be undertaken. Upon the written request of the Authority, Contractor shall provide to the Authority any information requested in connection with the Documents for Approval. Contractor shall discuss and answer any inquiries concerning the Documents for Approval with the Authority. Within a reasonable period of time, but not more than fifteen (15) Business Days after submission of the Documents for Approval pursuant to this **Section 10.1.1**, the Authority may reject or request changes to any Documents for Approval that are not in accordance with the Project Requirements. If the Authority has not rejected or amended the Documents for Approval within such fifteen (15) Business Day period, then Contractor may proceed with the Work described therein. Neither review, comment upon, approval, rejection or amendment of, nor the failure of the Authority to review, comment upon, approve, reject or amend all or any part of the

Documents for Approval shall (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

10.1.2. After submitting the Documents for Approval in accordance with **Section 10.1.1**, Contractor may, at its own risk, commence Work described in such Documents for Approval prior to the end of the fifteen (15) Business Day period described in **Section 10.1.1**. If, prior to the end of such fifteen (15) Business Day period, the Authority reasonably rejects or requires amendment of the Work described in such Documents for Approval in order to comply with the Project Requirements, Contractor shall, at its sole cost and expense, remove work implementing the rejected portion of the Documents for Approval and repair the Work to its condition immediately before commencing the rejected work or, in the case of an amendment, alter the Work to conform to the amendment. In no event shall the Authority's rejection or request for an amendment of the Work described in the Documents for Approval (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

10.1.3. If Contractor Disputes the Authority's rejection or amendment of Work described in the Documents for Approval because the Work does not conform to the Project Requirements, and this Dispute is resolved in favor of Contractor, then the Scheduled Substantial Completion Date and/or the Scheduled Final Completion Date shall be adjusted to reflect the delay caused by the Authority's rejection or amendment of such Documents for Approval; provided, however, in no event shall the Authority's rejection or amendment (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee. Notwithstanding the preceding sentence, if any such Dispute resolution award concludes that corrective Work performed under protest by Contractor was not required in order to correct defects or deficiencies in a Project or the Work or was not otherwise required pursuant to this Agreement, then a Change In Work shall be issued by the Authority to compensate Contractor for additional costs incurred by it to perform the corrective Work.

10.1.4. Contractor shall maintain at the Project Site for information purposes and for the Authority and County a copy of all Detailed Plans in good order and marked to show changes made during performance of the Work.

## 10.2 Changes to Specifications or Scope of Work.

10.2.1. Contractor acknowledges the material interest of the Authority in the Scope of Work and the Specifications, and notwithstanding Contractor's obligation to satisfy the Project Requirements and associated damages for failing to perform this obligation, Contractor agrees that no material change to the Specifications or the Scope of Work will be made without the prior written approval of the Authority. Material changes to the Specifications or Scope of Work can only be approved by the Authorized Representative or designee. In addition, Contractor, after consulting with the Authority and subject to the approval of the Authority shall make any change in the Specifications and the Scope of Work necessary to comply with applicable Laws. Contractor shall provide written copies of any material proposed changes to the Specifications or the Scope of Work to the Authority for approval and upon such approval Contractor shall implement such changes as part of the Work and provide written copies of the final material changes to the Authority as soon as the written changes are available. In no event shall the Authority's disapproval of a proposed change to the Specifications or Scope of Work (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

10.2.2 The Scope of Work and Specifications set out in **Exhibit A** and the Detailed Plans represent the Authority's basic requirements and the Authority reserves the right to reasonably request to review any additional specific drawing or technical data generated for a Project, subject to the provisions of **Article 27**.

### 10.3 Inspection.

10.3.1 Upon request by the Authority, Contractor shall provide the Authority with equipment production schedules for the major equipment components of the Project.

10.3.2 The Authority, the County and their designees shall have the right to reasonably inspect any item of design, engineering, equipment, material, service or workmanship to be provided hereunder, and Contractor shall reasonably attempt to arrange such inspection, at the point of fabrication, or elsewhere at the request of the Authority. The Authority shall have the right to reject, at any time, any portion of the Work, including, but not limited to, design, engineering, materials, equipment, installation, tools or supplies, that do not conform to the Project Requirements. Upon such rejection, Contractor shall promptly remedy at its sole cost and expense any condition identified by the Authority as giving rise to such rejection.

10.3.3 If the Authority is of the opinion that any Work already performed by Contractor does not meet the Project Requirements, then the Authority may direct Contractor to inspect or test any Work that has been performed by Contractor. If that portion of the Work is found to be defective or not in accordance with the Project Requirements, Contractor shall remedy such defective Work in accordance with the Project Requirements and such remedy shall not constitute a Change In Work for which Contractor is entitled to payment. If such portion of

the Work is in accordance with the Project Requirements, then the Authority shall pay Contractor the cost of the inspection or test and, if necessary, to appropriately extend the Scheduled Substantial Completion Date and/or the Scheduled Final Completion Date on account thereof, as applicable, pursuant to an executed Change In Work Form.

10.3.4 In no event shall the exercise by the Authority of its right to inspect or reject Work or other materials pursuant to this **Section 10.3** (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement, (D) result in any adjustment of the Service Fee or (E) result in any adjustment of the Fixed Construction Price, except as provided in the last sentence of **Section 10.3.3**.

#### 10.4 Access to Work.

The Authority, the County and their designees shall have the right, from time to time, to observe, inspect and/or independently test the Work, the Project, and Project Site and to observe all tests of the Work, Project, or Project Site. Contractor shall provide the Authority, the County and their designees with prior Notice of all tests of the Work, Project, and Project Site. Contractor shall provide the Authority, the County and their designees reasonable access to the Work, the Project, , the Project Site and the records and documents outlined in **Section 10.6**, as reasonably requested by the Authority or the County. Notwithstanding any other provision of this Agreement to the contrary, the County shall not have the authority to direct or order any Change In Work nor shall the County be considered or deemed the agent or representative of the Authority in connection with any activity undertaken thereby with respect to the Work or in connection with this Agreement.

#### 10.5 Effect of Inspection of Work.

The inspection, review, and/or comment by the Authority of any drawing, document, or any other Work or services performed by Contractor or any Subcontractor are for monitoring purposes and shall not (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) be used to change the Scope of Work design of a Project, unless actual errors are identified that must be corrected for the safety or proper execution of the Work, (C) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (D) impose any liability on the Authority under this Agreement or (E) result in any adjustment of the Fixed Construction Price or the Service Fee.

#### 10.6 Record Drawings.

The Detailed Plans shall be updated to reasonably reflect the record conditions for the Work. All Detailed Plans furnished by Contractor hereunder shall be in English and any

undefined terms therein shall have their usual and customary meaning in the United States. All drawings submitted as part of the Detailed Plans shall be identified with the following data:

- The Authority's Name;
- Project designation;
- Agreement number;
- Specification or Drawing number, if applicable;
- Contractor's name;
- Contractor's drawing number; and
- Revision Number and Date.

#### 10.7 Field Copies and Final Drawings.

Contractor shall provide to the Authority all procedures, specifications, Detailed Plans, two (2) reproducible copies of Contractor's field copy of Subcontractor drawings maintained on site and two (2) reproducible copies of the final revision of all engineering drawings prepared by Contractor specifically for the Project. These data must be submitted to the Authority sorted, assembled, categorized and in a condition that can easily be used by the Authority's and the County's staff. In addition, Contractor shall provide to the Authority two (2) electronic copies of all Detailed Plans on CD-ROM with drawings in PDF format with respect to Detailed Plans received from Subcontractors and data and lists in a commercially available computer database system reasonably acceptable to the Authority. Submittal of all data under this **Section 10.7** shall be a requirement of Contractor prior to Final Completion.

### **11. LANDFILL GAS; SALES OF ELECTRICITY; CONTRACTOR OPERATION AND MAINTENANCE RESPONSIBILITIES**

#### 11.1 Supply of Landfill Gas.

11.1.1 The Authority shall make available to Contractor (at no cost) all of the Landfill Gas for extraction, collection and recovery by the County. The Parties acknowledge and agree that (A) the quality, quantity and consistency of supply of Landfill Gas are uncertain and (B) the Authority makes no representations, warranties or guarantees hereunder regarding any specific quantity, quality, pressure, consistency of supply, or other characteristics of Landfill Gas.

11.1.2 The Parties acknowledge and agree that the Authority retains the right, in its sole discretion, to remove at any time any part of the Project (including, without limitation, any generating engine(s) incorporated in the Project) as a result of reduced available Landfill Gas supply or any other Project operating issues.

### 11.3 Sales of Electricity.

11.3.1 The Parties acknowledge and agree that (A) as between the Authority and Contractor, the Authority shall have all right, title and interest in the electricity, renewable energy credits and any other renewable energy benefits or attributes (including, without limitation, any carbon credits or offsets) generated by the Project and (B) the Authority shall be entitled to sell such electricity, credits, benefits and attributes to any third party at any price, as determined by the Authority in its sole discretion, free of any claims by Contractor, other than Contractor's right to receive payment of a portion of revenues from the sale of such electricity, credits, benefits and attributes generated by the Project as part of the Service Fee in accordance with **Section 6.2**.

11.3.2 The operation of the Project and the associated generation and transmission of electricity, renewable energy credits and any other renewable energy benefits or attributes shall be subject in all respects to (A) the terms and conditions of the Power Purchase Agreement(s) for such Project, (B) the terms and conditions of the Interconnection and Operating Agreements for such Project, (C) applicable transmission and distribution system operator, regional transmission organization or similar entity (including PJM and BGE) directions, rules, requirements, regulations, procedures or practices and (C) any direction that the Authority may, in its sole discretion, provide to Contractor from time-to-time. Contractor shall be entitled to a Change in Work to the extent that any requirements with respect to the matters identified in (A)-(D) above, including but not limited to those set forth in this **Section 11.3.2**, impose any obligations on Contractor that (1) cause a material increase in the Contractor's cost of performing its obligations hereunder, including the obligations set forth in **Exhibits A, E, G, L, and P**, or (2) effects Contractor's ability to complete the Work in accordance with the Project Schedule.

### 11.4 Operation, Maintenance and Repair of the Project.

11.4.1 Contractor shall perform the Work in a manner that allows for the continuous operation and management of the Collection and Recovery System and Landfill in accordance with applicable Law. Contractor shall submit at least thirty (30) Days in advance of each contract year a proposed planned outage schedule for each Project for such Contract Year. The Authority and contractor shall mutually agree upon the planned outage schedule for the Project and shall cooperate in good faith to minimize planned outages during peak price periods, as reasonably identified by the Authority.

11.4.2 Contractor shall operate, maintain, repair and replace the Project (as of the Substantial Completion Date), including without limitation, performing those activities listed in **Exhibit P**, (A) in compliance with all Project Requirements and using methods and equipment that are accepted as Prudent Industry Practices, (B) as required to maintain Subcontractor warranties, any proprietary license agreements and insurance required hereunder, (C) in an effort to maximize the amount of electricity generated by the Project and (D) in a manner that enables the Authority to satisfy its obligations under the Power Purchase Agreement(s) and the

Interconnection and Operating Agreements. Contractor shall provide the Authority, the County and their designees reasonable access to the records and documents associated with such operation, maintenance and repair, as reasonably requested by the Authority or the County. Contractor shall be entitled to a Change in Work to the extent that any requirements set forth in clauses (C) and (D) above reasonably cause a material increase in the contractor's cost of performing its obligations hereunder. The Contractor shall review any Power Purchase Agreements prior to finalization.

11.4.3 Contractor shall employ, train, supervise, maintain and provide qualified personnel in order to perform its obligations hereunder in accordance with the O&M Staffing Plan. Contractor shall administer all matters relating to labor relations, salaries, benefits, working conditions, payroll taxes, contributions, work hours, safety and all other matters relating to its personnel.

11.4.4 Contractor shall pay for all labor, parts, materials, equipment, supplies, consumables and other items necessary to operate, maintain, repair and replace the Project in accordance with Prudent Industry Practices.

11.4.5 If Contractor fails to timely perform its obligations hereunder to maintain, repair and replace the Project, the Authority, in addition to any of its other rights and remedies hereunder and after Notice to Contractor, shall have the right to perform or have performed by third parties the necessary maintenance, repair and replacement activities and the costs thereof shall be borne by Contractor in accordance with the provisions of this **Section 11.4**. Any such action by the Authority or any third party shall not alter, amend, waive or relieve any obligation of Contractor under this Agreement.

#### 11.5 Alterations of the Project and Collection and Recovery System.

Except as provided for hereunder in connection with Contractor's obligation to design, engineer, procure, construct, start-up and test the Project, Contractor shall not undertake any material alterations, changes or modifications to the Project or Collection and Recovery System without the prior written consent of the Authority.

#### 11.6 O&M Reports.

Contractor shall prepare and submit to the Authority with each Service Fee invoice a monthly report describing routine operating and maintenance activities performed during the prior month, in a format acceptable to the Project Manager. Contractor shall also prepare and submit to the Authority special reports relating to any unexpected or unscheduled operating or maintenance events, in a format acceptable to the Project Manager.

11.7 Cooperation with Authority, County and other Contractors.

Contractor shall cooperate with the Authority, the County and their respective contractors in order to minimize interference with any work or activities occurring on or with respect to the Project, the Collection and Recovery System, the Project Site or the Landfill.

11.8 Meters.

11.8.1 As part of its obligation to design, engineer, procure, construct, start-up and test the Project, Contractor shall install the following Landfill Gas flow measurement device(s) at the Project that satisfy the requirements and specifications provided by the Authority.

Gas Flow Measurement Device provided by E2 Instruments consists of -  
1 - Kessler Ellis Products Supertrol 2, Model ES749L10P Flow Computer  
1 - Barton Model FHCF33V4 Differential Pressure Transmitter  
1 - Stellar Technology Inc. Model GT25 Pressure Transmitter  
1 - Precision Digital RTD Temperature Transmitter  
1 - Tri Flo Tech, LLC Orifice Plate and Flanges

11.8.2 Contractor shall maintain the Landfill Gas flow measurement device(s) in good condition and repair and shall have such meters periodically inspected, tested and calibrated by Contractor but no less frequently than once each year. At any time, Authority may request testing by an independent and reputable third party at its own expense. Contractor shall provide the Authority with three (3) copies of all reports and data produced as a result of such meter inspection and testing. In addition, the Authority retains the right, upon reasonable prior Notice to Contractor and at the Authority's cost and expense, to have the Landfill Gas flow measurement device(s) inspected and tested by an independent and reputable third party selected by the Authority.

11.8.3 If, for any reason, a Landfill Gas flow measurement device(s) or utility electricity meter is out of service or out of repair such that the amount of Landfill Gas provided to the Project or electricity generated by the Project cannot be reliably determined, then the quantity of Landfill Gas provided to the Project or electricity generated by the Project for the period of time during which a measurement device or meter was out of service or out of repair shall be calculated in accordance with a procedure reasonably determined by the Authority and, as necessary, prior Service Fee invoices shall be adjusted accordingly, with interest accrued at the Late Payment Rate.

11.8.4 With each monthly Service Fee invoice, Contractor shall submit to the Authority meter readings for the Landfill Gas flow measurement device(s) and electricity meter(s) for the preceding month.

### 11.9 Reporting to PJM

Contractor shall submit all required documentation and reporting to PJM to sell Capacity.

PJM typically requires a forward looking maintenance schedule and a day ahead forecast of the hourly production for the day. Contractor will provide either PJM or the Authority's off-taker with the day ahead hourly schedule daily prior to 10:00 am in allow the power to be scheduled into the market. Contractor will also provide the monthly scheduled maintenance forecast prior to the first of the month. Any unscheduled outages that are determined to last more than three hours will be reported to the Authority's off-takers generation desk as soon as they are known with an expected duration.

## 12. **START-UP AND MECHANICAL COMPLETION**

### 12.1 Start-Up.

Prior to Mechanical Completion, Contractor shall start-up and checkout the Project in phases. Within thirty (30) days prior to the Scheduled Start-up Date as set forth in the Progress Schedule, Contractor shall submit to the Authority a detailed plan for the start-up and testing of the Project by Contractor (the "**Start-up Plan**"). The Start-up Plan shall include, without limitation, (A) a plan for the start-up and a proposed schedule of activities during start-up; (B) system checkout procedures; and (C) a list of System Checkout Packages.

### 12.2 System Checkout Packages.

12.2.1 "**System Checkout Packages**" shall be prepared by Contractor and provided to the Authority for review. System Checkout Packages shall include all reasonably necessary checkout and operation information for the Project, including, but not limited to, the following (as applicable):

- Instrumentation checkout and calibration data sheets;
- Factory test reports;
- "Marked Up" process and instrumentation diagrams (P&ID's);
- List of all Punchlist items remaining;
- Electrical test data sheets including megger test reports;
- Subcontractor field reports, if available; and
- Proof of ASME stamps.

12.2.2 After submittal of each System Checkout Package, the Authority shall have fifteen (15) Business Days to review and comment on such package. Contractor shall supply to the Authority any information missing from a System Checkout Package and shall

undertake to remedy any deficiencies identified by the Authority with which Contractor agrees, at Contractor's cost, and Contractor shall perform Disputed corrective work, subject to Contractor's right to Dispute resolution pursuant to **Article 33**. The Authority's comments or failure to comment on any System Checkout Packages shall not operate to waive any of Contractor's responsibilities under this Agreement or prevent Contractor from proceeding with the Work. If any Dispute resolution award concludes that corrective work performed under protest by Contractor was not required in order to satisfy its obligations under this **Section 12.2** or was not otherwise required under this Agreement, then a Change In Work shall be issued by the Authority to compensate Contractor for additional costs incurred by it to perform such additional Work and, if necessary, to appropriately extend the Scheduled Substantial Completion Date and/or the Scheduled Final Completion Date on account thereof.

### 12.3 Mechanical Completion.

12.3.1 Contractor shall provide Notice to the Authority when (A) Contractor has complied with all provisions of this Agreement relating to the installation of all necessary components and systems of the Project (except for completion of final cleanup, final grading and any other portion of the Work that in the Authority's reasonable opinion does not affect the commercial operability, safety and mechanical and electrical integrity of the Project); (B) the Project is mechanically and electrically complete and sound; (C) the equipment included in the Project may be operated without damage to the Project or any other property and without injury to any person; (D) all System Checkout Packages required pursuant to **Section 12.2** have been submitted to the Authority and any deficiencies noted therein by the Authority to Contractor have been corrected or determined not to be required pursuant to the Dispute resolution proceedings under this Agreement; and (E) the Mechanical Completion requirements set forth in **Exhibit Q** have been satisfied. If the Contractor is prevented from meeting all requirements set forth in Exhibit Q and the following conditions are met: 1)delays are outside the reasonable control of Contractor and are caused by BGE, MDE or PJM ; 2) Contractor has met all other requirements of Exhibit Q except those requirements dependant on actions of BGE, or PJM; and 3)the Contractor has used all commercial reasonable efforts to mitigate such delays; then the Authority shall exercise the right to grant the Contractor additional time to demonstrate that Contractor has met the requirements of Mechanical Completion. As it applies to the release of Payments under Exhibit H, Contractor shall be deemed to have met Mechanical Completion and any requirements still outstanding shall be included on the Punchlist, if such delays are not remedied within thirty (30) days. If the County is unable to provide a sufficient quantity of 42-50% methane gas to perform the testing to show Mechanical Completion, then Contractor may, with the Authority's prior written approval, perform the testing to show Mechanical Completion on the lower quality and/or quantity of gas. Any adjustments for the test results based upon the lower quality and/or quantity of Landfill Gas must be mutually agreed upon between the Authority and the Contractor.

12.3.2 Within ten (10) Business Days after the Authority's receipt of Contractor's Notice pursuant to **Section 12.3.1**, and all supporting documentation from Contractor reasonably necessary to verify the statements and conclusions contained therein, the Authority shall advise Contractor in writing of any Dispute with the representations set forth in Contractor's Notice, including, without limitation, (A) any known defects, deficiencies and/or discrepancies that interfere with the safe generation of electricity, and (B) any known discrepancies between (1) installed equipment, materials and workmanship of such equipment and (2) installed equipment, materials and workmanship required under this Agreement. Contractor shall then perform corrective measures to remove such defects, deficiencies and/or discrepancies with which Contractor agrees at Contractor's costs, and Contractor shall perform Disputed deficiencies, subject to Contractor's right to Dispute resolution pursuant to **Article 33**. Upon completion of such corrective measures, Contractor shall provide Notice to the Authority that Contractor has satisfied the requirements of **Section 12.3.1**. The Authority shall have ten (10) Business Days after receipt of each subsequent notification and all supporting documentation from Contractor reasonably necessary to verify the statements and conclusions contained therein, to advise Contractor, in writing, of any remaining known defects, deficiencies and/or discrepancies which must be corrected by Contractor prior to Mechanical Completion of the Project. If any Dispute resolution award concludes that corrective work performed under protest by Contractor was not otherwise required under this Agreement, then a Change In Work shall be issued by the Authority to compensate Contractor for additional costs incurred by it to perform such corrective work and, if necessary, to appropriately extend the Scheduled Substantial Completion Date and/or the Scheduled Final Completion Date on account thereof.

#### 12.4 Notice of Mechanical Completion.

Promptly after verification by the Authority that Contractor has satisfied all of the requirements of **Sections 12.3.1** and **12.3.2**, (but in no event more than ten (10) Business Days after receipt from Contractor of all materials reasonably necessary to conduct such verification) the Authority shall issue a Notice of Mechanical Completion (the "**Notice of Mechanical Completion**"), which shall specify the date of the final Notice of Contractor issued pursuant to **Section 12.3.1** or **Section 12.3.2** (as the case may be) as the "**Mechanical Completion Date.**"

#### 12.5 No Effect on Scheduled Substantial Completion Date, Scheduled Final Completion Date, Fixed Construction Price or Service Fee.

No action taken (or failed to be taken) by Contractor or the Authority pursuant to this **Article 12** shall (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless Authority fails to meet ten day deadlines specified above in Sections 12.3. and 12.4 or specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee. If Contractor is prevented from meeting any

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requirement set forth in Exhibit F and the following conditions are met: 1) delays are outside the reasonable control of Contractor and are caused by BGE, MDE or PJM; 2) Contractor has met all definitions of requirements in Exhibit Q except those requirements dependant on actions of BGE, MDE or PJM; and 3) the Contractor has used all commercial reasonable efforts to mitigate such delays; then the Authority shall exercise the right to grant Contractor additional time to meet the Scheduled Substantial Complete Date and Scheduled Final Completion Date resulting from the delays described herein this Section 12.5 if such delays are not remedied after a period of thirty (30) days.

### **13. PERFORMANCE TESTS; SUBSTANTIAL COMPLETION**

#### **13.1 Performance Test Plan.**

Contractor shall perform Performance Tests in accordance with the procedures set forth in **Exhibit F**. Contractor shall prepare a detailed procedure for each of the Performance Tests to be conducted indicating the data to be collected and method of analysis, and such detailed procedure (the “**Performance Test Plan**”) shall be submitted to the Authority for approval at least sixty (60) days prior to the conduct of the initial Performance Tests. With respect to any Performance Tests which are re-performed by Contractor after the initial Performance Tests, Contractor shall submit, to the Authority for approval, the Performance Test Plan for such tests, which shall include a description of Contractor’s proposed method for implementing improvements necessary to demonstrate satisfaction of the Minimum Performance Guarantees or the Performance Guarantees, at least ten (10) Business Days prior to the re-performance of such Performance Tests. Contractor shall permit representatives and/or designees of the Authority and/or the County to attend and observe the conduct of all Performance Tests. The cost of all Performance Tests is included in the Fixed Construction Price whether or not such test is successful (except if such additional testing is required by the Authority pursuant to a Change In Work due to no fault of Contractor).

#### **13.2 Performance Test Report.**

Within thirty (30) days after completion of the Performance Tests, Contractor shall provide to the Authority three (3) copies of a Performance Test report (the “**Performance Test Report**”) (in triplicate) and a final Notice to the Authority certifying completion of the Performance Tests and satisfaction of all of the Minimum Performance Guarantees or Performance Guarantees, as applicable. Within fifteen (15) Business Days of receipt of such materials from Contractor, the Authority shall either accept or object to such certifications, in whole or in part. If the Authority objects to such certifications, then Contractor shall re-perform the applicable Performance Tests (or any part thereof) until the Authority determines that all Minimum Performance Guarantees or Performance Guarantees (as applicable) have been

satisfied in accordance with this **Article 13**, subject to Contractor's right to Dispute resolution pursuant to **Article 33**. If the Authority does not object to Contractor's certifications within such fifteen (15) Business Day period or affirmatively provide Notice to Contractor of no objection, then the Performance Tests shall be deemed to have been successfully completed as of the date of the Performance Test Report relating to such Performance Tests but such deemed successful completion of the Performance Tests shall not relieve Contractor of any of its obligations or liabilities under this Agreement, except for its obligation to deliver the Performance Test Report with respect to such Performance Tests pursuant to this **Section 13.2**.

13.3 Substantial Completion.

Substantial Completion shall be deemed to have occurred when all of the following have occurred:

13.3.1 The Project is substantially and materially complete in accordance with this Agreement (except as provided in the Punchlist);

13.3.2 The Project has achieved Mechanical Completion;

13.3.3 Receipt by the Authority of the Performance Test Report, which demonstrates satisfaction of the Performance Guarantees or the Minimum Performance Guarantees;

13.3.4 All equipment and systems have been installed and are operational such that the Project can be safely and commercially operated in accordance with applicable Laws, Project Permits and the requirements of the Interconnection and Operating Agreements and the Power Purchase Agreement;

13.3.5 Contractor has provided Notice to the Authority that Contractor has satisfied all of the conditions for Substantial Completion as described in this **Section 13.3** (the "**Notice of Substantial Completion**");

13.3.6 Contractor has provided the Authority with copies of the Operation and Maintenance Manual pursuant to **Section 3.23.1**; and

13.3.7 In addition to the foregoing, only for the purpose of receiving the release of the retainage or the reduction in the amount of Retainage Security (as the case may be) as provided in **Section 7.7.1** the following additional requirements for Substantial Completion must be satisfied:

(A) Receipt by the Authority of all reports and information to be provided to it as described in **Section 10.7**;

- (B) Receipt by the Authority of payment of all amounts owed by Contractor hereunder;
- (C) Receipt by the Authority of the financial information required by **Section 3.7**; and
- (D) The results of the Performance Tests must demonstrate satisfaction of the Performance Guarantees rather than the Minimum Performance Guarantees.

13.3.8 If the Contractor is prevented from meeting all requirements set forth in Exhibit F or this Section 13.3 and the following conditions are met: 1)delays are outside the reasonable control of Contractor and are caused by BGE, MDE or PJM ; 2) Contractor has met all other requirements of Exhibit F except those requirements dependant on actions of BGE, or PJM; and 3)the Contractor has used all commercial reasonable efforts to mitigate such delays; then the Authority shall exercise the right to grant the Contractor additional time to demonstrate that Contractor has met the requirements of Substantial Completion. As it applies to the release of Payments under Exhibit H, Contractor shall be deemed to have met Substantial Completion and any requirements still outstanding shall be included on the Punchlist, in the event the such delays are not remedied within thirty (30) days.

#### 13.4 Notice of Substantial Completion.

13.4.1 Within fifteen (15) Business Days after receipt of Contractor's Notice that the Project has satisfied the requirements of **Section 13.3**, the Authority shall advise Contractor in writing of any Dispute with the representations set forth in Contractor's Notice. Contractor shall then perform corrective measures necessary to satisfy the conditions of **Section 13.3** in order to achieve Substantial Completion, subject to Contractor's right to Dispute resolution pursuant to **Article 33**, and upon completion of such corrective measures shall again notify the Authority in writing that Contractor has satisfied the requirements of **Section 13.3**. The Authority shall have fifteen (15) Business Days after each subsequent notification to advise Contractor, in writing, of any remaining defects, deficiencies and/or discrepancies which must be corrected by Contractor. If any Dispute resolution award concludes that corrective work performed under protest by Contractor was not required under this Agreement, then a Change In Work shall be issued by the Authority to compensate Contractor for additional costs incurred by it to perform such corrective work and to appropriately extend the Scheduled Substantial Completion Date and/or the Scheduled Final Completion Date on account thereof.

13.4.2 Within fifteen (15)Business Days after receipt by the Authority of Contractor's Notice that Contractor has satisfied all of the requirements of **Section 13.3**, the Authority shall either (A) advise Contractor in writing of a Dispute as provided in **Section 13.4.1**

or (B) issue a Notice of Substantial Completion which shall specify the Substantial Completion Date as the date on which Substantial Completion was achieved. If the Authority fails to advise Contractor in writing of a Dispute (as provided in **Section 13.4.1**) or issue the Notice of Substantial Completion as provided in this **Section 13.4.2**, for any reason other than Contractor's failure to perform its obligations under this Agreement, then the Notice of Substantial Completion shall be deemed to have been issued pursuant to this **Section 13.4.2**. Issuance or deemed issuance of the Notice of Substantial Completion pursuant to this **Section 13.4.2** shall in no way relieve Contractor of any of its obligations or liabilities under this Agreement.

13.5 No Effect on Scheduled Substantial Completion Date, Scheduled Final Completion Date, Fixed Construction Price or Service Fee.

No action taken, or failed to be taken by Contractor or the Authority pursuant to this **Article 13**, except in the event that Authority fails to meet the fifteen (15) day deadlines outlined in this **Article 13**, shall (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or Service Fee. If Contractor is prevented from meeting any requirements set forth in Exhibit F and the following conditions are met: 1) delays outside the reasonable control of Contractor that are caused by BGE, or PJM; 2) Contractor has met all definitions of requirements in Exhibit F except those requirements dependant on actions by BGE, or PJM; and 3) the contractor has used all commercial reasonable efforts to mitigate such delays; then the Authority shall exercise the right to grant Contractor additional time to meet the Scheduled Substantial Completion Date, and the Scheduled Final Completion Date resulting from delays described herein this Section 13.5.

**14. DELAY LIQUIDATED DAMAGES; BUYDOWN AMOUNT**

14.1 Delay Liquidated Damages.

14.1.1 Contractor understands that if Substantial Completion is not achieved by the Scheduled Substantial Completion Date, the Authority and the County will suffer damages, including, without limitation, lost revenues under Power Purchase Agreements and other costs which are difficult or impossible to ascertain or measure. Therefore, Contractor specifically agrees that if the Project has not achieved Substantial Completion by the Scheduled Substantial Completion Date, then Contractor shall pay daily delay liquidated damages to the Authority in an amount equal to one thousand five hundred Dollars (\$1,500) for each day or part thereof that a Project has not achieved Substantial Completion. It is expressly agreed that such delay liquidated damages do not constitute a penalty and, except as provided in **Sections 7.6** and **13.3.9** with respect to the Authority's right to withhold retainage, are the Authority's sole damage remedy for Contractor's delay in achieving Substantial Completion; provided that,

notwithstanding Contractor's payment of delay liquidated damages pursuant to this **Section 14.1**, the Authority shall also have the right to seek enforcement of this Agreement and the performance by Contractor of its obligations hereunder including, without limitation, the obligations of Contractor to continue performing corrective or remedial activity to cause the Project to achieve Substantial Completion. The delay liquidated damages payable pursuant to this **Section 14.1.1** are subject to the liquidated damage cap provisions set forth in **Section 37.10.2**.

14.1.2 Contractor shall pay the Authority for delay liquidated damages accrued in respect of the fixed daily amount under **Section 14.1.1** for each month (or any part of a month) of such delay, on or before the thirtieth (30<sup>th</sup>) day of the immediately succeeding month. Late payments of such amounts shall bear interest at Late Payment Rate or the highest rate permitted by Law, whichever is less. The Authority shall have the right to offset any liability of Contractor under this **Section 14.1** in accordance with **Section 7.9**.

14.1.3 If Contractor is required to pay delay liquidated damages under this **Section 14.1** with respect to the Project, then Contractor's obligation to pay such delay liquidated damages (other than damages accrued) shall cease upon the occurrence of Substantial Completion of such Project based on the Minimum Performance Guarantees.

14.1.4 If a Project does not demonstrate full satisfaction of the Minimum Performance Guarantees, then Contractor shall not be entitled to pay the Buydown Amount and thereby terminate its obligation to continue paying delay liquidated damages with respect to such Project pursuant to this **Section 14.1** and Contractor must continue to prosecute the Work under this Agreement in order to cause the full satisfaction of the Minimum Performance Guarantees and occurrence of Substantial Completion for such Project.

#### 14.2 Satisfaction of Minimum Performance Guarantees.

14.2.1 If the Substantial Completion Date for a Project is achieved based on the Minimum Performance Guarantees, then between the Substantial Completion Date for such Project and the date as of which Contractor has successfully demonstrated satisfaction of the Performance Guarantees for such Project, Contractor shall pay the Authority the liquidated damages set forth in Part 1 of **Exhibit L** (the "**Performance Guarantee Liquidated Damages**"). Performance Guarantee Liquidated Damages are subject to the liquidated damage cap provisions set for in **Section 37.10.2**.

14.2.2 Performance Guarantee Liquidated Damages owed by Contractor to the Authority in respect of any month may be invoiced by the Authority at any time after the last day of such month and Contractor shall pay the amount so invoiced within twenty (20) Business Days of receipt of such invoice. Late payments of such amounts shall bear interest at the Late Payment Rate or the highest rate permitted by Law, whichever is less. The Authority shall have the right to offset any liability of Contractor under this **Section 14.2** in accordance with **Section 7.9**.

14.2.3 If Contractor does not achieve the Performance Guarantees for a Project within sixty (60) days after the occurrence of the Substantial Completion Date for such Project, then the Authority may, in its sole discretion and upon Notice to Contractor, elect to cause the Contractor to pay the Buydown Amount for such Project to the Authority pursuant to **Section 14.3** based upon the results of the most recent Performance Tests certified or deemed certified by the Authority for such Project.

#### 14.3 Buydown Amount.

14.3.1 As liquidated damages for the failure of a Project to achieve the Performance Guarantees, as demonstrated by the results of Performance Tests conducted in accordance with **Section 13.1**, Contractor shall pay the liquidated damages set forth in **Exhibit V** (the “**Buydown Amount**”) for such Project based on the results of such recently completed Performance Tests certified or deemed certified by the Authority for such Project. The Buydown Amount payable pursuant to this **Section 14.3** is subject to the liquidated damage cap provisions set forth in **Section 37.10.2**.

14.3.2 The Authority and Contractor hereby acknowledge and agree that the terms, conditions and amounts fixed pursuant to this **Section 14.3** for the Buydown Amount are reasonable, considering the damages that the Authority would sustain in the event of Contractor’s failure to achieve the Performance Guarantees for a Project. These amounts are agreed upon and fixed as liquidated damages because of the difficulty of ascertaining as of the date hereof the exact amount of damages that would be sustained in such event and are the Authority’s sole monetary damage remedy for Contractor’s failure to achieve the Performance Guarantees.

14.3.3 Contractor shall pay the Buydown Amount required under this **Section 14.3**, on or before the earlier of (A) the Scheduled Final Completion Date or (B) ten (10) Business Days after the Contract Deadline if Substantial Completion does not occur by the Contract Deadline. If Contractor fails to make timely payment of the Buydown Amount, interest on any unpaid amount shall accrue from the due date at the lesser of (1) the Late Payment Rate or (2) the maximum permitted legal interest rate at the time prevailing. To the extent that the Authority is holding retainage owed to Contractor pursuant to **Section 7.7** or has drawn upon or otherwise obtained payment under Retainage Security pursuant to **Section 7.7**, the full amount of such retainage or the full amount of the Retainage Security drawn upon or otherwise paid over to the Authority (as the case may be) shall be applied to reduce the amount of the Buydown Amount on a dollar for dollar basis. The Authority shall have the right to offset any liability of Contractor under this **Section 14.3** in accordance with **Section 7.9**.

#### 14.4 Satisfaction of Availability Guarantees.

14.4.1 Contractor guarantees that the Project shall achieve an Availability Percentage of ninety-five percent (95%) (the “**Guaranteed Availability**”) during each Contract

month applicable to such Project, provided that during the first Contract year the first four (4) months of such contract Year shall be excluded from the calculation of the Availability Percentage. In the event that the Availability Percentage for a Project is greater than the Guaranteed Availability during a Contract month, Contractor shall receive a bonus as set forth in Part II of **Exhibit L** (the “**Availability Bonus/Penalty**”) to the Authority. In the event that the Availability Percentage for a Project is less than the Guaranteed Availability during a Contract month, Contractor shall provide a credit as set forth in Part II of **Exhibit L** (the “**Availability Bonus/Penalty**”) to the Authority. The Authority shall have the right to offset any liability of Contractor under this **Section 14.4** in accordance with **Section 7.9**. The Availability Bonus and Penalty payable pursuant to this **Section 14.4** are subject to the cap provisions set forth in **Exhibit L**.

14.4.2 The term “**Availability Percentage**” means, with respect to a Project, an amount calculated in accordance with the following formula:

$$\text{Availability Percentage} = 100 \times \frac{\text{total Operating Hours}}{\text{total Base Hours}}$$

where:

“Operating Hours” means, for the Project, the total number of hours in the month that the Project is (1) operating and generating electricity or (2) available and physically capable of generating electricity;

“Base Hours” means, for the Project, the total number of hours in the month minus (a) any hours during the Contract month that the Project is not operational as a result of an event of Force Majeure, and minus (b) any hours during the Contract month that the Project is not operational as a result of a Top End or Major Overhaul, utility outage or interruption in the normal quantity and/or quality landfill gas supply such that the either of the generating units is prevented from generating electricity; and

During the first contract year the first four (4) months of such Contract Year, shall be excluded from the calculation of the Availability Percentage.

As an example, assume that:

- (a) the total Operating Hours during the Contract month for the Millersville Project was 1458 hours;
- (b) the total Base Hours during the Contract month for the Millersville Project was 1488 hours;

then the Availability Percentage for the Millersville Project for the Contract month would be as follows:

$$\text{Availability Percentage} = 100 \times \frac{1,458}{1,488}$$

$$\begin{aligned} \text{Percentage} & \qquad \qquad \qquad 1,488 \\ & = \qquad \qquad \qquad 100 \times (.9798) \\ & = \qquad \qquad \qquad 97.98\% \end{aligned}$$

## 15. FINAL COMPLETION

### 15.1 Final Completion.

15.1.1 Within fifteen (15) Business Days after the Substantial Completion Date, Contractor shall submit to the Authority a list of Work to be completed to achieve Final Completion. The Authority shall have fifteen (15) Business Days to review and approve the list of requirements for Final Completion. If the Authority does not respond to such list within fifteen (15) Business Days of receipt thereof, then such list shall be deemed to have been approved provided that any approval or deemed approval of the list by the Authority shall not relieve Contractor of any of its obligations or liabilities under this Agreement.

15.1.2 Final Completion of the Project shall be deemed to have occurred when all of the following have occurred:

15.1.2.1 The Project has achieved Substantial Completion;

15.1.2.2 Receipt by the Authority of the Performance Test Report, certified (or deemed certified) by the Authority, demonstrating satisfaction of the Performance Guarantees, or, as the case may be, the Minimum Performance Guarantees, in which case Contractor shall have paid the Buydown Amount;

15.1.2.3 Contractor has completed all Punchlist items;

15.1.2.4 Contractor has provided the Authority with copies of the Operation and Maintenance Manual pursuant to **Section 3.23.1**;

15.1.2.5 All Contractor's and Subcontractors' personnel, supplies, equipment, waste materials, rubbish and temporary facilities have been removed from the Project Site;

15.1.2.6 The Authority has received from Contractor and each of its Subcontractors a final lien waiver in the form set forth in **Exhibit M-1 and M-2**; provided, however, if any lien has been filed against a Project Site, the Landfill or the Project, this condition shall be deemed to be satisfied with respect to such lien if the full amount of liability related to such lien has been bonded by Contractor pursuant to a payment bond in form and substance reasonably satisfactory to the Authority;

15.1.2.7 The Authority has received payment of all amounts owed by Contractor hereunder;

15.1.2.8 The Authority has received from Contractor the financial information required by **Section 3.7**; and

15.1.2.9 The Authority has received from Contractor all drawings, reports, data and information in accordance with **Section 10.7**.

15.1.3 Contractor shall provide Notice to the Authority when Contractor has satisfied all of the conditions for Final Completion as described in **Section 15.1.2**.

15.1.4 Within fifteen (15) Business Days after receipt of Contractor's notification that the Project has satisfied the requirements of **Section 15.1.2**, the Authority shall advise Contractor in writing of any Dispute with the representations set forth in Contractor's Notice. Contractor shall then perform corrective measures necessary to satisfy the conditions of **Section 15.1.2** in order to achieve Final Completion and upon completion of such corrective measures shall again notify the Authority in writing that Contractor has satisfied the requirements of **Section 15.1.2**. The Authority shall have fifteen (15) Business Days after each subsequent notification to advise Contractor, in writing, of any remaining defects, deficiencies and/or discrepancies which shall thereafter be promptly corrected by Contractor. If any Dispute resolution award concludes that corrective work performed under protest by Contractor was not required in order to satisfy its obligations under this Agreement, then a Change In Work shall be issued by the Authority to compensate Contractor for additional costs incurred by it and to appropriately extend the Scheduled Final Completion Date on account thereof.

## 15.2 Notice of Final Completion.

Within five (5) Business Days after verification by the Authority that Contractor has satisfied all of the requirements of **Sections 15.1.1, 15.1.2 and 15.1.3**, the Authority shall issue a Notice of Final Completion (the "**Notice of Final Completion**"), which shall specify the Final Completion Date as the date of the final Notice of Contractor to the Authority issued pursuant to **Section 15.1.3** or **15.1.4**, as applicable. If the Authority fails to advise Contractor in writing of a Dispute (as provided in **Section 15.1.4**) or issue the Notice of Final Completion as provided in this **Section 15.2**, for any reason other than Contractor's failure to perform its obligations under this Agreement, then the Notice of Final Completion shall be deemed to have been issued pursuant to this **Section 15.2**. Issuance or deemed issuance of the Notice of Final Completion pursuant to this **Section 15.2** shall in no way relieve Contractor of any of its obligations or liabilities under this Agreement.

## 15.3 No Effect on Scheduled Final Completion Date, Fixed Construction Price or Service Fee.

No action properly taken by Contractor or the Authority pursuant to this **Article 15** shall (A) affect the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation or liability of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

## 16. CHANGES IN WORK

### 16.1 Changes in Work Directed by the Authority.

16.1.1 The Authority's Authorized Representative or designee shall have the right to make any Change In Work, whether such Change In Work is a modification, alteration, addition or deletion. Prices for Changes In Work shall be developed on an "open book" approach and shall be priced based on (i) fully burdened direct labor costs for Contractor's employees to be incurred by Contractor; (ii) equipment and material costs to be incurred by Contractor; (iii) third party direct costs to be directly incurred by Contractor; and (iv) an Administrative Fee calculated in accordance with **Section 16.1.3** based upon the sum of subparagraphs (i), (ii) and (iii) hereof. Contractor shall provide the Authority with a detailed estimate of such costs. The estimate shall include capital costs for equipment and materials, field labor, expenses and engineering.

16.1.2 The Authority shall advise Contractor of any proposed Change In Work and the Authority and Contractor shall then promptly consult with each other concerning the cost and impact, if any, on the Progress Schedule of implementing the proposed change. Following such consultation, the Authority may request and Contractor shall thereupon promptly prepare, at its own cost and expense, a detailed estimate relating to the contemplated change (a "**Change In Work Form**"), which shall include (A) any projected increase or decrease of the Fixed Construction Price and/or the Service Fee and, if applicable, the Payment Milestone amount(s) affected by such change, (B) the projected effect, if any, on the Progress Schedule (including, but not limited to, the Scheduled Substantial Completion Date and the Scheduled Final Completion Date) and (C) the potential effect on Contractor's ability to comply with any of its obligations hereunder, including Warranties and the Performance Guarantees.

16.1.3 The "Administrative Fee" associated with a Change in Work shall be cost plus 10% mark-up.

### 16.2 Change in Work Form.

16.2.1 Upon agreement and execution of a Change In Work Form by Contractor and the Authority, the Authority shall promptly adjust (in consultation with Contractor), as necessary, the Fixed Construction Price, the Service Fee, the Progress Payment Schedule and/or the Progress Schedule to reflect the agreed upon changes.

16.2.2 If the Authority and Contractor cannot promptly reach agreement on the matters listed in the Change In Work Form, or cannot agree that the matters under discussion constitute a Change In Work, the Authority may, at its sole discretion, order Contractor in writing to promptly proceed to complete the Change In Work in accordance with the Authority's interpretation of the matter under Dispute and the Authority shall pay Contractor for the undisputed costs of such Change In Work. In the event the Authority and Contractor cannot reach agreement on the schedule change or estimated cost of the Change In Work within fifteen (15) Business Days after Contractor is ordered to proceed under protest, either Party may submit the matter for Dispute resolution as contemplated in **Article 33**.

16.2.3 In no event shall Contractor undertake a Change In Work until (A) a Change In Work Form has been approved and signed by the Authority, and (B) if a disagreement exists as described in **Section 16.2.2**, Contractor has received Notice from the Authority to proceed under protest. In no event shall changes to the Work necessary for Contractor's design and Detailed Plans work to allow each of the Project to perform as specified in this Agreement constitute a Change In Work unless such changes are caused by a Force Majeure or specifically agreed to in writing by the Authority.

#### 16.3 Suspension Due to Change in Work.

The Authority may notify Contractor in writing to suspend Work, for a maximum of fifteen (15) Business Days, on that portion of the Work affected by a contemplated Change In Work, (whether or not such change will require a modification to the Work), pending the Authority's decision on such Change in Work. The terms of such suspension shall be in accordance with **Article 21** and such suspension shall result in an adjustment of the Progress Schedule in accordance with **Section 6.4** only to the extent that such suspension affects the critical path of a Project as shown on the CPM schedule.

#### 16.4 Change in Law.

If after the date of this Agreement there is any Change In Law, Contractor shall promptly submit a Change In Work Form to the Authority reflecting any changes required by the Change In Law. Contractor shall not be responsible for compliance with any such Change In Law unless and until a Change In Work Form is accepted by the Authority or Contractor is ordered by the Authority to proceed under protest.

#### 16.5 Contractor Proposals.

After execution of this Agreement, Contractor may propose any addition, deletion, modification or amplification to this Agreement that in Contractor's opinion does not constitute a Change In Work by giving the Authority prior Notice thereof. The Authority shall promptly review and approve or reject Contractor's proposed addition, deletion, modification or amplification and accept or reject same. The Authority may, at its sole discretion, determine that

the proposed addition, deletion, modification or amplification be deemed a Change In Work, to be handled accordingly.

16.6 Contractor Proposed Change in Work.

Contractor may propose a Change In Work to the Authority on account of (A) additions, modifications, deletions or enhancements to the Project, (B) changes to the cost of the Work caused by the negligent acts or omissions of the Authority or anyone under the Authority's control (excluding Contractor and any person or entity performing Work on its behalf), (C) changes to the time of performance of the Work caused by the negligent acts or omissions of the Authority or anyone under the Authority's control (excluding Contractor and any person or entity performing Work on its behalf) or (D) Force Majeure events. However, Contractor shall not make any Change In Work (including changes that have no net cost effect on the Fixed Construction Price or the Service Fee) without a Change In Work Form signed by the Authority and Contractor or a decision of the arbitrators pursuant to the provisions of **Article 33**; provided, however, that if there is a Dispute between the Authority and Contractor as to the occurrence or existence of a Force Majeure, Contractor may unilaterally execute and submit a Change In Work Form in response to such Force Majeure and commence performance of the activities described therein prior to resolution of such Dispute in accordance with **Article 33** and, if the arbiter determines that (1) the activities described in such Change In Work were not required as a result of such Force Majeure, then Contractor shall have undertaken such activities at its sole cost and shall not be entitled to any reimbursement or adjustment to the Fixed Construction Price or the Service Fee for such activities undertaken pursuant to the unilateral Change In Work Form or (2) such Change In Work was required as a result of Force Majeure, then Contractor shall be entitled to (a) a Change In Work for the scope of the Work reflected in the arbiter's decision and, (b) solely with respect to a Force Majeure occurrence described in **Section 22.2(C)** (Change In Law) or **Section 22.2(D)** (adverse subsurface geotechnical conditions), an adjustment to the Fixed Construction Price or the Service Fee in accordance with the arbiter's decision. The Fixed Construction Price, the Service Fee or any component thereof shall not be increased with respect to any Change In Work proposed by Contractor unless the requirements set forth in this **Section 16.6** are satisfied.

16.7 Minor Changes.

The Authority shall have the right to issue clarifications and order minor changes in the Work, effected by written order, which do not involve an adjustment to the Fixed Construction Price, the Service Fee, the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, provided that such clarifications and changes are consistent with the intent of this Agreement. Such clarifications and changes shall be binding upon the Parties and Contractor shall receive no additional compensation therefore, nor shall there be any change to this Agreement.

16.8 Field Orders.

The Authority shall have the right to direct the Contractor to make a change in the field for issues that require immediate attention in order to prevent delays in the Work, protect property, assure safety of personnel or address other issues where failure to take immediate action could cause increased costs, property damage or pose environmental or safety hazards.

**17. WARRANTIES CONCERNING THE WORK**

17.1 Warranties.

As its “**Warranties**”, Contractor warrants the Work as follows:

17.1.1 The Work shall meet all Project Requirements, shall substantially conform to all material aspects of the final drawings and specifications and all equipment incorporated into the Work shall perform substantially in accordance with the Scope of Work, including, without limitation, the Performance Guarantees. The Authority’s rights under this **Section 17.1.1** shall extend until the later of (A) twelve (12) months from the Substantial Completion Date and (B) twelve (12) months following corrective action on the portion of the Work for which corrective action was performed (but not to exceed twenty-four (24) months from the Substantial Completion Date).

17.1.2 The Work shall be free from faulty or imperfect material or equipment or any imperfect, careless or unskilled workmanship. The Authority’s rights under this **Section 17.1.2** shall extend until the later of (A) twelve (12) months from the Substantial Completion Date and (B) twelve (12) months following corrective action on the portion of the Work for which correction action was performed (but not to exceed twenty-four (24) months from the Substantial Completion Date).

17.1.3 Contractor further warrants that the equipment and materials supplied by Contractor or its Subcontractors hereunder shall be new (unless otherwise specifically agreed to by the Authority in writing) and that all mechanical and electrical equipment, machines and similar devices shall be adequate for the use to which they are intended, and shall operate with ordinary care and attention in a satisfactory manner.

17.1.4 The Warranties and remedies stated herein are exclusive and expressly in lieu of all other warranties by Contractor, including, but not limited to, any warranty whether statutory, oral or written, express or implied. Contractor specifically disclaims any and all implied warranties, including, without limitation, warranties of merchantability and fitness for a particular purpose. Contractor shall have no responsibility for damage caused to the Work by ordinary wear and tear, or for damage caused by the Authority Indemnified Parties or by any other person (other than Contractor or its Subcontractors) at the Project Site performing the obligations of the Authority hereunder or on behalf of the Authority.

17.1.5 Contractor shall be responsible for correcting (at no expense to the Authority) latent defects in a Project or any failure of Contractor or any Subcontractor to follow the requirements hereunder (even if such defects or failure is discovered after the expiration of the Warranties). Any Contractor or Subcontractor design defects shall be remedied by a means that is mutually agreed to by the Parties.

17.1.6 Notwithstanding any provision of this Agreement to the contrary (other than **Section 17.1.7**), Contractor's warranty of the design, workmanship or materials in equipment or materials supplied by the engine/generator set manufacturers shall be as set forth in **Exhibit W**.

17.1.7 Notwithstanding anything herein to the contrary, the provisions of this **Article 17** and of **Exhibit W** shall not reduce, relieve or otherwise modify in any manner or fashion Contractor's obligation to operate, maintain, repair and replace the Project in accordance with the terms of this Agreement.

## 17.2 Breach of Warranties.

17.2.1 The Authority shall promptly give Notice to Contractor upon discovery of any breach of the Warranties under **Section 17.1** during the Warranty Period. In the event of any such breach, Contractor shall thereupon, and at its own cost and expense, reperform any necessary Work and provide (at no expense to the Authority) such design, engineering, equipment, material, labor, shipping and services necessary to cause the Work and the Project to conform to said Warranties. Contractor's Warranties for any rework of design, engineering, equipment, materials, construction or workmanship shall commence upon the completion of such rework; provided, however, no such rework shall extend the Warranties beyond the Warranty Period. The Warranties shall be assignable by the Authority without additional approval by Contractor.

17.2.2 Upon receipt from the Authority of a Notice during the Warranty Period of a breach of any Subcontractor warranty, representation or guarantee obtained by Contractor under **Section 17.3**, Contractor shall be responsible for enforcing any such warranty, representation or guarantee. The Authority's rights under this **Section 17.2.2** shall commence at the time such representation, warranty or guarantee is furnished and shall continue until the expiration of the Warranty Period. Until expiration of the Warranty Period, the cost of any equipment, material, labor (including re-engineering) or shipping shall be for the account of Contractor if such cost is (A) covered by the Warranties, (B) required to replace or repair defective equipment, materials or workmanship furnished by Subcontractors and (C) not recoverable by the Authority under any representation, warranty or guarantee received from a Subcontractor. Under the foregoing clause (C), should Subcontractor seek to defend on the grounds of errors by Contractor, the Authority may enforce the warranty against Contractor and Contractor shall resolve such issues with the Subcontractor.

17.2.3 If a breach of the Warranties or of any Subcontractor representation, warranty or guarantee that Contractor is responsible to enforce requires immediate curative action by Contractor or the Authority (such as an unplanned outage of a Project requiring immediate curative action), then Contractor and the Authority shall agree on a remedy immediately upon receipt by Contractor of Notice of such breach and Contractor shall use its best efforts to have personnel (with the necessary equipment, if practical under the circumstances) at the Project Site to remedy said breach within twenty-four (24) hours of receipt by Contractor of Notice of such breach. Except for the foregoing cases requiring immediate curative action by Contractor or the Authority, within five (5) Business Days of receipt by Contractor of a Notice from the Authority under this **Section 17.2** specifying a breach of the Warranties or of any Subcontractor representation, warranty or guarantee that Contractor is responsible to enforce, Contractor and the Authority shall mutually agree when and how Contractor shall remedy said breach. If Contractor does not begin and diligently proceed to complete said remedy within the time agreed to, or should Contractor unreasonably fail to reach such an agreement with the Authority within such five-day period (or immediately, in the case of conditions requiring immediate curative action, in which case Contractor's right to institute Dispute resolution proceedings pursuant to this Agreement shall be preserved), the Authority, after Notice to Contractor, shall have the right to perform or have performed by third parties the necessary remedy, and the costs thereof shall be fully borne by Contractor. Any such action by the Authority or any third party shall not alter, amend, waive or relieve any obligation of Contractor under this Agreement.

### 17.3 Subcontractor Warranties.

Without in any way derogating Contractor's representations and warranties (including the Warranties) and its Performance Guarantees with respect to all of the Work, Contractor shall use commercially reasonable efforts to obtain warranties from Subcontractors with a duration at least as long as the Warranties; provided that Contractor's inability to obtain such warranties from its Subcontractors shall not release Contractor from its obligations to provide the Warranties required under this Agreement. All warranties of Subcontractors when obtained by Contractor shall be (A) furnished promptly to the Authority, (B) written so as to survive all Authority and Contractor inspections, tests and approvals, (C) written in English, (D) assignable to the Authority and (E) freely further assignable by the Authority. While this Agreement is in effect, Contractor must enforce all rights and benefits and must perform all obligations under the Subcontractor warranties. Contractor shall assign any surviving Subcontractor warranty to the Authority upon the termination or expiration of this Agreement. Warranties for all equipment shall remain in effect from the date of delivery to the Project Site until twelve (12) months following the Substantial Completion Date. If Subcontractors offer extended warranties beyond the aforementioned warranty periods at extra cost, Contractor shall notify the Authority, and the Authority may, if it so elects, issue a Notice to Contractor of a Change In Work and the Fixed Construction Cost shall be adjusted accordingly. Warranties for repair or replacement of portions of the Work requiring repair or replacement after the Substantial Completion Date shall remain in effect for a period of twelve (12) months from the date such repairs or replacements are completed. For the purpose of this Agreement, each of the

periods described in the three (3) immediately preceding sentences and in **Sections 17.1.1 and 17.1.2** shall be defined as the “**Warranty Period**” with respect to the equipment or Work described therein. Contractor shall be responsible for enforcing all representations, warranties and guarantees from Subcontractors.

17.4 No Effect on Scheduled Dates, Fixed Construction Price or Service Fee.

Approvals given by the Authority hereunder represent consent to the action proposed by Contractor, but shall not be considered representations concerning the propriety, fitness or usefulness of the proposed action, and shall not (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, including, without limitation, Contractor’s obligation to strictly comply with the terms and conditions of this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

17.5 Governing Law of Warranties.

To the fullest extent possible, Contractor shall use commercially reasonable efforts to obtain Subcontractor warranties which are governed by the Laws of Maryland. Under no circumstances shall a warranty provided by any Subcontractor be governed by the Laws of any jurisdiction other than one of the states within the United States of America. If, prior to the execution of a subcontract, a Subcontractor rejects such governing law under a subcontract or purchase order, the Parties must agree in writing to the governing law of such subcontract before Contractor may enter into a subcontract or purchase order with such Subcontractor and if such an agreement between the Parties cannot be reached, such Subcontractor may not be used to perform Work on behalf of Contractor hereunder. Nothing in this **Section 17.5** shall (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, including, without limitation, Contractor’s obligation to strictly comply with the terms and conditions of this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

**18. TITLE; RISK OF LOSS**

18.1 Title.

18.1.1 Contractor warrants good title to all materials, equipment, tools and supplies furnished by it or its Subcontractors that become part of the Project or that are purchased for the Authority. Title to all or a portion of said materials, equipment, tools and supplies shall pass to the Authority, in the case of a Project, upon the date Contractor receives

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payment for said material, equipment, tools and supplies, provided that for all such items title shall pass to the Authority or the County upon payment to Contractor only if title has been passed to Contractor, otherwise, title shall pass to the Authority or the County at such time as Contractor has acquired title to such item. In no event shall Contractor acquire title to said materials, equipment, tools and supplies later than the delivery of any such item to the Project Site. Contractor shall retain care, custody and control of said materials, equipment, tools and supplies and exercise due care with respect thereto until the termination or expiration of this Agreement. Said transfer of title shall in no way affect the Authority's rights as set forth in other provisions of this Agreement.

18.1.2 For the purpose of protecting the interest of the Authority in all materials, equipment, tools and supplies with respect to which title has passed to the Authority but which remain in the possession of Contractor or another party, Contractor shall take or cause to be taken all commercially reasonable steps necessary under the Laws of the appropriate jurisdiction(s) to protect the Authority's title to those items identified in Subsection 18.1.1 and to protect the Authority against claims by other parties with respect thereto. In the event of any such claim, Contractor shall defend and hold harmless the Authority and the County if such claims are instituted against the Authority and/or the County.

18.1.3 All drawings and other documents (including specifications) furnished or to be furnished by Contractor in performing the Work shall be the property of the Authority. Contractor hereby grants to the Authority and its successors as owner or lessor of a Project an irrevocable, perpetual and royalty free license to use any documents furnished hereunder in connection with the ownership, operation and maintenance of the Project. The Authority agrees to treat all such documents as confidential and the Contractor agrees to identify confidential documents by stamping or marking them with the word 'confidential'. The Company understands that the Authority in its reasonable discretion may determine that disclosure of some information is required under the public disclosure act, COMAR 21.06.01.02 (F), and the Company agrees to waive any claim against the Authority with respect to any such disclosure. The Authority will give notice to the Company of any requests for disclosure of information identified as confidential. Treatment of Confidential Information is discussed in Section 27 of this Agreement.

## 18.2 Risk of Loss.

Contractor shall assume care, custody and control of the Project, as of the Substantial Completion Date for such Project. Contractor assumes the risk of loss for the Project and the Work, regardless of whether the Authority has title thereto, except to the extent that the loss is caused by the Authority's net negligence or willful misconduct. The provisions of this **Section 18.2** shall not increase Contractor's liability to third parties beyond that otherwise provided for in this Agreement.

## 19. DEFAULT AND TERMINATION UPON DEFAULT

### 19.1 Contractor Events of Default.

Each of the following constitutes an “**Event of Default**” on the part of Contractor, provided that none of the following shall constitute an Event of Default to the extent caused by the failure of the Authority to perform its obligations hereunder:

19.1.1 If Contractor (or any guarantor of Contractor’s obligation hereunder) makes an assignment for the benefit of creditors, or admits in writing an inability to pay debts generally as they become due, or consents to the appointment of a receiver or liquidator or trustee or assignee in bankruptcy or insolvency of either Contractor (or any guarantor of Contractor’s obligation hereunder) or of a major part of its property; or

19.1.2 If, by order of a court of competent jurisdiction, a receiver or liquidator or custodian or trustee of Contractor (or any guarantor of Contractor’s obligation hereunder) or of a major part of its property is appointed and is not discharged within sixty (60) days, or if, by decree of such a court, Contractor (or any guarantor of Contractor’s obligation hereunder) is adjudicated insolvent, or a major part of its property is sequestered, and such decree has continued undischarged and unstayed for sixty (60) days after the entry of such decree, or if a petition to reorganize Contractor (or any guarantor of Contractor’s obligation hereunder) pursuant to the Federal Bankruptcy Code (11 U.S.C.) or any other similar statute applicable to Contractor (or any guarantor of Contractor’s obligation hereunder), as now or hereinafter in effect, is filed against Contractor (or any guarantor of Contractor’s obligation hereunder) and is not dismissed within sixty (60) days after such filing, or if Contractor (or any guarantor of Contractor’s obligation hereunder) is adjudicated bankrupt or files a petition in voluntary bankruptcy under any provision of any bankruptcy Law or consents to the filing of any bankruptcy or reorganization petition against Contractor (or any guarantor of Contractor’s obligation hereunder) under any such Law, or (without limitation of the generality of the foregoing) files a petition to reorganize Contractor (or any guarantor of Contractor’s obligation hereunder) pursuant to the Federal Bankruptcy Code (11 U.S.C.) or any other similar statute applicable to Contractor (or any guarantor of Contractor’s obligation hereunder), as now or hereafter in effect; or

19.1.3 Contractor assigns its rights or obligations under this Agreement or any part thereof to any person, company, partnership, corporation or other entity except as otherwise permitted hereunder; or

19.1.4 Contractor disregards Laws or the lawful requirements of any competent authority or the instructions of the Authority consistent with this Agreement except to the extent such failure results from default by the Authority in its obligations to make payment under **Article 7**; or

19.1.5 Contractor fails or refuses to (A) design, engineer, procure, construct, start-up, test, operate, maintain, repair or replace the Project in accordance with this Agreement or (B) to substantially fulfill any of its material obligations to the Authority in accordance with this Agreement, notwithstanding the payment by Contractor of any damages or other amounts provided for under this Agreement, unless such failure or refusal is excused or justified pursuant to this Agreement, provided that failure of a Project to perform at or above the Performance Guarantees shall not constitute an Event of Default so long as no other Event of Default described in this **Section 19.1** shall have occurred, the Project continues to perform at or above the Minimum Performance Guarantees already met and Contractor pays the Buydown Amount for such failure as and when due under this Agreement; or

19.1.6 Any representation or warranty made by Contractor herein or in any payment invoice or related documentation submitted hereunder is false or misleading in any material respect when made; or

19.1.7 Contractor fails to pay any amount that Contractor is required to pay to the Authority under this Agreement within fifteen (15) Business Days after receipt by Contractor of written demand from the Authority, unless the Authority or Contractor has requested that arbitration be commenced pursuant to **Article 33** with respect to such failure to pay; or

19.1.8 Contractor abandons or suspends progress of the Work for five (5) Business Days due to any reason other than a Force Majeure, an Authority Event of Default or weather conditions that prevent the performance of certain elements of Work, which must be performed above certain temperatures or in dry conditions in order to meet design strength, warranty or other manufacturer requirements;

19.1.9 Contractor fails to provide and maintain in full force and effect the letter of credit or bonds, as applicable, as required pursuant to **Article 36**;

19.1.10 Contractor fails to provide and maintain in full force and effect the insurance policies required pursuant to **Section 23.1**;

19.1.11 Contractor fails to achieve Substantial Completion of the Project by the Scheduled Substantial Completion Date and Contractor fails to pay the associated delay liquidated damages that it is obligated to pay hereunder;

19.1.12 Contractor fails to achieve Final Completion of the Project by the Contract Deadline; or

19.1.13 Contractor fails to perform any obligation under this Agreement other than as specified above in this **Section 19.1**.

No failure or refusal on the part of Contractor described in **Sections 19.1.4, 19.1.6** or **19.1.7** shall constitute an “**Event of Default**” unless and until: (A) the Authority has given Notice to Contractor specifying with particularity the existence of such default; and (B)

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Contractor has failed to cure such default within thirty (30) days after receipt of such Notice, or in the case of a default which cannot be cured within thirty (30) days, has within thirty (30) days initiated actions reasonably likely to cure such default and is thereafter diligently pursuing such cure; provided, however, such period shall not extend beyond ninety (90) days after the Authority's initial Notice to Contractor concerning such default, unless approved by the Authority in writing (which approval shall not be unreasonably withheld by the Authority).

## 19.2 Authority Remedies.

In the case of one (1) or more Events of Default on the part of Contractor pursuant to **Section 19.1**, the Authority shall have the following rights and remedies, in addition to those rights and remedies that may be available to the Authority at law or in equity, and Contractor shall have the following obligations:

19.2.1 The Authority, without prejudice to any of its other rights or remedies, may upon five (5) Business Days Notice to Contractor (A) suspend payment and/or (B) terminate this Agreement on the date specified in a written Notice of termination to Contractor;

19.2.2 Upon termination of this Agreement by the Authority for cause in accordance with **Section 19.2.1** or for convenience in accordance with **Section 20.2**, Contractor shall reasonably cooperate with the Authority, the County and their designees to effect an orderly transition of the Work and shall, if requested by the Authority (A) withdraw from the Project Site, (B) provide the Authority with detailed information regarding the current status of the Work, including, without limitation, the status of subcontracts, purchase orders, Project Permits and other agreements related to the Work, (C) assign to the Authority or any designee of the Authority those subcontracts, purchase orders, Project Permits and other agreements related to the Work, as requested by the Authority, (D) enter into no further subcontracts, purchase orders or other agreements related to the Work other than as requested by the Authority and (E) turn over to the Authority complete possession of any or all designs, materials, equipment, tools, purchase orders, inquiries, letters, magnetic media, schedules, drawings or other items that the Authority deems necessary for completion of the Work. The Authority may employ any other person, company, partnership, corporation or other entity (hereinafter, a "**Replacement Contractor**") to finish the Work related to the design, engineering, procurement, construction, start-up and testing of the Project in accordance with the terms and conditions of this Agreement by whatever method that the Authority may deem expedient. In addition, Contractor shall not remove any equipment, materials or tools that (1) have been fabricated especially for or are unique to the Project, (2) are incorporated in or are attached to, or are intended to be incorporated in or attached to, the Project, (3) constitute temporary or permanent scaffolding or supporting elements for the construction of the Project or (4) the removal of which could damage the Project or any portion thereof or otherwise materially adversely affect or delay the construction, use or maintenance of the Project.

19.2.3 The Authority, without incurring any liability to Contractor, shall have the right to have the Work related to the design, engineering, procurement, construction, start-up and testing of the Project finished by the Replacement Contractor subject to **Section 19.2.4**.

19.2.4 If this Agreement is terminated by the Authority in accordance with **Section 19.2** for cause as a result of an Event of Default by Contractor under **Section 19.1** hereof, Contractor shall be liable to reimburse the Authority for all costs and expenses incurred by the Authority in connection with terminating this Agreement and engaging a Replacement Contractor plus the amount by which (A) the cost and expense to complete (or cure deficiencies in) the Work exceeds (B) the unpaid balance of the Fixed Construction Price plus the amount of any penalties, costs, expenses or damages payable by the Authority to any third party, including, without limitation, payments under Power Purchase Agreements, as a result of such termination. The Authority shall use its reasonable commercial efforts to mitigate such penalties, costs, expenses and damages. The Authority shall be entitled to withhold payments Contractor determines are due to it prior to the date of termination until Final Completion of the Project and determination by the Authority that Contractor is entitled to such payments. Upon completion of the Project by the Authority or third parties, the total cost of the Work related to the design, engineering, procurement, construction, start-up and testing of the Project shall be determined, and the Authority shall notify Contractor in writing of the amount, if any, that Contractor shall pay the Authority or the Authority shall pay Contractor. If at any time the total expense incurred by the Authority in completing the Project exceeds the portion of the Fixed Construction Price not paid to Contractor, then Contractor shall pay the amount of any such excess from time to time existing within thirty (30) days of written demand therefor by the Authority. Any amounts not paid hereunder when due shall bear interest at the Late Payment Rate. The Authority may in its discretion employ such other person, company, partnership, corporation or other entity to finish the Work by whatever method or means as the Authority in its sole discretion may deem expeditious. In the event that any termination of this Agreement by the Authority due to a Contractor Event of Default pursuant to **Section 19.2** is later adjudicated to have been improper, then Contractor shall be entitled to recover such amounts as Contractor is entitled to under **Section 20.3**.

### 19.3 Authority Events of Default.

Each of the following constitutes an “**Event of Default**” on the part of the Authority, provided that none of the following shall constitute an Event of Default to the extent caused by the failure of Contractor to perform its obligations hereunder:

19.3.1 If the Authority makes an assignment for the benefit of creditors, or admits in writing an inability to pay debts generally as they become due, or consents to the appointment of a receiver or liquidator or trustee or assignee in bankruptcy or insolvency of either the Authority or of a major part of its property; or

19.3.2 If, by order of a court of competent jurisdiction, a receiver or liquidator or custodian or trustee of the Authority or of a major part of its property is appointed and is not

discharged within sixty (60) days, or if, by decree of such a court, the Authority is adjudicated insolvent, or a major part of its property is sequestered, and such decree has continued undischarged and unstayed for sixty (60) days after the entry of such decree, or if a petition to reorganize the Authority pursuant to the Federal Bankruptcy Code (11 U.S.C.) or any other similar statute applicable to the Authority, as now or hereinafter in effect, is filed against the Authority and is not dismissed within sixty (60) days after such filing, or if the Authority is adjudicated bankrupt or files a petition in voluntary bankruptcy under any provision of any bankruptcy Law or consents to the filing of any bankruptcy or reorganization petition against the Authority under any such Law, or (without limitation of the generality of the foregoing) files a petition to reorganize the Authority pursuant to the Federal Bankruptcy Code (11 U.S.C.) or any other similar statute applicable to the Authority, as now or hereafter in effect; or

19.3.3 The Authority fails to pay any amount that the Authority is required to pay to Contractor under this Agreement within thirty (30) days after receipt by the Authority of written demand from, unless the Authority or Contractor has requested that arbitration be commenced pursuant to **Article 33** hereof with respect to such failure to pay.

19.3.4 Authority fails to substantially fulfill any of its material obligations to the contractor in accordance with this Agreement,

No failure or refusal on the part of the Authority described in **Sections 19.3.1, 19.3.2 or 19.3.3 or 19.4** shall constitute an “**Event of Default**” unless and until: (A) Contractor has given Notice to the Authority specifying with particularity the existence of such default; and (B) the Authority has neither corrected such default nor initiated actions reasonably likely to cure such default within thirty (30) days after receipt of such Notice.

#### 19.4 Contractor Remedies.

Contractor may elect to suspend the performance of the Work or to terminate this Agreement for cause as a result of an Event of Default by the Authority under **Section 19.3**, upon delivery of a Notice of such suspension or termination to the Authority.

19.4.1 If Contractor suspends the performance of the Work pursuant to this **Section 19.4**, then such suspension shall terminate upon cure of the Event of Default by the Authority, at which time Contractor shall immediately recommence performance of the Work and the Scheduled Substantial Completion Date shall be extended by a period equal to the suspension period plus any time reasonably required for mobilization or any other delay associated with the suspension in the Work that is beyond the reasonable control of Contractor, provided that the Scheduled Substantial Completion Date shall be extended only to the extent the suspension can be shown on the Progress Schedule to affect such date.

19.4.2 If Contractor terminates this Agreement pursuant to this **Section 19.4**, then Contractor shall have the right to compensation set forth in **Section 20.3** which right to such

compensation shall constitute Contractor's sole remedy for such Event of Default by the Authority.

**20. TERM; TERMINATION FOR CONVENIENCE; TERMINATION PAYMENT; TERMINATION FOR EXCESSIVE DAMAGES**

20.1 Term.

The initial term of this Agreement shall be for ten (10) years from the Substantial Completion Date.

20.2 Authority's Termination for Convenience.

Upon at least ninety (90) Days prior Notice to Contractor, the Authority shall have the right to terminate this Agreement for its convenience, at any time and without cause to the extent provided by Maryland law. In such event, Contractor shall be entitled to a Termination Payment in the full amount provided by Maryland law.

20.3 Termination Payment.

20.3.1 If this Agreement is terminated prior the Final Completion Date (A) by the Authority without cause, for convenience, and Contractor has complied with all of the Authority's termination instructions or (B) by Contractor for cause in accordance with **Section 19.4**, then Contractor shall be entitled to receive payment for Work actually performed up to the date of termination and with respect to the Fixed Construction Price, in accordance with the Project Payment Schedule, plus (1) all costs incurred by Contractor with respect to payment obligations already undertaken prior to such termination and (2) reasonably incurred demobilization and close out costs; provided, however, that in neither case shall Contractor be entitled to any recovery of profit or unabsorbed corporate overhead in connection with Work not actually performed or in connection with future Work. Contractor's right to such payment shall constitute Contractor's sole remedy for such termination of this Agreement.

20.3.1 If this Agreement is terminated on or after the Final Completion Date (A) by the Authority without cause, for convenience, and Contractor has complied with all of the Authority's termination instructions or (B) by Contractor for cause in accordance with **Section 19.4**, then Contractor shall be entitled to receive payment for Work actually performed up to the date of termination. Contractor's right to such payment shall constitute Contractor's sole remedy for such termination of this Agreement.

20.4 Authority's Termination Due to Excessive Damages.

If at any time Contractor is obligated to pay damages hereunder in excess of the liability cap provided in **Section 37.10.2** and relieved from paying such damages by operation of **Section 37.10.2**, then the Authority shall have the right to terminate this Agreement without any liability to Contractor, including pursuant to **Section 20.3**, as a result of such termination.

## 21. SUSPENSION

### 21.1 Suspension by the Authority.

The Authority may at any time and for any reason, in its sole discretion, suspend performance of the Work or portion thereof by giving Notice to Contractor. Such suspension shall continue for the period specified in the suspension Notice. At any time after the effective date of the suspension, the Authority may require Contractor to resume performance of the Work or portion thereof. On or before the end of the specified suspension period, the Authority shall advise Contractor in writing that (A) the suspension period will be extended, (B) Work will resume, or (C) this Agreement will be terminated (for convenience or for cause) on a specific date. If no such Notice is received from the Authority prior to expiration of the suspension period, Contractor shall give Notice to the Authority stating that, unless such Notice is given within thirty (30) days, this Agreement shall be deemed terminated for convenience as of the commencement date of the suspension period, and the Authority shall pay Contractor pursuant to the provisions of **Article 20**. In addition, and in either case, the Authority shall compensate Contractor as a Change In Work for those costs of Contractor incurred during or as a result of the suspension period that are documented by Contractor to the reasonable satisfaction of the Authority, attributable solely to the suspension, and are:

21.1.1 for the purpose of safeguarding and/or protecting from deterioration the Work and the materials and equipment in the course of manufacturing, in transit and at the Project Site; and

21.1.2 for personnel, Subcontractors or rented equipment the payment of which, with the Authority's prior written concurrence, is continued during the suspension period and/or for de-mobilization or remobilization of personnel, Subcontractors or equipment, demobilization, penalties for cancellation of contracts, or other costs incurred due to the suspension and for additional costs due to Contractor having to complete the Work under less favorable conditions.

### 21.2 Contractor Obligations During Suspension.

Upon receiving a Notice of a suspension from the Authority in accordance with **Section 21.1**, except to the extent that the Notice requires otherwise, Contractor shall (A) immediately discontinue the Work as of the date and to the extent specified in the Notice, (B) enter into no additional purchase orders or subcontracts, except those that may be specified in the Notice, (C) make reasonable efforts to obtain suspension of all purchase orders and subcontracts

to the extent that they relate to the performance of the suspended Work, (D) continue to protect and maintain the Work and the materials and equipment in the course of manufacturing, in transit, at the Project Site and (E) take any other reasonable steps to minimize the costs and expenses associated with such suspension.

21.3 Escalation Costs.

If prior to the Final Completion Date, the aggregate suspension period of the Work by the Authority hereunder is longer than two hundred seventy (270) days, and this Agreement is not terminated as described in **Section 21.1** then Contractor shall also be entitled to any actual, reasonable and documented escalation costs incurred by Contractor as a result of such suspension.

21.4 Extension of Scheduled Substantial Completion Date.

In the case of any suspension of the entire Work, or a portion thereof, under this **Article 21**, the Scheduled Substantial Completion Date shall be extended by a period equal to the suspension period plus any time that is demonstrated as reasonably required for mobilization, rework or any other delay associated with the suspension in the Work that is beyond the reasonable control of Contractor, provided that the Scheduled Substantial Completion Date shall be extended only to the extent that the suspension can be shown on the Progress Schedule to affect such date.

21.5 Contractor Claims for Compensation.

All claims by Contractor for compensation under this **Article 21** must be made within forty-five (45) days after the suspension period has ended or such claim shall be deemed to have been waived by Contractor.

**22. FORCE MAJEURE**

22.1 Notice of Force Majeure.

A Party to this Agreement shall not be in default hereunder or liable to the other Party for its failure to perform its obligations under this Agreement, to the extent such failure results from a Force Majeure. A Party claiming the benefit of this **Section 22.1** (the “**Affected Party**”) shall undertake normal and customary commercially reasonable steps to diligently overcome or remove such Force Majeure. The Affected Party shall give Notice of such claim to the other Party within five (5) Business Days of becoming aware of the occurrence of the Force Majeure and the Affected Party shall provide the other Party with information concerning the nature and duration of the Force Majeure, its effect on the Work and the Progress Schedule and the Affected Party’s efforts to overcome or remove the Force Majeure. If the Affected Party

fails to provide the Notice described in the preceding sentence to the other Party within twenty (20) Business Days of the inception of the event of a Force Majeure, the Affected Party shall be deemed to have waived its rights to the benefits of this **Article 22** or any other relief described in this Agreement with respect to such Force Majeure. A Notice satisfying the requirements of this **Section 22.1** must be clearly titled “NOTICE OF FORCE MAJEURE EVENT” and any writing not so titled shall not constitute the Force Majeure Notice required by this **Section 22.1**. The Affected Party shall provide periodic updates to the other Party during the continuation of the Force Majeure describing the duration of the Force Majeure, its effect on the Work and the Progress Schedule and the Affected Party’s efforts to overcome or remove the Force Majeure. When the Affected Party is able to resume the performance of its obligations hereunder it shall promptly provide a Notice to the other Party and resume such performance.

#### 22.2 Definition of Force Majeure.

“**Force Majeure**” means any event or condition, whether affecting the Project, the Collection and Recovery System, the Project Site, Contractor, the Authority or the County that occurs after the date of this Agreement and that has, or may reasonably be deemed to have, a material adverse effect on the Project, the Collection and Recovery System, the Project Site, the Work or on the ability of Contractor or the Authority to perform any of their respective obligations under this Agreement or for delay in such performance or compliance, in each case if such event or condition is beyond the reasonable control, could not reasonably have been foreseen and protected against using customary and normal commercial means, and is not the result of willful or negligent action of the Affected Party or its agents or Subcontractors relying thereon as justification for not performing any obligation or complying with any condition required of such Party hereunder. Force Majeure events may include, without limitation, the following:

- (A) an act of God (but not including reasonably anticipated weather conditions for the geographic area of the Project Site), landslide, lightning, tornado, earthquake or similar occurrence, fire, explosion or other casualty, an act of the public enemy, terrorism, war, blockade, insurrection, riot, general arrest or restraint of government and people, civil disturbance or similar occurrence, or sabotage;
- (B) the order or judgment of any Government Authority if it is not also the result of willful or negligent action or a lack of reasonable diligence of the non-performing Party, provided that the diligent contest in Good Faith of any such order or judgment shall not constitute or be construed as a willful or negligent action or a lack of reasonable diligence of such non-performing Party;
- (C) Change in Law, which does not include any federal or state regulation that has been added, interpreted and/or enforced to offset any misinterpretation of the law;

- (D) an adverse subsurface geotechnical condition satisfying the conditions set forth in **Section 4.2.4**;
- (E) failure of a Government Authority to timely issue a Project Permit or other required Governmental Approval by the late finish date for such Project Permit or Governmental Approval, as shown in the CPM schedule, provided that such failure is not the result of delayed, willful or negligent action or a lack of reasonable diligence or responsiveness of the Contractor in (1) applying for or following through on such Project Permit or Governmental Approval or (2) otherwise performing its obligations hereunder;
- (F) the discovery of Hazardous Materials (unless such Hazardous Materials were introduced to the Project Site by Contractor or its Subcontractors or as a result of the negligence, willful misconduct or failure of Contractor to perform its obligations hereunder) at, on or beneath the Project Site.
- (G) Acts of third parties not under the reasonable control of Contractor.

**“Force Majeure”** shall not include the following:

- (1) reasonably anticipated weather conditions for the geographic area of the Project Site;
- (2) the imposition of any new condition in or other change to a Project Permit if reasonably foreseeable;
- (3) the failure of a Subcontractor or any party to an agreement with Contractor to perform its obligations under such agreement or undertaking unless the failure of such person to perform is caused by a Force Majeure affecting such person;
- (4) with respect to Contractor only, any error or defect in the design or construction or equipping of the Project or the performance of the Work;
- (5) any lawful labor strike or work stoppages that are the result of Contractor’s or its Subcontractor’s breach of a valid collective bargaining agreement or violation of applicable Laws; or
- (6) general economic or industry conditions or increased costs of equipment, material, labor or other components of the Work.

### 22.3 Removal of Force Majeure.

22.3.1 The Affected Party shall continue to perform its obligations under this Agreement to the extent possible after the occurrence of the Force Majeure and must use all commercially reasonable efforts to overcome, mitigate and remedy its inability to perform its obligations and the delays, damages and effects of the Force Majeure.

22.3.2 If, within five (5) Business Days after a Force Majeure occurrence that has caused Contractor to suspend or delay performance of all or a portion of the Work, Contractor has failed to take commercially reasonable efforts to overcome or cure the Force Majeure occurrence or its direct or indirect effects on the performance of its obligations hereunder, the Authority may, in its sole discretion and after Notice to Contractor, at Contractor's expense, initiate commercially reasonable measures to overcome or cure such Force Majeure occurrence or its direct or indirect effects on the performance of Contractor's obligations hereunder and thereafter require Contractor to resume full or partial performance of the Work; provided, however, that no such action of the Authority shall (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

### 22.4 Extension of Scheduled Substantial Completion Date.

If a delay results from an occurrence that constitutes a Force Majeure under this **Article 22**, the Scheduled Substantial Completion Date shall be extended only to the extent Contractor demonstrates to the reasonable satisfaction of the Authority that such delay is shown on the Progress Schedule to affect such date(s). This analysis shall be based on the most current Progress Schedule in effect at the start of the Force Majeure occurrence and take into account the critical path of the Project for the activity(ies) affected by the Force Majeure occurrence as shown on the CPM schedule. The Progress Schedule shall be adjusted to reflect any new Scheduled Substantial Completion. The Fixed Construction Price and/or the Service Fee shall only be subject to adjustment for a Force Majeure occurrence described in **Section 22.2(C)**, **Section 22.2(D)** or **Section 22(E)**. Adjustment of the Fixed Construction Price and/or the Service Fee due to such Force Majeure occurrences or adjustment of the Scheduled Substantial Completion Date and adjustment of the Progress Schedule shall be Contractor's sole remedies in the event of a Force Majeure. For the avoidance of doubt, if Contractor disagrees with the Authority's rejection of Contractor's evaluation of the effect of the Force Majeure event on the Progress Schedule or the Fixed Construction Price, Contractor may have recourse to the Dispute resolution provisions of **Article 33**.

## 23. INSURANCE

### 23.1 Contractor Provided Insurance.

Prior to commencement of any Work under this Agreement and throughout the Term, Contractor shall obtain and maintain, at its sole expense, and shall require each Subcontractor to obtain and maintain (either individually or as an additional insured under Contractor's policies), the insurance policies set forth in **Exhibit U**. All such insurance policies shall be subject to the following provisions:

23.1.1 The deductible for claims made against any insurance obtained pursuant to this **Section 23.1** shall be borne by Contractor

23.1.2 Only "occurrence" type coverages with no "sunset clause" ("claims made" coverages are not acceptable except with respect to professional liability insurance);

23.1.3 Coverages must be with Best's "A-" rated carriers that are licensed and qualified to do business in the State of Maryland;

23.1.4 The Authority and the County shall be named as additional insureds on the Commercial General Liability and Environmental Impairment policies;

23.1.5 All losses shall be adjusted to the Authority's and the County's satisfaction;

23.1.6 Deductibles in excess of twenty-five thousand Dollars (\$25,000) shall require the Authority's prior written approval; and

23.1.7 All claims made shall provide a minimum of a three (3) year discovery period.

### 23.2 Certificates of Insurance.

23.2.1 All certificates of insurance for the insurance described in **Section 23.1** shall expressly provide that no less than forty-five (45) days prior Notice by certified mail shall be given to the Authority and the County in the event of (A) the exhaustion of any aggregate limit under any insurance policy or (B) any material alteration, cancellation or non-renewal of the coverage evidenced by such certificate. The Authority shall not be obligated to make payment of any portion of the Fixed Construction Price or the Service Fee to Contractor unless Contractor's current certificates of insurance are on file and acceptable to the Authority.

23.2.2 In no event shall any failure of the Authority to receive Contractor's certificates of insurance required hereunder or to demand receipt of such certificates of insurance be construed as a waiver of Contractor's obligations to obtain insurance pursuant to these

insurance requirements. The obligation of Contractor to procure and maintain any insurance required by the provisions of **Section 23.1** is a separate responsibility of Contractor and independent of the duty to furnish a certificate of insurance of any such insurance policies.

23.2.3 Neither Party shall amend the insurance policies so as to reduce or limit coverages, increase deductibles or otherwise adversely affect the rights and coverages of the insured under such policies or allow the required insurance coverages to lapse without the other Party's prior written approval thereto.

23.3 Notice of Cancellation.

Should a notice of insurance cancellation be issued for non-payment of premiums or any part thereof with respect to insurance to be provided by Contractor hereunder, or should Contractor fail to provide and maintain certificates for such insurance as set forth herein, the Authority shall have the right, but shall not be obligated, to pay for such coverage and to deduct all costs and expenses thereof from any sums that may be due or become due Contractor, or to seek reimbursement for said payments from Contractor, which sums shall be due and payable immediately upon receipt by Contractor of an invoice therefor from the Authority.

23.4 Failure to Provide Insurance.

In the event of failure of Contractor to furnish and maintain the insurance required of it pursuant to **Section 23.1** and to furnish satisfactory evidence thereof, the Authority shall have the right (but not the obligation) to secure and maintain such insurance on behalf of Contractor and Contractor agrees to furnish all necessary information to place the insurance coverage and to pay the costs and expenses thereof to the Authority immediately upon presentation of an invoice and reasonable cost substantiation therefor.

23.5 Cooperation.

Contractor agrees to cooperate fully with the Authority's insurance representatives and/or risk manager in providing any necessary insurance data and information as requested by the Authority and to, complete any associated documents furnished by the Authority or its insurance representatives.

23.6 Claims.

23.6.1 A Party entitled to or desiring recovery of insurance proceeds under any insurance policy (such Party hereinafter defined as the "**Claimant**") shall be solely responsible for initiating and pursuing such claim. A Claimant who is unsuccessful in obtaining insurance proceeds shall not be entitled to relief from the other Party to this Agreement or to any adjustment, modification or relief of or from its obligations under this Agreement as a result of the denial of such claim. If both the Authority and Contractor initiate claims under an insurance

policy and such claims exceed the total liability limit of such insurance policy, the Authority and Contractor shall revise their respective claims by amounts proportionate to the relative amounts of their claims so that the total amount of their claims equals the total liability limit.

23.6.2 A Claimant is solely responsible for the payment or cost of any and all deductible amounts applicable under the insurance policy to which its claim relates. If both the Authority and Contractor initiate claims under an insurance policy, the Authority and Contractor shall apportion the deductible amounts applicable under the insurance policy to which their claims relate in proportion to the relative amounts of their claims. Notwithstanding any provision in this Agreement to the contrary, neither the Fixed Construction Price or the Service Fee shall be increased to cover Contractor's obligation to pay any insurance deductible in connection with an insurance claim by Contractor, and Contractor shall not be entitled to any adjustment, modification or relief of or from its obligations under this Agreement as a result of Contractor's obligation to pay or bear the cost of any insurance deductible in connection with an insurance claim by Contractor.

## **24. LOSS OR DAMAGE**

### **24.1 Project Repair and Replacement Responsibility.**

Contractor assumes full responsibility, without reimbursement, for the cost of replacing the loss or repairing the damage to all materials, equipment, supplies and maintenance equipment (including temporary materials, equipment and supplies) which are purchased by Contractor for permanent installation in or for use during construction, operation or maintenance of the Project regardless of whether the Authority has title thereto, except to the extent that the loss is caused by the Authority's negligence or willful misconduct, or events outside of Contractor's control including but not limited to Acts of God.

### **24.2 Responsibility for Safe Delivery of Materials, Equipment and Supplies.**

As part of the performance of the Work, Contractor shall be responsible for assuring safe delivery of all materials, equipment, supplies and other items to the Project Site and the safe storage thereof at such locations.

## **25. INDEMNIFICATION**

### **25.1 Contractor Indemnification.**

25.1.1 To fullest extent permitted by applicable Law, Contractor shall defend, indemnify and hold harmless the Authority and the County and their respective, assigns, employees, agents, officers, directors, members and anyone else acting for or on behalf of them or their successors and assigns (the "**Authority Indemnified Parties**") from and against all

liability, suits, judgments and claims by third parties, damages, losses, and expenses (including, but not limited to, costs of response, removal of, remediation, any other clean up costs, liabilities and/or penalties, court costs and reasonable attorneys' fees) which may arise as a result of:

- (A) any negligent act, error or omission or willful misconduct of Contractor, any Subcontractor or their assigns, employees, agents, officers and directors or anyone else acting for or on behalf of Contractor, any Subcontractor or their Affiliates, successors or assigns, in the performance of professional engineering and consulting services pursuant to this Agreement,
- (B) except as set out in subparagraph (A) above, any act, or omission of Contractor, any Subcontractor or their assigns, employees, agents, officers and directors or anyone else acting for or on behalf of Contractor, any Subcontractor or their Affiliates, successors or assigns
- (B) Hazardous Materials that were introduced to the Project Site by Contractor or its Subcontractors or as a result of the negligence, willful misconduct or failure of Contractor to perform its obligations hereunder, or
- (C) any breach or default by Contractor in performing its obligations under this Agreement.

The above indemnification shall not apply to any claim, damage, loss or expense caused by the gross negligence or willful misconduct of any Authority Indemnified Party.

25.1.2 Contractor shall defend, indemnify and hold the Authority Indemnified Parties harmless from and against all claims by any Government Authority claiming Taxes based on net receipts or on income of Contractor or any of its Subcontractors or any of their respective agents or employees with respect to any payment for the Work made to or earned by Contractor or any of its Subcontractors or any of their respective agents or employees under this Agreement.

## 25.2 Indemnification Claims.

25.2.1 In any and all claims against an Authority Indemnified Party by Contractor or any Subcontractor or by anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the Contractor's indemnification obligation stated above shall not be limited in any way in the amount or type of damages, compensation or benefits payable by or for Contractor or the Subcontractor under the applicable workers' compensation act, disability acts, or other employee benefit acts.

25.2.2 When required to indemnify an Authority Indemnified Party in accordance with this Agreement, Contractor shall assume on behalf of such Authority Indemnified Party, and conduct with due diligence and in Good Faith, the defense of any such

suit against such person, whether or not Contractor is joined therein; provided, however, that, without relieving Contractor of its obligations hereunder, the Authority Indemnified Party may elect to participate, at its expense, in the defense of any such suit.

25.2.3 The Authority Indemnified Party shall promptly give Contractor Notice of such claim or action upon the receipt of actual knowledge or information by the Authority Indemnified Party of any possible claim or of the commencement of such claim or action. Contractor shall have the right to assume the defense of any such claim or action with counsel designated by Contractor and reasonably satisfactory to the Authority Indemnified Party; provided, however, that if the defendants in any such action include both Contractor and the Authority Indemnified Party, and the Authority Indemnified Party shall have reasonably concluded that there may be legal defenses available to it which are different from or additional to those available to Contractor, the Authority Indemnified Party shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on behalf of such Authority Indemnified Party, the cost of which shall be subject to indemnification by Contractor under this **Article 25**. Should any Authority Indemnified Party be entitled to indemnification under this **Article 25** as a result of a claim or action by a third party, and should Contractor fail to assume the defense of such claim or action, the Authority Indemnified Party may, at the expense of Contractor contest or settle such claim or action. Except to the extent expressly provided herein, no Authority Indemnified Party shall settle any claim or action with respect to which it has sought or intends to seek indemnification pursuant to this **Article 25** without the prior written consent of Contractor, which consent shall not be unreasonably withheld, conditioned or delayed.

25.2.4 The provisions of this **Article 25** shall not deprive any Authority Indemnified Party of any other indemnity action, right or remedy otherwise available to such Authority Indemnified Party at common law.

25.2.5 Notwithstanding anything in this **Article 25** shall survive completion of the Work and/or the termination or expiration of this Agreement.

### 25.3 Survival of Indemnification.

The provisions of this **Article 25** shall survive completion of the Work and/or the termination or expiration of this Agreement.

## 26. PATENT INFRINGEMENT

### 26.1 Patent Infringement and Indemnification Rights.

26.1.1 Contractor shall defend, indemnify and hold harmless the Authority Indemnified Parties against all loss, damage and expense (including court costs and reasonable attorneys' fees) arising from any claim or legal action for unauthorized disclosure or use of any

trade secrets or of patent, copyright, license or trademark infringement arising from Contractor's performance or that of its Subcontractors under this Agreement and/or asserted against any Authority Indemnified Party that either (A) concerns any equipment, materials, supplies, or other items provided by Contractor or any Subcontractor under this Agreement; or (B) is based upon the performance of the Work by Contractor or any Subcontractor, including the use of any tools, implements or construction methods 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 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; provided, however, that such indemnification shall exclude any claim solely based upon uses by the Authority in violation of Subcontractor's manuals supplied to the Authority by Contractor, or changes in the equipment, materials, supplies, or other items made by the Authority, or any item or unit installed by the Authority.

26.1.2 If such claim or legal action for such infringement results in a suit against the Authority, Contractor shall, at its election and in the absence of a waiver of this indemnity by the Authority, have sole charge and direction thereof on the Authority's behalf so long as Contractor diligently prosecutes said suit. The Authority shall promptly give Contractor Notice of such claim or action upon the receipt of actual knowledge or information by the Authority of any possible claim or of the commencement of such claim or action.

26.1.3 If Contractor has charge of a suit brought against the Authority by a third party, then the Authority shall render such assistance as Contractor may reasonably require in the defense of such suit except that the Authority shall have the right to be represented therein by counsel of its own choice and at its own expense.

26.1.4 If the Authority is enjoined from completion of a Project or any part thereof, or from the use, operation or enjoyment of a Project or any part thereof as a result of any claim, legal action or litigation of the type described in this **Article 26**, requiring indemnification by Contractor, Contractor shall promptly arrange to have such injunction removed at no cost to the Authority, and the Authority may, at its option and without thereby limiting any other right it may have hereunder or at law or in equity, require Contractor to supply, temporarily or permanently, facilities meeting the requirements of this Agreement and not subject to such injunction and not infringing any patent or to remove all such facilities and refund the cost thereof to the Authority or to take such steps as may be necessary to ensure compliance by the Authority with such injunction, all to the satisfaction of the Authority and all without cost or expense to the Authority.

## 26.2 No Effect on Scheduled Dates, Fixed Construction Price or Service Fee.

In no event shall the Authority's acceptance of Contractor's engineering designs and/or proposed or supplied materials and equipment (A) affect the Scheduled Substantial Completion Date or the Scheduled Final Completion Date, unless specifically agreed to in writing by Contractor and the Authority, (B) otherwise alter, amend, waive or relieve any

obligation of Contractor under this Agreement, (C) impose any liability on the Authority under this Agreement or (D) result in any adjustment of the Fixed Construction Price or the Service Fee.

26.3 Survival of Indemnification.

The provisions of this **Article 26** shall survive completion of the Work and/or the termination or expiration of this Agreement.

**27. TREATMENT OF CONFIDENTIAL INFORMATION**

27.1 Confidential Information.

The rights and obligations of the parties set forth herein with respect to Confidential Information are subject to Applicable Law, including Title 10, Subtitle 6 of the State Government Article of the Annotated Code of Maryland, as amended.

To the extent permitted by Applicable Law, the Authority shall hold Confidential Information in strict confidence and take all reasonable precautions to prevent disclosure to third parties. The Authority shall promptly notify the Company of the identity of any Person who requests a disclosure of Confidential Information. The Authority in its reasonable discretion shall determine the response to any request for disclosure of Confidential Information and is not required to withhold disclosure of Confidential Information upon a lawful request for information. The Authority shall consider any information or legal arguments presented by the Company before the disclosure of the requested information. The Authority will not be liable for any legal issue associated with the Company's position.

The company should specifically identify confidential information by marking the applicable pages "CONFIDENTIAL." However, the Company understands that the Authority in its reasonable discretion may determine that disclosure of some information is required under the public disclosure act, COMAR 21.06.01.02 (F), and the Company agrees to waive any claim against the Authority with respect to any such disclosure. The Authority will give notice to the Company of any requests for disclosure of information identified as confidential.

In addition, any information that is marked by the company as confidential is not confidential if it (a) is now in or after the date hereof has entered the public domain through no fault of the Authority or its Board, (b) was known by the Authority prior to its disclosure and not obtained through a confidential claim hereunder, (c) was obtained by a third party who is not known by the Authority to be prohibited from disclosing such information, and (d) is required to be disclosed by the Authority, County or the Authority's Board as a matter of law and or regulation.

27.2 Public Relation Matters.

Contractor agrees that all public relation matters arising out of or in connection with the Work shall be the sole responsibility of the Authority. Therefore, Contractor shall obtain the Authority's prior written approval of the text of any announcement, publications, photograph or other type of communication concerning the Work or a Project that Contractor or its Subcontractors wish to release for publication.

27.3 Survival.

The provisions of this **Article 27** shall survive completion of the Work and/or the termination or expiration of this Agreement.

**28. INVENTIONS AND LICENSES**

28.1 Intellectual Property Rights.

28.1.1 Contractor agrees that the Authority, the County and any other owner, licensee or lessee of a Project and their respective successors, assigns and designees shall at all times have the right to use, either by license or otherwise, any and all patented or proprietary information relative to a Project that is included in the Work, whether now existing or hereinafter developed or otherwise acquired, to the extent necessary in connection with the construction, ownership, operation or maintenance of a Project, and Contractor further agrees that it shall, upon request, provide aforementioned persons and parties with such information in a timely fashion, without any limitations and subject only to the confidentiality restrictions provided in **Article 27**. Contractor hereby grants to the County, the Authority and their respective successors, assigns and designees an irrevocable, perpetual and royalty free license to use all patents, copyrights and other proprietary information now or hereafter owned or controlled by Contractor or its Subcontractors, that in any way relates to the use or enjoyment of all or any part of the Work or a Project, in each case, to the extent necessary for the construction, ownership, operation or maintenance of the Project or any unit or component thereof designed, specified or constructed by Contractor under this Agreement.

28.1.2 Contractor shall obtain an assignment of the same rights and licenses, as stated in **Section 28.1.1**, with respect to all patents, copyrights and other proprietary information from each Subcontractor and such rights and licenses are hereby assigned by Contractor to the Authority.

28.2 Survival.

The provisions of this **Article 28** shall survive completion of the Work and/or the termination or expiration of this Agreement.

## **29. ASSIGNMENT BY THE AUTHORITY**

29.1 The Authority may, at any time and without the prior consent of Contractor, assign all or part of its rights, title, and interest in this Agreement. In addition, the Parties acknowledge and agree that the Authority may, at any time and without the prior consent of Contractor, sell, lease or otherwise transfer all or any portion of the Project to the County or any other party. If such assignment, sale, lease or transfer affects the Project Schedule, Contractor shall be entitled to an adjustment to the Scheduled Substantial Completion Date, Scheduled Final Completion Date and Fixed Construction Price resulting from the assignment sale, lease or transfer.

29.2 In the event that the Authority assigns, sells, leases or otherwise transfers all or any portion of the Project to a third party, other than the County, and such third party is, in the exercise of Contractor's reasonable discretion, determined to be a direct competitor of Contractor with respect to the construction, operation and maintenance of generating facilities similar to the Project, Contractors shall have the right to provide the Authority with a written request that this Agreement be terminated for the convenience of the Authority and the Authority shall so terminate this Agreement.

## **30. ASSIGNMENT BY CONTRACTOR**

Contractor may, with the Authority's prior written consent (which consent may not be unreasonably withheld, delayed or conditioned), assign this Agreement to any successor to all of or substantially all of its business by merger or acquisition. Any other assignment by Contractor of this Agreement or any partial or total interest therein, without the Authority's prior written consent, shall be null and void *ab initio*.

## **31. INDEPENDENT CONTRACTOR**

Contractor is an independent contractor and nothing contained herein shall be construed as constituting any relationship with the Authority other than that of the Authority and independent contractor, nor shall it be construed as creating any relationship whatsoever between the Authority and Contractor's employees. Neither Contractor, nor any of its employees, are or shall be deemed to be employees of the Authority. Neither the Authority, nor any of its employees, are or shall be deemed to be employees of Contractor. Subject to the provisions of this Agreement, Contractor has sole authority and responsibility to employ, discharge and otherwise control its employees.

### **32. LIENS AND CLAIMS**

Contractor shall indemnify and hold harmless the Authority and the County and defend them from any and all liens filed in connection with the Work, including all expenses and attorneys' fees incurred in discharging any liens or similar encumbrances provided that such liens did not result from the Authority's wrongful action or wrongful failure to pay Contractor. If Contractor shall default in discharging any lien(s) or claims(s) filed or asserted against or upon the Authority, the County, the Project, the Landfill or the Project Site to the extent such liens or claims are filed in connection with the performance of the Work hereunder or upon any materials, equipment or structures encompassed therein, or upon the premises upon which they are located, the Authority shall provide Contractor with Notice thereof and Contractor shall then satisfy or defend any such lien(s) or claims(s) or otherwise cause such lien to be released or discharged in accordance with applicable Law. If Contractor either does not satisfy such lien(s) or claim(s) or does not post a bond against such lien(s) and claim(s), in each case within fifteen (15) Business Days of Notice from the Authority, then the Authority shall have the right to satisfy such lien(s) and claim(s) or post a bond against such lien(s) and claim(s), and Contractor shall, within five (5) Business Days of request by the Authority, reimburse the Authority for all costs incurred by the Authority to discharge or bond such lien(s) or claim(s) including administrative costs, attorneys' fees and other direct third party expenses. The Authority shall have the right to offset any liability of Contractor under this **Section 32** in accordance with **Section 7.9**.

### **33. DISPUTE RESOLUTION AND ARBITRATION**

#### 33.1 Dispute Resolution Procedure.

33.1.1 Initiation. Either Party may initiate the Dispute resolution by giving Notice of its claim to the other Party.

33.1.2 Level I. Within five (5) Business Days of the receipt of the Notice, the Project Manager and the Project Director shall meet, confer, and attempt to resolve the Dispute within the next ten (10) Business Days.

33.1.3 Level II. If the Dispute is not resolved within two (2) Business Days of the close of the Level I meeting, a representative of the Authority and Contractor shall meet, confer, and attempt to resolve the Dispute within the next ten (10) Business Days.

33.1.4 Resolution. The terms of the resolution of all Disputes concluded in Level I or Level II meetings shall be memorialized in writing and signed by each Party.

33.1.5 Arbitration. No Dispute may be pursued through arbitration unless such Dispute has been raised and considered in the above Dispute resolution procedure, unless specified otherwise.

33.2 Arbitration.

33.2.1 Any Dispute not resolved by the procedures set forth in **Sections 33.1.2** and **33.1.3** shall, upon the request of either Party (and without regard to whether or not any provision of this Agreement expressly provides for arbitration), be submitted to and settled by arbitration in Anne Arundel County, Maryland, in conformance with Construction Industry Arbitration Rules of the American Arbitration Association then in effect (or at any other place or under any other form of arbitration mutually acceptable to the Parties). Any award and a judgment thereon may be entered in the highest court of a forum, state or Federal, having jurisdiction.

33.2.2 The expenses of the arbitration shall be borne by the losing Party (or apportioned if there is no clear winning or losing Party), as determined by the arbiters, provided that:

33.2.2.1 Each Party shall pay for and bear the cost of its own experts, evidence and counsel; provided, however, if the arbiters determine that a Party's Dispute, controversy, or claim submitted to arbitration is frivolous or non-meritorious, such Party shall pay all costs of experts, evidence and counsel incurred by the other Party; and

33.2.2.2 If during the arbitration process a Party proposes the financial settlement of a claim (the "**Proposed Settlement**") that is the subject of the arbitration, which Proposed Settlement is subsequently rejected by the other Party (the "**Rejecting Party**"), and thereafter the arbiters award the proposing Party an amount more favorable than or equal to the Proposed Settlement amount or correspondingly require the proposing Party to pay an amount less than or equal to the Proposed Settlement (as the case may be), then the Rejecting Party shall pay all costs of experts, evidence and counsel incurred by the Party that offered the Proposed Settlement.

33.3 Selection of Arbiters.

Contractor shall nominate and appoint the first arbiter (the "**First Arbiter**"), and the Authority or its legal representative shall nominate and appoint the second arbiter (the "**Second Arbiter**"). The First and Second Arbiters shall agree upon the appointment of the third arbiter (the "**Third Arbiter**"), and if the First and Second Arbiters cannot agree on the appointment of the Third Arbiter, the Third Arbiter shall be selected by the American Arbitration Association. The three (3) arbiters shall resolve the Dispute, controversy, or claim and report that decision in writing to Contractor and the Authority. The Authority and Contractor agree to require that the three (3) arbiters meet to resolve the Dispute a minimum of ten (10) days per month until the written decision is issued.

33.4 Parties Rights During Arbitration.

In any arbitration under this **Article 33** both Parties shall be entitled to:

33.4.1 Request the other Party to produce documents or things in accordance with the limitations and procedures set forth in Rule 34 of the Federal Rule of Civil Procedure; and

33.4.2 Serve upon the other Party written interrogatories to be answered by the Party served, in accordance with the limitations and procedures set forth in Rule 33 of the Federal Rules of Civil Procedure.

Upon timely objection or request by a Party, the arbitrator(s) shall:

33.4.3 Determine the extent to which propounded interrogatories shall be permitted and answered; and

33.4.4 Upon Notice and a showing of good cause therefor, order a Party to produce documents and things and to permit the inspection and copying or photographing of any designated documents or objects, provided such documents or objects have been specifically identified, are not privileged, their relevance and materiality to the issue(s) in arbitration have been explained and are reasonably calculated to lead to the discovery of admissible evidence. In the event the Parties cannot themselves agree thereon, the arbitrators may also specify just terms and conditions in making the inspection and taking the copies and photographs.

### **34. NOTICES AND COMMUNICATIONS**

#### 34.1 Notices.

Any Notice pursuant to the terms and conditions of this Agreement shall be in writing and (A) delivered personally, (B) sent by registered or certified mail, return receipt requested or (C) sent by a recognized overnight mail or courier service, to the following addresses or such other address as any such person shall specify to the other such persons:

If to Contractor:       LES Operations Services LLC  
29261 Wall Street  
Wixom, MI. 48393  
Attention: President

If to the Authority:  
Northeast Maryland Waste Disposal Authority  
Tower II – Suite 402  
100 South Charles Street  
Baltimore, MD 21201  
Attention: Executive Director

Notices shall be deemed served when delivered.

### **35. REPRESENTATIONS AND WARRANTIES**

#### **35.1 Contractor Representations and Warranties.**

Contractor represents and warrants to the Authority that:

35.1.1 Contractor is a limited liability company, duly organized, validly existing, and in good standing under the Laws of Delaware and is duly authorized and qualified to conduct business in the State of Maryland.

35.1.2 Contractor has duly authorized the execution and delivery of this Agreement and this Agreement has been duly executed and delivered by Contractor and constitutes a legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms.

35.1.3 Neither the execution or delivery by Contractor of this Agreement, nor the performance by Contractor of its obligations in connection with the transactions contemplated by this Agreement, or the fulfillment by Contractor of the terms or conditions thereof (A) conflicts with, violates or results in a breach of any Law applicable to Contractor, or (B) conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which Contractor is a party or by which Contractor or any of its properties or assets are bound, or constitutes a default thereunder.

35.1.4 No approval, authorization, order or consent of, or declaration, registration or filing with, any Government Authority is required for the valid execution and delivery of this Agreement by Contractor or performance hereunder by Contractor, other than the Project Permits which will be obtained in accordance with the terms hereof.

35.1.5 There is no action, suit or proceeding, at law or in equity, before or by any court or Government Authority, pending or, to the best of Contractor's knowledge, threatened, against Contractor, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by Contractor of its obligations under this Agreement or in connection with the transactions contemplated by each thereof, or which, in any way, would adversely affect the validity or enforceability of this Agreement, or any other agreement or instrument entered into by Contractor in connection with the transactions contemplated hereby.

35.1.6 Contractor is not in arrears with respect to the payment of any monies due and owing the State of Maryland, or any department or unit thereof, including, but not limited to, the payment of taxes and employee benefits, and that it shall not become so in arrears during the Term.

35.1.7 Contractor has not employed or retained any person or entity, other than a bona fide employee or agent working for Contractor, to solicit or secure this Agreement and Contractor has not paid or agreed to pay any person or entity, other than a bona fide employee or agent working for Contractor, any fee or any other consideration contingent on the execution of this Agreement.

35.2 Authority Representations and Warranties.

The Authority represents and warrants to Contractor that:

35.2.1 The Authority is a body politic and corporate and a public instrumentality of the State of Maryland, duly organized and validly existing under the constitution and Laws of the State of Maryland, with full legal right, power and authority to enter into and perform its obligations under this Agreement.

35.2.2 The Authority has duly authorized the execution and delivery of this Agreement and this Agreement has been duly executed and delivered by the Authority and constitutes a legal, valid and binding obligation of the Authority, enforceable against the Authority in accordance with its terms.

35.2.3 Neither the execution or delivery by the Authority of this Agreement, nor the performance by the Authority of its obligations in connection with the transactions contemplated by this Agreement, or the fulfillment by the Authority of the terms or conditions thereof (A) conflicts with, violates or results in a breach of any Law applicable to the Authority, or (B) conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which the Authority is a party or by which the Authority or any of its properties or assets are bound, or constitutes a default thereunder.

35.2.4 No approval, authorization, order or consent of, or declaration, registration or filing with, any Government Authority is required for the valid execution and delivery of this Agreement or performance hereunder by the Authority, other than any approval of the County required under the terms of the County Agreement.

35.2.5 There is no action, suit or proceeding, at law or in equity, before or by any court or Government Authority, pending or, to the best of the Authority's knowledge, threatened, against the Authority, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by the Authority of its obligations under this Agreement or in connection with the transactions contemplated by each thereof, or which, in any way, would adversely affect the validity or enforceability of this Agreement, or any other agreement or instrument entered into by the Authority in connection with the transactions contemplated hereby.

### **36. PERFORMANCE SECURITY**

As of the date hereof, Contractor shall deliver to the Authority (A) a letter of credit substantially in the form set forth in **Exhibit K** issued by a financial institution that is acceptable to the Authority, in its sole discretion, or (B) a one hundred percent (100%) performance bond and a one hundred percent (100%) payment bond substantially in the forms set forth in **Exhibit N-1** and **Exhibit N-2**, respectively, executed by itself as principal and a surety that is acceptable to the Authority, in its sole discretion. In the event that the Authority desires to have additional persons named as payees on the letter of credit or obligees on the bonds, as applicable, the Authority may request an endorsement to the letter of credit or bonds in a form reasonably acceptable to the Authority and the letter of credit issuer or Contractor's surety, as applicable. The letter of credit or the payment and performance bonds required under this **Article 36**, as applicable, shall be in an amount equal to the Fixed Construction Price and shall expire on the date of the Final Completion. If a latent defect(s) is discovered in a Project after the expiration of the Warranty Period, then Contractor shall deliver to the Authority a letter of credit substantially in the form set forth in **Exhibit K** issued by a financial institution that is acceptable to the Authority, in its sole discretion, in an amount equal to the estimated costs to repair such latent defect(s) and that expires on the date that such latent defect(s) have been corrected by Contractor.

### **37. MISCELLANEOUS PROVISIONS**

#### **37.1 Limit on Authority's Obligations.**

Notwithstanding anything herein to the contrary, all obligations to be undertaken by the Authority pursuant to this Agreement shall not constitute general obligations of the Authority and shall not pledge the full faith and credit of the Authority, but shall be limited obligations of the Authority only, payable solely from funds provided by the County pursuant to the County Agreement, which County funds are subject to appropriation. The Authority shall be required to make payments and to perform such of its obligations under this Agreement as require the expenditure of funds only to the extent that there are funds available to the Authority from the County in accordance with the terms and conditions of the County Agreement.

#### **37.2 No Personal Liability Against Agents of the Authority.**

The execution and delivery of this Agreement by the Authority does not impose any personal liability on the members, officers, employees or agents of the Authority. No recourse can be had by Contractor for any claims based on this Agreement against any member, officer, employee or other agent of the Authority in his or her individual capacity, all such liability, if any, being expressly waived by Contractor by the execution of this Agreement.

#### **37.3 Severability.**

The invalidity or unenforceability of any portion or provision of this Agreement shall in no way affect the validity or enforceability of any other portion or provision hereof. Any invalid or unenforceable portion or provision shall be deemed severed from this Agreement and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain such invalid or unenforceable portion or provision.

37.4 Governing Law.

This Agreement shall be governed by the Laws of the State of Maryland.

37.5 Survival.

In order that the Parties may fully exercise their rights and perform their obligations hereunder arising from the performance of the Work under this Agreement, any provisions of this Agreement that are required to ensure such exercise or performance shall survive the termination or expiration of this Agreement.

37.6 Entire Agreement.

This Agreement, as executed by authorized representatives of the Authority and Contractor, and all amendments and modifications thereto issued by the Authority, as each relates to the Work and all of which are incorporated herein by reference, constitute the entire agreement between the Parties with respect to the matters dealt with herein, and there are no oral or written understandings, representations or commitments of any kind, express or implied, which are not expressly set forth herein. Any representations, warranties, statements or inferences therefrom by either Party or its representatives, whether made orally or in writing, prior to the date of this Agreement shall have no legal effect and shall not be binding on either Party unless incorporated herein or in documents or agreements mutually agreeable to the Parties provided after the date of this Agreement.

37.7 Modifications.

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

37.8 Waiver.

Either 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.

37.9 Records.

Contractor shall retain and maintain all records and documents relating to this Agreement for four (4) years after termination or expiration of this Agreement and shall make such records and documents available for inspection and audit by authorized representatives of the Authority and the County at all reasonable times.

37.10 Limitations of Liability.

37.10.1 With respect to the performance hereunder, a Party shall not be liable to the other Party, whether arising out of contract, tort (including negligence) or strict liability, for loss of anticipated profits, loss of use of equipment or facilities, substitution of equipment or facilities, down-time costs, service interruption, cost of money, loss of use of capital, or consequential loss or damage of any other nature; provided, however, this subsection shall not in any manner negate or limit the scope of any indemnity provided hereunder or the liquidated damages and the Buydown Amount provided in **Article 14**, all of which are independent obligations of Contractor under this Agreement. Moreover, Contractor agrees that if Contractor challenges the validity of such liquidated damages as penalties or as being otherwise unenforceable, and such liquidated damages or the Buydown Amount are so held to be unenforceable, the Authority shall be entitled to recover all actual damages incurred by the Authority and that such actual damages shall not be limited by any term contained in this **Section 37.10.1** or by the limitation of liability set forth in **Section 37.10.2**. The Authority and Contractor agree that each is estopped to argue the invalidity or otherwise question the reasonableness of the liquidated damages or Buydown Amount provisions, as each represents the allocation of risk between the Parties and the basis of the bargain.

37.10.2 Subject to **Section 37.10.1**, in no event shall the liquidated damages payable by Contractor to the Authority pursuant to **Article 14** (excluding Availability Damages) exceed thirty percent (30%) of the Fixed Construction Price. The foregoing limit shall not include items for which Contractor is obligated to indemnify a party hereunder and shall not include any sub-limits. Nothing in this **Section 37.10.2** shall relieve a Party of its obligation to comply with its performance obligations hereunder it being the intent of the Parties that this **Section 37.10.2** only limit the amount of aggregate liquidated damages payable by Contractor as specifically provided in this **Section 37.10.2**.

37.10.3 In no event shall the Authority's aggregate total liability for all monetary damage payments to Contractor arising out of this Agreement (other than the Authority's obligation to pay the Fixed Construction Price and the Service Fee pursuant to **Article 7**) exceed thirty percent (30%) of the Fixed Construction Price.

37.11 Priority of Documents.

In the event of a conflict in the provisions of this Agreement, the following priority of documents shall control the resolution of such conflict:

1. The provisions of this Agreement (excluding the Exhibits to this Agreement);
2. **Exhibit L** – Performance Guarantees;
3. **Exhibit F** – Performance Test Procedures;
4. **Exhibit A** – Scope of Work and Specifications;
5. **Exhibit S** – Detailed Plans;
6. Other Exhibits to this Agreement;
7. Specifications and other materials approved by or on behalf of the Authority during prosecution of the Work; provided, however, that the general rule that specifics prevail over generalities shall remain in effect in interpreting this Agreement; and
8. The Request for Proposals for Beneficial Use of Landfill Gas at the Millersville Landfill in Anne Arundel County, Maryland dated October 20, 2006 and all addendums thereto issued by the Authority, each of which are hereby incorporated by reference and made a part hereof.

37.12 Cooperation.

Each Party shall take such further actions, execute such documents and furnish such information as may be reasonably requested by the other Party, and shall reasonably cooperate with the other Party in order to carry out the purposes and intent of this Agreement and in order to enable them to perform their respective obligations hereunder. Such activity or cooperation shall be provided by each Party at no additional cost to the other Party, unless otherwise provided herein. Contractor agrees to cooperate with the Authority in connection with any documents, agreements or amendments or additions to this Agreement reasonably required by the County.

37.13 County as Third-Party Beneficiary.

The County is a third-party beneficiary of all of the Contractor's obligations hereunder. The County has the right, but not the obligation, to enforce the rights, remedies, powers and privileges of the Authority under this Agreement in accordance with the County Agreement.

37.14 Rules of Interpretation.

The following rules shall apply in interpreting this Agreement unless otherwise expressly provided herein or the context otherwise requires:

37.14.1 All reference in this Agreement to designated “Articles”, “Sections”, “Exhibits” and other subdivisions are to the designated Articles, Sections, Exhibits and other subdivisions of this Agreement.

37.14.2 Words of the masculine gender include correlative words of the feminine and neuter genders and words expressed in the singular shall include the plural and the plural and singular.

37.14.3 The table of contents and the headings or captions used in this Agreement are for convenience of reference only and do not define, limit or describe any of the provisions hereof or the scope or intent hereof.

37.14.4 References to agreements or contracts include all amendments, modifications and supplements thereto.

37.14.5 All terms and phrases used in this Agreement shall be interpreted in accordance with common usage and meaning in the United States. All documents, warranties, Notices, instructions and other written materials to be provided to the Parties hereunder shall be provided in English.

**[SIGNATURES APPEAR ON FOLLOWING PAGE]**

IN WITNESS WHEREOF, the Authorized Representative of the Parties hereto have caused this Agreement to be executed under seal as of the day and year first above written.

**NORTHEAST MARYLAND WASTE  
DISPOSAL AUTHORITY**

Attest:

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

**LES OPERATIONS SERVICES, LLC**

Attest:

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

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