**FORM OF OPERATION AND MAINTENANCE AGREEMENT**

**by and between

San Diego Gas & Electric Company**

**as Owner

and

[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_]**

**as Contractor

Dated as of [\_\_\_\_\_\_ \_\_\_], 20[ ]

Solar Energy Operation and Maintenance Services**

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FORM OF OPERATION AND MAINTENANCE AGREEMENT

PREAMBLE:

THIS OPERATION AND MAINTENANCE AGREEMENT (“Agreement”) is made and entered into as of [*date*] (the “Effective Date”) by and between \_\_\_\_\_\_\_\_\_\_\_ (hereinafter “**Contractor**”), and San Diego Gas & Electric Company, a California corporation (hereinafter “**Owner**”). Owner and Contractor are sometimes hereinafter referred to individually as a “**Party**” and together as the “**Parties**.”

RECITALS:

WHEREAS, Owner and Contractor have entered into a Build-Own-Transfer Agreement dated as of [ date 2015 ] (the “BOT Agreement”), pursuant to which Contractor will develop, build and transfer to Owner a photovoltaic solar-powered electric generating facility in San Diego County, California (as more specifically defined herein, the “Project”):Contractor); and

WHEREAS, Owner desires to retain Contractor to provide and carry out certain operations, service and maintenance activities for the Project from and after the date of transfer of the Project from Contractor to Owner (the “Asset Transfer Date”), and Contractor desires to provide and carry out such operations, service and maintenance activities for the Project, all in accordance with the terms and conditions set forth in this Agreement.

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

# DEFINITIONS AND INTERPRETATION

## **Definitions**

. Initially-capitalized terms used in this Agreement (including the preamble and Recitals hereto) and not otherwise defined herein shall have the meanings specified below.

“**Actual Energy Production**”of the Projecthas the meaning and shall be calculated using the methodology described in Exhibit G.

“**Affiliate**” means, as to a specified Person, any other Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person in question.

“**Agreement**” means this Operation and Maintenance Agreement between Owner and Contractor, including all Exhibits attached hereto and any Change Orders agreed to by the Parties.

“**Applicable Laws**” means all (a) constitutions, treaties, statutes, laws, ordinances, rules, regulations, judgments, decrees, injunctions, writs and orders of any Governmental Authority; (b) decisions of and determinations by, and interpretations of, any of the foregoing set forth in clause (a) by any Governmental Authority or arbitrator; and (c) requirements of Permits, in the case of each of the items described in clauses (a)-(c), that apply to either or both of the Parties or their Affiliates, the Project, the terms of this Agreement or otherwise to the Person or matter in question. For the avoidance of doubt, “Applicable Laws” includes rules and regulations of any independent system operator, regional transmission operator or other interconnection or transmission operator or authority (including System Operator) and of any reliability authority and any electrical specifications, grid codes and other similar requirements applicable to the Project imposed by any Governmental Authority (including any independent system operator, regional transmission operator or other interconnection or transmission operator or authority (including System Operator) or any reliability authority).

“**Asset Transfer”** means the conveyance and transfer of ownership in the Project, including, without limitation, the Project Equipment, Project Warranties and real property rights in the Project Site, from Contractor to Owner pursuant to the BOT Agreement.

**“Asset Transfer Date”** means the date on which the Asset Transfer is effective.

“**BOT Agreement**” has the meaning set forth in the Recitals.

 “**Business Day**” means every day other than a Saturday, Sunday or a day on which banks are required or authorized by Applicable Law to close in the city of San Diego, California (U.S.).

“**Change Order**” means a written instrument signed by Owner and Contractor stating their mutual agreement upon an amendment or supplement to this Agreement.

“**CI Representatives**” has the meaning set forth in Section 12.1.1.

“**Confidential Information**” has the meaning set forth in Section 12.1.1.

“**Construction Documents**” means, collectively, (1) the BOT Agreement for the Project; (2) any and all “Long-Term Degradation Warranties” (as such terms is defined under the BOT Agreement) with respect to the Project; and (3) any other agreement entered into by and between Contractor and any Subcontractor (of whatever tier), which agreement contains one or more warranties with respect to either the Project or any Project Equipment.

“**Consumer Price Index**” or “**CPI**” means, for any given calendar month, the monthly Consumer Price Index, “All Urban Consumers; U.S. City Average; All Items less Food and Energy; Not Seasonally Adjusted” as published by the United States Bureau of Labor Statistics (or if such index shall cease to be published, such other index as may be reasonably agreed by the Parties) for such calendar month.

“**Contractor**” has the meaning set forth in the Preamble to this Agreement.

“**Contractor Event of Default**” has the meaning set forth in Section 5.2.

“**Contractor Permits**” has the meaning set forth in Section 2.1.4.

“**Contractor Responsible Party**” means (a) Contractor, (b) its owners (direct and indirect) and Affiliates, (c) the Subcontractors, (d) any other Person (including any entity) employed by any of them or for which any of them is responsible or liable and (e) without limiting the generality of clauses (a)-(d) of this definition, the respective directors, officers, employees and agents of the Persons described in clauses (a)-(d) of this definition.

“**Contractor Taxes**” has the meaning set forth in Section 15.1.

“**Contractor’s Invoice**” has the meaning set forth in Section 4.2.

“**Contractor’s Manager**” has the meaning set forth in Section 3.1.

“**Control**” when used with respect to any specified Person, means the possession of the power to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities or partnership or other ownership interests, by contract or otherwise.

“**Cover Work**” has the meaning set forth in Section 2.13.

 “**Defect**” means any failure to comply with the O&M Defect Warranty.

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

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

“**Energy Model**” of the Project means the “Energy Model” developed for the Project pursuant to Article 10 of Exhibit A to the BOT Agreement.

“**Energy Production Guarantee**”has the meaning set forth in Section 13.2.1.

**“Energy Production Test”** means the twelve (12) month energy production test run to determine whether the applicable Project satisfies the Energy Production Guarantee for such Project for the year in which such Project is tested, all as more fully set forth in Exhibit G.

“**Environmental Law**” means applicable federal, state, regional, county or local law, regulation, decision of the courts, ordinance, rule, code, order, directive, guideline, permit, or permit conditions which, now or in the future, relate in any way to worker or workplace safety, environmental conditions, environmental quality or policy, or health and safety issues or concerns (including product safety), as they exist now or as they may be amended in the future. Environmental Law includes, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, (42 USC, §§9601 et seq.), the Resource Conservation and Recovery Act (42 USC, §§6901 et seq.), the Federal Water Pollution Control Act (33 USC §§ 1251 et seq.), the Safe Drinking Water Act (42 USC § §300 et seq.), the Hazardous Materials Transportation Act (49 USC §§ 1801 et seq.), the Toxic Substance Control Act (15 USC §§2601, et seq.), the Occupational Safety and Health Act (29 USC §§651 et seq.), and the Occupational Safety and Health Act of the state where the Services are performed.

 “**Event of Default**” means either an Owner Event of Default or a Contractor Event of Default, as applicable.

“**Expected Energy Production**” has the meaning and shall be calculated using the methodology described in Exhibit G.

“**Extra Work**” has the meaning set forth in Section 2.14.1.

“**Fail**” means, with respect to any Project Equipment or Services, (a) to become damaged, break or cease operation, (b) to cease to operate safely and free of nuisance errors that are resolved only temporarily by automatic or manual resets, (c) to cease to conform to the Requirements, (d) for its performance, use, safety, functionality or expected lifetime to be otherwise adversely affected, (e) for it to increase the cost of ownership, construction, administration, operation, maintenance, repair or use of the Project Equipment or the Project or (f) for it to cause any of the effects set forth in clauses (a)-(d) on the Project.

“**Governmental Agency**” shall mean any federal, state regional, municipal or local governmental agency or other public or political body having the jurisdiction, mandate, authority or power to regulate, implement, coordinate, administer or enforce any Environmental Law.

“**Governmental Authority**” means any national, state, local or other governmental, quasi-governmental, regulatory, judicial, administrative, public or statutory instrumentality, tribunal, agency, commission, authority, body or entity (including any independent system operator, regional transmission operator or other interconnection or transmission operator or authority, including System Operator, and any reliability authority), or any political subdivision thereof, lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, policy, regulatory or taxing authority or power over the matter or Person in question.

“**Hazardous Materials**” means any chemical, substance, material, controlled substance, object, product, by-product, residual, condition, solid or hazardous waste or combination thereof which is hazardous to human health or safety or the environment due to its ignitability, corrosivity, reactivity, toxicity, or other harmful or potentially harmful properties or affects. Hazardous Materials include, without limitation, any flammable explosives, radioactive materials, hazardous wastes, toxic substances or related materials, and substances defined as “hazardous substances,” “hazardous material,” “hazardous wastes,” or “toxic substances” in, under or pursuant to any Environmental Law. “Hazardous Materials” shall also include oil or petroleum and petroleum products, asbestos, and any asbestos containing materials, radon, polychlorinated biphenyls (PCBs), urea formaldehyde insulation, lead paints and coatings, and all of those chemicals, substances, materials, controlled substances, objects, conditions and waste or combinations thereof which now are, or become in the future, listed, defined or regulated in any manner by any Environmental Law. For purposes of this Agreement, the terms “encumbrance” and “encroachment” shall not be deemed to include the presence of any Hazardous Material contamination on, in or under the property or its underlying groundwater.

 “**HSE Rules**” means (a) the health and safety plan and procedures for the Project, and (b) the site rules and practices for the Project, as such plans are developed by Contractor and approved by Owner pursuant to the provisions of Section 2.8.2.

“**IA Requirements**” means those requirements derived from the Project’s interconnection agreement and set forth on Exhibit C.2, as may be updated from time to time upon notice to Contractor.

 “**Insolvent**” means, with respect to a Person, that such Person (a) files a petition or otherwise commences, or authorizes the commencement of, a proceeding or cause under any bankruptcy, insolvency, receivership or similar law for the protection of creditors, or (b) has such a petition filed or proceeding commenced against it, which petition or proceeding remains undismissed for ninety (90) days, or (c) files an answer or pleading admitting or failing to contest the material allegations of any such petition, or (d) takes any action for its winding up, liquidation or dissolution, or (e) is otherwise adjudged bankrupt or insolvent under any bankruptcy, insolvency, receivership or similar law for the protection of creditors, or (f) consents to any of the actions described in clauses (a) through (e) of this definition being taken against it.

“**Insurance Requirements**” means the applicable requirements of any insurance policy carried (or required to be carried) by Contractor or any Subcontractor as set forth in Article 6.

“**Intellectual Property**” means all (a) recognized protectable intellectual property existing from time to time under any laws or regulations, including patents, copyrights, copyrightable works, corporate names, logos, slogans, trade names, trademarks, trade dress, service marks, applications for any of the foregoing, software, firmware, trade secrets, mask works, industrial design rights, rights of priority, know how, design flows, methodologies and any and all intangible protectable proprietary information that is legally recognized and (b) algorithms, designs, drawings, formulae, know-how, ideas, concepts, inventions, plans, processes, software, techniques, tools, trade secrets, hardware, works of authorship, and other technology, whether or not protectable by any form of intellectual property rights.

“**Interested Party**” means a financing party.

“**Landowner Requirements**” means those requirements of any landowner or occupant of the real property adjacent to the Project set forth on Exhibit C.3, as may be updated from time to time upon notice to Contractor.

“**License**” has the meaning set forth in Section 10.1.7.

“**License Scope**” means all activities of Owner or any direct or indirect transferee of Owner or any of their respective (direct or indirect) subcontractors in order to (a) perform Owner’s obligations hereunder and exercise Owner’s rights hereunder, including performing warranty re- work pursuant to Article 13 and (b) perform Contractor’s obligations hereunder (to the extent this Agreement is terminated prior to the completion thereof); (c) own, operate, maintain, repair and service, and otherwise use for its intended purpose, the Warranted Equipment; and (d) transfer the Warranted Equipment (with such transferee likewise having the right to perform the License Scope).

“**Licensed Materials**” means all Intellectual Property (now or hereafter) owned, licensed or otherwise used by Contractor and/or the Subcontractors and required for the License Scope.

“**Lien**” means, with respect to any property or asset, any mortgage, deed of trust, lien, stop notice, pledge, claim, charge, security interest, or encumbrance of any kind in respect of such property or asset, whether or not filed, recorded or otherwise perfected or effective under Applicable Law, as well as the interest of a vendor or lessor under any conditional sale agreement, capital lease or other title retention agreement relating to such asset.

“**Losses**” means any and all claims, causes of action, judgments, demands, damages, fines, losses, liabilities, offsets, interest, awards, penalties and costs and expenses, including reasonable attorneys’ fees (including fees and disbursements of in-house and outside counsel), court costs and other reasonable costs of suit, administrative proceedings, administrative investigations, litigation, arbitration, dispute resolution or other similar proceedings, including for injury, illness or death and including those owed to third parties.

“**Manuals**” means the manuals and other documents prepared by Contractor (or any of its subcontractors) pursuant to Section [xx] of the Technical Specifications of the BOT Agreement, which manuals and other documents shall be attached to Exhibit C.5 in accordance with Section 2.18.

**“O&M Fee**” has the meaning set forth in Section 4.1. “**O&M Defect Warranty**” has the meaning set forth in Section 13.1.

 “**Owner**” has the meaning set forth in the Preamble to this Agreement.

“**Owner Data**” has the meaning set forth in Section 9.3.

“**Owner Group**” means the following Persons, individually and collectively: Owner and Owner’s Affiliates, Owner’s and their respective co-venturers, co-owners, co-lessees, co-working interest owners, joint venturers, partners and all of their Affiliates and the officers, directors, managers, shareholders, members, employees, agents and representatives of all those Persons.

“**Owner Permits**” means those Permits obtained by Owner for the Project after the Services Commencement Date of the Project, but only if Owner provides Contractor with the terms and conditions of such Permit.

“**Owner Taxes**” means any and all sales and use, service, general excise or similar Taxes on the purchase by Owner from Contractor of the Services (including Extra Work), but specifically excluding (a) Taxes measured by or imposed on the revenue, income or profit of persons or entities other than Owner and (b) any Taxes on any equipment or services performed pursuant to the Warranties.

“**Owner’s Contractors**” means those Persons, other than Contractor and the Subcontractors, with whom Owner contracts or subcontracts to perform work in connection with the Project, including sub-subcontractors. “Owner’s Contractors” may also include Owner in the event Owner elects to perform any work in connection with the Project.

“**Owner’s Manager**”has the meaning set forth in Section 3.1.

“**Party**” and “**Parties**” have the meanings given in the Preamble to this Agreement.

**“Performance Liquidated Damages”** has the meaning set forth in Section 13.2.3.

“**Permit**” means each and every national, state, local or other license, consent, appraisal, authorization, ruling, exemption, variance, order, judgment, decree, declaration, regulation, certification, filing, recording, permit or other approval with, from or of any Governmental Authority, including each and every environmental, construction, operating or occupancy permit and any agreement, consent or approval from or with any other Person, that is required by any Applicable Law for the lawful performance of the Services by Contractor or the Subcontractors or the operation of the Project.

“**Permitted Lien**” means any Lien (a) in favor of Contractor that arises from Owner’s failure to make undisputed payments to Contractor as and when they become due under this Agreement, (b) granted by Owner to an Interested Party or (c) granted by Contractor to Owner.

“**Person**” or “**Persons**” means any natural person, corporation, partnership, limited liability company, association, joint stock company, trust, unincorporated organization, joint venture, Governmental Authority or any other entity.

“**PMRS System**” means the “Performance Monitoring & Reporting Services System” for the Project installed by Contractor as part of the BOT Agreement.

“**Power Output**” has the meaning set forth in Exhibit G.

“**Power Output Test**” means the five (5) day capacity test to test the Power Output of the Project as more fully set forth in Exhibit G.

“**Power Output Baseline**” means the capacity of the Project demonstrated by the Power Output Test used by the Contractor to achieve Asset Transfer under the applicable BOT Agreement.

“**Project**” means the photovoltaic solar generating facility developed, built and transferred to Owner by Contractor pursuant to the BOT Agreement, as described in Exhibit E, as the same may be updated from time to time pursuant to Section 2.1.1.

“**Project Equipment**” means all materials, equipment (including photovoltaic panels, inverter, mounting system, meteorological and performance monitoring instruments, and control panels) and other items incorporated into the Project and all services and other work performed in connection with such materials, equipment and other items, including as provided:

(a) pursuant to the Construction Documents;

(b) by Contractor or the Subcontractors (including materials, equipment and other items provided in performance of the Services with respect to the fulfillment of the Warranties), and

(c) by Owner or Owner’s Contractors in connection with any (i) warranty re-work performed by Owner or Owner’s Contractors or (ii) work performed by Owner or Owner’s Contractors pursuant to Section 5.5.3.

“**Project Site**”means, with respect to the Project, the Site of the Project as described on Exhibit F, as such exhibit may be may be updated from time to time pursuant to Section 2.1.1.

“**Project** **Warranties**” means the warranties (including, but not limited to, any warranty under any Construction Document) that have been provided to Owner with respect to the Project and the component pieces thereof pursuant to the Construction Documents.

“**Proposed HSE Rules**” for a Project has the meaning in Section 2.8.2.

“**Prudent Solar Industry Practices**” means, those practices, methods, equipment, specifications and standards of manufacture, safety, performance, dependability, efficiency and economy, as the same may change from time to time, as are commonly used, and generally recognized, by reputable, international, professional solar photovoltaic equipment manufacturers, suppliers, construction firms and service and maintenance firms performing services for, or supplying components or equipment to, solar generation projects of similar type and size, and having geographical attributes similar to, the Projects, that, in the exercise of reasonable judgment and in light of the facts known at the time the decision was made, are considered good, safe and prudent practice in connection with the design, supply, installation, service and use of solar power generation equipment, facilities and improvements, and that would be expected to accomplish the result intended at a reasonable cost and consistent with Applicable Laws, reliability, safety and expedition.

“**Rate Schedule**” means Contractor’s standard rate schedule, attached hereto as Exhibit L.

“**Records**” has the meaning set forth in Section 3.5.

“**Representative**” means Owner’s Manager (with respect to Owner) or Contractor’s Manager (with respect to Contractor).

“**Requirements**” has the meaning set forth in Section 2.2.

“**Scheduled Services**” means the scheduled maintenance and servicing of Project Equipment in accordance with the Manuals and the other Requirements.

**“Semi-Annual Service Reports**” means the reports, substantially in the form of Exhibit B, which Contractor shall provide to Owner’s Manager or its designee in accordance with this Agreement, including Exhibit A.

“**Services Commencement Date**” means the day after the Asset Transfer Date.

“**Service Fee**” has the meaning set forth in Section 4.1.

“**Services**” has the meaning set forth in Section 2.1, including (x) the Scheduled Services and other services specified in Exhibit A and (y) any Extra Work.

“**Subcontract**” means any contract, agreement, purchase order, arrangement or understanding with a Subcontractor in respect of any of the obligations of Contractor hereunder.

“**Subcontractor**” means (a) any subcontractor (of any tier) that performs services or work for Contractor in connection with the Services and (b) any supplier (of any tier) of equipment to Contractor or its Affiliates or Subcontractors in connection with the performance of the Services.

“**System Operator**” means the California Independent System Operator or any future successor agency.

“**Taxes**” means all taxes, assessments, customs, charges, tariffs, imposts, duties, fees, levies and other governmental charges effective or enacted as of the Effective Date or thereafter, including income, corporate, capital gains, franchise, capital stock, ad valorem (including real property and personal property taxes levied or imposed on the value of real or personal property), utility, tangible, withholding, employment, payroll, social security, social contribution, unemployment compensation, disability, national insurance, transfer, sales, use, fuel, excise, gross receipts, net worth, value-added, stamp, import, customs, and all other taxes, assessments, customs, charges, tariffs, imposts, duties, fees, levies and other governmental charges of any kind, and any charges, interest, additions to tax, penalties, or any other amounts imposed by any Governmental Authority, whether such amounts are normally included in the purchase price of an item or service or are normally stated separately.

“**Temporary Work**” means all supplies, labor, materials, consumables, consumable parts, start-up spares, utilities (including electricity, phone, water, toilet, sewage and other similar services), construction equipment, tools, construction vehicles, protection for workers, erection structures, sanitary, safety, first aid and fire prevention facilities and other equipment, services and other items, in each case, of whatever kind or nature, required for the performance of the Services but which do not form a permanent part of the completed Project.

“**Term**” has the meaning set forth in Section 5.1.

“**Transition Actions**” has the meaning set forth in Section 5.6.2.

“**TSDF**”has the meaning set forth in Section 8.1.9(a).

“**Unweighted LD Amount**”has the meaning set forth in Section 13.2.4(a).

“**Warranted Equipment**” has the meaning set forth in Section 13.1.

“**Warranties**” means those warranties provided in this Agreement, including those set forth in Section 13.1.

“**Warranty Period**” means the twenty-four (24) month period beginning after the completion of the applicable Service (including the completion of the installation or repair of any applicable Warranted Equipment), which twenty-four (24) month period shall be renewed for an additional period of twenty-four (24) months (beginning after the completion of the applicable re-performance, repair or re-installation) if any such Service is Defective and must be re-performed, repaired, or re-installed pursuant to Section 13.1.

## **Recitals, Articles, Sections and Exhibits**

. References to Recitals, Articles, Sections and Exhibits are, unless otherwise indicated, to Recitals of, Articles of, Sections of and Exhibits to, this Agreement. All Exhibits attached to this Agreement are incorporated herein by this reference and made a part hereof for all purposes. References in this Agreement to an Exhibit shall mean the referenced Exhibit and any sub-exhibits, sub-parts, components or attachments included therewith.

## **Technical Meanings**

. Words, abbreviations, numerical symbols and measurement symbols not defined in this Agreement but that have well-known technical or design, engineering or solar power industry meanings, are used in this Agreement in accordance with such meanings.

## **Headings**

. The headings of Articles, Sections and subsections are for convenience only and shall be ignored in construing this Agreement.

## **Precedence**

. In the event of any conflict between the provisions in the body of this Agreement and any Exhibit or between the provisions of any Exhibit and any other Exhibit, the order of precedence shall be as follows:

1. The body of this Agreement
2. The Exhibits in the following order of priority: G, K, C-2, C-3, C-5, I.1, I.2, L, J, A, D, E, F, M, B

Notwithstanding the above, the provisions of this Agreement, including all Exhibits, shall be, wherever possible, construed as complementary rather than conflicting.

## **Status of Contractor**

. Contractor shall perform and execute its obligations under this Agreement as an independent contractor to Owner.

## **Gender**

.As used in this Agreement, the masculine gender shall include the feminine and neuter and the singular number shall include the plural, and vice versa.

## **Successors and Assigns**

.Unless expressly stated otherwise, references to a Person include its successors and permitted assigns and, in the case of a Governmental Authority, any Person succeeding to its functions and capacities.

## **Day**

.As used in this Agreement, references to “days” shall mean calendar days, unless the term “Business Days” is used. If the time for performing a payment or notice obligation under this Agreement expires on a day that is not a Business Day, the time shall be extended until that time on the next Business Day. All periods of time shall be based on, and computed according to, the Gregorian calendar.

## **Grammatical Forms**

.As used in this Agreement, where a word or phrase is specifically defined, other grammatical forms of such word or phrase have corresponding meanings; the terms “hereof,” “herein,” “hereunder” and similar words refer to this entire Agreement (and as this Agreement may be varied, amended, substituted, novated, assigned or otherwise transferred from time to time as permitted by this Agreement) and not to any particular Article, Section, Exhibit or any other subdivision of this Agreement; “including” means “including, for example and without limitation,” and other forms of the verb “to include” are to be interpreted similarly.

## **References to Documents**

.As used in this Agreement, all references to a given agreement, instrument or other document shall be a reference to that agreement, instrument or other document as amended, supplemented, restated or otherwise modified from time to time. Any term defined or provision incorporated in this Agreement by reference to another document, instrument or agreement shall continue to have the meaning or effect ascribed thereto whether or not such other document, instrument or agreement is in effect.

## **References to Laws**

.Any reference to Applicable Laws and Environmental Law and to terms defined in, and other provisions of, Applicable Laws ) and Environmental Law (including those set forth electronically on an internet web site shall be references to the same (or a successor to the same) as amended, supplemented or otherwise modified from time to time.

## **Writing Required**

.Provisions of this Agreement that include the word “agree,” “agreed” or “agreement” require the agreement to be recorded in writing and signed by Owner and Contractor.

## **Computation of Time Periods**

.In the computation of periods of time specified in any notice, such periods shall be exclusive of the day on which the notice was given or was deemed to be given and inclusive of the last day on which the event or action specified in such notice is due to occur or be taken.

# RESPONSIBILITIES

## **Scope of Services**

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### **Project for Which Services Will be Provided**.

#### Set forth on Exhibit E is the Project for which Contractor shall provide Services hereunder (as of the Effective Date). Set forth on Exhibit F is the full legal description of the Project Site.

### **General Description of Services**.

#### Beginning on the Services Commencement Date and continuing thereafter throughout the Term, Contractor shall, in a timely manner, perform and/or provide all work, services, supervision, management, labor, equipment, materials, parts, tools, consumables, consumable parts, Temporary Work, materials, supplies and other items necessary or appropriate to (i) perform the activities and scope of services (in the quantity and frequencies) set forth in Exhibit A, (ii)  perform its other obligations under this Agreement and (iii) take such other actions as necessary or appropriate to accomplish the foregoing (collectively, the “**Services**”); *provided*, *however*, that any Services that constitute Extra Work shall not be performed by Contractor unless a Change Order for such Extra Work is executed by the Parties or Owner has approved in writing the proposed adjustments corresponding to such Extra Work or has expressly authorized or directed Contractor in writing to perform such Extra Work prior to execution of a Change Order.

#### Contractor has included within the Service Fees the cost to complete all Services (except Extra Work) in accordance with and subject to the Requirements. Therefore, any item indicated, reasonably inferable from, or incidental to, this Agreement, or the Requirements is to be considered part of the Services and will not require a Change Order. Work not specifically delineated in this Agreement will be performed and provided by Contractor to the extent necessary or appropriate to complete the Services in accordance with or subject to the Requirements. As a result, except for Extra Work, Contractor hereby waives any and all claims for an increase in the Service Fees, or an extension of time hereunder, based, in whole or in part, upon an assertion that any license, technical assistance, engineering, assembly, construction, service, labor, material, equipment, consumables, consumable parts, Temporary Work, operation, management or other service or item is not included in the Services when such license, technical assistance, engineering, assembly, construction, service, labor, material, equipment, consumables, consumable parts, Temporary Work, operation, management or other service or item is indicated in, reasonably inferable from, or incidental to, this Agreement or the Requirements or otherwise necessary or appropriate in order to complete the Services in accordance with and subject to the Requirements.

### **Maintenance of Project Site**. Without limiting the scope of Services covered by Section 2.1.2, Contractor shall:

#### maintain Project Site clear of, and shall be responsible for collecting and removing from the Project Site, debris, waste material, rubbish and removed parts and equipment generated during performance of the Services or otherwise by the Project Equipment and dispose of the same in accordance with Applicable Law.

#### at such times, and from time to time, as required by the Requirements, thoroughly clean all Project Equipment using appropriate cleaning methods.

#### The Services Fee hereunder includes one washing for all the panels once during every twelve (12) month period (calculated from the Effective Date and each anniversary thereafter) during the Term. Unless such washing occurs earlier in such twelve (12) month period, Contractor shall perform such washing between July 1 and September 30th. Notwithstanding the foregoing, Contractor shall, as part of its Services hereunder, monitor the actual soiling levels at the Project and shall use the once-per-year budgeted washing to wash the panels (in the case where the once per year budgeted washing for such Project has not yet occurred) so as to prevent soiling in excess of modeled assumptions. Contractor shall notify Owner if the soiling levels of the panels installed at the Project exceed the applicable Energy Model assumptions for soiling for the Project. Contractor shall also notify Owner in advance if actual soiling levels are reasonably likely to exceed the soiling level assumption set forth in the Project’s Energy Model without an additional panel washing (in the case of a washing which would be in excess of the once per year budgeted washings). In a case where the once per year budgeted washings for the Project has already occurred but it is reasonably likely that that soiling levels of the panels installed at the Project will exceed the applicable Energy Model assumption for soiling for the Project, the Parties shall discuss in good faith whether additional washings are in Owner’s interest, given cost and typical rain patterns in San Diego County. The Parties agree, for any additional washings (beyond the one included washing at the Project Site), that Contractor shall solicit two (2) competitive bids from potential Subcontractors and provide such bids to Owner for its review. The bid validity of such bids shall extend for at least fourteen (14) Business Days after receipt by Owner. Owner may, in its sole discretion (but within the bid validity period), select one such Subcontractor to perform such additional washing. If Owner elects to have such additional washing performed, Contractor shall cause such washing to occur and Contractor shall pass through such costs directly to Owner as “Extra Work” at an 15% mark-up over the applicable Subcontractor’s bid.

#### monitor Project performance at the Project Site via the Project’s PMRS System. If it is reasonably likely that the Actual Energy Production for the Project will not equal or exceed the Energy Production Guarantee for the Project for the applicable Energy Production Test, then Contractor shall (i) promptly notify Owner of such reasonable likelihood, (ii) visit the site within five (5) Business Days after such determination is made and evaluate system performance, and (iii) prepare for Owner’s review a recommend a corrective action plan to address Project Actual Energy Production deficiencies.

#### administer the Long Term Panel Warranty (as such term is defined in the Construction Documents) on Owner’s behalf. Such administration shall include, but not limited be limited to, (i) providing timely notification to the applicable panel manufacturer of any panel defect (whether such defect is a workmanship, capacity, or other defect) which is otherwise warranted by the Long Term Panel Warranty; (ii) arranging for the shipment of defective panels to the panel manufacturer; (iii) promptly delivering to Owner any correspondence received by Contractor with respect to any warranty claim. Contractor shall perform all the Services such that the performance of such Services will comply with the provisions and requirements of the Project Warranties so as to ensure that such Project Warranties remain in full force and effect and enforceable by Owner. Notwithstanding the foregoing, Contractor shall not have the right to, and shall not, (1) settle or waive any claim or right under any Project Warranty; and/or (2) agree on Owner’s behalf to pay any amounts to the applicable Long Term Panel Warranty provider.

### **Permits**.

#### Contractor shall obtain, pay for and maintain all Permits required to allow Contractor to lawfully perform the Services and otherwise carry out its business affairs as contemplated hereby (the “**Contractor Permits**”) and shall secure each Contractor Permit prior to performance of the relevant portion of the Services for which such Contractor Permit is required. For purposes of clarity, Contractor shall not be required to obtain or maintain any Owner Acquired Permits. Owner shall, at no cost or expense to it, cooperate with Contractor’s reasonable requests to assist Contractor in obtaining the Contractor Permits. Contractor shall deliver copies to Owner of each Contractor Permit promptly after receipt thereof. Contractor shall perform all the Services such that the performance of such Services will comply with the provisions of all Contractor Permits and all Owner Permits.

#### To the extent reasonably requested by Owner, Contractor shall provide administrative support to Owner with respect to obtaining or maintaining any Owner Permit.

### **Remote Monitoring**. As part of the Services, Contractor shall provide remote monitoring of the Project Equipment via the PMRS System on a twenty-four (24) hour a day, seven (7) days a week, basis in accordance with Exhibit A and the other Requirements.

### **Minimum Interruption**. Contractor shall (a) comply with the written requests of Owner, consistent with the Manuals, regarding the scheduling and performance of Services and (b) perform its obligations under this Agreement in a manner that maximizes the revenue generating potential of the Project.

### **Call-Out**. Contractor shall have personnel available on an “on-call” basis, in accordance with the Warranty Call-Out Procedures attached as Exhibit J.

### **Maintenance Audit**. At any time during the Term, Owner may inspect or audit, or cause a third party to perform an inspection or audit of, the Project Equipment, any documents prepared in the course of performing the Services and generally Contractor’s performance of the Services in order to determine if such Services are being performed in accordance with the Requirements. Owner shall be responsible for the costs of any such inspection and audit; *provided* that, if any such inspection or audit reveals that Contractor has performed the Services in a manner that is not in compliance with the Requirements, Contractor shall reimburse Owner for the costs of such inspection and audit.

## **Standards for Performance of the Services**

. Contractor shall perform the Services in a workmanlike manner, using new materials and in accordance with:

(a) the Manuals for the Project;

(b) Applicable Laws;

(c) Prudent Solar Industry Practices;

(d) Insurance Requirements;

(e) the HSE Rules;

(g) the IA Requirements;

(i) the Landowner Requirements;

(j) the other requirements of this Agreement (including the Warranties);

(k) the requirements of the Construction Documents; and

(l) any actions required to ensure that the Project Equipment complies with the Project Warranties;

(collectively, the “**Requirements**”).

Contractor shall promptly notify Owner of any communication from any Governmental Authority that alleges that Contractor is not acting in compliance with Applicable Laws. Contractor shall provide a copy immediately upon receipt of any notice, order or other correspondence by Contractor or any Subcontractor from any Governmental Authority related to any failure or asserted failure to comply with any Requirement. If the Requirements are inconsistent but one is more stringent that the other(s) (such that all can be complied with by complying with the most stringent Requirement), Contractor shall perform its obligations in accordance with the most stringent Requirement. If two or more Requirements are in conflict (such that it is impossible to comply with all of them concurrently), Contractor shall promptly notify Owner of the conflict and Owner shall resolve such conflict in its sole discretion.

## **Personnel Standards**

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### **Status of Personnel**. Contractor shall provide the labor and professional, supervisory and managerial personnel required to perform the Services in accordance with the Requirements. Such personnel shall be qualified (including possessing appropriate licenses), experienced and trained in the duties to which they are assigned by Contractor and capable of performing such duties in accordance with this Agreement. Without limiting the generality of the foregoing, for purposes of federal and state income taxes, social security and Medicare taxes, unemployment and disability insurance premiums, Contractor shall comply with all applicable laws related to reporting and withholding of such taxes and premiums with respect to its employees and individuals performing Services under the Agreement on the behalf of Contractor who are not employed as a Subcontractor.  Contractor shall also be responsible to ensure that all Subcontractors similarly comply with all applicable laws related to reporting and withholding of such taxes and premiums with respect to their respective employees and individuals performing Services under the Agreement on the behalf of any such Subcontractor who are not employed by such Subcontractors.  No exceptions are permitted under this Section without a written Amendment to this Agreement prior to an individual performing any Services under this Agreement. Contractor agrees that, at any time during the performance of this Agreement, Owner shall have the right to audit Contractor’s compliance (with respect to its employees) with the foregoing requirements. Additionally, Contractor shall include similar audit clauses in its agreements with all Subcontractors, and Owner shall have the right to audit any such Subcontractors to ensure (with respect to their respective employees) that such Subcontractors are complying with the foregoing requirements. Any such audit shall occur at reasonable times with Contractor’s and any Subcontractor’s full cooperation.

### **Review of Personnel Matters**. Except as otherwise expressly provided, Contractor shall retain sole authority, control and responsibility with respect to labor matters in connection with the performance of the Services. Upon Owner’s request, Contractor shall provide Owner with the qualifications of any or all personnel employed in connection with the Services at the Project Site. Contractor shall remove, and cause Subcontractors to remove, any employee, agent or other Person engaged in the performance of the Services for Contractor or such Subcontractor, as the case may be, whose conduct Owner reasonably deems to be harming or having a negative effect on the Services or the Project Site, the health and safety of such individual or others at the Project Site, or the perception of the Project, or Owner’s relationship, with the surrounding community.

### **Training Program**. Contractor shall provide ongoing training and education programs, as necessary, for all personnel engaged by Contractor in providing the Services to provide such Services in accordance with the Requirements. Prior to the end of the Term, Contractor shall train Owner’s personnel in the performance of the Services and in the start-up, shut-down and operation and maintenance of, safety, and all general process understanding and emergency procedures for the Project and all of its sub-systems. Such training shall commence six (6) months prior to the end of the Term and consist of (a) allowing a reasonable number of Owner personnel to shadow Contractor personnel during the performance of the Services, and (b) no less than two (2) full day training sessions which shall build on the knowledge transfer occurring as a result of Owner’s personnel shadowing Contractor’s personnel. Such full day training sessions shall occur at a time and place mutually agreeable to both Owner and Contractor, but in all cases shall be completed prior to the day which is thirty (30) days prior to the expiration of the Term.

### **Union Labor**. Except as set forth in the last sentence of this Section 2.3.4, Contractor shall use union labor for the performance of all Services hereunder. Contractor shall perform all Services in accordance with (i) any applicable provision in a collective bargaining agreement to which Owner is a party from time to time or as otherwise identified by Owner at any time, and (ii) any applicable collective bargaining or union labor agreement as may be entered into by Contractor from time to time. All personnel used or hired by Contractor to Services who are required under Owner’s collective bargaining agreement to be members of a union shall be qualified and appropriate for such work pursuant to the terms of such agreement. As the only exceptions to the foregoing covenants, Contractor may perform (i) warranty re-work for equipment purchased under the applicable BOT Agreement; (ii) specialized preventative maintenance for equipment purchased under the applicable BOT Agreement; and (iii) the washing of the photovoltaic panels (including the budgeted washings pursuant to Section 2.1.3(c)), in each case, with non-union labor (with no requirement to pay prevailing wages).

### **Labor Disputes**. Contractor shall adopt policies and practices designed to avoid labor disputes, and to minimize the risk of labor-related delays or disruption in providing the Services. Contractor shall advise Owner promptly, in writing, of any actual or threatened labor dispute of which Contractor has knowledge that might materially affect the provision of the Services. Notwithstanding the foregoing, the settlement of labor disputes shall be at the discretion of the Party having the difficulty.

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

### **Means and Methods**. Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating provision of the Services consistent with the terms of this Agreement, including the timely performance or delivery of work by its Subcontractors, except where this Agreement otherwise provides specific instructions concerning these matters.

### **Language Comprehension**. Contractor shall ensure that all personnel (regardless of hire date) that supervise Services provided at Project Site have the ability to read, speak and understand English. Contractor shall cause each Subcontractor to cause its respective supervisory personnel to likewise have the ability to read, speak and understand English.

## **Compliance with Applicable Laws**

. Without limiting Section 2.2, in providing the Services, Contractor shall comply with all Applicable Laws.

## **Service Data; Reports and Records**

. Contractor shall prepare and provide the log books and reports, including the Semi-Annual Service Reports, specified in Section 3.3, Exhibit A and/or elsewhere in this Agreement. Contractor shall provide reasonable assistance to Owner in preparing all reports, plans and other materials that Owner is required to deliver concerning the maintenance and servicing of the Project Equipment.

## **No Liens or Encumbrances**

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### **No Liens**. Contractor shall not assume, create or suffer to exist or be created, by, through or under Contractor or any other Contractor Responsible Party, any Lien on any Project Equipment, the Project Site, the Project or any portion thereof or any other property of Owner or any portion thereof, except (in each case) a Permitted Lien.

### **Discharge of Liens**.If there arises any Lien that violates Contractor’s obligations under Section 2.6.1 (including Liens imposed by Subcontractors), then Contractor shall:

#### promptly, following receipt of written notice of such Lien, or of Contractor’s becoming aware of the existence of such Lien, provide written notice thereof to Owner; and

#### as soon as reasonably practicable, but in no event later than the date that is the earliest to occur of: (a) ten (10) Business Days prior to the date the existence of such Lien would give rise to a default under any financing documents or similar agreements Owner has with any Interested Parties, as determined by Owner (and notified to Contractor); (b) one (1) Business Day following the date that the claimant commences procedures to foreclose upon (or otherwise enforce) such Lien or (c) ten (10) Business Days after the date of filing or recording of such Lien, either (x) pay or discharge, release and remove of record, any such Lien, (y) pay the appropriate amount into court in order to have the Lien vacated or (z) provide, at its option, a bond or letter of credit from a surety or commercial bank reasonably acceptable to Owner in an amount and on terms and conditions reasonably acceptable to Owner to protect against such Lien.

### **Contractor Failure to Discharge Liens**.Upon the failure of Contractor to perform its obligations under Section 2.6.2, or in order to prevent a claimant from foreclosing upon (or otherwise enforcing) a Lien that violates Contractor’s obligations under Section 2.6.1, Owner may, but shall not be obligated to, obtain a bond, letter of credit or other security for such Lien and, upon such posting of such security therefor, shall be entitled to recover promptly from Contractor the costs and expenses incurred by Owner in connection therewith. In addition, Owner may offset such amounts from any amounts otherwise due to Contractor hereunder.

## **Preservation of Project Warranties**

. If required under the terms and conditions of any of the Project Warranties, Contractor shall provide all information to the applicable manufacturer necessary to register the Project Equipment with such manufacturer. Contractor shall not take any action that would cause a breach of, or adversely affect, the Project Warranties. Contractor shall (a) identify any claims attributable to the Project Warranties, (b) notify Owner promptly after learning of the same and (c) cooperate with Owner to enforce the Project Warranties, including by providing any information available to Contractor that is needed in order to submit Project Warranty claims. Without limiting the foregoing, Contractor shall coordinate all the activities related to a claim in respect of a Project Warranty, including (w) documenting the warranty notification process between the Owner and the appropriate Construction Agreement counterparty (i.e., photovoltaic panel manufacturer), as applicable, (x) issuing a warranty notice to such counterparty, (y) logging of the defect and the corresponding warranty notice in association with a particular Project Warranty claim and (z) documenting the applicable counterparty’s response, if any. With respect to the administration of the Project Warranties, Contractor shall comply with the provisions of Exhibit J.

## **Emergency Action/Safety; Landowner Concerns**

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### **Emergency Action**. In the event of an emergency endangering life or property, Contractor shall take such action as may be necessary or reasonable to prevent or mitigate injury, damage or loss and shall promptly notify Owner of any such emergency and the actions taken by Contractor. In addition, Owner may take such action as is necessary or reasonable to prevent, avoid or mitigate injury, damage or loss (*provided* that the taking of such action by Owner, or Owner’s failure to do so, shall not limit Contractor’s liability or its obligations under this Agreement), and if the necessity of taking of such action is caused by Contractor’s acts or omissions or those of any other Contractor Responsible Party, including Contractor’s failure to comply with its obligations set forth in this Section 2.8.1, then Contractor shall reimburse Owner for the costs incurred by Owner in taking such action.

### **HSE Rules**. Not later than thirty (30) days prior to the Services Commencement Date, the Contractor shall deliver for Owner review and approval (i) a proposed safety plan for the Project which meets the standards of, and otherwise complies with, the rules, practices, procedures and guidelines set forth in Exhibit I.1 (which plan shall also include a proposed personal protective equipment plan (including lock-out and tag-out procedures for the Project)), and (ii) a proposed set of project site standard practices rules for the Project, which meets the standards of, and otherwise complies with, the rules, practices, procedures and guidelines set forth in Exhibit I.2 (collectively, the “**Proposed HSE Rules**”). Contractor’s Proposed HSE Rules shall also conform with Applicable Laws, Prudent Solar Industry Practices and the other Requirements and that are designed to prevent injury to property and persons (including members of the public and the employees, agents, Contractors, consultants and representatives of Owner, Contractor and its Subcontractors) while performing Services on the Project Site. Owner shall have the right (but not the obligation) to review and comment on the Proposed HSE Rules within thirty (30) days after submission by Contractor; provided, however, that Contractor shall remain solely responsible for performing such Work in accordance with this Agreement. If Owner conditions its approval on reasonable changes in the Proposed HSE Rules for the Project submitted by Contractor, then Contractor will effect such changes and resubmit such programs to Owner within ten (10) days after Contractor receives Owner’s conditional approval. Such resubmission of the safety and security assurance program shall not be considered a change in work hereunder. The Proposed HSE Rules which Owner approves shall be considered the “**HSE Rules**” for the Project. Owner will have ten (10) days after such resubmission to review, comment on, and approve or disapprove such program resubmitted by Contractor. Without limiting Contractor’s obligation to comply with the HSE Rules, Contractor shall nevertheless perform all Services in accordance with Applicable Laws, Prudent Solar Industry Practices and the other Requirements. Without limiting the foregoing, Contractor shall exercise reasonable efforts to eliminate or abate reasonably foreseeable safety hazards created by or otherwise resulting from the performance of the Services. Contractor shall, and shall cause all of its employees, agents and Subcontractors to, follow the approved HSE Rules, all safety measures and procedures normally utilized by Contractor and the safety program initiated pursuant to the first sentence of this Section 2.8.2. Contractor shall submit to Owner, as part of the Semi-Annual Service Report, a written report identifying (a) any violations of the HSE Rules and other incidents related to work-safety or those described in Section 2.8.1, including near-miss events, (b) the causes thereof and (c) actions planned to remedy and prevent recurrence of the same.

### **Landowner Concerns**. Contractor shall cooperate with the requests of Owner to address any and all concerns of the landowners or occupants of real property adjacent to the Project Site. Contractor shall not enter into any agreement, contract or understanding with any landowner or occupant of real property adjacent to the Project Site, or otherwise liaise with such landowners or occupants, without the prior written consent of Owner.

## **Project Site Security**

. Contractor shall follow and access the Project Site in accordance with the security procedures set forth in the HSE Rules starting on the Services Commencement Date. If Contractor becomes aware that representatives of any Governmental Authority visit the Project Site for any purpose related to the Work, Contractor shall immediately notify Owner.

## **Subcontracts**

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### **Subcontractors**. Contractor may locate and procure the services of such Subcontractors as in Contractor’s reasonable judgment may be necessary or advisable to complete Contractor’s duties and obligations pursuant to this Agreement; *provided*, that no such engagement shall (a) relieve Contractor of any of its duties, responsibilities, obligations or liabilities hereunder or (b) relieve Contractor of its responsibility for the performance of any Services (including Extra Work) rendered by any such Subcontractor; *provided* further that Contractor may not utilize any such Subcontractor without first obtaining the written consent of Owner.

### **Contractor Responsibility**. Without limiting Section 2.10.1, the review and approval by Owner of any Subcontractor shall not constitute any approval of the Services undertaken or performed by any such Person or in any way relieve Contractor of its responsibilities and obligations under this Agreement. As between Owner and Contractor, Contractor shall be solely responsible for the acts, omissions and defaults of the Subcontractors and any other Contractor Responsible Party (with the acts, omissions and defaults of the Contractor Responsible Party being deemed attributed to Contractor). Without limiting the foregoing, Contractor shall cause each of the Subcontractors to comply with the requirements of this Agreement that are applicable to such Subcontractor’s work as if such Subcontractor were Contractor hereunder. For the avoidance of doubt, this Section 2.10.2 shall apply whether or not this Agreement, in any particular provision, expressly refers to “Contractor and the Subcontractors” (or similar phrase) or just “Contractor.” Nothing in this Agreement shall be construed to impose on Owner any obligation, liability or duty to a Subcontractor or any other Contractor Responsible Party, or to create any contractual or other (including employer-employee) relationship between any such Contractor Responsible Party and Owner, including any obligation to pay or to see to the payment of any moneys due any such Contractor Responsible Party. No Subcontractor or any other Contractor Responsible Party is intended to be nor shall be deemed a third-party beneficiary of this Agreement.

### **Reserved.**

### **Subcontract Assignment**. No Subcontract shall bind or purport to bind Owner.

### **Information and Access**. Contractor shall furnish such information and access relative to the identity of and scope of services or supply of its Subcontractors as Owner may request.

## **Access**

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### **Access for Interested Parties**. Owner and any Interested Party shall at all times have the right to observe, review and inspect all aspects of Contractor’s and the Subcontractors’ work relating to the Services. During any inspection or review of the Project Equipment, any documents prepared in the course of performing the Services and/or performance of the Services, Owner and such Interested Party shall comply with Contractor’s reasonable safety and security procedures, and shall conduct such inspection and reviews in such a manner as to cause minimum interference with Contractor’s activities. Notwithstanding anything herein to the contrary, no review, comment, inspection or approval by Owner and/or any Interested Party as to any of the Services performed by Contractor or the Subcontractors (including any procedure, plan or strategy therefor) shall constitute Owner’s approval or acceptance of any portion of the Services, relieve or release Contractor from any of its duties, obligations or liabilities under this Agreement or result in a waiver of any rights or remedies Owner may have with respect to any portion of the Services that have been, or subsequently are, determined not to be supplied or performed in accordance with the Requirements.

### **Access of Contractor**. Owner shall permit Contractor to enter the Project Site seven (7) days a week, twenty-four (24) hours a day, including during the night, on weekends and on national holidays, as reasonably required to perform the Services, subject to (a) Section 2.8 and Section 2.12, (b) reasonable restrictions imposed by Owner that do not unreasonably interfere with or delay Contractor’s performance of the Services, (c) Applicable Laws, (d) Insurance Requirements, (e) Landowner Requirements and (f) the applicable HSE Rules. As between Owner and Contractor, Contractor shall be responsible for all damage caused by any Contractor Responsible Party to public or private roads and highways in connection with performance of the Services, including site roads. Without limiting the provisions of Section 11.3, Owner may include additional Landowner Requirements from time to time by Notice to Contractor containing such requirements.

### **Reserved.**

## **Cooperation with Owner’s Contractors**

. Contractor acknowledges that Owner may, from time to time, retain Owner’s Contractors to provide administrative, management and other services for Owner in connection with the Project. Contractor agrees to attend any meeting requested by Owner and/or the Owner’s Contractors (whether or not Owner is an attendee of such meeting) for the purpose of coordinating performance of the Services or to resolve concerns relating to the Services, either Party’s employees, or either Party’s subcontractors, including plan of the day and other daily meetings at the Project Site.

## **Performance by Owner**

. If Contractor does not perform the Services (excluding Extra Work) in accordance with this Agreement or does not complete Extra Work prior to the applicable date set forth in the applicable Change Order, and such breaches are not cured after thirty (30) days following Owner’s provision of notice of such breach to Contractor, then Owner shall have the right, but shall not be obligated, in its sole discretion, to remedy such failure (“**Cover Work**”) and Contractor shall be liable for all costs, charges and expenses incurred by Owner in connection with such Cover Work and shall pay to Owner, within thirty (30) days after receipt of invoices with supporting documentation, an amount equal to such costs, charges and expenses. The performance or non-performance of Cover Work shall not in any way limit or relieve Contractor of its obligations, or adversely affect Owner’s rights and remedies, under this Agreement.

## **Extra Work**

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### To the extent mutually agreed by the Parties or directed by Owner pursuant to Section 4.5, Contractor shall perform (a) extra work not included within the Services (the “**Extra Work**”). The scope of any Extra Work shall be (a) performed in accordance with the standards of performance (including the Requirements) and other terms and conditions of this Agreement applicable to the Services, (b) documented by Contractor as the Extra Work proceeds and (c) performed promptly after a Change Order for such Extra Work is executed by the Parties or Owner has approved in writing the proposed adjustments corresponding to such Extra Work or has expressly authorized or directed Contractor in writing to perform the Change Order prior to such approval (and, in any event, by the date set forth in the applicable Change Order).

### The compensation that Contractor shall receive for any Extra Work shall be set forth in the applicable Change Order.

## **Spare Parts Inventory**

. Within the first thirty (30) days after the Effective Date for the Project, and on each anniversary of the Effective Date thereafter, Contractor shall provide Owner with a list of recommended inventory of special tools and spare parts for the Project. Owner shall purchase, in its sole discretion, those items of inventory which Owner may elect from time to time, and shall make such items of inventory available (during normal business hours) at Owner’s storage location located at [PARTIES TO INCLUDE LOCATION OF STORAGE LOCATION PRIOR TO EXECUTION FOR PROJECT(s) – PROVIDED IT’S SOMEWHERE IN SAN DIEGO COUNTY] for Contractor’s use to perform the Services (including for Contractor’s use in correcting any defects in the Project Equipment covered by the applicable Project Warranties or Defects covered by the Defect Warranty). Except as set forth in the next sentence, if Contractor uses any such item of inventory, Contractor shall promptly notify Owner of such usage and shall order for replacement such item of inventory at Contractor’s sole cost and expense within fifteen (15) business days for delivery to the above storage location upon standard delivery terms and conditions. As the sole exception to the cost allocation set forth in the previous sentence, if Contractor uses an item of inventory to repair, replace, or a correct a defect not covered by the Project Warranties or the Defect Warranty, then Contractor shall not be responsible for the cost to replace such item. For the avoidance of doubt, Contractor shall not be entitled to an adjustment in the Energy Production Guarantee or any other adjustment or relief by virtue of Owner electing not to purchase an item of inventory recommended by Contractor hereunder.

## **Utilities**

. Contractor shall contract for (at its own cost and expense) all Temporary Work necessary or incidental to Contractor’s performance of the Services.

## **Energy Model.**

Contractor and Owner have agreed upon an Energy Model pursuant to the terms and conditions of the BOT Agreement.

## **IA Requirements and Manuals**.

On the Services Commencement Date the following Exhibits shall be deemed automatically amended as follows without further action by either Party:

#### With respect the IA Requirements, the Parties agree to add to Exhibit C.2 the applicable terms and conditions of the interconnection agreement (or similar agreement) for the Project whereby such Project is interconnected to the applicable transmission system. The terms and conditions of the interconnection provider’s tariff applicable to the interconnection service shall also be deemed included. Contractor and Owner acknowledge and agree that because Contractor was fully aware of the terms and conditions of such IA Requirements prior to the execution of the BOT Agreement, that Contractor shall not be eligible for any adjustment to the O&M Fee or to the schedule to perform the Services as a result of such terms and conditions.

#### With respect to the Manuals, the Parties agree to add to Exhibit C.5 the applicable Manuals for the Project. Contractor and Owner acknowledge and agree that because Contractor prepared such Manuals (or caused the same to be prepared) pursuant to the applicable BOT Agreement, that Contractor shall not be eligible for any adjustment to the O&M Fee or to the schedule to perform the Services as a result of such terms and conditions.

####

# PROCEDURES, PLANS, REPORTING AND MEETINGS

## **Representatives**

. Contractor shall appoint (and promptly identify to Owner in writing) a single representative (“**Contractor’s Manager**”) who will manage and coordinate all matters concerning this Agreement and Contractor’s obligations hereunder. Moreover, all individuals performing Services on behalf of Contractor hereunder will report to Contractor’s Manager. Owner shall appoint (and promptly identify to Contractor) a single representative (“**Owner’s Manager**”) who will manage and coordinate all matters concerning this Agreement and Owner’s obligations hereunder. Contractor’s Manager shall not be replaced without prior written consent of Owner, which consent shall not be unreasonably withheld. Each Representative shall (a) act as the liaison for its respective Party’s communications with the other Party, (b) be responsible for receiving all reports due under this Agreement from the other Party and delivering all reports due hereunder to the other Party, (c) have authority to act on behalf of its respective Party and (d) have the experience and authority to make prompt means and methods decisions at the Project Site on a real time basis. Each Party shall at all times keep the other Party informed of the identity of, and contact information for, its Representative and, to the extent a different individual has responsibility for site safety, environmental issues, emergencies or billing and invoicing, the identity of and contact information for such individuals.

## **Form of Reports.** Contractor and Owner shall agree on one form of report for the quarterly report required by Section 3.3.5, the Semi-Annual Service Report and the Annual Maintenance Report for use on all the Projects within sixty days (60) days after the Effective Date of the Agreement. Unless Owner agrees otherwise in writing, such form of report shall contain all of the categories of information specified in or reasonably inferred from this Agreement.

## **Standard Reports**

. Contractor shall prepare and provide Owner with the following reports:

### **Semi-Annual Service Reports**. On or before the 10th day of the calendar month following the end of each six month period, Contractor shall provide (in the form agreed upon pursuant to Section 3.2) Owner with a Semi-Annual Service Report (in electronic format emailed to Owner at an email address identified by the site manager), which shall contain (itemized unless Owner otherwise agrees):

#### a summary of all Scheduled Services and other Services performed during the past quarter (including (a) the parts used or replaced on the Project Equipment, including serial numbers for new photovoltaic panels, inverters, transformers and other major components, (b) the Services performed by Contractor on each visit and the nature of the alarm or error (or cause of the Failure) giving rise to such visit, if any, (c) any abnormal conditions observed with respect to the operation of the Project Equipment and (d) any Services, including Extra Work, that should be performed based upon such observations.

#### Scheduled Services being performed during the current quarter, Scheduled Services status, spare parts inventory status and staffing status;

#### all requirements for a quarterly report as set forth in Section 3.3.5;

#### an inverter maintenance report;

#### summary of equipment condition based on performance monitoring data;

#### a summary of the conditions at the Project based on a visual inspection;

#### a summary of planned or forced outages;

#### incident reports as required by Section 2.8.2;

#### energy produced by the Project; including, the average active and reactive power produced by the Project (measured in fifteen (15) minute increments), kWh production, peak kW, and capacity factor;

#### to the extent available through the PMRS System, a summary of Project Equipment conditions;

#### the success (or lack thereof) of any initiatives implemented by Contractor in order improve the efficiency and energy production of the Project Equipment; and

#### any other relevant issues with respect to any Project Equipment or the Services.

Additionally, the Semi-Annual Service Reports prepared for the second and fourth calendar quarters shall also contain an inverter maintenance report.

### **Annual Maintenance Report**. On or before the 30th day after each anniversary of the Effective Date, Contractor shall provide (in the form agreed upon pursuant to Section 3.2) Owner with an annual maintenance report (“**Annual Maintenance Report**”) (in electronic format emailed to Owner at an email address identified by the site manager), each of which shall contain (itemized unless Owner otherwise agrees):

##### A summary of all Services performed in the previous year;

##### to the extent available through the PMRS System, data recorded by the Project Site monitoring equipment (such as pyranometers, anemometers, hygrometers and other monitoring devices, meteorological or otherwise), such as the ambient temperature, module temperatures, insolation, wind speed, humidity and alarms recorded during such month;

##### a summary of performance data at the Project;

##### reports of any environmental disturbances (including, but not limited to, the release of any Hazardous Materials);

##### a summary of any safety or accident reports for the Project Site;

##### a summary of any Extra Work performed (if any);

##### the results of the Energy Production Test, including any related assumptions or calculations made by Contractor, including the Actual Energy Production, the Expected Energy Production, and the amount and calculation for Contractor’s Performance Liquidated Damages (if any);

##### a copy of the maintenance and inspection log books; and

##### the proposed actions required to be taken by Contractor or Owner (if any).

### **Log Books**. Owner shall create log books using SharePoint (or another program) for Contractor to record the identity and activity of all visitors to the Project Site. All personnel and representatives of Contractor shall be required to record their identity, the date, time and purpose of any visit to the Project Site, the nature of any work performed thereon and such other details for which the SharePoint log books may reasonably be used.

### **Fault Analysis Reports**. Contractor shall submit a report promptly (1) after completing the performance of any diagnostic or corrective services on Project Equipment or (2) in response to repetitive incidents of Failures,containing the following information:

###### the immediate source and root cause of the breakdown or Failure of the applicable Project Equipment;

###### the parts in any Project Equipment, if any, that need repair and/or replacement;

###### the necessary repair, replacement and/or maintenance actions that are recommended to be taken to remedy such breakdown or Failure, as applicable; and

###### any recommendations to avoid future breakdown or Failures of the same type.

### Quarterly Reports

**.** Contractor will also provide a quarterly report which includes a summary of the energy production (kWh), peak production (kW) and average capacity factor.

## **Reporting**

**.** Upon obtaining knowledge thereof, Contractor shall submit prompt written notice Owner of:

##### any litigation, claims, disputes or actions threatened or filed, concerning the Project, Project Equipment or the Services;

##### any refusal or threatened refusal to grant, renew or extend (or any action pending or threatened that might affect the granting, renewal or extension) of any Permits;

##### any dispute with any Governmental Authority with respect to the Project Equipment, the Project, the Project Site, any Permits or the Services;

##### all penalties or notices of violation issued by any Governmental Authority; and

##### any breach or contravention of any Applicable Laws, including Permits;

that, in each case, would reasonably be expected to have a material adverse effect on the Services, the Project Equipment, the Project or the Project Site.

## **Records Retention**

. Contractor shall retain and preserve all records, reports, documents and data (including all data retrievable from an electronic data storage source and, for the avoidance of doubt, the records set described in Section 14.14), created in providing the Services (collectively, the “**Records**”). The Records shall be maintained by Contractor during, and for at least five (5) years following the expiration of, the Term. Upon expiration of the retention period, Contractor shall not dispose of such Records without providing at least sixty (60) days prior notice to Owner, and Owner may request delivery of such Records by giving Contractor notice prior to the expiration of the sixty (60) day period.

## **Meetings**

. Each quarter, at a mutually agreeable time within such quarter, the Representatives shall meet to discuss and review (a) the information contained in the Semi-Annual Service Reports, (b) any technical issues that may have arisen with respect to the performance, availability or maintenance and servicing of the Project and other Project Equipment, (c) maintenance performed during the preceding quarter, (d) any and all Failures and the causes thereof, (e) maintenance to occur during the next quarter, and (f) whether the then-current service plan continues to be appropriate or should be revised in light of recent performance levels and current aggregate hours of actual operation and output of the Project Equipment.

# COMPENSATION AND PAYMENT

## **Compensation**

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As full payment for the performance of the Services hereunder, Contractor shall be paid as follows: First year price for O&M services herein shall be [$XX.XX]/installed kW at DC-STC per year (2016 dollars) with escalation not to exceed CPI published by the U.S. Bureau of Labor Statistics with the series ID CUUR0400SA0 (<http://data.bls.gov/cgi-bin/srgate>), capped at 2.5% annually (the “O&M Fee”) for each year thereafter for the duration of this Agreement.

For purposes of clarity, installed kW cannot exceed Nameplate Rated Capacity for the Project as defined in Exhibit A of the BOT Agreement.

Payment of the O&M Fee shall be made quarterly in arrears (assuming Contractor is not in breach under this Agreement) for each calendar quarter (or portion thereof in the case of the calendar quarter in which the Services Commencement Date falls). Contractor shall reasonably identify which activities were performed in the applicable calendar quarter.

The quarterly service fee (the “**Service Fee**”) shall then be calculated by multiplying the O&M Fee times 0.25. The Parties acknowledge and agree that the Service Fee is full compensation for Contractor’s performance and provision of the Services (excluding Extra Work) for the full calendar quarter in which such Services were provided in accordance with this Agreement.

Notwithstanding the foregoing, the O&M Fee shall not decrease below the previous year’s O&M Fee nor shall it increase by more than two and one-half percent (2.5%) over the previous year’s O&M Fee.

The Service Fee shall be payable quarterly in arrears as set forth in Section 4.2.

## **Contractor’s Invoice**

. On or before the 10th day of the calendar month following the end of the previous calendar quarter, Contractor shall submit an invoice substantially in the form of Exhibit M (the “**Contractor’s Invoice**”) to Owner in respect of the Service Fee earned in such quarter, as well as any Extra Work completed in, or other amounts payable to Contractor hereunder in respect of, the preceding calendar quarter.

### Each Contractor’s Invoice shall:

#### certify: (i) the completion of the applicable Extra Work as described in the applicable Change Order or in the applicable portion of this Agreement (or other basis for payment); (ii) the payment that is then due as a result of the completion of such Extra Work or other basis, (iii)  the total amount of the Service Fee due under such Contractor’s Invoice and the figures and calculation used to determine such amount; (iv) that Contractor has paid, in accordance with the applicable subcontract and this Agreement, all amounts then due Subcontractors (other than any such amounts that Contractor is contesting in good faith); (v) that the Project Equipment, the Project (and each portion thereof) and other property of Owner (and each portion thereof) are, as of the date of the Contractor’s Invoice, free of all Liens, other than Permitted Liens specifically scheduled (including amounts) in the Contractor’s Invoice and Liens for which Contractor has provided security in accordance with Section 2.6.2, (vi) the total amount due under such Contractor’s Invoice and the figures and calculation used to determine such amount and (vii) that the amounts included in such Contractor’s Invoice do not include any amounts excluded pursuant to Section 4.2.2; and

#### include documentary evidence of the completion of the Extra Work described in such Contractor’s Invoice required by this Agreement or the applicable Change Order in connection with such Extra Work or otherwise sufficient for Owner to reasonably verify that such Extra Work has been completed.

### Contractor agrees that it may not request in any Contractor’s Invoice the payment of any sum attributable to Services (including Extra Work): (a) for which Contractor has already been paid; or (b) other than in the case of the Service Fee, (i) that have not been properly (including free of Defects) completed or (ii) any portion of which, as between Contractor and a Subcontractor, has been rejected by Contractor or otherwise constitutes or relates to such Subcontractor’s application for payment, billings or invoices that Contractor disputes or for any other reason does not intend to pay.

### Each Contractor’s Invoice shall comply with the requirements of Applicable Law. Contractor may not invoice for amounts due under this Agreement other than through a Contractor’s Invoice according to this Section 4.2. Contractor understands and agrees that any Contractor’s Invoice that does not comply with this Section 4.2 shall not constitute a valid request for payment and shall not be payable by Owner.

## **Payment**

.Except to the extent otherwise provided in this Agreement, all payments to be made to either Party under this Agreement shall be paid in Dollars and shall be paid electronically (by means of ACH or wire) in immediately available funds on the date due or, if such date is not a Business Day, on the immediately succeeding Business Day, to such account as may be designated by the paying Party from time to time by written notice to the other Party; *provided, however*, that banking transfer instructions are provided by such Party to the paying Party at least five (5) Business Days before the payment of the paying Party is due and payable. Except to the extent otherwise provided in this Agreement, payment of undisputed amounts shall be due within forty-five (45) days after the paying Party’s receipt of the other Party’s invoice (which, in the case of Owner as the paying Party, must be a Contractor’s Invoice prepared according to Section 4.2, including all accompanying documentation required thereby). For the avoidance of doubt, Contractor shall be responsible for paying all Subcontractors in connection with the Services performed by such Subcontractor; Owner shall not have any obligation to pay any Subcontractor with respect to the Services performed by such Subcontractor.

## **Holdbacks**

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### **Owner Holdbacks**. Notwithstanding anything herein to the contrary, Owner, upon notice to Contractor, may withhold such portion (including all) of any payment due to Contractor under this Agreement as reasonably necessary in Owner’s reasonable opinion to correct, or protect Owner from Losses resulting from, any of the following:

##### A Contractor Event of Default;

##### Any part of a payment to Contractor previously made that is attributable to Services (including Project Equipment provided pursuant thereto) that contain one or more Defects that Contractor has not corrected;

##### Any claim that has been made by any Subcontractor to Owner demanding payment for material or labor or any claim that has been made for which Contractor is obligated to indemnify Owner under this Agreement, including the existence, assertion, filing or recording of any Lien that has not been removed by Contractor pursuant to this Agreement;

##### Any failure by Contractor to provide appropriate evidence of insurance in conformance with the requirements of this Agreement; or

##### Contractor materially failed to perform in the prior calendar quarter the Services (or Extra Work) which was otherwise scheduled to be performed in such calendar quarter.

Owner may use any holdback pursuant to this Section 4.4.1 to cure a breach or default by Contractor, for payment of amounts owed to Subcontractors not being contested by Contractor in good faith, for payments to remove Liens that violate this Agreement and for payment of any and all other amounts payable to Owner hereunder. Except to the extent so used by Owner, Owner shall release such holdback upon correction of the condition for which such holdback was made. Except as may otherwise be specifically required pursuant to Applicable Law, any interest accruing on any holdback pursuant to this Section 4.4.1 shall be for the account of Owner and not Contractor.

### **Limitation on Contractor’s Rights**. Without limiting Section 5.5, Contractor shall not have any rights to terminate this Agreement or suspend performance hereunder as a result of Owner’s good faith exercise or attempted exercise of its rights under Section 4.4.

## **Change Orders**

. Contractor shall perform Extra Work or implement a change in the Services or any other term or condition of this Agreement only after Contractor has received a written amendment (a “**Change Order**”) executed by an authorized procurement agent or officer of Owner and Contractor. All changes shall be performed under the terms and conditions of this Agreement. Contractor hereby expressly waives any compensation, reimbursement of expenses and any other right to receive payment with respect to any change not authorized by a written Amendment to this Agreement.

### **Reserved***.*

### **Reserved***.*

### **Reserved***.*

### **No Change**. Except as otherwise contemplated by this Agreement, Contractor shall not be obligated to proceed with any change in the Services (including any Extra Work) requested by Owner unless and until a Change Order is executed by the Parties in relation to such change. Further, Contractor shall not proceed with any change in the Services or Extra Work contemplated by a Change Order until Owner has approved in writing the proposed adjustments or has expressly authorized or directed Contractor in writing to perform the Change Order prior to such approval.

### **Settlement**. By executing a Change Order, Contractor thereafter waives the right to assert any further claim for an increase in the Service Fee or other compensation or an extension in the schedule for performing the Services (including the timing required by any Change Order) or other adjustment based on the subject matter of, or the claim addressed by, such Change Order; it being acknowledged and agreed by Contractor that any such Change Order shall be deemed to completely address any schedule, cost or other impact associated with the subject matter of, or the claim addressed by, such Change Order.

## **Reserved.**

## **Disputes Regarding Payments**

. If a dispute arises regarding the payments to be made to Contractor or Owner hereunder, Owner or Contractor, as applicable, shall pay all undisputed amounts (but shall not be required to pay the disputed amounts until ultimately determined to be due). Additionally, the disputing Party shall notify the other Party of the specific basis for the dispute, including all supporting calculations, as soon as practicable after becoming aware of the basis for the dispute.

## **Effect of Payment**

. Notwithstanding anything herein to the contrary, payment of the Service Fee or any amount due in connection with Extra Work or other amount payable under this Agreement or any portion thereof shall not constitute Owner’s approval or acceptance of any portion of Services (or any Project Equipment provided pursuant thereto), relieve or release Contractor from any of its duties, obligations or liabilities under this Agreement or result in a waiver of any rights or remedies Owner may have with respect to any portion of the Services or Project Equipment that has been, or subsequently is, determined not to be in accordance with the Requirements, the Project Warranties or the Warranties.

## **Set Off**

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

# TERM; DEFAULT; TERMINATION

## **Term**

. The term (the “**Term**”) of this Agreement shall commence on the Effective Date and shall expire on the tenth (10th) anniversary of the Effective Date, unless terminated earlier pursuant to the terms of this Agreement or extended or renewed upon such terms as the Parties shall agree in writing. The Parties shall negotiate in good faith option pricing for yearly renewals for up to fifteen years after the end of the initial 10 year term.

## **Contractor Events of Default**

. The occurrence of any one or more of the following events shall constitute an event of default by Contractor hereunder (a “**Contractor Event of Default**”):

##### Contractor fails to pay to Owner any payment or issue any credit required under this Agreement that is not in dispute, and such failure continues for fifteen (15) days after receipt of written notice of such failure from Owner;

##### Any representation or warranty of Contractor contained in this Agreement shall prove at any time to be false or misleading at the time such representation or warranty is made and has a material adverse effect on either Party’s ability to perform its obligations hereunder or on any Project, and Contractor fails to remedy such materially false or misleading representation or warranty and to make Owner whole for any consequences thereof within thirty (30) days after receipt of written notice from Owner with respect thereto; *provided* that, if such materially false or misleading representation is not reasonably capable of cure within such thirty (30) days but is reasonably capable of cure within an additional sixty (60) days, then such materially false or misleading representation shall not be deemed a Contractor Event of Default until the expiration of such additional sixty (60) day period if Contractor has commenced to remedy the materially false or misleading representation within the initial thirty (30) day period after receipt of written notice from Owner and thereafter diligently pursues such remedy until such materially false or misleading representation is fully cured;

##### Contractor becomes Insolvent;

##### Reserved;

##### Any assignment by Contractor not in conformity with Section 14.1; or

##### Except as otherwise expressly provided for in this Section 5.2, Contractor is in material breach of its obligations under this Agreement and such material breach continues uncured for thirty (30) days after receipt of written notice from Owner; *provided* that, if such material breach is not reasonably capable of cure within such thirty (30) days but is reasonably capable of cure within an additional sixty (60) days, then such material breach shall not be deemed a Contractor Event of Default until the expiration of such additional sixty (60) day period if Contractor commences to remedy the material breach promptly after receipt of written notice from Owner and thereafter diligently pursues such remedy until such material breach is fully cured,

##### Reserved.

## **Termination by Contractor**

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

##### Owner’s failure to pay to Contractor any payment required under this Agreement that is not in dispute, where such failure continues for fifteen (15) days after receipt of written notice of such failure from Contractor; or

##### Owner becomes Insolvent.

## **Reserved**

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## **Event of Default Remedies**

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### **Termination**. Upon the occurrence of any Event of Default and *provided* that such Event of Default is continuing, the non-defaulting Party, in addition to its right to pursue any other remedy given under this Agreement or now or hereafter existing at law or in equity (including specific performance), may, by written notice to the defaulting Party, terminate this Agreement; *provided*, *however*, that no Party shall have a right to terminate, revoke or treat this Agreement as repudiated, or suspend performance hereunder, other than in accordance with the provisions of this Agreement. The termination of this Agreement shall be without prejudice to any other rights or remedies that a Party may have against the other hereunder or otherwise at law or in equity, and no termination of this Agreement shall constitute a waiver, release or estoppel by either Party of any right, action or cause of action it may have against the other. Without limiting the foregoing, no termination under this Section 5.5 shall release either Party from any obligations arising hereunder prior to such termination. Notwithstanding anything to the contrary, Owner’s sole and exclusive liability and Contractor’s sole and exclusive remedy for any breach of, or default under, this Agreement shall be money damages, and Contractor shall have no right to terminate this Agreement (or to suspend performance of Contractor’s obligations hereunder or any portion thereof) for any such breach or default, except in the case of an uncured Owner Event of Default under Section 5.3. If Owner elects to terminate this Agreement due to a Contractor Event of Default, and it is determined for any reason by a tribunal of competent jurisdiction that Contractor was not in default hereunder, the Parties’ rights and obligations shall be the same as if notice of termination had been issued pursuant to Section 5.8. – Owner Termination for Convenience.

### **Specific Enforcement**. Contractor and Owner hereby agree (a) that money damages would not be a sufficient remedy for a breach by Contractor of this Agreement and (b) that, in addition to all other available remedies, Owner shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any breach by Contractor of this Agreement.

### **Further Owner Remedies**. Upon the occurrence of any Contractor Event of Default and provided that such Contractor Event of Default is continuing, Owner may (but shall not be obligated to), in addition to and without waiving any of its rights to pursue any other remedy given under this Agreement (including Section 2.13) or now or hereafter existing at law or in equity (including specific performance):

##### reserved; or

##### suspend all or any part of the Services by giving written notice of such suspension to Contractor; or

##### perform or caused to be performed (including, without limitation, by engaging one or more third parties) any obligations of Contractor that Contractor has not performed in accordance with the terms of this Agreement and/or any activities required to cure any Contractor Event of Default; and, in such event, Owner shall be entitled to recover from Contractor or setoff against any amounts otherwise owed to Contractor under this Agreement, the costs that Owner incurred in connection with taking such remedial action.

### **Remedies Cumulative**. Except as otherwise set forth in this Agreement, remedies are cumulative, and the exercise of, or failure to exercise, one or more of them by a Party shall not limit or preclude the exercise of, or constitute a waiver of, other remedies by such Party. Whether or not this Agreement is terminated, either Party may assert any claims available to it under this Agreement or at law or in equity (subject to the indemnities and other releases, waivers, allocations and disclaimers of, and limitations on, liabilities or remedies set forth in this Agreement), so as to recover Losses against the other Party resulting from any breach of or Event of Default under this Agreement by such other Party.

## **Effect of Termination and Actions Required**

. In the event of a termination pursuant to Section 5.5:

### The terminating Party shall (in addition to its right to pursue any other remedy given under this Agreement or now or hereafter existing at law or in equity or otherwise) be entitled to all Losses suffered by it as a result of the termination (including replacement of the Warranties and related services in the event Owner is the terminating Party and elects to terminate all or any portion of Contractor’s obligations under the Warranties and, also in the case Owner is the terminating party, the amount of any Service Fee paid in respect of the period after termination); and

### Contractor shall immediately: (a) discontinue the performance of its obligations hereunder and, except to the extent required to perform the Transition Actions, remove its personnel from the Project Site, (b) cease entering into Subcontracts in respect of the Services; (c) conduct and provide to Owner an inventory of the equipment and materials related to its obligations hereunder at the Project Site or en route to the Project Site, (d) reserved, (e) irrevocably assign, to the extent assignable, all Permits then held by Contractor (or its Affiliates) pertaining to the performance of Contractor’s obligations hereunder and so requested by Owner, (f) deliver and make available to Owner all Intellectual Property of Contractor related to the Services reasonably necessary to permit Owner to complete or cause the completion of the Services, and in connection therewith (without limiting the License) Contractor authorizes Owner and its respective agents to use such information in completing the Services, (g) remove from the Project Site such Temporary Work, materials, equipment, tools and instruments used by, and any debris or waste materials generated by, Contractor in the performance of the Services as Owner may direct, (h) provide written notice to its Subcontractors of such termination, (i) to the extent it hasn’t already occurred, assign the long term panel warranty and any outstanding claims (of any Subcontractor) to Owner, and (j) take such steps as are necessary to preserve, inventory and protect the equipment that is en route to the Project Site until the same is delivered to the Project Site and complete delivery thereof to the Project Site; (x) in the case of a Contractor Event of Default, at Contractor’s sole cost and expense, and (y) in the case of an Owner Event of Default, at Owner’s sole cost and expense (collectively, and together with Contractor’s obligations set forth in Section 5.7, the “**Transition Actions**”).

## **Condition of Project at End of Term**

. Upon expiration or termination of this Agreement, Contractor shall, at Contractor’s expense, assist Owner in arranging for the future performance of the Services by Owner or the successor to Contractor, and shall thereafter promptly remove its personnel from the Project Site. Contractor shall leave the Project Equipment and the Project Site in as good condition as on the Services Commencement Date, normal wear and tear (assuming use thereof according to the Requirements) excepted.

## **Owner Termination**

## **for Convenience**. It is also expressly agreed that Owner shall have the right to terminate this Agreement, or any part thereof, at any time for its sole convenience upon \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ten (10) calendar days' written notice, pursuant to Section 14.6, to Contractor and no termination charges shall apply except as specifically set forth in this Section 5.8. If Owner terminates the Agreement in its entirety in accordance with this Section 5.8, then Owner shall reimburse Contractor for (a) all outstanding undisputed invoices; and (b) the Service Fees accrued through the effective date of termination; and (c) a pro-rata portion of any unpaid fees for Extra Work incurred through the effective date of termination. Contractor shall fully justify and document to Owner in writing any termination charges claimed by Contractor. Except as provided in this Section 5.8, in no event shall Contractor be entitled to payment for any Services which have not been authorized by Owner, or have not yet been performed, or any anticipated profits for any Services that have not been authorized or performed. Any payment of termination charges shall occur within thirty (30) days of receipt of Contractor's written submittal of charges and justification to Owner's satisfaction. Owner shall have the right to review and verify by independent audit, any termination charges claimed by Contractor prior to payment. To the extent Owner wishes Contractor to perform any Transition Actions following the effective date of termination, such actions shall be performed at Contractor’s then current rates indicated in Exhibit L. For the avoidance of any doubt, if Owner terminates this Agreement in its entirety pursuant to this Section 5.8, Contractor’s obligation to achieve the Energy Production Guarantee shall also terminate.

**5.**8.1 Owner can terminate the Agreement for convenience at any time. As a result of such termination, Contractor shall be paid a pro-rata portion of the quarterly fee. Upon any termination of the Agreement Contractor will ensure, to the extent it hasn’t already occurred, that the long term panel warranty and any outstanding claims (of any subcontractor) are assigned to Owner.

## **Reserved.**

## **Surviving Obligations**

.This Article 5 shall survive the termination or expiration of this Agreement.

# INSURANCE

## **GENERAL REQUIREMENTS**. Insurance requirements are set forth as follows, but shall not in any way limit the amount or scope of liability of Contractor under this Agreement. This Article 6 constitutes the minimum insurance and requirements relating thereto.

## **EFFECTIVENESS, CERTIFICATES, NOTICE OF CANCELLATION**. On or before the Effective Date, and thereafter during its Term, Contractor shall provide Owner with original, current certificates of insurance, and renewal certificates of insurance thereafter, executed by a duly authorized representative of each insurer, or by the insurance agent or broker authorized to do so, as evidence of all insurance policies required under this Article. Contractor shall not commence Services until Contractor has obtained all insurance required by this Article and has provided acceptable certificates of insurance. No insurance policy may be canceled, materially revised, or subject to non-renewal without at least thirty (30) calendar days prior written notice being given to Owner, ten (10) days for non-payment of premium. Contractor shall provide Owner with renewal certificates of insurance or binders within five (5) Business Days prior to or after such expiration. Insurance shall be maintained without lapse in coverage during the Term of this Agreement. Owner shall also be given certified copies of Contractor’s policies of insurance, upon request.

## **ADDITIONAL INSURED**. Owner and its parent company, and its subsidiaries, Affiliates and their respective officers, directors, employees, agents representatives, successors and assigns shall be named as an additional insured for all policies listed below in Sections 6.6.1, 6.6.2, 6.6.3 (Employers’ Liability only) and 6.6.4. Commercial General Liability insurance listed in Section 6.6.1 shall provide a severability of interest or cross-liability clause.

## **AS CONTRIBUTION FROM OWNER**. The required policies, and any of Contractor’s policies providing coverage excess of the required policies, shall provide that the coverage is primary for all purposes and Contractor shall not seek any contribution from any insurance or self-insurance maintained by Owner.

## **RATING**. All required policies of insurance shall be written by companies having an A. M. Best rating of “A -,VII” or better, or equivalent.

## **DEDUCTIBLE**. Contractor shall be solely responsible for any deductible or self-insured retention on insurance required hereunder.

## Types of insurance required to be provided by Contractor:

### **Commercial General Liability Insurance**. Contractor shall carry and maintain an “occurrence” form commercial general liability policy or policies, insuring against liability arising from bodily injury, death, property damage, personal and advertising injury, products/completed operations liability, contractual liability covering all operations of Contractor for Services performed under this Agreement. There shall be no explosion, collapse or underground exclusion. Such coverage shall be in an amount of not less than $1,000,000 per occurrence. If the policy maintains a policy aggregate, such aggregate shall not be less than twice the per occurrence limit.

### **Commercial Automobile Liability Insurance**. Contractor shall maintain an automobile liability policy or policies insuring against liability for damages because of bodily injury, death, or damage to property, (including loss of use thereof), and occurring in any way related to the use by or on behalf of Contractor, in pursuit of the Services, including loading or unloading of any of Contractor’s automobiles (including owned, non-owned, leased, rented/or hired vehicles). Such coverage shall be in an amount of not less than $1,000,000 combined single limit.

### **Workers’ Compensation & Employers’ Liability Insurance**. In accordance with the laws of the State(s) in which the Services shall be performed, Contractor shall maintain in force workers’ compensation insurance for all of its employees. If applicable, Contractor shall obtain U.S. Longshoremen’s and Harbor Workers compensation insurance, separately, or as an endorsement to workers’ compensation insurance. Contractor shall also maintain Employer’s Liability coverage in an amount of not less than $1,000,000 per accident and per employee for disease. In lieu of such insurance, Contractor may maintain a self-insurance program meeting the requirements of the State(s) in which the Services shall be performed along with the required Employer’s Liability insurance.

### **Pollution Liability Insurance**. If applicable to the scope of work under this Agreement, Contractor shall maintain pollution liability insurance or insurance policies insuring against liability arising out of activities contemplated under this Agreement or as might be required by federal, state, regional, municipal and local laws, in an amount of not less than $1,000,000 each claim. If the policy maintains a policy aggregate, such aggregate shall not be less than twice the per occurrence limit.

### **Professional Liability Insurance**. If the Contractor is providing professional design, engineering or other professional services (including Design-Build), Contractor shall maintain Professional Liability insurance covering liability arising out of error, omission, or negligent act in the performance, or lack thereof, of professional services contemplated under this Agreement in an amount of not less than $1,000,000 per claim. If the policy maintains a policy aggregate, such aggregate shall not be less than twice the per occurrence limit.

## **Waiver of Subrogation**. Each policy of insurance maintained by Contractor above in Sections 6.6.1, 6.6.3 and 6.6.4 shall contain a waiver of subrogation in favor of Owner.

## **Contractor’s Subcontractors**. In accordance with Section 2.10.2 of this Agreement, Contractor shall accept total responsibility to require all other persons, firms and corporations engaged or employed by Contractor in connection with the performance of the Services to carry and maintain coverage with limits not less than those required in this Article. Contractor shall incorporate insurance requirements by reference within any contract executed by Contractor and its Subcontractors, sub-subcontractors, suppliers, and agents shall cause each Subcontractor, sub-subcontractor, supplier, and agent to comply with the terms of this Agreement. Contractor will obtain and verify accuracy in their entirety of certificates of insurance evidencing required coverage prior to permitting its Subcontractors, sub-subcontractors, suppliers, and agents from performing work or Services on the property of Owner. Contractor will furnish original certificates of insurance with additional insured endorsements from all of its Subcontractors, sub-subcontractors, suppliers, and agents as evidence thereof as Owner may reasonably request.

## **Reports**. Contractor shall immediately report to Owner, and promptly thereafter confirm in writing, the occurrence of any injury, loss or damage incurred by Contractor or its consultants, Subcontractors, sub-subcontractors, suppliers, agents or Contractor’s receipt of notice or knowledge of any claim by a third party of any occurrence that might give rise to such a claim over $100,000.  Upon completion of Contractor’s Services, Contractor shall submit to Owner a written summary of all such injuries, losses, damage, notices or third party claims and occurrences that might give rise to such claims.  Nil reports are required.

## **Other Terms and Provisions**

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### **Omissions; Errors**. It is hereby understood and agreed that the coverages afforded by the insurances required of Contractor set forth in this Article 6 shall not be invalidated or affected by any unintentional omissions or errors.

# INDEMNIFICATION

## **Contractor to Indemnify Owner**. As between Owner and Contractor, Contractor shall be solely responsible for and Contractor shall indemnify, defend and hold Owner, its current and future parent, subsidiaries, affiliates and their respective directors, officers, shareholders, employees, agents, representatives, successors and assigns, the city or county in which the Services take place, Governmental Agencies issuing permits in connection with the Services, Owner or tenants of the property in the vicinity of, adjacent to, or on which any part of the Services are performed, harmless from and against any and all Losses resulting from: (a) injuries to or death of any and all individuals, including, without limitation, members of the general public, or any employee, agent, independent Contractor or consultant or affiliate of either Party, arising out of or connected in any manner with the performance of the Services; (b) damage to, loss, and/or destruction of property, including, without limitation, to, property of Owner, Contractor or others arising out of or connected in any manner with the performance of the Services; (c) any unauthorized release of a Hazardous Material by Contractor or any Subcontractor; (d) any enforcement or compliance proceeding commenced by or in the name of any Governmental Agency because of an alleged, threatened or actual violation of any Environmental Law by Contractor or any Subcontractor; (e) any action reasonably necessary to abate, remediate or prevent a violation or threatened violation of any Environmental Law by Contractor or any Subcontractor; (f) claims, suits, damages, loss, liability, or actions for indemnity by the city or county in which the Services are performed arising out of actions or inactions by Contractor or any Subcontractor; (g) claims, suits, damages, loss, liability, or actions for indemnity by Governmental Agencies issuing permits in connection with the Services arising out of actions or inactions by Contractor or any Subcontractor; (h) claims, suits, damages, loss, liability, or actions for indemnity by the Owner or tenants of the property in the vicinity of, adjacent to, or on which any part of the Services are performed arising out of actions or inactions by Contractor or any Subcontractor; (i) claims for compensation for work performed or materials provided by any Subcontractor or any other person claiming such compensation as a result of the engagement by Contractor or any of its Subcontractors in furtherance of the performance of the Services or (j) third party claims of any kind, including but not limited to contractual indemnity obligations which Owner may have assumed in connection with the Services, whether based upon negligence, strict liability or otherwise, arising out of or connected in any manner to Contractor's acts or omissions in breach of this Agreement. Contractor’s obligations under this Section 7.1 shall not apply to the extent, but only to the extent, that a final judgment of a court of competent jurisdiction establishes that the Losses are proximately caused by the sole negligence, active negligence or willful misconduct of Owner.

## **Indemnification for Intellectual Property Infringement**. Contractor shall indemnify, defend and hold Owner and its current and future parent company, subsidiaries, affiliates and their respective directors, officers, shareholders, employees, agents, representatives, successors and assigns harmless from and against any and all Losses arising from or in connection with: (a) actual or alleged infringement or misappropriation by Contractor or any Subcontractor or other representative of any patent, copyright, trade secret, trademark, service mark, trade name, or other intellectual property right in connection with the Services; and (b) Contractor's violation of any third party license to use intellectual property in connection with the Services.

## **Defense**. If any claim or action is brought against Owner arising out of or related to this Agreement or the Services, then Contractor shall be entitled to participate in and, unless in the opinion of counsel for Owner a conflict of interest between Owner and Contractor may exist with respect to such claim or action, assume the defense of such claim or action, with counsel reasonably acceptable to Owner. If Contractor does not assume the defense of Owner, or if a conflict precludes Contractor from assuming the defense, then Contractor shall reimburse Owner on a monthly basis for Owner's defense costs through separate counsel of Owner's choice. Even if Contractor assumes the defense of Owner with acceptable counsel, Owner, at its sole option and expense, may participate in the defense with counsel of Owner’s own choice without relieving Contractor of any of its obligations hereunder.

## **Obligation to Indemnify Not Limited**. Contractor’s obligation to indemnify Owner under this Article shall not be limited in any way by any limitation on the amount or type of damages, compensation, penalty or benefits payable by or for Contractor under any statutory scheme, including without limitation, any Workers Compensation Acts, Disability Benefit Acts or other Employee Benefit Acts.

## **Survival**

. The provisions set forth in this Article 7 shall survive the termination or expiration of this Agreement.

# environmental responsibilities

## **Environmental Liability**

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### **Materials and Licenses**. Contractor agrees that all materials and equipment to be supplied or used by Contractor, its Subcontractors, if any, in the performance of its obligations under this Agreement, including, but not limited to vehicles, loading equipment, and containers, shall be in good condition and fit for the use(s) for which they are employed by Contractor or its Subcontractor, if any. Contractor further agrees that none of the materials to be supplied or used by Contractor and its Subcontractors, if any, in the performance of the Services shall contain asbestos or asbestos-containing materials, unless feasible alternatives or commercially reasonable replacements do not exist or are not available. Such materials and equipment shall at all times be maintained, inspected and operated as required by applicable Environmental Law. Contractor further agrees that all licenses, permits, registrations and certificates or other approvals required by any Environmental Law or Governmental Agency shall be procured and maintained for such materials and equipment at all times during the use of the same by Contractor or its Subcontractors, if any, in the performance of any of Contractor’s obligations under this Agreement.

### **Duty to Comply with Laws**. Contractor specifically agrees that in the performance of its obligations under this Agreement and in the performance of all the Services hereunder, Contractor shall at all times fully comply with and cause each of its Subcontractors, if any, to fully comply with all applicable Environmental Laws. Contractor further agrees that Contractor shall have and cause its Subcontractors, if any, to have and keep in effect all licenses, permits, registrations, certificates, and approvals required by any Environmental Law or by any Governmental Agency for the Services undertaken by Contractor or its Subcontractors, if any, in the performance of Contractor’s obligations under this Agreement.

### All Hazardous Materials used in connection with the Services required under this Agreement shall be promptly and properly managed, containerized, stored, removed, transported and disposed of by Contractor in accordance with all applicable Environmental Laws.

#### Without in any way limiting the foregoing, Contractor shall not, under any circumstances, cause or permit the spillage, discharge, emissions, or release of any Hazardous Materials in the course of performing Services. If spillage, discharge, emission, or release should accidentally occur through Contractor’s actions, Contractor shall immediately notify Owner and take such actions in accordance with the Section below, entitled “Release."

### **Storage**. Contractor shall not store any Hazardous Materials for periods in excess of applicable site storage limitations imposed by Environmental Law, other law or Owner standards, whichever shall be more restrictive. Contractor shall take, at its expense, all actions necessary to protect third parties, including, without limitation, Owner’s tenants, employees, and agents, from any exposure to, or hazards of, Hazardous Materials which are associated in any manner with the Services, including, but not limited to, site soils and/or groundwater contamination while they are, or should be, under Contractor’s control, as well as any discharges, releases, and spills of such Hazardous Materials.

### **Consultation**. Contractor shall comply with all applicable Environmental Laws and the requirements of all Governmental Agencies; however, Contractor shall exert all efforts to reach and consult with Owner’s Manager prior to making any report to any Governmental Agencies pursuant thereto and shall follow Owner’s Manager’s instructions so long as they are consistent with Contractor’s legal obligations.

### **Release**. In the event of any release of a Hazardous Material by Contractor or any Subcontractor, Contractor shall perform the following actions:

(1) Take all reasonable steps necessary to stop and contain said release;

(2) Make any report of such release as required under Environmental Law;

### (3) Clean up such release as required by the applicable Governmental Agency.

### **Notification**. Contractor shall immediately notify Owner’s Manager of the following upon the occurrence of any release of Hazardous Material in connection with the Services:

(1) A description of the release;

(2) The identification of the Hazardous Material and the volume released;

(3) Death of any person;

(4) Property damage;

(5) Any communication from any Governmental Agency that alleges that Contractor is not acting in compliance with Environmental Law.

### (6) Any communication from any Governmental Agency that affects any permits or licenses necessary to perform the Services.

### **Reports**. Contractor shall submit within thirty-six (36) hours of the release to Owner’s Manager a written report, in a format required by Owner describing in detail any event of any release of a Hazardous Material which shall include the following information:

(1) Name and address of Contractor and any Subcontractor(s) involved.

(2) Name and address of Contractor’s commercial and environmental liability insurance carrier.

(3) Name and address of any injured or deceased persons, if applicable.

(4) Name and address of any property damage, if applicable.

(5) A detailed description of the release including the identification of the Hazardous Material, the date and time of the release, the volume released, and the nature of the any environmental contamination.

(6) A determination of whether any of Owner’s personnel, equipment, tools or materials were involved.

### (7) A detailed description of all reports made to any Governmental Agency, and a description of the actions taken to respond to the release.

### **No Transportation of Owner’s Hazardous Material**. Contractor shall NOT (a) transport any Hazardous Material that Owner generated for purposes of treatment, storage, recycling and/or disposal; or (b) conduct any treatment, storage, recycling and/or disposal of any Owner generated Hazardous Material unless specifically authorized by Owner to perform such activities in writing. If Contractor is authorized by Owner to perform such activities then the following terms and conditions shall apply:

#### **Authorized Treatment Facility**. Contractor shall not transport any Owner generated Hazardous Material to any treatment, storage, recycling and/or disposal facility (hereinafter called “**TSDF**”) not authorized by Owner in writing. Prior to transporting Owner generated Hazardous Material in each case, Contractor shall confirm that the TSDF has procured and maintained in effect all licenses, permits, registrations, certificates or other authorizations required by any Environmental Law or Governmental Agency to lawfully receive, handle, transport, store, treat, recycle, incinerate, dispose of, or otherwise manage or use such Hazardous Material. Contractor shall not transport any Owner generated Hazardous Material to any TSDF which is unable or fails to provide such confirmation. Contractor shall immediately notify Owner if the TSDF is unable or fails to provide such confirmation. Owner reserves the right at any time, in Owner’s sole discretion, to cancel its authorization of any TSDF by written notice to Contractor.

#### **Hazardous Waste Manifest**. Owner shall, when required by Environmental Law, provide Contractor with a complete and executed manifest for Hazardous Material or other shipping documentation for Owner generated Hazardous Material to be transported for treatment, storage, recycling and/or disposal. Contractor’s transportation, recycling, treatment, storage, and/or disposal of any such Hazardous Material in accordance with this Agreement shall be documented by Contractor utilizing, among other things, the manifest for Hazardous Material tracking system or other records as required by Environmental Law, copies of which shall be provided to Owner within ten (10) days of shipment.

# DOCUMENTS AND DATA

## **Documents**

. All reports and documents prepared by or for Contractor for Owner in connection with the performance of the Services shall become the property of Owner immediately upon creation thereof. Subject to Section 9.3 and Article 12, Contractor may retain and use copies of all such reports and documents prepared by Contractor.

## **Review by Owner**

.All reports and documents prepared by or for Contractor for Owner in connection with the performance of the Services shall be available for review by Owner at all times during development and promptly upon completion. All such reports and documents required to be submitted to Owner shall be prepared and processed in accordance with the requirements and specifications set forth in the Manuals and other Requirements. Owner’s review of the reports and documents submitted by Contractor shall not relieve Contractor of its responsibility for the correctness thereof or of its obligations hereunder or be construed as a waiver by Owner of any of its rights under this Agreement.

## **Owner Data**

.As between the Parties, Owner or its Affiliates shall own (a) any Intellectual Property developed or acquired by Owner prior to or independently of this Agreement and the relationship with Contractor created hereby, (b) all data generated by the PMRS System (collectively, the “**Owner Data**”), and (c) all Intellectual Property therein, excluding in each case any of the Licensed Materials incorporated therein. Until the end of the later of the Warranty Period or the Term and subject to Article 12, Owner shall allow Contractor to utilize the Owner Data (a) for the purpose of performing and exercising its rights and obligations under this Agreement, (b) for use in the technical development and product improvement (solely with respect to the Equipment and Materials of the Projects) and (c) in aggregated statistical material for marketing purposes (but not in any other manner in marketing materials and, in particular, not in any manner that specifically identifies the Project or Owner or is otherwise in violation of Article 12). Contractor agrees to share with Owner any material described in the preceding sentence.

## **Survival**

.The provisions of this Article 9 shall survive the termination or expiration of this Agreement.

# REPRESENTATIONS AND WARRANTIES

## **Contractor Representations**

. As of the Effective Date, Contractor represents and warrants to Owner that:

### **Due Organization; Valid Existence; Qualified to do Business**. Contractor is a [corporation] duly organized under the laws of [California], validly existing and in good standing under the laws of [California], and qualified to conduct business in all jurisdictions for which the performance of its obligations under this Agreement require qualification.

### **Enforceability**.This Agreement has been duly executed by Contractor and constitutes the legal, valid and binding obligation of Contractor, enforceable against it in accordance with its terms, except to the extent limited by bankruptcy, insolvency or other similar laws relating to the rights of creditors.

### **Due Authorization**.The execution, delivery and performance of this Agreement by Contractor has been duly authorized by all necessary corporate action on the part of Contractor and does not and will not require the consent of any other party to any other agreement with Contractor.

### **Permits**.Contractor is (or will be prior to performing the relevant Services for which such Contractor Permit is required), either directly or indirectly through its Affiliates, the holder of all Contractor Permits.

### **Qualifications and Skill of Contractor**.All Persons who will perform any portion of the Services have and will have all business and professional certifications and registrations and contracting licenses, and such other certifications, registrations and licenses if and as required by Applicable Law to perform the Services. Contractor has all the required authority, ability, skills, experience and capacity necessary to perform the Services in a timely and professional manner, utilizing sound engineering principles, project management procedures, construction procedures, maintenance procedures and supervisory procedures, all in accordance with Prudent Solar Industry Practices. Contractor has the experience and skills necessary to determine, and Contractor has reasonably determined, that Contractor can perform the Services (excluding Extra Work) for the Service Fee and in accordance with the timelines set forth in the Manuals.

### **Title**. Contractor shall, if and when title to the Services and Project Equipment supplied in connection with the performance of the Services transfers to Owner pursuant to this Agreement, have good and marketable title to the Services and such Project Equipment, free and clear of any Liens (other than Permitted Liens), and shall have the right to sell, convey, transfer and assign such Services and Project Equipment to Owner.

### **Rights to Licensed Technology**. The Services and Project Equipment supplied in connection with the performance of the Services will not infringe on any Intellectual Property rights of any Person, and no infringement on any Intellectual Property rights of any Person will occur as a result of the manufacture, offer for sale, sale, supply or importation of the Project Equipment supplied in connection with the performance of the Services, or any part or component thereof, nor other performance of Contractor’s obligations under this Agreement. No infringement on any Intellectual Property rights of any Person will occur as a result of the performance by Owner or any direct or indirect transferee of Owner or any of their respective (direct or indirect) subcontractors of any of Owner’s rights or obligations contemplated in this Agreement. Without limiting the foregoing, Contractor hereby grants to Owner a paid-up, irrevocable, non-exclusive, world-wide license (the “**License**”) for Owner to use all Licensed Materials that Owner or any direct or indirect transferee of Owner or any of their respective (direct or indirect) subcontractors will need for purposes of performing the License Scope, subject to the restrictions set forth herein.

### **Business Practices**.None of Contractor or its representatives have made any payment or given anything of value, and Contractor covenants that it will not, and Contractor will direct its employees, agents, and Subcontractors, and their employees or agents to not, make any payment or give anything of value, directly or indirectly, to any government official (including any officer or employee of any Governmental Authority) to influence such Person’s decision or to gain any other advantage for Owner or Contractor in connection with the Services to be performed hereunder. None of Contractor, its Subcontractors, nor any of their employees or agents shall intentionally take any action with respect to this Agreement or any of the Services that in any way violates the United States Foreign Corrupt Practices Act or any similar Applicable Law. Contractor shall immediately provide written notice to Owner of any violation of this covenant.

### **Governmental Approvals**. No governmental approval or consent, and no registration, declaration or filing with any Governmental Authority is required on the part of Contractor in connection with the execution, delivery or performance of this Agreement, except those that have already been obtained or that Contractor anticipates will be timely obtained in the ordinary course of performance of this Agreement.

### **Construction Documents**. Contractor has fully familiarized itself with the provisions of the Construction Documents in order to properly perform the Services in accordance with the Requirements.

## **Owner Representations**

. As of the Effective Date, Owner represents and warrants to Contractor that:

### **Due Organization; Valid Existence; Qualified to do Business**. Owner is a corporation, duly organized under the laws of the State of California, is validly existing and in good standing under the laws of the State of California, and qualified to conduct business in all jurisdictions for which the performance of its obligations under this Agreement require qualification.

### **Enforceability**. This Agreement has been duly executed by Owner and constitutes the legal, valid and binding obligation of Owner, enforceable against it in accordance with its terms, except to the extent limited by bankruptcy, insolvency or other similar laws relating to the rights of creditors.

### **Due Authorization**. The execution, delivery and performance of this Agreement by Owner has been duly authorized by all necessary action on the part of Owner and does not and will not require the consent of any other party to any other agreement with Owner.

# EXCUSABLE DELAYS

## **Excusable Delays**. Each Party shall notify the other Party in writing immediately of any delay, or anticipated delay in the performance of such Party’s obligations under this Agreement due to acts of god, acts of war, terrorism, or similar causes or circumstances, in each case, beyond the reasonable control of the Party (or any Subcontractor to such Party) claiming such delay, and which could not have been prevented by the claiming Party had such party taken reasonable care. The Party claiming the delay shall also include in its Notice the anticipated length of the delay. As the sole remedy available to the claiming Party as a result of any such occurrence, the dates for performance herein shall be extended for a period equal to the time lost by reason of the delay. Neither Party shall be eligible under any circumstances for additional compensation due to any such extension of time. Any extension to the contract Term pursuant to this Article 11 shall be documented by a written Change Order to this Agreement.

## **Reserved**

## **Reserved**

# CONFIDENTIAL INFORMATION

## **Confidential Information**

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### **Definitions**. For purposes of this Agreement, the term "**Confidential Information**" means proprietary information concerning the business, operations and assets of Owner, its present and future direct or indirect parent company(ies), affiliates and/or subsidiaries, including, without limitation, information or materials prepared in connection with any the performance of Services hereunder, or any related subsequent agreement, designs, drawings, specifications, techniques, models, data, documentation, source code, object code, diagrams, flow charts, research, development, processes, procedures, know-how, manufacturing, development or marketing techniques and materials, development or marketing timetables, strategies and development plans, customer, supplier or personnel names and other information related to customers, suppliers or personnel, pricing policies and financial information, and other information of a similar nature, whether or not reduced to writing or other tangible form, and any other trade secrets. Confidential Information shall not include (i) information known to Contractor or a CI Representative prior to obtaining the same from Owner; (ii) information in the public domain at the time of disclosure by Contractor; (iii) information obtained by Contractor or a CI Representative from a third party who did not receive same, directly or indirectly, from Owner; or (iv) information approved for release by written authorization of an authorized officer of Owner. For purposes of this Agreement, “**CI Representatives**” means collectively each of Contractor's directors, officers, employees, agents, advisors or affiliates.

### **Limited Use; Nondisclosure**. Contractor hereby agrees that it shall use the Confidential Information solely for the purposes of providing the Services herein and not in any way detrimental to Owner, its present and future direct or indirect parent company(ies), affiliates and/or subsidiaries. Neither Contractor nor its CI Representatives shall use the Confidential Information for their own benefit. Contractor agrees to use the higher of the same degree of care it uses with respect to its own proprietary or confidential information or a reasonable standard of care to prevent unauthorized use or disclosure of the Confidential Information. Except as otherwise provided herein, Contractor and its CI Representatives shall keep confidential and not disclose the Confidential Information. Contractor shall cause each of its CI Representatives to become familiar with, and abide by, the terms of this Agreement.

### **Court or Administrative Order**. Notwithstanding the provisions of Section 12.1.2 above, Contractor and its CI Representatives may disclose any of the Confidential Information in the event, but only to the extent, that, based upon advice of counsel, it is required to do so by the disclosure requirements of any law, rule, or regulation or any order, decree, subpoena or ruling or other similar process of any court, governmental agency or governmental or regulatory authority. Prior to making or permitting any of its CI Representatives to make such disclosure, Contractor shall provide Owner with prompt written notice of any such requirement so that Owner (with Contractor's assistance) may seek a protective order or other appropriate remedy.

### **Publicity**. Contractor and its CI Representatives shall not, without the prior written consent of Owner, disclose to any person (i) the fact that the Confidential Information has been made available to Contractor or its CI Representatives or (ii) any information regarding the ongoing discussions and negotiations between the Parties, including the fact that such discussions and negotiations are occurring; provided, however, that Contractor and its CI Representatives may disclose the information described in clauses (i) and (ii) above if such disclosure is required under any of the circumstances described in Section 12.1.3 above, in which case the procedures specified therein with respect to such disclosure shall apply.

### **Document Retention**. At any time upon the request of Owner, Contractor shall promptly deliver to Owner or destroy (with such destruction to be certified to Owner) all documents (and all copies thereof, however stored) furnished to or prepared by Contractor and its CI Representatives that contain Confidential Information and all other documents in Contractor's possession that contain or that are based on or derived from Confidential Information.

### **Survival**. Notwithstanding the return or destruction of all or any part of the Confidential Information, the confidentiality provisions set forth in this Agreement shall nevertheless remain in full force and effect with respect to specific Confidential Information until the date that is five (5) years after the date of disclosure of such Confidential Information.

### **Remedies**. The Parties acknowledge that the Confidential Information is valuable and unique, and that damages would be an inadequate remedy for breach of this Agreement and the obligations of Contractor and the CI Representatives are specifically enforceable. Accordingly, the Parties agree that in the event of a breach or threatened breach of this Agreement by Contractor, Owner, its present and future direct or indirect parent company(ies), affiliates and/or subsidiaries, who shall be third party beneficiaries of this Agreement, shall be entitled to seek an injunction preventing such breach, without the necessity of proving damages or posting any bond. Any such relief shall be in addition to, and not in lieu of, money damages or any other legal or equitable remedy available to Owner, its present and future direct or indirect parent company(ies), affiliates and/or subsidiaries.

# WARRANTIES; ANNUAL ENERGY PRODUCTION TEST; Energy Production Guarantee; POWER OUTPUT TEST

## **Services Warranty**.

### Contractor warrants that (1) all materials, supplies, equipment, parts, components, and appurtenances thereto supplied by Contractor or any Subcontractor hereunder as part of the performance of the Services which does not constitute Project Equipment (collectively, the “**Warranted Equipment**”); and (2) all Services provided hereunder, will be, in each case (the “**O&M Defect Warranty**”), (a) in compliance with the Requirements; (b) new (except in the case of a repaired part), and good and suitable quality when installed and generally fit for the purpose for which it was installed; (c) free from Liens and defects in design, materials, workmanship or fabrication; and (d) conform to the applicable manufacturer’s requirements. To the extent any Services or any such Warranted Equipment fails to conform to the foregoing during the applicable Warranty Period, Contractor will, at its expense, promptly correct such failure by re-performing such defective Services, and/or (as applicable), promptly repair or replace the defective Warranted Equipment.

 For purposes of clarity, nothing in this Section 13.1 is intended to modify, amend, restate or otherwise replace any of the warranties set forth in any of the Project Warranties, it being the understanding of the Parties that part of the Services provided by Contractor hereunder is to administer such warranties on behalf of Owner. The foregoing O&M Defect Warranty is intended to apply to those Services and materials, supplies, equipment, parts, components, and appurtenances, etc., provided by Contractor under this Agreement and which are not then covered by the applicable warranty set forth in the applicable Project Warranties.

## **Energy Production Test and Energy Production Guarantee**. Beginning on the Services Commencement Date and yearly thereafter until the end of the Term, Contractor shall conduct a twelve (12) month Energy Production Test (as described more fully in Exhibit G) designed to measure the Actual Energy Production at the Project Site for such twelve (12) month period. Consistent with the provisions of Section 2.11.2, Contractor shall have reasonable access to the Project as reasonably required to run such Energy Production Tests and to the energy production data collected during such test.

### Contractor guarantees that the Actual Energy Production of the Project shall equal or exceed ninety percent (90%) of the Expected Energy Production of the Project, as predicted by the Energy Model for the Project, for such 12 month period, including all system losses and auxiliary load deductions; and accounting for module degradation (the “**Energy Production Guarantee**”) (barring acts of God, or vandalism to the system). The Actual Energy Production for each Project shall be measured using the PMRS System for the Project.

### Actual Energy Production and Expected Energy Production shall be calculated using the methodology described in Exhibit G.

### In the event that the Project fails to achieve the Energy Production Guarantee during the Energy Production Test for the applicable twelve (12) month period, Contractor shall (a) be liable for performance liquidated damages (“**Performance Liquidated Damages**”) as calculated below; and (b) recommend a course of action, including but not limited to the repair, cleaning or addition of more PV modules in order to bring the total system Actual Energy Production into compliance with the applicable Energy Production Guarantee. It shall be Contractor’s responsibility to make these changes to the system in a timely fashion, at Contractor’s sole cost and expense.

### In the event Actual Energy Production is less than Energy Production Guarantee for the Project, then the calculation of the Performance Liquidated Damages for such Project Site shall be calculated as follows:

#### **LD Calculation**: First, the Parties shall calculate a Performance Liquidated Damages amount as follows: For each day, CAISO day ahead market price for closest node to the project x energy deficiency (kWh) (*i.e.,* Expected Energy Production less Actual Energy Production (but not less than zero) below the Energy Production Guarantee of the Project.

####

###  In each event that Performance Liquidated Damages are due and owing, Contractor agrees to pay the Performance Liquidated Damages as provided herein within five (5) Business Days after an invoice therefor is delivered to Contractor, and, in case the same are not paid, agrees that Owner may deduct the amount thereof from any moneys due, or that may become due, to Contractor under this Agreement. In case the amount of Performance Liquidated Damages due to Owner is greater than any payment then due to Contractor, Contractor shall pay the difference to Owner within ten (10) calendar days.

## **<Reserved>**

## **Nature of Performance Liquidated Damages; Limitation**

### The Parties acknowledge and agree that because of the unique nature of the Services, it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by Owner as a result of Contractor’s failure to cause the Project to achieve the applicable Energy Production Guarantee for the applicable twelve (12) month period. It is understood and agreed by the Parties that (a) Owner will be damaged by failure of Contractor to meet such obligations, (b) it would be impracticable or extremely difficult to fix the actual damages resulting therefrom, (c) any sums that would be creditable or payable hereunder are in the nature of liquidated damages, and not a penalty, and are fair and reasonable, (d) each payment represents a reasonable estimate of fair compensation for the Losses that may reasonably be anticipated from each such failure, and (e) the Parties renounce their respective rights to claim to any court or arbitral tribunal the adjustment of any such sums.

### The Parties explicitly agree and intend that the provisions of this Article 13 relating to payment of Performance Liquidated Damages shall be fully enforceable by any court or arbitrator(s) of competent jurisdiction. Each Party hereby irrevocably waives any defenses available to it under law or equity relating to the enforceability of the Performance Liquidated Damages set forth in this Agreement. To the extent Contractor attempts to obviate the application of any portion of the Performance Liquidated Damages in this Agreement, and it is then determined by any court or arbitrator(s) that Contractor’s obligation to pay the applicable Performance Liquidated Damages is unenforceable, the Parties agree that Owner shall have the right to avail itself of any right or remedy available to it in law or equity for any failure described herein, including, for the avoidance of doubt, consequential damages.

### **Reserved**.

### **Reserved**.

### Contractor’s liability for Performance Liquidated Damages for any Energy Production Test conducted during the applicable twelve (12) month period (from the Services Commencement Date (or the anniversary thereof) to the day before the anniversary of such Services Commencement Date) shall be capped at three (3) times the aggregate Service Fee payable to Contractor for the Project during such twelve (12) month period.

### The exclusive remedy of Owner set forth in Sections 13.2, 13.3, and 13.4 shall be construed as (1) an exclusive remedy of Owner; and (2) a limitation of Contractor's liability, in each case (clauses (1) and (2)), solely and exclusively because the Project Site did not achieve the Energy Production Guarantee during such twelve (12) month period, and shall not act to limit Owner’s remedies, or be deemed a limit of Contractor’s liabilities to Owner, as a result of Contractor’s failure to perform its other obligations under this Agreement (including, but not limited to, Contractor’s indemnity obligations and confidentiality obligations).

## **Power Output Test**. In addition to the Energy Production Test for the Project, Contractor shall also conduct a Power Output Test (as described more fully in Exhibit G), which test shall be conducted annually until the end of the Term within the calendar months of July, August or September. Notwithstanding the foregoing, if Contractor washes the panels of a Project in July, August or September, then the Power Output Test for such Project shall be conducted within one week after the completion of such washing. Consistent with the provisions of Section 2.11.2, Contractor shall have reasonable access to the Project as reasonably required to run such Power Output Test and to the capacity data collected during such test. In the event that the results of the Power Output Test for the Project indicate degradation in the capacity of the Project in excess of 0.5% per year when compared to the Power Output Baseline for the Project, then Contractor shall recommend a course of action, including but not limited to the repair, cleaning or replacement of PV modules in order to bring the total system capacity in accordance with the 0.5% targeted degradation rate. It shall be Contractor’s responsibility to make these changes to the system in a timely fashion, at Contractor’s sole cost and expense.

## **Survival**

. The provisions of this Article 13 shall survive the termination or expiration of this Agreement to the extent any Warranty claims or Performance Liquidated Damages accrued prior to the termination or expiration of this Agreement.

# MISCELLANEOUS PROVISIONS

## **Assignment**

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### **Generally**. This Agreement shall be binding upon and shall inure to the benefit of the successors and permitted assigns of Contractor and Owner.

### **Assignment by Owner**. Owner may assign in whole or part its rights and obligations under this Agreement at any time without the consent of Contractor.

### **Assignment by Contractor**. Contractor understands that this Agreement is personal to Contractor. Subject to the immediately succeeding sentence, without Owner’s prior written consent (which shall not be unreasonably withheld or delayed) Contractor shall have no right, power, or authority to assign or delegate this Agreement or any portion thereof, either voluntarily or involuntarily, or by operation of law; *provided*, *however*, that nothing in this Section 14.1.3 shall prevent Contractor from engaging Affiliates or Subcontractors in connection with the performance of its obligations under, and in accordance with, this Agreement. Absent Owner’s prior written approval, Contractor’s attempted assignment or delegation of any of its Services hereunder shall be null and void and shall be ineffective to relieve Contractor of its responsibility for the Services assigned or delegated.

### **Void**. Any attempted assignment or transfer that does not comply with this Section 14.1 shall be null and void *ab initio* and of no force or effect whatsoever.

## **Entire Agreement and Amendments**

. This Agreement, including all Exhibits attached hereto or listed in the Table of Contents, contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior or contemporaneous discussions, agreements and commitments between the Parties with respect to the subject matter hereof, and any prior or contemporaneous confidentiality agreements executed by the Parties in respect of the transactions contemplated by this Agreement, and there are no agreements or understandings between the Parties respecting the subject matter hereof or thereof, whether oral or written, other than those set forth herein and neither Party has relied upon any representation, express or implied, not contained in this Agreement. This Agreement may be modified or amended only by an instrument in writing signed by both Parties hereto.

## **Survival**

. All provisions of this Agreement that either expressly by their terms survive or, by their nature are to survive or come into or continue in force and effect after the expiration or termination of this Agreement shall remain in effect and be enforceable following such expiration or termination. The provisions of this Article 14 shall survive expiration or termination of this Agreement.

## **Severability**

.If any provision of this Agreement shall be held to be invalid or unenforceable by a Governmental Authority with jurisdiction, such provision shall be (a) invalid or unenforceable only to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable any other provision hereof and (b) revised or reformed, to the maximum extent permitted under Applicable Law, in a manner resulting in rights, duties, and obligations most closely representing the intention of the Parties as expressed herein.

## **Waiver**

.Without limiting the proviso to the next sentence, no delay or omission by the Parties in exercising any right or remedy provided for herein shall constitute a waiver of such right or remedy nor shall it be construed as a bar to or waiver of any such right or remedy on any future occasion. Each Party, in its sole discretion, shall have the right, but shall have no obligation, to waive, defer or reduce any of the requirements to which the other Party is subject under this Agreement at any time; *provided*, *however*, that, except as otherwise expressly provided in this Agreement, neither Party shall be deemed to have waived, deferred or reduced any such requirements unless such action is in writing and signed by the waiving Party. A Party’s exercise of any rights hereunder shall apply only to such requirements and on such occasions as such Party may specify in the written waiver and shall in no event relieve the other Party of any requirements or other obligations not so specified.

## **Notices**

.Any notice or invoice required or authorized to be given hereunder or any other communications between the Parties provided for under the terms of this Agreement shall be in writing (unless otherwise provided) and shall be served personally or by reputable next Business Day express courier service or by facsimile transmission addressed to the relevant Party at the address stated below or at any other address notified by that Party to the other as its address for service. Any notice so given personally or by express courier shall be deemed to have been served on delivery, and any notice so given by facsimile transmission shall be deemed to have been served on written, email or facsimile confirmation of receipt by the named recipient. As proof of such service it shall be sufficient to produce a receipt showing personal service, the receipt of a reputable courier company showing the correct address of the addressee or an activity report of the sender’s facsimile machine showing the confirmation of successful transmission.

The Parties’ addresses for notice and service are:

|  |  |
| --- | --- |
| To Owner: | San Diego Gas & Electric Company8315 Century Park Court CP22DSan Diego, CA 92123\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Facsimile No: \_\_\_\_\_\_\_\_\_\_\_\_\_ 858-636-5559Attention: Director, Supply Management Attention: Director, Supply Management |
|  |  |
| To Contractor:With a copy to: | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Facsimile No: \_\_\_\_\_\_\_\_\_\_\_\_\_Attention: 1\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Facsimile No: \_\_\_\_\_\_\_\_\_\_\_\_\_Attention:  Attention: Jay Miller, PMP Attention: Linda Strand |

## **Governing Law.** The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California, without reference to principles of conflicts of laws.

## **Further Assurances**

. Without limiting Section 14.1.4, Section 14.16 or Section 14.20, Contractor and Owner agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party in order to give full effect to this Agreement and to carry out the intent of this Agreement. Without limiting the foregoing, Contractor shall cooperate with reasonable requests by Owner in connection with Owner’s ownership (including obtaining board and other company approvals, performing audits, industrial planning and other administration), construction, operation, maintenance, servicing or transfer of the Project Equipment (or the sale or marketing of power and other products therefrom) or the financing or refinancing (or any consideration thereof) of the Project or the assets (including working capital) by an Interested Party, including any efforts of Owner to qualify for or obtain incentives or other tax credits. Contractor’s obligations pursuant to the preceding sentence shall include providing any information, certificate or document requested by Owner for the foregoing purposes. Further, each Party shall provide such assistance and support, including interfacing with Governmental Authorities and representatives, as may be requested by the other Party in order to secure any licenses, Permits or other approvals such Party may need to perform its obligations hereunder.

## **No Third Person Beneficiaries**

. This Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto and shall not imply or create any rights on the part of, or obligations to, any other Person except to the extent expressly provided herein.

## **Dollars**

. All payments to be made by either Party to the other hereunder shall be in Dollars.

## **Counterparts; Effective Date**

. This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which together will constitute one instrument, binding upon all Parties hereto, notwithstanding that all of such Parties may not have executed the same counterpart. The delivery of an executed counterpart of this Agreement by facsimile or portable document format (.pdf) shall be deemed to be valid delivery thereof. This Agreement shall be effective on, and shall be binding upon, the Parties hereto upon the full execution of this Agreement, as of the Effective Date.

## **Time is of the Essence**

. Contractor acknowledges that timely performance of the Services is essential to Owner, and therefore time is of the essence of this Agreement.

## **No Partnership Created**

. Contractor is an independent Contractor and nothing contained herein shall be construed as constituting any relationship with Owner other than that of purchaser and independent Contractor, nor shall it be construed as creating any relationship whatsoever between Owner and Contractor, including employer/employee, partners or joint venture parties.

## **Audit Rights**

. Contractor shall keep and maintain such full and detailed books, records and accounts as may be reasonably necessary for proper financial management under this Agreement, including one set of records showing all payments made to Contractor by Owner. At any reasonable time within five (5) years after final payment to Contractor, Owner and its representatives may inspect, copy and audit such records relating to (a) payments to Contractor for Extra Work performed on a time and materials basis or other non-fixed price basis, (b) Taxes assessed or imposed on the Services and/or Extra Work, (c) any regulatory or other proceeding before a Governmental Authority or (d) necessary or appropriate to verify, among other things, (i) the accuracy of any statement, charge or computation made pursuant to the provisions of this Agreement or (ii) Contractor’s performance under or compliance with the terms and provisions of this Agreement. If the audit determines that there has been an under or over payment, then the Party owing money shall promptly pay the amount due.

## **Dispute Resolution**

. Except as provided in this Section 14.15 the sole procedure to resolve any claim arising out of or relating to this Agreement is the dispute resolution procedure set forth below.

### If such a dispute arises, the Parties will attempt in good faith to resolve any controversy or claim by prompt negotiations between each Party’s authorized representative designated in writing as a representative of the Party with settlement authority to resolve the matter without seeking further approvals (“**Dispute Representative**”). Each Dispute Representative shall either discuss in person or by phone the dispute within 14 days of either Party receiving written Notice that there is a dispute under the Agreement. If the matter is not resolved within 30 days after the discussions between the Dispute Representatives, either Party has the right to request either a meeting between the Parties to resolve the dispute, or informal mediation, or that Party may proceed to arbitration.

### Any dispute that cannot be resolved by management negotiations as set forth above shall be resolved through binding arbitration by a retired judge or justice conducted in San Diego administered by and in accordance with the JAMS Commercial Rules. To the extent those rules conflict with this Agreement, this Agreement shall prevail. The dispute, and the arbitration thereof, shall be governed by California law, and any conflict of law principles shall not be applicable.

### Within sixty (60) days after a notice for demand for arbitration has been delivered, each Party shall provide three names to the other Party as potential arbitrators. The Parties shall mutually agree on one arbitrator. If the parties cannot choose an arbitrator, the Parties shall contact JAMS to select an arbitrator pursuant to its rules. The arbitrator shall follow the JAMS rules and guidelines. Any arbitrator shall have no affiliation with, financial or other interest in either Party and shall be knowledgeable in the field of the dispute.

#### At the request of a Party, the arbitrator shall permit written and oral discovery. Such discovery shall be governed by the California Rules of Civil Procedure. The arbitrator shall also have discretion to compel Parties to answer written or oral discovery where a Party has refused to do so, upon good cause shown.

#### The arbitrator shall have the authority to grant dispositive motions prior to the commencement of or following the completion of discovery.

#### The arbitrator shall have no authority to award punitive or exemplary damages or other damages other than direct and actual damages. The arbitrator shall have no authority to grant injunctive relief, or any other equitable remedy. Any request for injunctive relief, or other equitable remedy, shall be pursued through a court of competent jurisdiction.

#### The arbitrator’s award shall be made within 3 months after conclusion of any trial on the arbitration. The arbitrator shall prepare in writing and provide to the Parties an award including factual findings and the reasons on which their decision is based. The decision of the arbitrator may be enforced as a final judgment in any court of competent jurisdiction.

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

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

### **Reserved.**

### **Language**. The language of the arbitration shall be English.

### **Reserved.**

### **Survival**. The provisions set forth in this Section 14.15 shall survive the termination or expiration of this Agreement.

## **[Reserved]**

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## **Joint Effort**

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

## **English Language Documents**

. Any document, manual, drawing, exhibit, certificate or notice required or authorized to be given hereunder shall be provided in the English language.

## **Consents and Approvals in Writing**

. Except as otherwise expressly provided herein, any consents, authorizations or approvals contemplated herein shall be in writing.

## **Competitive Position of this Agreement**

**.** Contractor acknowledges the possibility that, due to the financial and economic climate existing as of the Effective Date, certain Governmental Authorities may approve specific instruments, laws and regulations aimed to enhance and promote their respective national economies or the renewable energy industry (such as, for example, the 2009 American Recovery and Investment Act). Should the terms and conditions of this Agreement either (a) become less competitive as a result of, or (b) prevent Owner from taking full advantage of, any such instruments, laws and/or regulations, Contractor shall use commercially reasonable efforts to negotiate with Owner, in good faith, and implement changes to this Agreement that are necessary or advisable to re-establish the competitive position of this Agreement and allow Owner to take full advantage of any such instruments, laws and/or regulations.

# TAXES

## **Contractor Taxes**

. Contractor shall pay directly, as they become due, any and all Taxes, except Owner Taxes, arising out of or relating to the performance of its obligations hereunder (“**Contractor Taxes**”). For the avoidance of doubt, Contractor Taxes shall include sales or use taxes on the purchase of equipment, materials, parts, tools, consumables, consumable parts, Temporary Work, materials, supplies and other items necessary or appropriate to perform the activities and scope of Services (in the quantity and frequencies) set forth in Exhibit A. Owner shall cooperate with reasonable requests of Contractor in any reasonable efforts by Contractor to seek exemption from, or to minimize, any Contractor Taxes.

## **Owner Taxes**

. All prices reflected in the Agreement shall be inclusive of all applicable Taxes, except Owner Taxes. Owner shall bear all amounts payable for Owner Taxes following receipt from Contractor of an invoice therefor and reasonable documentation supporting the calculation thereof. Contractor shall timely collect and remit to the appropriate Governmental Authority all Owner Taxes, and Owner shall have no liability for any penalties and/or interest associated with the failure of Contractor to timely collect and remit such Owner Taxes to the appropriate Governmental Authority.

## **Cooperation**

.

### Contractor shall cooperate with (and shall cause the Subcontractors to cooperate with) requests by Owner in any efforts of Owner to obtain exemption from, or to minimize, any such Owner Taxes, including bifurcating this Agreement into two (or more) separate agreements and/or adjusting the payment, location of the transfer of title to the Warranted Equipment, or other provisions. Without limiting the foregoing, if Owner provides Contractor with an exemption certificate or other required substantiation of an exemption from any Owner Taxes required by Applicable Law to be invoiced and collected by Contractor, Contractor shall not invoice or collect from Owner any such Owner Taxes exempted.

### Without limiting the generality of Section 15.3.1, at the request of Owner, Contractor shall claim any and all applicable tax exemptions, credits or deductions relating to the Services available to itself or Owner, including any sale-for-resale exemption and any manufacturing machinery and/or equipment exemption.

### Without limiting the generality of Section 15.3.1, in the event that an assessment for any Owner Tax for which Owner previously provided Contractor with an exemption certificate or other required substantiation of an exemption is levied against Contractor, Contractor shall promptly notify Owner and furnish to Owner a copy of such assessment notification. If Owner determines that the assessment should be contested and so notifies Contractor in writing, Contractor shall cooperate with and assist Owner in any such contest or other tax assessment proceeding.

# TITLE AND RISK OF LOSS

##  Title to all Services shall pass from Contractor to Owner as performed. Title to the Warranted Equipment shall pass from Contractor to Owner upon the incorporation of such Project Equipment into the Project. At any time on or after passage of title to any Project Equipment pursuant to this Section 16.1 or any other provision of this Agreement, Contractor shall promptly execute and deliver to Owner such documentation reasonably requested by Owner and sufficient to evidence the passage of title contemplated by this Section 16.1 or any other provision of this Agreement.

## Responsibility for risk of loss to all newly installed Project Equipment shall pass to Owner upon the incorporation of such Project Equipment into the Project; provided that (a) Owner’s assumption of risk of loss does not obviate Contractor’s obligations to correct any Services or Warranty non-conformances in accordance with the provisions of this Agreement and (b) that Contractor shall remain fully responsible for any damage caused by Contractor or any other Contractor Responsible Party.

**ARTICLE 17**

**WAIVER OF CONSEQUENTIAL DAMAGES**

Except as expressly provided in the following sentence, Owner and Contractor waive all claims against each other (and against the Affiliates of each, and their respective members, shareholders, officers, directors, agents and employees) for any consequential, incidental or indirect damages arising out of this Agreement; and, regardless of whether any such claim arises out of breach of contract, guaranty or warranty, tort, product liability, indemnity, contribution, strict liability or any other legal theory, and Owner and Contractor each hereby releases the other and each of such Persons from any such liability, to the extent permitted by the governing law of this Agreement. Notwithstanding the foregoing, the preceding sentence shall not be deemed to limit (a) Contractor’s obligations with respect to matters indemnified hereunder, (b) any other liability of Contractor arising out of or relating to a breach of Section 10.1.7 or Article 12, (c) damages arising from the fraud or willful misconduct of any Party, (d) Losses imposed by any Governmental Authority as a result of Contractor’s breach hereunder, whether or not indemnified by Contractor hereunder, or (e) Contractor’s obligations to pay any Performance Liquidated Damages. The provisions of this Article 17 shall survive the termination or expiration of this Agreement.

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IN WITNESS WHEREOF, this Agreement has been executed and delivered by the duly authorized representatives of Owner and Contractor as of the date first written above.

|  |  |
| --- | --- |
| **[CONTRACTOR]** | **San Diego Gas & Electric Company**: |
|  |  |
|  |  |
|  |  |
| By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| Name:  | Name:  |
| Title:  | Title:  |

**EXHIBIT A**

**Scope of Contractor Services**

**Performance Monitoring**

During the term of the O&M Agreement, Contractor shall monitor system performance via permanently installed Performance Monitoring and Data Collection System that includes internet based communications / alarms. In the event that system performance falls outside of acceptable parameters, Contractor will visit the site within 48 hours, evaluate system performance, and then determine a course of action. Contractor shall notify Owner of any such issues.

**Operation and Maintenance Tasks**

All tasks shall be performed annually except as noted.

**GENERAL CONDITION AND PHYSICAL INSPECTION**

* Verify new and/or existing shade concerns for the photovoltaic array. Inspect panels for defects or damage.
* Weed abatement from array and immediate vicinity as needed, subject to Owner approval.
* Verify that all placards are firmly attached and legible*;* replace as required*.*
* Note any potential safety concerns or fire hazards based on Project HSE rules; correct as required*.*

**INTERMODULE WIRING AND CONNECTIONS**

* Verify condition of inter-module array wiring for aging and corrosion.
* Inspect all array wiring connections to make sure quick connect leads are fully seated into one another.
* Inspect all array wiring to make sure it is secured/dressed properly to the module frame and/or array racking so as not to hang from the underside of the array.

**RACKING CONDITION**

* Verify secure module attachment by random torque test of 100 module attachments.
* Verify condition of racking for corrosion, sagging of rails, etc.
* Verify condition of racking hardware connections, splices, etc.

**BOS COMPONENTS**

* Verify condition of wire transition junction boxes for weatherproofing, corrosion and security of internal wiring connections.
* Verify condition of all DC conduit and connections.
* Verify interior and exterior condition of DC combiner box(es).
* Verify condition of all wall & pad mounted switchgear, meters and inverters for corrosion & security of attachment to wall/structure/pad, etc. Note any new access issues.
* Verify physical condition of all AC conduits and ensure all connections still weather tight.
* Verify condition of dc disconnect(s).
* Verify condition of ac disconnect(s).

**DATA ACQUISITION SYSTEM (DAS)**

* Tightening of all connections.
* Clean pyranometers*.*
* Inspection and lubrication of Wind Sensors.
* Clearing of debris from temperature sensors.
* Confirm that pyranometers are aligned with the plane of the PV array or note if pyranometer(s) cannot be adjusted to match the array.
* Log kwh readings from Inverters and meters, and compare data to monitoring system to verify proper calibration of meters and monitoring system. Note any anomalies in annual report and recalibrate meters as needed.

**ELECTRICAL CONNECTION TORQUE TESTS**

* Torque test all AC and DC power cable terminations 8 AWG or larger from combiner boxes to the point of interconnection.
* Verify ground bond integrity.

**INVERTER MAINTENANCE**

**Perform all maintenance as and when required by the inverter manufacturer, but in all cases perform the following services every six months:**

* Test Operating AC voltage and current at inverter output.
* Calculate power output corrected for temperature and insolation.
* Monitor and note power quality (waveshape and harmonics).
* Measure ground resistance at POC ground. Resistance = ohms
* Check the operation of all inverter safety devices (E-stop, door switches)
* Check appearance/cleanliness of inverter cabinet, ventilation system and all exposed surfaces
* Inspect weather stripping, replace as necessary
* Inspect, clean or replace inverter air filter elements as necessary
* Clean external heat exchange, if equipped
* Check for corrosion on all inverter terminals, cables and enclosure
* Perform a complete visual inspection of inverter internally mounted equipment including: Subassemblies, wiring harnesses, contactors, power supplies and all major components (tighten as necessary).
* Complete thermal scan of inverter connections, wiring and electronics
* Check all inverter fuses
* Check condition of all the inverter AC and DC surge suppressors and MOV's
* Confirm power supply and transformer output
* Check operation of relays and contacts
* Inspect AC and DC fans, replace as necessary
* Check pressure gauges, if equipped, address as necessary
* Confirm the inverter operating modes including Standby, Startup, and Run
* Validate display data accuracy
* Record all operating voltages and current readings via the inverter front display panel
* Record lifetime and instantaneous inverter power output including environmental data
* Record total kWh from CGOM (including multiplier)
* Visual inspection and thermal scan of system electrical components
* Clean fan and heat sink and check for proper cooling during operation*.*
* Note condition of circuit boards and electrical components.
* Verify that all service bulletins have been performed. Note any manufacturer updates that may be available.
* Review Inverter Manufacturer Annual Maintenance Requirements with Owner and address any resulting additional actions.

**INFRARED INSPECTIONS (CONDUCT AS CLOSE TO FULL LOAD AS POSSIBLE)**

* Set baseline IR files for all components.
* Conduct IR inspection of tie‐in/point of connection.
* Conduct IR inspection of inverter(s).
* Conduct IR inspection of combiner boxes.
* Conduct IR inspection of junction boxes.
* Make any repairs as necessary and note any anomalies in the Annual Report.

**ON‐LINE STRING LEVEL TESTS**

* Measure Irradiance (W m/2) and cell temperature.
* Test Operating DC Voltages (Vmp).
* Test Operating DC Currents (Imp) of All Strings.

**FINAL CHECKS**

* Verify all signage still in place.
* Verify one line electrical drawing, maintenance manual, keys, and spare fuses still intact on site.
* Confirm that the system is back on line and that the output is at the expected level.
* Confirm that the monitoring system is in service and functioning properly.

**NOTES:**

1. Take digital photos of arrays and all major system components.
2. Take digital images of any anomalies during thermographic (IR) inspections, if possible.
3. Submit digital images along with checklist and other documentation.

**EXHIBIT B**

**form of reports**

**Reports:**

1. Contractor shall provide a quarterly report that includes:

a. summary of facility condition based on visual inspection

b. summary of planned or forced outages

c. summary of equipment condition based on performance monitoring data

d. summary of kWh production, peak kW, and capacity factor

2. Contractor shall also provide a biannual report that includes:

a. all Quarterly report requirements

b. Inverter maintenance report

1. Contractor shall provide an annual maintenance/inspection report that includes*:*
2. summary of operations;
3. weather and production data;
4. calculation of Actual Annual Energy Output for the period
5. system performance data;
6. reports of any environmental disturbances (e.g. chemical spills)
7. safety/accident reports;
8. summary of additional services, if any;
9. summary of performance test;
10. maintenance and inspection logs; and
11. proposal of actions required to be taken by Contractor or Owner, if any.

**EXHIBIT C.1**

**[Reserved]**

**EXHIBIT C.2**

**IA Requirements**

The Parties agree to add to this Exhibit C.2, without the further action by either Party, the applicable terms and conditions of the interconnection agreement (or similar agreement) for the Project whereby such Project is interconnected to the applicable transmission system. The terms and conditions of the interconnection provider’s tariff applicable to the interconnection service shall also be deemed included.

**EXHIBIT C.3**

**Landowner Requirements**

Per Section 2.11.2, Owner shall have the right to include additional Landowner Requirements by Notice to Contractor containing such requirements. Upon any such Notice being delivered, such Landowner Requirements shall be deemed added to this Exhibit C.3 without further action by the Parties.

**EXHIBIT C.4**

**[Reserved]**

**EXHIBIT C.5**

**Manuals**

The Parties agree to add to this Exhibit C.5, without the further action by either Party, the applicable Manuals developed under the applicable BOT Agreement for the Project.

**EXHIBIT D**

**[Reserved]**

**EXHIBIT E**

**PROJECT DESCRIPTION**

**EXHIBIT F**

**project Site**

The legal description of the Project Site shall be included below:

**EXHIBIT G**

**ENERGY PRODUCTION TEST; POWER OUTPUT TEST**

**Energy Production Guarantee and Energy Production Test:**

The Energy Model developed pursuant to Section 10 of the Technical Specification (Exhibit “F”), which Energy Model shall be developed prior to the conducting of the Acceptance Tests under the BOT Agreement. For purposes of the Energy Model degradation rate of the Project shall not to exceed 0.5% per year.

During the term of the O&M Agreement, Contractor shall annually conduct a 12 month Energy Production Test (as set forth in Section 11.12.10 of the Technical Specification) designed to measure the Actual Energy Production of the Project for such 12 month period. The Energy Production Test shall commence on the first day of the applicable O&M Year.

### Contractor guarantees that the Actual Energy Production of each Project shall equal or exceed ninety percent (90%) of the Expected Energy Production, including all system losses and auxiliary load deductions; and accounting for module degradation (the “Energy Production Guarantee”) (barring acts of God, or vandalism to the system). Note, system energy generation will be measured using the permanent data acquisition system.

Actual Energy Production and Expected Energy Production shall be calculated using the methodology described in Section 11.12.10 and 11.12.11 of the Technical Specification.

Table 1.1 shall be included in the annual report for the Project, showing expected and actual outputs of the Project using historical meteorological data. The Expected Energy Production for the Project will be calculated using the actual meteorological conditions experienced at the Project for the applicable year at the nameplate Project capacity.

**TABLE 1.1 GUARANTEED ENERGY PRODUCTION AT POINT OF CONNECTION**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **YEAR** | **Expected Annual Production (kWhac)** | **90% of Expected Annual Production (kWhac)** | **Actual Annual Production (kWhac)** | **90%0f expected minus Actual****(kWhac)** | **Liquidated Damages Owed****(Y/N)** |
| **1** |  |  |  |  |  |
| **2** |  |  |  |  |  |
| **3** |  |  |  |  |  |
| **4** |  |  |  |  |  |
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| **25** |  |  |  |  |  |

Annual production guarantee is 90% of that shown above in Table 1.1 as calculated by PVSys.

Annual degradation rate used = 0.5%

**Power Output Testing:**

Capitalized terms not otherwise defined in this section shall have the meanings described in Section 11.12.1. of the Tech. Spec. (Exhibit F).

During the months of July or September of each year that the O&M Agreement is in place, Contactor shall perform a Project wide Power Output Test (as described in 11.12.2, 11.12.5, 11.12.6 and 11.12.7 of the Technical Specification) using the permanent Performance Monitoring and Data Collection System. For purposes of clarity, such annual test shall be commenced no later than one week after the scheduled July – September washing. Such Power Output Test shall demonstrate actual Project Power Output and compare it to Power Output Baseline (as determined by the Power Output Test used by the Contractor to achieve Asset Transfer under the BOT Agreement). Primary Instrumentation shall be calibrated no less than five (5) days prior to the commencement of the test. Data point collection intervals will be every fifteen (15) minutes.

Table 2.1 shall be included in the annual report for the Project, showing expected and actual Power Outputs of the Project using historical meteorological data at an assumed nameplate capacity. The actual Power Output Baseline for the Project will be calculated using the actual results of the Power Output Test used by Contractor to achieve Asset Transfer under the BOT Agreement at the nameplate Project capacity.

**TABLE 2.1 INSTANTANEOUS POWER OUTPUT**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **YEAR** | **Expected Power Output (kWdc)** | **Actual Power Output****(kWdc)** | **Expected minus Actual Power Output** **(kWdc)** | **Liquidated Damages Owed****(Y/N)** |
| **1** |  |  |  |  |
| **2** |  |  |  |  |
| **3** |  |  |  |  |
| **4** |  |  |  |  |
| **5** |  |  |  |  |
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| **25** |  |  |  |  |

1st year power output guarantee is 93% of year one as shown in Table 2.1 above.

Annual degradation rate used = 0.5%

**EXHIBIT H**

**[Reserved]**

**EXHIBIT I.1**

**Safety Plan**

**[TO ATTACH SAFETY PLANS FROM SDG&E]**

**EXHIBIT I.2**

**Project Site Rules and Practices**

**[TO ATTACH SAFETY PLANS FROM SDG&E]**

**EXHIBIT J**

**warranty Call-Out Procedures**

The following procedures shall be utilized to administer Contractor’s obligations (1) under the Agreement with respect to Contractor’s administration of the Project Warranties under the applicable Construction Documents; and (2) with respect to its O&M Defect Warranty. Capitalized terms not otherwise defined in this Exhibit “J” shall have the meaning given such terms in Article 1 of the Agreement.

1. **GENERAL WARRANTY PROCEDURES (INCLUDING PROCEDURES**

**RELATING TO EMERGENCIES)**

* 1. When Owner believes that (a) the completed “Work” (or any other items of work, service, equipment, material, design, panel performance, etc.) under the applicable Construction Document is in breach of the applicable Project Warranty; or (b) that the completed Services under the Agreement is in breach of the O&M Defect Warranty (collectively, a “Warranty Claim”), Owner shall notify Contractor’s designated point of contact for warranty claims and submit a completed Part 1 of a Warranty Claim report (“WCR”). A typical WCR is attached to this Exhibit “J”.
	2. Contractor shall acknowledge receipt of the WCR by returning a numbered and dated copy to Owner within two (2) business days. This return of the acknowledgement is not intended to indicate any acceptance or rejection of the Warranty Claim by Contractor.
	3. Based on the information provided by Owner on the WCR form, Contractor shall confirm the applicability of the claimed warranties under the applicable Construction Document or the Agreement (as applicable) to the Warranty Claim described in the WCR. This determination shall consider, at a minimum, if the applicable warranty period is in effect, or if any limitation applies under the terms of the applicable contract. Contractor may schedule a joint inspection with Owner to assess applicability of the claimed warranty. Contractor shall reply to Owner within five (5) business days of receipt of the WCR; and if Contractor fails to do so, then Contractor shall be deemed to have accepted responsibility for the Warranty Claim described in the WCR. This five (5) business day time period may be extended upon mutual agreement with Owner, if reasonably required to complete the investigation of the Warranty Claim.
		1. A rejected WCR shall be returned to Owner so noted and signed stating the basis for the rejection.
		2. If Contractor determines the applicable Warranty Claim is covered by the claimed warranty, Contractor shall identify the party responsible for performing the repair. For purposes of this Warranty Procedure, the responsible party is meant to be the entity responsible for performing the remedy, which may include Contractor, a subcontractor, manufacturer and/or vendor.
	4. Contractor shall establish a plan with Owner and responsible party to perform the necessary repairs, the timing, consent requirements, and content of such plan shall be in compliance with the requirements of the applicable Construction Document, and, with respect to defective Services under the Agreement, such plan shall be presented to Owner with its replay set forth in clause (3) above. After the plan is agreed, Contractor shall complete Part 2 of the WCR and return a signed copy to Owner.
	5. When Contractor determines the Warranty Work is complete it shall submit the WCR to Owner for final sign-off. If Owner does not agree that the Warranty Work was completed in accordance with the terms of the Contract, Owner shall notify Contractor in writing within five (5) business days of receipt of the signed off WCR. Such notification shall clearly state Owner’s reasons and basis for its determination that the Warranty Work was not satisfactorily completed.
	6. Contractor shall maintain, and upon Owner’s request shall deliver to Owner a copy of the log of all WCRs submitted (whether approved or rejected) as follows:
* WCR Number
* Date Received
* Equipment/Component ID Tag
* Contractor’s Reference Number
* Description of Warranty Claim
* If warranty claim is made with respect to a warranty under a Construction Document, the applicable Construction Document to which such warranty claim relates
* Disposition (Accepted or Rejected)
* Responsible Party
* Date Responsible Party Notified
* Owner’s Spare Parts Used
* Start Date for Repairs
* Date Returned to Service
* Date Owner was Notified of Disposition
* Owner’s Work Authorized (*if applicable*)
	1. All Warranty Work performed by Contractor on any Project Equipment shall be conducted under the terms and conditions of the applicable Construction Document. Nothing herein shall be deemed to modify the term or conditions with respect to any warranty period under any Construction Document.
	2. In no event shall Owner resolve a warranty dispute with a manufacturer or vendor without Contractor’s prior agreement; provided, however, Owner may contract with any manufacturer or vendor to perform any disputed Warranty Work, so long as such contract does not prejudice Contractor’s rights against such vendor concerning such dispute.
	3. Where Owner determines an emergency exists, Owner may perform all re-design, repurchase, repair or replacement so as to cause such Work (or other items of work, service, equipment, material, design, panel performance, etc.) or Services (“Warranty Work”) in accordance with (a) the applicable Construction Document (with respect to warranty claims made under a Construction Document) or (b) the Agreement, with respect to the Services, in each case, after providing verbal notification to Contractor’s designated point of contact for Warranty Claims. Owner shall provide a completed WCR to Contractor within five (5) business days following notification of the emergency. Contractor reserves its right to investigate and determine the eligibility of such Warranty Claims. An “emergency” is a situation when there is a threat of imminent harm to persons or property or where the basis of the Warranty Claim materially and adversely affects the performance of the applicable Project.
1. **PROCEDURES WHERE OWNER HAS A RIGHT TO PERFORM WARRANTY WORK.**
2. When Owner has agreed or is permitted in accordance with the terms of the applicable Construction Documents and/or the Agreement to take corrective action, and upon notifying Contractor as required under the applicable Construction Document and/or the Agreement, Owner may undertake corrective action, but Contractor reserves its right to investigate and determine the eligibility of such Warranty Claims, and the following shall apply:
	* 1. Owner shall provide a failure report to Contractor, which failure report shall contain technical and logistical information sufficiently detailed to enable Contractor to assess the applicable defect and to evaluate appropriate corrective action.
		2. Warranty Claims for which Owner seeks reimbursement shall include the following documents:
	1. a reasonably descriptive failure report;
	2. list of equipment or materials purchased or used in accomplishing the repair and subcontractors hours applicable to each claim, and a copy of any internal work orders or purchase orders prepared in connection with each such claim; and
	3. copies of invoices received or prepared for costs and expenses claimed.
		1. Warranty Work performed by Owner under a Warranty Claim shall be billed on a time and material basis and shall be defined as the sum of the following:

(i) the product of 115% of the normal hourly wage (including fringe benefits, insurance and taxes, but excluding overhead) Owner or an affiliate pays each of its employees multiplied times the number of hours such employee performs work in connection with such warranty claim; and

(ii) 115% of the actual purchase price paid by Owner or an affiliate to a third party for the materials or supplies incorporated or consumed in connection with the Warranty Work;

(iii) With respect to Warranty Work performed by a subcontractor (other than an entity which directly or indirectly controls, is controlled by, or is under common control with, Owner, Warranty Work performed by any such entity being deemed Warranty Work performed by Owner through its own employees for purposes of this definition), 115% of the actual amount paid by Owner to subcontractor for such Warranty Work; and

* + 1. All Warranty Claims where Owner has independently undertaken corrective action that are submitted to Contractor on or before the last day of each month shall be paid by Contractor by the last day of the following calendar month.
		2. Accounting settlement between Owner and Contractor due to Warranty Claims shall occur on a quarterly basis.
		3. Owner shall maintain adequate records to support all warranty claims for one (1) year and allow Contractor to audit warranty claims upon not less than thirty (30) calendar days notice.

**PROJECT**

**WARRANTY CLAIM REPORT**

**WCR No. \_\_\_\_\_\_\_\_ Part 1 of 2**

**Part 1 - To be completed by Owner**

Project:

Unit No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Equipment/Component ID Tag No. \_\_\_\_\_\_\_\_\_\_\_\_\_

Description of Problem/Justification for Warranty Claim:

Description of Construction Document and/or Provision of Agreement applicable:

Additional Attachments ? Yes / No

List Attachments:

Parts Available From Owner ? Yes / No if Yes, Parts List Attached ? Yes / No

Maintenance History Attached ? Yes/No

Operating Data Attached ? Yes/No

Investigation Performed By Owner Prior To WCR Submittal ? Yes / No

Explanation of Investigation:

Emergency Work Performed By Owner ? Yes/No Work Order No. \_\_\_\_\_\_

Explanation of Emergency:

Owner Elects to Defer Warranty Work Until: \_\_\_\_\_\_\_\_\_\_

Date WCR Submitted to Contractor: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Owner Authorized Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**PROJECT**

**WARRANTY CLAIM REPORT**

**WCR No. \_\_\_\_\_\_\_\_ Part 2 of 2**

**Part 2 - To be completed by Contractor**

WCR Received: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Contractor Acknowledgement Signature \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Contractor Warranty Applicable ? Yes / No if No, Explanation of Contractor Rejection:

Contractor Authorization Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date Warranty Work Starts: \_\_\_\_\_\_\_\_\_\_\_\_

Responsible Party: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Work Plan:

Owner Acceptance ? Yes / No

Owner Authorized Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_

Contractor Authorizes Owner to Perform Work ? Yes / No

Special Instructions:

Date Warranty Work Completed: \_\_\_\_\_\_\_\_\_\_\_\_\_

Contractor Comments:

Attachments ? Yes / No

Warranty Extension Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (*if applicable*)

Contractor Authorized Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: \_\_\_\_\_\_\_\_\_\_\_

Owner Accepts Warranty Work - WCR Closed ? Yes / No

Owner Authorized Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date \_\_\_\_\_\_\_\_\_\_\_\_\_

**EXHIBIT K**

**Energy Model**

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**EXHIBIT L**

**Contractor’s standard rate schedule**

**EXHIBIT M**

**form of invoice**

Within thirty (30) days after the Effective Date of this Agreement, Contractor shall provide a form of invoice meeting the requirements contained in this Agreement, including, without limitation, those requirements specified in Section 4.2 and those reasonable requirements of Owner’s account payable department.