TURNKEY

ENGINEERING, PROCUREMENT AND CONSTRUCTION

AGREEMENT

FOR

SOLAR PHOTOVOLTAIC GENERATING FACILITY

BETWEEN

EL PASO ELECTRIC COMPANY,

as Owner

AND

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

as Contractor

Dated as of \_\_\_\_\_\_\_\_\_\_\_ \_\_\_, 2019

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TURNKEY ENGINEERING, PROCUREMENT AND CONSTRUCTION

AGREEMENT

FOR

SOLAR PHOTOVOLTAIC GENERATING FACILITY

**THIS TURNKEY ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT FOR SOLAR PHOTOVOLTAIC GENERATING FACILITY** (this “Agreement”), dated as of \_\_\_\_\_\_\_ \_\_\_, 2019 (the “Effective Date”), is by and between **El Paso Electric Company**, a Texas corporation (“Owner”) and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_ corporation (“Contractor”).

W I T N E S S E T H:

**WHEREAS**, Owner wishes to construct, own and operate a \_\_\_ MWac (approximately \_\_\_\_ MWdc depending on final design engineering) solar photovoltaic generation facility and all services and utilities related thereto as described in Appendix A, all to be built on the Site (as defined herein) located in Las Cruces, New Mexico;

**WHEREAS**, Contractor has represented that it is experienced and qualified in providing technical assistance, licensing, engineering, procurement, supply, construction management, construction, commissioning, start‑up and testing services, and that it possesses the requisite expertise and resources to complete the Work (as defined herein);

**WHEREAS**, Contractor has agreed to provide, through itself or through Subcontractors and Vendors (as such terms are hereinafter defined), such Work on a “turnkey” basis for the Contract Price (as defined herein); and

**WHEREAS**, Contractor has agreed to guarantee the timely and proper completion of the Work in strict accordance with the terms and conditions hereinafter set forth.

**NOW, THEREFORE**, in consideration of the foregoing premises, the mutual promises and covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Owner and Contractor hereby agree as follows:

# **GENERAL MATTERS**

## **Defined Terms**

As used in this Agreement, including the appendices, exhibits and other attachments hereto, capitalized terms used in this Agreement shall have the meanings assigned to them in the document or as set forth in Schedule 1 unless the context otherwise requires.

## **Interpretation**

Unless the context of the Contract Documents otherwise requires:

### The headings contained in this Agreement are used solely for convenience and do not constitute a part of this Agreement between the Parties, nor should they be used to aid, to construe or to interpret this Agreement;

### The gender of all words used herein shall include the masculine, feminine and neuter and the number of all words shall include the singular and plural words;

### The terms “hereof”, “herein” “hereto” and similar words refer to this entire Agreement and not to any particular Article, Section, Appendix or any other subdivision of this Agreement;

### References to “Article,” “Section,” “Appendix” or “Exhibit” are to this Agreement unless specified otherwise;

### Reference to “this Agreement” (including any Appendix hereto) or any other agreement, Exhibit, permit or document shall be construed as a reference to such agreement or document as the same may be amended, modified, supplemented or restated, and shall include a reference to any document which amends, modifies, supplements or restates, or is entered into, made or given pursuant to or in accordance with its terms;

### Unless otherwise expressly stated, references to any law, statute, rule, regulation, notification or statutory provision (including Applicable Laws, Applicable Permits and the Operating Guidelines) shall be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or re‑enacted;

### References to any Person shall be construed as a reference to such Person’s successors and permitted assigns; and

### References to “includes,” “including” and similar phrases means “including, without limitation.”

## **Appendices**

The following Appendices are attached to and incorporated into and made a part of this Agreement:

Appendix A‑1 Scope of Work

Appendix A‑2 Technical Specifications

Appendix B Critical Path Schedule Requirements

Appendix C‑1 Approved Subcontractors

Appendix C‑2 Assigned Warranties of Subcontractors

Appendix D Forms of Certificates

Appendix E‑1 Module Warranty

Appendix E‑2 Tracker Warranty

Appendix E‑3 Inverter Warranty

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Appendix T Surveys, Geotechnical Reports, Cultural and Endangered Species Studies

Appendix U Performance Test Protocol

## **Order of Precedence**

### In the event of conflicts among the terms of the Contract Documents, interpretations shall be based upon the following Contract Documents which are set forth in ranked order of precedence:

#### amendments, addenda or other modifications to the Contract Documents (including Change Orders) duly signed and issued after the signing of this Agreement and effected in accordance with the terms hereof, with those of a later date having precedence over those of an earlier date;

#### this Agreement; and

#### the Appendices to this Agreement;

### Section 1.4.1 notwithstanding:

#### The Scope of Work as described in Appendix A‑1 shall control over this Agreement in the event of any conflict between the two specifically with respect to the description of the Work to be done or the methods by which the Work is to be done; and

#### the order of precedence in Section 1.4.1 shall be utilized to resolve a conflict only after commercially reasonable efforts have failed to reconcile the allegedly conflicting provisions.

### In the event of a conflict among, or within, any other Contract Document(s) within any one of the levels set forth in the order of precedence in Section 1.4.1, or between the Contract Documents and Applicable Laws or Applicable Permits, or among Applicable Laws or Applicable Permits themselves, the more stringent or higher quality requirements shall control. All obligations imposed on Contractor and each Subcontractor under this Agreement or under Applicable Laws, Applicable Permits or Applicable Standards and not expressly imposed or addressed in the Contract Documents shall be in addition to and supplement the obligations imposed on Contractor under the Contract Documents, and shall not be construed to create an “irreconcilable conflict.”

# **RETENTION OF CONTRACTOR**

## **Retention of Contractor**

Owner hereby engages Contractor, and Contractor hereby agrees to be engaged by Owner, to perform the Work in accordance with the terms and conditions set forth herein.

## **Status of Contractor; No Partnership**

Contractor shall be an independent contractor with respect to any and all Work performed and to be performed under the Contract Documents. The Contract Documents shall not be interpreted or construed to create an association, joint venture or partnership relationship among or between the Parties or any similar relationship, obligations or liabilities. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, act on behalf of, or to act as or be an agent or representative of, or to otherwise bind or obligate the other Party.

## **Subcontractors and Vendors**

### Subject to Section 2.3.2, Contractor shall have the right to have any portion of the Work performed by a Subcontractor or Vendor qualified to perform such Work pursuant to written subcontracts or written purchase orders; provided that Contractor shall not be relieved from any liability or obligation under the Contract Documents. Except as otherwise expressly provided in the Contract Documents, Contractor shall be solely responsible for engaging, managing, supervising and paying all such Subcontractors and Vendors. Contractor shall require that all Work performed, and all Equipment provided by Subcontractors and Vendors are received, inspected and otherwise furnished in accordance with all Applicable Permits and the Contract Documents. Contractor shall be liable for all acts, omissions, liabilities and Work (including Defects therein) of such Subcontractors and Vendors. Owner shall not have any obligation or liability to any Subcontractor or Vendor. Nothing in any contract, subcontract or purchase order with any Subcontractor or Vendor shall in any way diminish or relieve Contractor from any duties and obligations under the Contract Documents. No Subcontractor or Vendor is intended to be or shall be deemed a third‑party beneficiary of the Contract Documents. Subcontractors may not in turn assign responsibilities under the subcontract. Vendors may not assign responsibilities under purchase orders. Owner has approved the use of the Subcontractors identified on Appendix C‑1. Contractor shall notify Owner in writing prior to retaining any additional Subcontractor that it expects to pay in excess of ONE HUNDRED THOUSAND DOLLARS ($100,000), together with a description of the portion of the Work proposed to be performed by it. Within five (5) Business Days after receipt of such notice and information, Owner shall advise Contractor if the additional proposed Subcontractor is unacceptable. If Owner fails to object to the additional proposed Subcontractor within such five (5) Business Day period, Contractor may retain such Subcontractor for the portion of the Work proposed. If Owner objects in writing (stating with reasonable detail the basis for such objection) within such five (5) Business Day period to the additional proposed Subcontractor, Contractor shall not retain such proposed Subcontractor. If Contractor disagrees with Owner’s objection, it shall promptly notify Owner. If the selection of a new Subcontractor results in costs for the portion of the Work completed by such Subcontractor that exceed both the cost that would have been incurred to the proposed Subcontractor to which Owner objected, and Contractor’s budgeted amount for the portion of the Work covered by the related subcontract, then Contractor shall submit a Change Order in accordance with Section 6.1 before the new Subcontractor is selected and the Parties will follow the procedures applicable to Change Orders. Contractor shall not change or replace any Subcontractor identified on Appendix C‑1 without the prior written approval of Owner, which approval shall not be unreasonably withheld or delayed. Effective as of the Final Acceptance Date, Contractor hereby assigns to Owner, and Owner hereby accepts, all of Contractor’s right, title and interest in and to each of the warranties of the Subcontractors, copies of which are set forth in Appendix C‑2, in each case free and clear of any Liens (collectively, the “Assigned Warranties”).

### Each subcontract and purchase order shall require such Subcontractor and Vendor to assume toward Contractor those terms and conditions of contracting which Contractor customarily includes in its subcontracts. At a minimum, all subcontracts shall be in writing and shall require the Subcontractors to comply with Applicable Laws and Applicable Permits, shall provide that Owner has the right of inspection as provided hereunder and require such Subcontractors and Vendors to:

#### Be subject to the labor obligations hereunder as well as the safety and security provisions of the Contract Documents;

#### Provide guarantees and warranties with respect to its portion of the Work and the Equipment on terms substantially similar to those required hereunder,

#### Provide certificates of insurance as set forth herein; and

#### Be subject to the dispute resolution procedures as required herein.

All Subcontractors shall be licensed and bonded in accordance with New Mexico law. All subcontracts shall preserve and protect the rights of Owner.

# **CERTAIN OBLIGATIONS AND RESPONSIBILITIES OF CONTRACTOR**

## **Scope of Work; Applicable Standards**

### Contractor shall, at its own cost and expense:

#### Design, engineer, procure, construct, start up, and carry out the Tests for the Plant, and perform its other obligations hereunder, including completion of the Project as set forth in Appendix A, and any warranty work hereunder; and

#### Manage, supervise, inspect and furnish all Labor, Equipment, Contractor Equipment, temporary structures, temporary utilities, products and services for the foregoing, all on a turnkey basis, in accordance with the Contract Documents, including, without limitation, the Critical Path Schedule and the Scope of Work, as the same may be modified from time to time in accordance with the terms hereof by a Change Order or other amendment hereto (all of the foregoing in clauses (a) and (b) being collectively referred to in this Agreement as the “Work”).

### Subject to the remedies provided for herein, Contractor shall perform the Work and turn the Plant over to Owner in a manner that is:

#### Sufficient, complete and adequate in all respects and free from Defects;

#### In conformance with the professional standards and skill, and expertise and diligence of design and construction, of professionals regularly involved in utility grade, utility‑scale, grid‑connected solar photovoltaic power projects in the United States;

#### In compliance with the terms of the Contract Documents, the Operating Guidelines, the Utility’s interconnection requirements, all Applicable Laws, Applicable Standards and Applicable Permits; and

#### Approved as to form, use and content by all Government Authorities and private entities authorized to administer or enforce any building or construction code or standard whose approval of the final design of the Plant, or any portion thereof, is necessary for the construction, operation or interconnection of the Plant.

### In light of the foregoing, Contractor has included within the Contract Price the cost to complete the entire Scope of Work. Items need not be specifically listed in the Contract Documents or in Appendix A‑1, in order to be deemed to be items within the Scope of Work. It is understood that Contractor is better qualified to list exclusions than Owner is to list inclusions. Therefore, any item indicated on the Contract Documents, inferable therefrom, incidental thereto or required in accordance with any Applicable Law, Applicable Standards, Applicable Permits or Prudent Utility Practices in existence as of the Effective Date, that is not specifically excluded from the Scope of Work in Contractor’s exclusions set forth on Appendix A‑1, is to be considered as part of the Scope of Work. In addition, the Scope of Work includes all that should be properly included and all that would be customarily included within the general scope and magnitude of the Work in order to achieve the Final Acceptance Performance Level applicable to the Project. As a result, except for Contractor’s exclusions set forth on Appendix A‑1, Contractor hereby waives any and all claims for an increase in the Contract Price or an extension of the Guaranteed Commercial Delivery of Power Date, Guaranteed Final Acceptance Date or the Outside Completion Date based, in whole or in part, upon an assertion that any certain license, permit, technical assistance, engineering, assembly, construction, service, labor, material, equipment, operation or management is beyond the Scope of Work when such license, permit, technical assistance, engineering, assembly, construction, service, labor, material, equipment, operation or management is indicated in the Contract Documents, the Drawings or other instruments of service prepared in connection with the Contract Documents, inferable therefrom, incidental thereto, required in accordance with any Applicable Law, Applicable Standards, Applicable Permits, Prudent Utility Practices in existence as of the Effective Date, or otherwise necessary in order to complete a Project in accordance with and subject to the requirements of the Contract Documents. Without limiting the generality of the foregoing, Contractor shall not be entitled to a change in the Contract Price if tariffs or duties are imposed on the photovoltaic solar panels used for the Project by any Government Authority.

### Contractor shall perform the Work in conformance with the professional standards and skill, and expertise and diligence of design and construction, of professionals regularly involved in utility grade, utility‑scale, grid‑connected solar photovoltaic power projects for public utilities in the United States. Without limiting the generality of the foregoing, Contractor shall:

#### Comply with, and shall cause the Work and all components thereof to comply with, the Operating Guidelines, Applicable Laws, Applicable Standards, Applicable Permits, Prudent Utility Practices, the requirements of the Contract Documents and the generally accepted standard of care, skill and diligence as would be provided by, in the case of engineering services, a prudent engineering firm, and in the case of construction or procurement services, by a prudent construction firm, in each case experienced in supplying such services in the United States to power‑producing entities for utility‑grade, major power projects;

#### Cause the Work to be performed with Contractor’s best skill and judgment, in a safe, expeditious, good and workmanlike manner in accordance with the preceding paragraph (a);

#### Cause the Work to be approved as to form, use and content by all Government Authorities and private entities authorized to administer or enforce any building or construction code or standard whose approval of the final design of the Project, or any portion thereof, is necessary for the construction or operation of the Project;

#### Cause the Plant to be designed to operate, and shall cause the Plant to be capable of being operated, at all levels and operating modes in accordance with the Operating Guidelines, Applicable Laws, Applicable Standards, Applicable Permits, Prudent Utility Practices and the requirements of the Contract Documents; and

#### Cause the Plant and all items of Equipment and improvements comprising the Plant to be designed, manufactured, installed, calibrated and tested where applicable in accordance with the published codes and standards (as in effect from time to time) of the organizations listed in the Scope of Work and Contractor shall notify Owner of any codes and standards of such organizations that are inconsistent with each other and advise Owner of the manner in which it intends to resolve such inconsistency in accordance with the published standard.

Contractor shall inspect or cause to be inspected all items to be incorporated into or used in the performance of the Work and shall reject those items determined not to be in compliance with the requirements of the Contract Documents. Except as otherwise expressly provided in this Agreement, the standard of performance set forth in this Section 3.1.4, shall apply to all aspects of the Work, and this Section 3.1.4, shall be deemed to be incorporated by reference into each provision of the Contract Documents describing the Work, Contractor’s obligations hereunder, or referring to the “requirements of the Contract Documents”, “in accordance with the Contract Documents” or words of similar effect. In no event will references in any provision of Contract Documents to one or more of the codes, standards, guidelines, practices, regulations, laws, or permits contained in this Section 3.1.4, be interpreted to limit in the applicability of all such standards, guidelines, practices, regulations, laws, and permits to such provision. Additionally, as a condition to meeting Final Acceptance, the Work must be completed in accordance with all of the codes, standards, guidelines, practices, regulations, laws, and permits contained in this Section 3.1.4.

### Contractor acknowledges that this Agreement constitutes, subject to the terms hereof, a fixed price obligation to:

#### Engineer, design, procure, permit, construct, test and start up by the Guaranteed Commercial Delivery of Power Date and the Guaranteed Final Acceptance Date (as applicable) a turnkey Project, complete in every detail, within the time and for the purpose designated herein;

#### Achieve Commercial Delivery of Power and Final Acceptance within the times designated herein;

#### Comply with all of the warranty obligations set forth in this Agreement; and

#### Perform Contractor’s other obligations hereunder.

References to the obligations of Contractor under this Agreement as being “turnkey” and performing the Work on a “turnkey basis” means that Contractor is obligated to supply all of the Equipment and design services, install all of the Equipment, supply all labor and supply and perform all of the Work, in each case as may reasonably be required, necessary, incidental, or appropriate (whether or not specifically set forth in this Agreement) to complete the Work such that the Project satisfies the applicable terms, conditions, and Contractor’s obligations concerning the Final Acceptance Performance Level and other guarantees and requirements set forth in this Contract Documents, all for the Contract Price (except where expressly indicated).

## **Control and Method of the Work**

### Subject to the terms hereof, Contractor shall be solely responsible for performing or causing to be performed the Work in accordance with the terms of the Contract Documents, and for all means, methods, techniques, sequences, procedures, and safety and security programs in connection with such performance. Contractor shall inform Owner in advance concerning its plans for carrying out the Work, by submitting construction plans. Contractor shall prepare the construction plans (including construction time schedules) and submit such plans to Owner for approval on or before the date specified thereof in Appendix B. Owner shall have fifteen (15) Business Days to respond to Contractor regarding the existence of any material issues in the construction plans prepared by Contractor, and the unexcused failure of Owner to do so will result in an Owner Caused Delay. Any approval by Owner of such construction plans shall in no way relieve Contractor of any of its obligations or responsibilities hereunder. Notwithstanding the foregoing, all of the construction plans set forth in Appendix G‑1 have been approved by Owner.

### Without limiting the express obligations of Contractor hereunder, whenever the words “as ordered,” “as directed,” “as required,” “as permitted,” “as allowed,” “approved,” “reasonable,” “suitable,” “acceptable,” “properly,” “satisfactory,” or words or phrases of similar effect and import are used, it shall be understood that none of such terms shall imply that Owner has any authority over, right to control or responsibility for supervision of Contractor or its Subcontractors or Vendors, such supervision (including sole control over and responsibility therefor) being strictly reserved for Contractor. Any method of Work suggested by Owner that is used by Contractor will be used at the risk and responsibility of Contractor, and Owner will assume no responsibility therefor.

### Contractor shall perform the Work in a manner designed to protect the environment on and off the Job Site and minimize damage or nuisance to Persons and property of the public or others, including damage or nuisance resulting from pollution, noise, traffic, dust, or other causes arising as a consequence of methods of construction or operation of the Plant.

## **Certain Matters Pertaining to Job Site**

### Contractor acknowledges that, prior to the date of this Agreement, Contractor:

#### Has made a complete and careful examination of the Job Site and the surrounding areas, any reports provided by Owner, and other information set forth in the Contract Documents;

#### Has made a complete and careful examination to determine the difficulties and hazards incident to the performance of the Work, including:

##### The location of the Project;

##### The proximity of the Project to adjacent facilities and structures;

##### The conditions of the roads and waterways in the vicinity of the Job Site, including the conditions affecting shipping and transportation, access, disposal, handling and storage of materials;

##### The nature and character of the soil, terrain, surface and sub‑surface conditions of the Job Site;

##### A survey of the Site, performed by Contractor;

##### The labor conditions in the region of the Job Site;

##### Applicable Laws and Applicable Permits;

##### Rights of Owner regarding the Job Site as set forth herein;

##### The local weather conditions based upon previous weather data; and

##### All other known matters and other matters that Contractor should know under Applicable Standards that might affect Contractor’s performance under this Agreement or the design, engineering, procurement, construction, start‑up, demonstration and testing of the Plant; and

#### Has determined to Contractor’s satisfaction the nature and extent of such difficulties and hazards.

### Where Owner has made investigations of sub‑surface conditions in areas where Work is to be performed under this Agreement, such investigations are made by Owner for the purpose of study and conceptual design of the Project. The interpretation of such records shall be the sole responsibility of Contractor. Owner assumes no responsibility whatsoever with respect to the sufficiency or accuracy of such investigations, the records thereof, or of the interpretations set forth and there is no warranty or guarantee, either express or implied, that the conditions indicated by such investigations or records thereof are representative of those existing throughout such areas, or any part thereof, or that unforeseen developments may not occur, or that materials other than or in proportions different from those indicated may not be encountered.

### In light of the foregoing, Contractor accepts the Job Site in its existing condition and waives any right to additional compensation beyond the Contract Price or an extension of the Guaranteed Commercial Delivery of Power Date, the Guaranteed Final Acceptance Date or the Outside Completion Date, and any other claims that may arise due, in whole or in part, to errors or omissions in, or inconsistencies among, the Contract Documents and any information provided in connection with the Project.

## **Owner Access to Job Site**

Subject to Contractor’s safety policies, Owner shall have the right to have access to the Job Site and the Work, and to have representatives on the Job Site. In addition, Contractor shall provide reasonable access to the Job Site and the Work at all times to Owner, Owner’s other contractors, the Independent Engineer and their respective employees, representatives, agents and consultants, subject to Contractor’s Job Site rules and safety policies.

## **Inspection and Testing of Work in Progress**

### Each item of Equipment to be supplied by Contractor shall be subject to inspection and testing during and upon completion of its fabrication and installation in accordance with the provisions of the Scope of Work. Without limiting the foregoing, Contractor shall be responsible for inspection and testing of the Equipment in accordance with Applicable Standards, at Contractor’s sole expense. All Equipment, or any component thereof, to be supplied by Contractor or its Subcontractors that is to comprise, be a part of or be incorporated into, the Plant shall be (a) new, (b) in good condition and (c) fit for the use(s) for which it is employed by Contractor or its Subcontractors. The Equipment shall at all times be maintained, inspected and operated as required by Applicable Laws, consistent with Industry Standards and in accordance with, and in a manner that does not void, any manufacturer’s or supplier’s warranties (including any warranties of Subcontractors). Contractor further agrees that all licenses, permits, registrations and certificates or other approvals required by Applicable Law or any Government Authority shall be procured and maintained for the Equipment at all times during the use of the same by Contractor or its Subcontractors in the performance of any of Contractor’s obligations under this Agreement. Contractor shall, as a requirement of Final Acceptance, (i) deliver to Owner invoices (redacted to the extent necessary) or other documentation evidencing Contractor’s proof of purchase of the Equipment and (ii) submit completed warranty cards for the Equipment to the original equipment manufacturers.

### Contractor shall perform inspection, expediting, quality surveillance and all other services as are required for performance of the Scope of Work. Contractor shall perform such detailed inspection of Work in progress at intervals appropriate to the stage of construction of the Project as is necessary to ensure that such Work is proceeding in accordance with this Agreement and the Contract Documents and to protect Owner against Defects and deficiencies in such Work. Reasonably prior to the time Contractor or its representative intends to inspect or test a portion of the partially completed Plant, Contractor shall notify Owner in writing of the date and time of the inspection. With respect to any inspection that Owner chooses not to attend, Contractor shall:

#### Keep Owner informed in all material respects of the inspection or test; and

#### Advise Owner of any deficiencies revealed through such inspections or tests and of the measures proposed by Contractor to remedy such deficiencies.

## **No Waiver of Responsibility**

No inspection made, acceptance of Work, payment of money or approval given by Owner or the Independent Engineer shall relieve Contractor of its obligations for the proper performance of the Work in accordance with the terms hereof. Subject to the limitations of ARTICLE 12, Owner may reject any Work with Defects or which is not in accordance with the requirements of the Contract Documents. No approval given by Owner, in and of itself, shall be considered as an assumption of risk or liability.

## **Defective Work**

### Contractor shall at its own cost and expense correct or replace any Work that contains a Defect or is not otherwise in accordance with the Contract Documents, as provided in this Agreement. Equipment that has been replaced, if situated on the Job Site, shall be removed by Contractor from the Job Site at Contractor’s own cost and expense.

### Contractor shall correct any and all deficiencies as required by the Contract Documents notwithstanding any actual or possible legal obligation or duty of a Subcontractor concerning same and nothing contained in this Section shall modify Contractor’s obligation to achieve Final Acceptance in accordance with the Contract Documents.

## **Clean‑Up**

### Contractor shall at all times keep the Job Site reasonably free from waste, rubbish and Hazardous Material, other than Pre‑Existing Hazardous Material, relating to its Work, in accordance with Section 3.15. Contractor shall maintain the Job Site in a neat and orderly condition throughout the performance of the Work. Contractor shall act to limit the production of dust at or near the Job Site.

### Prior to the Final Acceptance Date or as soon as practicable after the termination of this Agreement by Owner in accordance with the provisions of ARTICLE 15, whichever is earlier, Contractor shall:

#### Remove all Contractor Equipment from the Job Site (other than equipment, supplies and materials necessary or useful to the operation or maintenance of the Plant and Equipment and equipment, supplies and materials directed by Owner to remain at the Job Site until completion of the Plant);

#### Tear down and remove all temporary structures on the Job Site built by it or its Subcontractors and restore such areas to a condition consistent with that of a newly constructed solar photovoltaic power plant, except as required by Applicable Law, Section 3.15.3, or any other provision of this Agreement; and

#### Remove all waste, rubbish and Hazardous Material from and around the Job Site in accordance with Section 3.15.

## **Obtaining, Maintaining and Identifying Permits**

### Contractor shall timely obtain, renew and maintain all Applicable Permits, at Contractor’s sole cost. Contractor shall deliver to Owner evidence that the Applicable Permits necessary to begin construction of the Plant have been received by Contractor or, if any such required Permit has not actually been issued, that it has been approved for issuance, or in the opinion of Contractor, will be approved for issuance.

### All Applicable Permits shall be issued in the name of Owner unless otherwise required by Applicable Law or such Applicable Permit. Where a Permit cannot be issued in Owner’s name, Contractor shall execute an appropriate assignment in blank. If any Applicable Permit (or application therefor) is in the name of Owner or otherwise requires action by Owner, Owner shall, upon the request of Contractor, sign such application or take such action as reasonably appropriate.

## **Labor**

### *General*. Contractor shall be responsible for retaining all Labor necessary for it to perform its obligations hereunder and comply with the provisions hereof, all in accordance with Applicable Laws. Contractor shall be responsible for all costs incurred in complying with this Section 3.10, or otherwise associated with its Labor, including costs incurred by any member of its Labor, whether by direct contract or subcontract, for medical treatment, transport and accommodation as a result of injuries or illness arising from engagement or employment in the execution of the Work.

### *Engagement of Labor*. Contractor shall make its own arrangements for the engagement of all Labor sufficient to perform the Work under the Contract Documents. Contractor shall employ in the performance of the Work Only Labor, whether supervisors, skilled workers or laborers, who are competent to perform their assigned duties in a safe and secure manner and shall use all reasonable efforts to cause its Subcontractors and Vendors to adhere to the same standard with respect to their Labor. Contractor agrees, where required by Applicable Law, to employ only licensed personnel in good standing with their respective trades and licensing authorities to perform engineering, design, architectural and other professional services in the performance of the Work. All such professional services shall be performed with the degree of care, safety, skill and responsibility customary among such licensed personnel. All Labor shall have received formal documented training, to the extent required by Applicable Standards, in their area of expertise and, if applicable, certification.

### *Alcohol and Drugs*. Contractor shall implement and enforce the drug and alcohol programs set forth in its Health Plan and Safety Plan.

### *Arms and Ammunition*. Contractor shall at all times assure that the Job Site is kept free from arms and ammunition.

### *Disorderly Conduct*. Contractor shall be responsible for the conduct and deeds of its Labor and its Subcontractors’ Labor relating to the Contract Documents and/or on the Job Site, and the consequences thereof. Contractor shall at all times take all reasonable precautions to prevent any unlawful, riotous or disorderly conduct by or among such Labor and for the preservation of peace, protection and safety of Persons and property in the area of the Job Site against the same.

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

### *Personnel Documents*. Contractor shall ensure that all its personnel and personnel of any Subcontractors or Vendors performing the Work are, and at all times shall be, in possession of all such documents (including visas, driver’s licenses and work permits) as may be required by all Applicable Laws.

### *Replacement*. Within two (2) Business Days after written request by Owner, remove from the Site and performance of the Work, and cause any Subcontractor to remove from the Site and performance of the Work, and as soon as reasonably practicable, replace, any Contractor or Subcontractor personnel performing the Work (including any of the Key Personnel) in the event Owner reasonably believes that any such personnel poses a material risk of either: (a) non-achievement of a Milestone; or (b) material non-performance by Contractor of the Work in accordance with this Contract. In the event Owner believes that any such personnel poses a safety hazard, Owner may require that such personnel be removed immediately.

### *Screening Measures*. Contractor shall comply with all applicable labor and immigration laws that are relevant to Contractor’s Work under this Agreement, including the Immigration Reform and Control Act of 1986 and Form I‑9 requirements. Contractor shall perform all required employment eligibility and verification checks and maintain all required employment records. Contractor acknowledges and agrees that it is responsible for conducting adequate screening of its employees and agents prior to starting the Work. By providing an employee or Subcontractor under this Agreement, Contractor warrants and represents that it has completed the screening measures with respect to such employee or Subcontractor and that such screening measures did not reveal any information that could reasonably be expected to adversely affect such employee’s or Subcontractor’s suitability for employment or engagement by Contractor or competence or ability to perform duties under this Agreement. In all circumstances, Contractor shall ensure that the substance and manner of any and all screening measures performed by Contractor pursuant to this Section 3.10.9 conform to Applicable Law.

## **Project Management and Contractor’s Representative**

### Project Management. Contractor has designated a management team as set forth on Appendix H, and any future members of the management team must be approved by Owner in writing prior to his designation, which approval shall not be unreasonably withheld. During the performance of the Work from the Initial Site Mobilization and thereafter, Contractor shall maintain continuously at the Job Site adequate management, supervisory, administrative, security and technical personnel, including the Contractor Project Manager, to ensure expeditious and competent handling of all matters related to the Work, according to its determination of the staffing required for this purpose. Contractor will not re‑assign, remove or replace the Contractor Project Manager without Owner’s prior written consent, which consent shall not be unreasonably withheld. Contractor shall promptly replace its Contractor Project Manager upon written request of Owner, if such individual is disorderly or if in Owner’s opinion, such individual is otherwise incompetent for his position and responsibilities. The Key Personnel shall at all times hold the positions and be dedicated to the performance of the duties described in Appendix H. Any replacement of the Key Personnel shall be subject to the prior written consent of Owner which consent will not be unreasonably withheld.

### *Contractor’s Representative*. Contractor shall appoint one individual (the “Contractor’s Representative”), with the prior written consent of Owner, which shall not be unreasonably withheld, who shall be authorized to act on behalf of Contractor and with whom Owner may consult at all reasonable times, and whose instructions, requests and decisions in writing will be binding upon Contractor. Contractor shall not remove or replace such representative without prior written notice to Owner.

### *Owner’s Representative*. Owner designates, and Contractor agrees to accept, [NAME] as Owner’s Representative with respect to this Agreement and Contractor’s performance of the Work. Subject to Section 3.11.4, the actions taken by Owner’s Representative shall be deemed to be the acts of owner and shall be fully binding upon Owner. Owner may, upon the prior consent of Contractor (which consent shall not be unreasonably withheld or delayed), change the designated Owner’s Representative.

### *Limited Authority*. Notwithstanding Sections 3.11.1, 3.11.2 and 3.11.3, except as otherwise expressly set forth in this Agreement, a Representative or Project Manager shall have no power or authority on behalf of a Party to enter into, or execute any Change Orders or amendments to this Agreement on behalf of a Party hereunder.

## **Temporary Office Quarters**

Contractor shall provide Owner’s representatives with office space separate from that of Contractor, which space shall include electricity, heating, ventilation and air conditioning, file cabinet, access to a photocopier, and two desks with chairs. Contractor shall properly maintain such offices at its sole expense. Contractor shall be responsible for paying all utility deposits and charges, other than long distance telephone charges related to calls made by Owner and its representatives, related to such offices for Owner.

## **Cooperation with Other Contractors/Community**

Contractor shall use reasonable efforts and cause its Subcontractors and Vendors to use their reasonable efforts, to assist Owner in creating, assessing and carrying out programs which shall, during all phases of the Work, minimize the impacts upon the host community caused by the construction of the Project. Such programs, at a minimum, shall include: (i) sequencing of the Work so as to minimize the impacts of noise, dust, and traffic at and around the Job Site; (ii) using active dust control measures on access roads and the Job Site; and (iii) using local labor and other resources whenever possible and cost effective.

## **Protection and Safety**

### Contractor shall be responsible for the security, protection and safety of all Persons (including members of the public and the employees, agents, contractors, consultants and representatives of Owner, Contractor and its Subcontractors and Vendors, and other contractors and subcontractors) and all public and private property (including structures and facilities above and below ground, along, beneath, above, across or near the Job Site) that are at or near the Job Site or that are in any manner affected by the performance of the Work. As of the Closing Date, Owner shall have operational control over the Project. Notwithstanding the foregoing, Contractor shall remain responsible for the security, protection and safety of all Persons performing any portion of the Work at the direction of Contractor as well as any damage to property caused directly or indirectly by Contractor’s acts or omissions or failure to comply with the provisions of the Contract Documents while on the Job Site.

### Contractor shall initiate and maintain reasonable safety precautions and accident prevention programs for the Job Site and in the performance of the Work, which shall be in compliance with Contractor’s Safety Plan and all Applicable Laws and Applicable Permits, to prevent injury to persons or damage to property on, about or adjacent to the Job Site and in the performance of the Work.

### Contractor shall provide Owner, as part of its meeting minutes issued pursuant to Section 3.18.3:

#### Notification of all Occupational Safety and Health Act recordable events;

#### Notifications and copies of all citations by Government Authorities concerning accidents or safety violations at the Job Site;

#### Copies of written accident reports for lost time accidents; and

#### Notifications regarding any environmental release or spill, or violation of any permit condition.

### Owner shall have the right to require Contractor immediately to stop Work whenever, in Owner’s reasonable judgment, safety violations or other conditions or circumstances exist that could be reasonably expected to result in serious personal injury, death, occupational disease or significant damage to property (“Safety Violations”). The reasonable expense of any such stoppage of Work, including any standby time or other cost incurred, shall be at Owner’s expense unless such stoppage is due to the gross negligence or willful misconduct of Contractor. Persons responsible for Safety Violations shall be removed from the Site until such time as, in the reasonable judgment of Contractor and Owner, such Persons have received appropriate safety instructions and training.

### In the event of any emergency endangering life or property, Contractor shall take all actions as may be reasonable and necessary to prevent, avoid or mitigate injury, damage or loss and shall promptly report each such emergency, and Contractor’s responses thereto, to Owner. In any event, Contractor shall use commercially reasonable efforts to report an emergency to Owner in sufficient time to allow Owner to make any required reports to any Government Authority in accordance with Applicable Laws. In addition, Contractor shall notify and provide Owner, in accordance with Applicable Law, with (a) a reasonably detailed preliminary accident report within twenty‑four (24) hours of any material accident, including any accidents resulting in bodily injury or property damage or significant near‑miss incidents or fires arising out of or in connection with the Work, with a final report to follow within five (5) Business Days thereafter and (b) a copy of all reports made to Government Authorities and insurance companies relating to any accident or injury occurring during the performance of the Work within twenty‑four (24) hours after their submission. Each final report and each report made to Government Authorities shall also contain an analysis of cause and a correction plan to prevent similar occurrences.

### Contractor shall promptly deliver to Owner any written communication with any Government Authority (including any notices) with respect to accidents that occur at the Job Site.

## **Environmental Matters**

### *Hazardous Material*. Contractor shall, and shall cause its Subcontractors and Vendors to, comply with all Applicable Laws relating to Hazardous Material and all Applicable Permits. Without limiting the generality of the foregoing:

#### Contractor shall conduct its activities under the Contract Documents, and shall cause each of its Subcontractors to conduct its activities in a manner designed to prevent pollution of the environment or any other release of any Hazardous Material by Contractor and its Subcontractors and Vendors in a manner or at a level requiring remediation pursuant to any Applicable Law.

#### Contractor shall not cause or allow the release or disposal of Hazardous Material at the Job Site, bring Hazardous Material to the Job Site, or transport Hazardous Material from the Job Site, except in accordance with Applicable Law and Applicable Permits. Contractor shall be responsible for the management of and proper disposal of all Hazardous Material brought onto or generated at the Job Site by it or its Subcontractors or Vendors, and shall procure all required permitting and proper shipping documents in accordance with all applicable regulations, at Contractor’s sole cost.

#### If Contractor or any of its Subcontractors or Vendors releases any Hazardous Material on, at, or from the Job Site, or becomes aware of any Person who has released any Hazardous Material on, at, or from the Job Site during the Work, Contractor shall immediately notify Owner in writing. Contractor shall, at its sole cost and expense, diligently proceed to take all necessary or desirable remedial action to clean up fully the contamination caused by any:

##### Release by Contractor or any of its Subcontractors or Vendors of any Hazardous Material; and

##### Hazardous Material that was brought onto or generated at the Job Site by Contractor or any of its Subcontractors or Vendors, whether on or off the Job Site.

#### If Contractor discovers any Pre‑Existing Hazardous Material that has been stored, released or disposed of at the Site, Contractor shall immediately notify Owner in writing. If Contractor’s Work involves the area where such a discovery was made, Contractor shall immediately stop any Work affecting the area and Owner shall determine a reasonable course of action. Contractor shall not cause its Subcontractors and Vendors to take any action that may exacerbate any such contamination. Contractor shall cooperate with and assist Owner in making the Job Site available for taking necessary remedial steps to clean up any such contamination at Owner’s expense.

### *Waste Treatment and Disposal*. Without limiting the foregoing:

#### *Toxic Waste and Industrial Hazards*: Contractor shall be responsible for the proper management and disposal of all toxic waste and industrial hazards brought onto or generated at the Job Site by it or its Subcontractors or Vendors, if any. Contractor shall, and shall cause its Subcontractors and Vendors to, comply with all Applicable Laws, Applicable Permits and applicable safety standards related to the treatment, storage, disposal, transportation and handling of toxic wastes and industrial hazards. Contractor shall not store or dispose of toxic wastes and industrial hazards near groundwater, surface water or drainage systems. Liquid wastes shall not be dumped onto the ground or in any groundwater, surface water or drainage systems. All waste oil and grease resulting from construction activities shall be collected, stored in approved staging areas, and properly contained in D.O.T approved shipping containers. Disposal of such waste will be performed in a manner that prevents contamination to soil, ground water, and surface water, and recycled or incinerated if possible. Vehicle maintenance shall be conducted in an environmentally safe manner following the same level of management as with oil and grease referenced above. Such activities shall be performed in areas that have been pre‑designated, and away from watercourses and oil or fluid runoff shall be collected in grease traps. Toxic waste and industrial hazard storage containers shall be well‑labeled.

#### *Sanitary and Solid Waste*: Contractor shall take appropriate measures in accordance with the Applicable Law and Applicable Permits for the treatment and disposal of sanitary and solid waste, and in particular, Contractor shall perform the Work in such a manner so as to protect environmentally sensitive areas and water supplies. Run‑off from disposal sites shall be curtailed.

### *Protected Areas*. In the event that any portions of the Site are identified by Owner prior to the Notice to Proceed Date, or are discovered or identified by Contractor during the performance of Work under the Contract Documents, to be wetlands or other protected areas (“Protected Areas”), Contractor shall erect a temporary barrier or other blockade to isolate Protected Areas and protect such areas from impact by any Work in accordance with Applicable Laws. Contractor shall not allow any Work to be conducted in or otherwise interfere with or impact such Protected Areas. Contractor shall, and shall cause its Subcontractors and Vendors to, comply with the Environmental Plan and all permits, rules, regulations and all other Applicable Laws and Applicable Permits in connection with the Protected Areas on or adjacent to the Site.

## **Fire Prevention**

Contractor shall be responsible for providing adequate fire prevention and protection at the Job Site and shall take all reasonable precautions to minimize the risk of fire at the Job Site.

## **[Intentionally Omitted.]**

## **Reports, Plans and Manuals**

### *Monthly Progress Reports*. Within two (2) Business Days after the beginning of each month beginning on the Notice to Proceed Date or, if a Limited Notice to Proceed has been issued by Owner, beginning the month after said date of issuance Contractor shall prepare and submit to Owner written Monthly Progress Reports, containing the information described in Appendix N, which include a description of the progress and status of the Work compared to the Critical Path Schedule, the status of Equipment and other scheduled deliveries, the Subcontractors’ activities and engineering, procurement and construction progress. In addition, each such Progress Report will provide cost information regarding back charges and a summary of any Changes executed by the Parties as of the date of such report. In accordance with Section 5.2, Contractor shall also report any events which may affect the Critical Path Schedule, including any Force Majeure Events, liens on the Site or the Project, or any asserted violations of Applicable Laws. Such Monthly Progress Reports shall be submitted to Owner within fifteen (15) Days after the end of each calendar month.

### *Health Plan, Safety Plan and Environmental Plan*. No later than thirty (30) days prior to Initial Site Mobilization, Contractor shall prepare and submit to Owner:

#### A health plan that includes health and emergency procedures to be used at the Job Site (the “Health Plan”);

#### An environmental plan (the “Environmental Plan” as more particularly described in Appendix A) that includes:

##### A Hazardous Material, waste and industrial hazards management and disposal program which details the controlled usage and treatment of all Hazardous Material, toxic wastes, industrial hazards, sanitary waste, solid waste and other waste brought onto, used or produced at the Job Site or in relation to the Work and outlines a management structure for carrying out the specific provisions of such program;

##### An environmental protection and management program, including, without limitation, a dust and erosion control program; and

##### The description, location and drawings of construction facilities and temporary works.

#### A safety assurance plan substantially in a form compliant with Appendix L, which shall include an acknowledgement by Contractor that Contractor shall at all times remain in compliance with all federal, state and local safety codes (the “Safety Plan”).

The Health Plan, Environmental Plan and Safety Plan shall be consistent with all Applicable Laws and Applicable Permits and shall be submitted to Owner for review and comment. Owner shall provide any comments to the Health Plan, Environmental Plan and Safety Plan no later than fifteen (15) days of receipt by Owner. If Owner fails to comment within fifteen (15) days after receipt of such Health Plan, Environmental Plan and Safety Plan, Owner shall be deemed to have accepted such Health Plan, Environmental Plan and Safety Plan. Contractor shall either promptly make changes to such Health Plan, Environmental Plan or Safety Plan incorporating the comments of Owner or negotiate and resolve in good faith with Owner any such changes. Contractor shall comply and ensure that its Subcontractors comply with the Health Plan, Environmental Plan, and Safety Plan.

### *Weekly Progress Reports*. Following notice by Owner, Contractor shall prepare Weekly Progress Report containing the information described in Appendix N and submit it to Owner within fifteen not later than twenty-four (24) hours prior to the weekly meetings held in accordance with Section 3.18.4. In addition, Contractor shall keep, and furnish to Owner at Owner’s request, such information as related to Appendix N as Owner may reasonably require to determine that the Work is progressing according to the Critical Path Schedule. Contractor also shall keep daily logs at the Site and shall promptly provide to Owner copies of weekly meeting minutes regarding the Project. A reasonable number of photographs shall also be included reasonably documenting the construction progress. Each photograph shall show the date, Contractor’s name and description of the view taken. Notwithstanding the foregoing obligation regarding Weekly Reports, Contractor shall provide Owner with a notice of delay containing the information required by Section 14.2 at any time that Contractor becomes aware of a material delay in any aspect of the Critical Path Schedule. In accordance with Section 5.2, Contractor shall also report any events which may affect the Critical Path Schedule, including any Force Majeure Events, liens on the Site or the Project, or any asserted violations of Applicable Laws.

### *Meetings*. During the performance of the Scope of Work, Contractor and Owner shall, at a minimum, conduct weekly meetings or conference calls at a mutually convenient time and date for the purpose of reviewing the progress of the Scope of Work, the latest progress reports and the Critical Path Schedule as well as the status of any claims on the Project and claims submitted pursuant to the terms of the Contract Documents. Contractor shall provide Owner with an agenda for each meeting, and shall prepare detailed minutes of each meeting, in form and content acceptable to Owner. Contractor shall distribute the meeting minutes to Owner within three (3) days after each meeting. Informal meeting between Contractor and Owner may be held as the Parties may agree.

### *Contractor Not Relieved of Duties or Responsibilities*. The approval by Owner of progress and other reports, plans and manuals, and the information provided in those meetings shall not relieve Contractor of any of its duties or responsibilities under the Contract Documents.

## **Drawings, Engineering Data and Other Materials**

### Contractor shall provide Owner with hard copies and email copies (at no additional cost to Owner), of all Drawings, Final Plans, reports and other information (except financial, accounting and payroll records) furnished to Contractor, or prepared by it, its Subcontractors or others in connection with the performance of the Work. Such items shall be kept by Contractor in an orderly and catalogued fashion for reference by Owner during the performance by Contractor of the Work. All design Drawings used to perform the Scope of Work shall be stamped by a New Mexico–licensed engineer. All Drawings shall be provided in both electronic format and hardcopy. Electronic Drawings shall be in AutoCAD format. Contractor shall maintain at the Site at least one (1) copy of all Drawings, Final Plans, Change Orders and other modifications in good order and marked to record all changes made during performance of the Work, including, without limitation, all field deviations from the construction drawings. As a condition precedent to Final Acceptance, or upon the earlier termination of this Agreement, Contractor shall transfer the Final Plans to Owner and they shall become the property of Owner.

### Final Plans (both hard and electronic copies, at no extra charge to Owner), if not furnished earlier, shall be furnished to Owner upon Contractor’s request for a Final Acceptance Certificate or upon the earlier termination of this Agreement. Contractor and any of its Subcontractors, as applicable, may retain copies of all such documents for their records, subject to the confidentiality provisions of this Agreement. Final Plans delivered pursuant to this provision shall be identified by number and date, catalog reference, or other document control system.

## **Required Manuals**

Contractor shall supply Owner and Operator with all of the Required Manuals (in both hard copy and electronic format, at no additional cost to Owner) which provide, either in a single manual or handbook or collectively, complete operating and maintenance instructions for each major piece of Equipment and system of the Plant. Each such Required Manual shall comply with the requirements of the Scope of Work and the guidelines contained in Appendix F, including with respect to matters such as quantity, content and the time when such manuals are to be supplied to Owner and Operator, and shall be substantially complete and delivered to Owner and Operator prior to Mechanical and Electrical Completion in order to support training of personnel and start‑up and testing of the Plant. Contractor recommends the spare parts set forth in Appendix P.

## **Training of O&M Personnel**

During the construction of the Plant, and at least thirty (30) days prior to the Final Acceptance Date, Contractor shall provide, at its own expense, a training program in Plant operation and maintenance for the Operator’s Plant personnel (“O&M Personnel”). The training program provided by Contractor shall:

### Include classroom and field training;

### Include all Required Manuals, Drawings, and other educational materials necessary or desirable for the adequate training of O&M Personnel; and

### Establish quality controls to so that O&M Personnel are suitably trained and capable of operating and maintaining the Plant after Closing.

Representatives of manufacturers of Equipment shall be utilized to provide specialized training for such Equipment where deemed necessary by mutual agreement of the Parties. All training programs conducted in accordance with this Section 3.21, shall be videotaped and made available to Owner in electronic format, at Contractor’s sole cost.

## **Accounting Information; Financial Reporting Requirements**

During the term of this Agreement and continuing for five (5) years after Closing, Contractor will provide Owner with any reasonably necessary information that Owner believes necessary for Owner’s federal, state or local tax filings, exemptions or positions advocated by Owner; provided, however, that such access to cost information not otherwise made available to Owner pursuant to the terms hereof may be disclosed to an independent auditor of Owner’s choice that agrees to keep confidential from Owner, Contractor’s cost and other competitively sensitive information. Contractor shall cooperate with and assist Owner in obtaining all local, state, and federal tax incentives for the Project, including without limitation, any applicable state Tax Credits and the federal Investment Tax Credit.

## **Contractor Taxes**

Except for Owner Taxes, Contractor shall, as required by applicable law, pay and administer any and all Taxes and duties incurred or payable in connection with the Work, including, without limitation, taxes based on or related to the income, receipts, capital or net worth of Contractor, Contractor’s or its Subcontractors’ or Vendors’ Labor or income (collectively, “Contractor Taxes”).

INVOICING

Invoices for new construction Services shall be separated and state the subtotal due for: (a) labor, supervisory, management, equipment rental, and other miscellaneous charges, (b) Qualifying Manufacturing Equipment, and (c) other Equipment. The subtotal for Qualifying Manufacturing Equipment shall include line itemizations for each item or unit of Qualifying Manufacturing Equipment. Contractor will separately state the amount of New Mexico Gross Receipts Tax due, if any, on the invoice.

TAX LANGUAGE

Contractor shall invoice Owner for and Owner agrees to pay, state sales, use, or similar taxes, if applicable to the Services or the Equipment directly incorporated into the realty or, in lieu thereof, as appropriate, Contractor shall provide to its Vendors a valid tax resale certificate, and Owner shall provide to the Contractor a valid tax exemption certificate, exempting Owner from the payment of such taxes, or Owner shall provide a valid direct pay certificate allowing Owner to pay such taxes directly to the state taxing authority. The invoice shall separately state the amount of New Mexico Gross Receipts Tax due, if any, on the invoice.

## **Construction Utilities**

Contractor shall be responsible for the cost, supply and availability of electric power and all other utilities necessary for the performance of the Work.

## **Intellectual Property Rights**

### Contractor hereby grants to Owner an irrevocable, permanent, non‑exclusive, royalty‑free license to utilize patents, copyrights, trademarks, proprietary rights or information, licenses and other intellectual property rights of Contractor in respect of the Project (collectively, the “Intellectual Property Rights”) and the Intellectual Property Rights of third parties (to the extent of Contractor’s rights thereto which can be transferred without violation of obligations owed to such third parties), to the extent necessary for the operation, maintenance, repair or alteration (other than improvements affecting basic design) of the Project or any component thereof specified or constructed by Contractor under this Agreement.

### Owner shall have the right to assign the benefit of such license to a purchaser in connection with a transfer of the Project, or to any subsequent purchaser or assignee of same. Any such purchaser or assignee shall acquire such license subject to the same terms and restrictions as stated in this Section 3.25.

### Contractor shall, as necessary to deliver the Project with full title and free of any third party claims, obtain a valid written assignment of all applicable Intellectual Property Rights from its Subcontractors in terms identical to those that obligate Contractor to Owner as expressed in this Section 3.25, which Intellectual Property Rights Contractor hereby assigns to Owner.

### This Section 3.25 shall survive the expiration or termination of this Agreement.

## **Wastewater, Potable Water**

Contractor shall supply at its expense all raw, potable and other water at the Job Site as necessary in connection with the Work. Contractor shall dispose of all wastewater in conformance with Applicable Law and Applicable Permits.

## **Start Up Process**

Contractor shall perform the Plant start‑up in accordance with the process set forth in Appendix A. Contractor shall engage the O&M Personnel to participate in the Plant start‑up and initial operation. The Owner shall have the right to be involved in the initial operation of the Work that that provides electricity to the transmission grid in accordance with ARTICLE 10.

## **Accommodations Regarding Testing**

Contractor shall coordinate with Owner as to the scheduling of any Test.

## **Job Site**

Contractor shall perform the Work consistent and in accordance with Owner’s ownership, license and easement rights in and to the Job Site.

## **Critical Path Schedule**

Contractor has provided the Critical Path Schedule set forth in Appendix B. Contractor shall advise Owner of any proposed Critical Path Schedule changes and promptly provide Owner with any revisions thereto and reasons therefor. In connection therewith, Contractor shall employ a project management system able to provide schedule monitoring and analysis which shall include a comparison of the Critical Path Schedule with the actual progress for each time period with all variances noted. Schedule analysis shall include a determination of the impact of such variance, if material, on the Critical Path Schedule and any action necessary to correct the variance. Utilizing the critical path method, Contractor shall be aware of factors that are delaying or that could delay the Work beyond the Guaranteed Commercial Delivery of Power Date or the Guaranteed Final Acceptance Date (as applicable)and shall take remedial actions reasonably within its control to eliminate or minimize schedule delays including, without limitation, over‑time for the employees of Contractor and Subcontractors and the assignment of additional personnel and/or other resources. Contractor will update its Critical Path Schedule to reflect the current status of the Work. At a minimum, the updates will be performed and provided to Owner on a monthly basis as part of the Monthly Progress Report.

# **CERTAIN OBLIGATIONS OF OWNER**

## **Permits**

Owner shall execute such applications as Contractor may reasonably request in connection with obtaining any of the Applicable Permits; provided, that Contractor shall provide Owner with such information and documentation as Owner shall reasonably request in order to execute such applications.

## **Interconnection Facilities**

Owner shall be responsible to enter into appropriate agreements and take all actions necessary to interconnect the Project to the electricity transmission grid.

## **Access to Site**

Owner shall make the Site reasonably available to Contractor and its Subcontractors and Vendors and assure reasonable rights of ingress and egress to and from the Site for Contractor and its Subcontractors and Vendors for performance of the Work; provided, however, that Contractor shall coordinate with Owner regarding: (i) initial entry onto the Site or any part thereof; and (ii) initial contact with the Persons who own property on or near, or have granted license or easement rights in and to, the Site. During the period commencing on the Closing Date and ending at the expiration of all warranty periods pertaining to warranties issued by Contractor or any Subcontractor or Vendor, Owner shall make the Job Site reasonably available to Contractor for the purpose of monitoring the Plant in connection with Contractor’s satisfaction of its warranty obligations under ARTICLE 12.

## **[Intentionally Omitted]**

## **Owner Taxes**

Owner shall pay all real property taxes assessed against the Site (“Owner Taxes”). In the event that Owner is required to pay additional Taxes, penalties or interest because Contractor failed to comply with its obligations under Section 3.23, Contractor shall be responsible for the cost of such additional Taxes, penalties or interest within thirty (30) days of Owner’s request therefor.

## **Owner’s Documents**

Owner shall make reasonable efforts to supply to Contractor, in a timely manner, either directly or indirectly, material information and data that is made available to Owner and that is required for the performance of the Work. Contractor may reasonably rely on any written studies or reports regarding the Site prepared by third parties and provided by Owner (“Third Party Reports”); to the extent that such reliance is expressly permitted by such third party or by the terms of such Third Party Report, Owner does not warrant the correctness of the Third Party Reports or any other similar information and documentation provided hereunder. Except with respect to the Third Party Reports, Contractor acknowledges and agrees that documents or information provided by Owner have been or will be provided as background information and as an accommodation to Contractor.

## **Owner’s Representative**

No later than the date of this Agreement, Owner shall designate in writing one or more representatives at the Site (at least one of whom shall be at the Job Site during Owner’s normal business hours) who shall act as the point of contact for both Contractor and the Independent Engineer with respect to the Work; provided that such representative(s) shall not be authorized to execute or make any amendments to, authorize Change Orders in respect of, or provide waivers under, this Agreement. Owner shall provide Contractor with prior written notice in the event that it changes its representatives.

## **Conditions Precedent**

This Agreement shall become effective as of its execution date, subject to the fulfillment (or waiver by Owner, in its sole discretion) of each of the conditions precedent set forth below in paragraphs (a), (b) and (c) of this Section4.8.

#### Within twenty (20) Business Days after the fulfillment (or waiver by Owner, in its sole discretion) of the condition precedent set forth below in paragraph (b) of this Section 4.8, the Board of Directors of Owner shall have approved the execution and delivery of this Agreement by Owner, and the performance by Owner of its obligations hereunder (the “Owner Board Approval”).

#### Owner’s application requesting approval to construct, operate and maintain the Plant pursuant to this Agreement is approved without change by the New Mexico Public Regulation Commission by final order issued by such regulatory authority (“Regulatory Approval”).

# **PROJECT SCHEDULE; INSPECTION; DELIVERABLES**

## **Notices to Proceed**

### *Limited Notice to Proceed*. If, at the option of Owner, Owner wishes Contractor to commence performance of any portion (but not all) of the Work, Owner shall issue a “Limited Notice to Proceed” to Contractor authorizing such work, and Contractor shall on the next Business Day commence and thereafter diligently pursue such work in accordance with the Contract Documents.

### *Notice to Proceed*. When Owner is prepared for Contractor to commence performance of the Work, it shall issue a “Notice to Proceed” to Contractor authorizing such work. The Business Day after which Owner provides Contractor with the Notice to Proceed shall be the “Notice to Proceed Date”. On the Notice to Proceed Date, Contractor shall commence and shall thereafter diligently pursue all Work in accordance with the Contract Documents.

## **Coordination of the Work with other Activities**

When necessary, in Owner’s reasonable discretion, Owner will have the right to coordinate the scheduling of on‑site activities under this Agreement in order to avoid material interference with other activities at the Site, facilitate inspections and tests of the Work by Owner and its contractors and suppliers, deliveries by vendors of Owner Materials and the work of Owner’s other contractors, and adjustments, repairs, and replacements of Owner Materials or the work of Owner’s other contractors. Contractor will use its best efforts to coordinate its activities and those of its subcontractors with Owner, and Owner’s other contractors, will provide Owner with any requested information concerning upcoming activities under this Agreement, and will use its best efforts to conform its activities to scheduling requirements issued by Owner from time to time pursuant to the rights granted by this Section 5.2. No delay in the Work or expense to Contractor or any other person that results from Owner’s reasonable exercise of such scheduling rights will extend the Guaranteed Commercial Delivery of Power Date, the Guaranteed Final Acceptance Date or any Completion Date or otherwise give rise to any claim by Contractor, unless such delays exceed a duration of 48 hours per occurrence or cause a delay of five (5) or more days cumulatively in the critical path of the Work. In applying the previous sentence, no delay resulting from a Force Majeure Event will be taken into account in determining the duration of a delay under this Section 5.2.

Contractor will provide clear access to the applicable portions of the Plant for Owner’s other contractors, as well as sufficient lay down area in very close proximity to the area in which the subcontractors will be working.

## **Critical Path Schedule**

### Contractor shall perform the Work in compliance with the Critical Path Schedule, including completing the Work required by the Guaranteed Commercial Delivery of Power Date and the Guaranteed Final Acceptance Date. Contractor hereby covenants and warrants to Owner that in undertaking to complete the Work in accordance with the terms hereof, Contractor has taken into consideration and made reasonable allowances for hindrances and delays incident to such Work not caused by Owner.

### Without limiting the obligations of Contractor under Section 5.3.1, above, Contractor shall provide, together with its Monthly Progress Reports required hereunder, a Critical Path Schedule and any updates thereto that provide for the orderly, practicable and expeditious completion of the Work in accordance with the requirements of the Contract Documents. The Critical Path Schedule and any update shall be presented electronically every other week and in such reasonable detail as Owner may require and shall address all material elements of the Work. In the absence of a Change Order, no update to the Critical Path Schedule shall in any way amend, alter or otherwise change the Critical Path Schedule, the Guaranteed Final Acceptance Date or the Outside Completion Date.

### Appendix B includes the current Critical Path Schedule and Appendix M includes Critical Milestones and Milestones. Contractor shall not revise or modify the Critical Path Schedule or Milestones except pursuant to a Change Order mutually agreed by the Parties, except that no Change Order shall be necessary for revisions or modifications that either: (a) cause a deviation from the Critical Path Schedule or Milestones of less than twenty (20) days; or (b) are described in a Schedule Recovery Plan approved by Owner pursuant to Section 5.10. Contractor shall notify Owner in writing within fifteen (15) days of achievement of Milestones.

## **Inspection**

Owner shall have the right, but not the obligation, to inspect any item of Equipment, material, design, engineering, service, workmanship, permit application, documentation, drawing, specification, or any other portion of the Work to be provided hereunder, and Contractor shall submit for review by Owner all design criteria, system descriptions, applicable design calculations, quality assurance reports, design drawings, shop drawings, and other documents relating to the Work as required by this Agreement, and, to the extent reasonably feasible, arrange for Owner to inspect Equipment or material at the point of fabrication in accordance with the Critical Path Schedule if requested by Owner. Owner shall be responsible for the costs of its personnel and their transportation with respect to such inspection. Before any Work scheduled to be inspected is covered, Contractor shall give Owner timely written notice (a minimum of 24 hours) of its intent to do so to permit Owner to review and determine conformance with this Agreement during Owner’s normal business hours. Should Contractor fail to give such notice and cover the Work, Contractor must uncover the Work upon written notice by Owner to permit adequate review of the Work. The cost of such uncovering and recovering shall be borne by Contractor whether the Work is found to be in conformance or nonconformance with this Agreement. Should Owner fail to respond to Contractor’s notice and Contractor covers the Work, Owner may request, and Contractor must uncover the Work. The cost of any such uncovering and recovering shall be borne by Contractor if the Work contains a Defect; and if the Work is found not to contain a Defect, Contractor shall be entitled to request a change in Work in accordance with ARTICLE 6 and such costs shall be borne by Owner.

## **Third Party Inspection**

Contractor understands that Owner and its representatives have the right to observe and inspect the Work, any item of Equipment, material, design, engineering, service, or workmanship to be provided hereunder and to observe all tests of the Work and the Project (including factory or other tests performed at a location other than the Site). Upon reasonable written notice to Contractor by Owner, Contractor shall allow Owner and its representatives reasonable access to the Work and the Project. Contractor shall incorporate such rights into all Equipment purchase orders and subcontracts. To facilitate such observations and inspections, Contractor shall maintain at the Site a complete set of all Drawings and the current Critical Path Schedule. Contractor shall comply with all inspection and testing requirements.

## **Deliverables Schedule**

Within fifteen (15) days after the Notice to Proceed Date, Contractor shall deliver to Owner a Deliverables Schedule identifying all Contractor Deliverables to be delivered to Owner, the deadline for delivery thereof, and Owner’s time period for review and comment with respect thereto. The Deliverables Schedule shall include, without limitation, the Drawings, Contractor Deliverables and all other documents that Contractor is required to deliver under this Agreement. Owner shall have the right to promptly review and comment on such Deliverables Schedule. If Owner provides any comments with respect to the Deliverables Schedule to Contractor, then Contractor shall incorporate changes into such Deliverables Schedule addressing such comments, and resubmit the same to Owner. Such incorporation of changes to address Owner’s comments shall not be considered a change in Work. If Owner fails to comment within fifteen (15) days after receipt of such Deliverables Schedule, Owner shall be deemed to have accepted such Deliverables Schedule.

## **Owner Review of Contractor Deliverables**

Contractor, at its sole expense, shall submit for review to Owner hard (printed) copies and electronic copies (in a format agreed to by Owner) of all Contractor Deliverables in accordance with the requirements of this Agreement, including the Deliverables Schedule. In case of discrepancy between the electronic and hard copy version of the document, the hard copy shall control. Contractor shall ensure that all such items undergo a comprehensive independent in‑house review and approval process before submission of such items to Owner. After receipt of any Contractor Deliverable, Owner shall have the right, during the time period for Owner’s review specified in the Deliverables Schedule (but in no event less than 14 days after receipt thereof by Owner), to describe any Defects in such Contractor Deliverable. In no event shall Contractor issue any purchase orders based on any Contractor Deliverables until Owner has completed its review during the time period specified in the Deliverables Schedule.

## **Remedy of Defects**

If Owner identifies any Defects with respect to any Contractor Deliverables submitted for review, then Contractor shall incorporate changes into such Contractor Deliverables addressing and remedying the Defects and resubmit the same to Owner, and such incorporation of changes to address Owner’s comments shall not be considered a change in Work. No Contractor Deliverable subject to Section 5.7 shall be released for use in connection with the Work prior to completion of the review process set forth in Section 5.7.

## **Limitation on Owner’s Obligations**

Any inspection, review, approval or comment under this ARTICLE 5 by Owner is solely at the discretion of Owner and shall not in any way affect or reduce Contractor’s obligations to complete the Work in accordance with the provisions of this Agreement or be deemed to be acceptance by Owner with respect to such Work.

## **Schedule Recovery Plan**

If: (a) Contractor believes it will fail to stay within ten (10) days of the Critical Path Schedule (as determined using the Critical Path Schedule) for achieving completion of the Scope of Work on or before the Guaranteed Commercial Delivery of Power Date or the Guaranteed Final Acceptance Date; or (b) Contractor believes it will fail to complete any of the Milestones set forth in the Critical Path Schedule within ten (10) days after the date set forth on the Critical Path Schedule for completion of such item, then Contractor shall, within five (5) days after Contractor becomes aware of such potential delay, submit for approval by Owner, a written plan (the “Schedule Recovery Plan”) to complete all necessary Work to achieve completion of the Scope of Work on or before the Guaranteed Commercial Delivery of Power Date or the Guaranteed Final Acceptance Date. Within ten (10) days after receipt of the Schedule Recovery Plan, Owner shall deliver written notice of approval or disapproval of the Schedule Recovery Plan to Contractor, such approval not to be unreasonably withheld. If Owner disapproves all or any portion of the Schedule Recovery Plan, Owner shall approve those portions of the Schedule Recovery Plan that are acceptable and provide modifications to those portions of the Schedule Recovery Plan that have been disapproved. Contractor shall then resubmit a revised Schedule Recovery Plan addressing such modifications as shall have been provided by Owner within five (5) additional days and, upon approval by Owner, promptly proceed with such additional Work as may be required under the Schedule Recovery Plan. Approval by Owner of a Schedule Recovery Plan shall not be deemed in any way to have relieved Contractor of its obligations under this Agreement relating to the failure to achieve completion of the Scope of Work on or before the Guaranteed Final Acceptance Date, be a basis for an increase in the Contract Price, or limit the rights of Owner under ARTICLE 11. If any costs associated with any Schedule Recovery Plan are not recovered via insurance: (i) Contractor shall pay such costs to the extent the Schedule Recovery Plan was necessitated by the fault of Contractor and or its Subcontractors; and (ii) Owner shall pay such costs to the extent the Schedule Recovery Plan was necessitated by the fault of Owner. Contractor shall present to Owner a summary of any non‑insured costs associated with any Schedule Recovery Plan necessitated by a Force Majeure Event.

## **Liquidated Damages**

Nothing contained in this ARTICLE 5 shall relieve Contractor of its obligation to pay Schedule Liquidated Damages, in accordance with ARTICLE 11, in the event (i) Commercial Delivery of Power is not achieved by the Guaranteed Commercial Delivery of Power Date or (ii) that Final Acceptance is not achieved by the Guaranteed Final Acceptance Date.

# **CHANGE ORDERS**

## **Changes**

Without invalidating this Agreement, the Parties may from time to time enter one or more written orders (each a “Change Order” and, collectively, the “Change Orders”) executed by Owner and Contractor pursuant to this Section 6.1 (i) to make any change to the Work, (ii) to make any change to any element of the Critical Path Schedule, (iii) to make any change to the Contract Price, or (iv) to make any change to the Scope of Work or the Drawings. All Change Orders shall be originated, considered, and made effective only in accordance with this Section 6.1.

### Owner may unilaterally, at any time prior to the completion of all Work, make changes to the Work or the Scope of Work or the Drawings, which Contractor shall proceed to perform or obtain in accordance with such Change Order and the other Contract Documents. Any appropriate increase or decrease in the Contract Price, change in the Critical Path Schedule, or change in any testing shall be agreed between the Parties and reflected in each Change Order.

### Owner may unilaterally, at any time prior to the completion of all Work, make changes to the Owner Materials, which Contractor shall proceed to incorporate into the Work without delay in accordance with such Change Order and the other Contract Documents. Any appropriate increase or decrease in the Contract Price, change in the Work, Critical Path Schedule, or change in any testing shall be agreed between the Parties and reflected in each Change Order.

### Contractor may, at any time prior to the completion of all Work, propose other changes to the applicable Work. Owner shall consider such changes but shall have no obligation to make any such change. Contractor will not be relieved of any obligation under this Agreement while such a proposed Change Order is under consideration.

### Within fourteen (14) days following any required notice of (i) a Force Majeure Event, (ii) delay to Contractor caused by Owner (except as permitted by Section 5.2), or (iii) Owner’s failure to perform its obligations under ARTICLE 4, Contractor may submit a proposed Change Order proposing changes to the Critical Path Schedule, changes to the Work or the Scope of Work or the Drawings, and associated changes to the Contract Price, to compensate for delays caused by (x) such Force Majeure Event, (y) delay to Contractor caused by Owner, or (z) delay caused by any failure by Owner to perform its obligations under ARTICLE 4. Failure to make a timely request for a Change Order under this Section 6.1.4 constitutes a waiver of Contractor’s right to any such Change Order.

### If Owner terminates this Agreement pursuant to Section 15.3, Owner will be entitled to a Change Order under this Section 6.1.5 that reduces the Contract Price by an amount reasonably necessary to complete elements of the Work that have not been completed as of the date of such termination.

### The parties may enter into any other agreed Change Order.

### *Disputed Changes*. Except as provided in Section 7.1.2, in the event of a dispute concerning the need for or the substance of a proposed Change Order, such dispute shall be resolved according to the dispute resolution process set forth in ARTICLE 17 of this Agreement. If under a Change Order initiated by Owner the disputed portion of the proposed change to the Contract Price is less than $25,000, Contractor shall proceed with the Work described in the disputed Change Order pending resolution of the dispute; if such disputed portion is equal to or greater than $25,000, Contractor shall be entitled to defer the Work described in the disputed Change Order pending resolution of the dispute, provided, however, that if Owner prepays Contractor the disputed amount under written protest, Contractor shall proceed with the associated work pending resolution of the dispute. When this dispute is resolved, any such prepayment in excess of the finally determined cost of the Change Order, if any, will be refunded to Owner, with simple interest at the rate of 8% per annum, within thirty (30) days or, at Owner’s election such excess and accrued interest will be applied against amounts becoming due to Contractor from Owner under this Agreement.

### *Pricing of Changes*. Change Orders resulting in an increase in the Contract Price shall be priced as an agreed fixed price. Labor costs included in any increase to the Contract Price will not reflect any premium based on “productivity loss” or otherwise on diminished efficiency or productivity in the performance of the Work.

# **CONTRACT PRICE; PAYMENTS TO CONTRACTOR; CLOSING**

## **Contract Price**

*Calculation of Charges*. Contractor shall accomplish the Work and otherwise perform its obligations under this Agreement for a “Contract Price” equal to $[\_\_\_\_\_\_\_\_\_\_\_\_] (which Contract Price is subject to adjustment only pursuant to a Change Order under Section 6.1). This is a separated contract and the Contract Price is composed of a fixed amount of $[\_\_\_\_\_\_\_\_\_\_\_\_\_\_] for incorporated materials and a fixed amount of $[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] for services and consumable items, each of which fixed amounts is subject to adjustment pursuant to this Agreement. Except as provided in this Section 7.1 and Section 7.2, Owner shall not be liable for payment of the cost of work, services, materials, equipment, facilities, transport, storage, security, or other items or matters required to perform the Work in accordance with the Contract Documents, whether or not specifically included within the Scope of Work or Contractor Equipment described in the Scope of Work or otherwise.

The Contract Price shall be paid in accordance with this ARTICLE 7 and the Schedule of Values attached hereto as Appendix S. The Contract Price may be amended only in accordance with Section 6.1.

The parties’ respective responsibilities for sales, use, excise, property, or similar taxes relating to the Work are set forth in Section 3.23.

### Receipt by Contractor of payment of the Contract Price shall constitute a release by Contractor of Owner, Affiliates, and every officer and agent thereof from all liens (whether statutory or otherwise and including mechanics’ or suppliers’ liens), claims and liability hereunder with respect to any Work performed or furnished in connection with this Agreement, or for any act or omission of Owner or of any person relating to or affecting this Agreement, except claims for which Contractor has delivered a dispute notice to Owner. No payment by Owner shall be deemed a waiver by Owner of any obligation of Contractor under this Agreement.

### In the event that (a) the Notice to Proceed has not been issued by Owner and (b) Owner has reason to believe that the cost of any Equipment that is to be incorporated into the Work has fallen since the Effective Date, then Owner may, in its sole discretion, direct Contractor to investigate the then-current costs to procure such Equipment (or equivalent replacement Equipment). If such investigation shows that such costs have fallen since the Effective Date, then Owner shall have the right to issue a Change Order under Section 6.1 to reflect such reduced Equipment cost and to make an appropriate adjustment to the Contract Price. If Owner and Contractor cannot agree on the extent of such cost reductions or the amount of the adjustment to the Contract Price, then Owner may elect to terminate this Agreement in accordance with Section 15.3.

## **Invoices for Work**

All invoices for Work shall conform to the provisions of this Section 7.2.

### Invoices for Work shall be submitted either electronically or hard copy, at Owner’s request, monthly based on progress during the preceding month in the completion of each element of the Work identified in the Schedule of Values attached as Appendix S and for any amounts otherwise earned during the preceding month under Change Orders. Within 10 days following the end of each month, Contractor will submit to Owner for review an Application for Payment filled out and signed by Contractor covering the Work completed through the end of the preceding month, indicating the progress of each element of the Work and setting forth the proposed invoice amount. Contractor and Owner will mutually agree on the monthly progress and the amount to be invoiced under the Schedule of Values. Contractor will submit an invoice based on such agreement and also reflecting any amounts otherwise earned during the preceding month under Change Orders.

### Each invoice for Work shall be separated and state the subtotal due for (i) labor, supervisory, management, equipment rental, consumables, and other miscellaneous charges; (ii) Qualifying Manufacturing Equipment; and (iii) other Equipment. The subtotal for Qualifying Manufacturing Equipment shall include line itemizations for each item or unit of Qualifying Manufacturing Equipment.

### Each invoice shall reference this Agreement. Each invoice that covers Work under a Change Order shall also reference the date and Change Order number appearing on such Change Order. As a condition to Final Acceptance, Contractor shall provide (i) from each subcontractor and supplier with a contract value of more than $10,000, an unconditional waiver and release on final payment in the form appended to this Agreement in Appendix J, and (ii) from Contractor, a conditional waiver and release on final payment in the form appended to this Agreement in Appendix J.

### All invoices shall be sent to:

El Paso Electric Company  
Attention Accounts Payable  
100 N. Stanton Street  
El Paso, Texas 79901

A copy of each invoice shall be contemporaneously sent to the designated Owner’s Representative.

## **Payment of Invoices**

Except to the extent Owner disputes any portion of an invoiced amount, Owner will pay invoices for Work on or before 21 Days following Owner’s receipt. Amounts neither paid nor disputed within such 21 day period shall bear simple interest at the rate of 8% per annum after the due date; provided, however, that disputed amounts resolved in favor of Contractor shall bear such interest from the end of such 21 day period until paid.

## **Certain Withholding**

Notwithstanding any provisions to the contrary in this Agreement, Owner may withhold, deduct from, and apply all or any part of any amount due to Contractor under this Agreement to pay, as may be required or authorized by Applicable Law, the valid claims of Contractor’s subcontractors and suppliers for labor, materials, or equipment (or any combination thereof) furnished in connection with the Work or pursuant to the Contract Documents and may continue to hold and apply as provided herein any amount necessary in Owner’s reasonable judgment to address claims then in dispute. Contractor shall have the right, as provided by law, to bond around or provide security against any lien in lieu of Owner withholding or deducting additional amounts.

## **[intentionally Omitted]**

## **[Intentionally Omitted]**

## **Subcontractors and Suppliers**

Contractor shall provide Owner in writing the name, address, and telephone number of each supplier of Contractor Equipment and each subcontractor of Work whose portion of the Work will have a value of more than $10,000. Contractor will make such information available to Owner on request with respect to any other supplier of Contractor Equipment or subcontractor of Work. Contractor shall give Owner notice in writing of any dispute with a Subcontractor, Vendor, or supplier of Contractor Equipment, where the amount in dispute is in excess of $2,500.

## **Closing**

The “Closing” shall take place on a date selected by Owner that is no later than three (3) Business Days after all deliveries set forth in Section 7.9 have been made (the “Closing Date”).

## **Deliveries at Closing**

### *Contractor’s Deliveries at Closing*. At the Closing, Contractor will deliver to Owner (a) a statement executed by officers of Owner and Contractor stating the final Contract Price (less any agreed upon retentions) under this Agreement has been paid, (b) the Contractor Final Release and Waiver of Liens and Claims in substantially the form attached as Appendix J and (c) a Subcontractor Final Release and Waiver of Liens substantially in the form of Appendix J from each Subcontractor and Vendor.

### *Owner’s Deliveries at Closing*. At or prior to the Closing, Owner will deliver to Contractor (a) the Final Acceptance Certificate, and (b) the remaining balance of the Contract Price. The Contract Price shall be payable by wire transfer or other immediately available funds to an account or accounts designated by Contractor.

# **TITLE, RISK OF LOSS AND POSSESSION**

## **Clear Title**

Contractor warrants and guarantees that good, exclusive and marketable title to and the ownership of the Work (including, without limitation, all Equipment, patents, licenses, Contractor Deliverables, Required Manuals and any spare parts purchased by Contractor on behalf of Owner at Owner’s request in connection with the construction, operation and maintenance of the Plant) shall pass to Owner, free and clear of any and all Liens and claims of third parties, at the time of payment for such Work, and agrees to defend Owner against all claims adverse to such title and ownership. If there is a dispute pending under this Agreement at the time payment for Work is due, then title to such Work shall nonetheless transfer and Contractor shall make the warranty set forth above.

## **Risk of Loss**

### From the date hereof until the Closing Date, Contractor hereby assumes the risk of loss for the Project and the Work, including:

#### Any Equipment whether on or off the Job Site;

#### All other Work completed on or off the Job Site; and

#### All Work in progress.

### All Equipment not yet incorporated into the Plant shall be stored in secured areas. Contractor shall bear the responsibility of preserving, safeguarding, and maintaining such Equipment and any other completed Work and Work in progress. If any loss, damage, theft or destruction occurs to the Work, on or off the Job Site, Contractor shall, at Contractor’s cost, promptly repair or replace the property so affected thereby. Contractor shall, subject to the provisions of ARTICLE 12, continue to be responsible after the Closing Date for claims, physical loss or damage to the Work to the extent resulting from (a) the acts or omissions of Contractor or any Affiliate thereof, any Subcontractor or Vendor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable and/or (b) any failure to comply with the requirements of the Contract Documents.

### Risk of loss or damage to the equipment or tools of Contractor, all Subcontractors and their respective employees and agents shall at all times remain with those parties, and Owner shall have no responsibility for such equipment or tools.

# **INSURANCE**

## **Contractor Insurance Policies**

### *Contractor’s Insurance*. Contractor, at its own expense, shall procure or cause to be procured and maintain or cause to be maintained in full force and effect at all times commencing no later than upon commencement of the Work at the Job Site and until the expiration of the Initial Warranty Period, all insurance coverages specified in Appendix R (except that the Ocean Marine Cargo and Builder’s All Risk insurance coverages shall be maintained in full force and effect until the Final Acceptance Date). All insurance coverage shall be in accordance with the terms of this ARTICLE 9 and Appendices R-1 and R-3, using insurance companies, to the extent required by Applicable Law, authorized to do business in New Mexico. All policies required shall be written on an “occurrence” basis (except for workers’ compensation and professional liability).

### *Owner’s Insurance*. Owner, at its own expense, shall procure or cause to be procured and maintain or cause to be maintained in full force and effect at all times during the period from the Notice to Proceed Date through the Final Acceptance Date, all insurance coverages specified in Appendix R. All insurance coverages shall be in accordance with this ARTICLE 9 and Appendices R and R, using companies, to the extent required by Applicable Law, authorized to do business in New Mexico.

### *Non‑Violation*. Contractor shall not knowingly violate nor knowingly permit to be violated any conditions of the policies provided by Owner under the terms of this Contract and shall at all times satisfy the requirements of the insurance companies issuing them. All requirements imposed by such policies and to be performed by Contractor shall likewise be imposed upon and assumed by each Subcontractor.

## **Subrogation Waivers**

Contractor insurance policies shall provide for a waiver of subrogation rights except for professional liability as specified in Appendix R against Owner, its Affiliates and their respective assigns, subsidiaries, Affiliates, directors, officers, employees, insurers, and underwriters, and of any right of the insurers to any set‑off or counterclaim or any other deduction, whether by attachment or otherwise, in respect of any liability of any such person insured under any such policy. Contractor releases, assigns, and waives any and all rights of recovery against Owner, its Affiliates, and their respective assigns, subsidiaries, Affiliates, directors, officers, employees, insurers, and underwriters, that Contractor may otherwise have or acquire in or from or in any way connected with any loss covered by policies of insurance maintained or required to be maintained by Contractor pursuant to this Agreement or because of deductible clauses in or inadequacy of limits of any such policies of insurance. Owner shall provide for a waiver of subrogation rights under Owner’s property coverage.

## **Evidence of Insurance**

Should Owner be named in any lawsuit or threatened with litigation for a claim under a policy of insurance provided by Contractor to which Owner is an additional insured, then if requested by Owner, copies of such insurance policy shall be made available to the Owner for review in Contractor’s corporate office.

## **Failure to Maintain Insurance**

If at any time the insurance to be provided by Owner or Contractor hereunder shall be reduced or cease to be maintained, then (without limiting the rights of the other Party hereunder in respect of any default that arises as a result of such failure) the other Party may at its option (following notice to the responsible Party), procure and maintain the insurance required hereby, and, in such event (a) Owner may withhold the cost of insurance premiums expended for such replacement insurance from any payments to Contractor (provided copies of such replacement policies of insurance are provided to the responsible Party), or (b) Owner shall reimburse Contractor for the premium of any such replacement insurance, as applicable.

# **SYNCHRONIZATION, TESTS, MECHANICAL AND ELECTRICAL COMPLETION AND FINAL ACCEPTANCE**

## **General**

### All start‑up, synchronization, operation and testing conducted by Contractor shall be in accordance with the Contract Documents, applicable manufacturers’ instructions and warranty requirements, Applicable Laws, Applicable Standards, Applicable Permits, Prudent Utility Practices and any and all applicable rules as agreed to by Owner and Contractor. Contractor shall provide Owner with at least thirty (30) days’ advance written notice of the first Test that involves delivering energy to the El Paso Electric Interconnection Facilities. In addition, no Test of the Plant that delivers electrical output shall be conducted unless Contractor gives prior written notice thereof as provided in Section 10.1.2. Owner, the Utility, the Independent Engineer, all relevant Government Authorities and their respective authorized representatives shall have the right to inspect the Work and to be present during the start‑up, synchronization, operation and testing of the Project pursuant to this Article.

### Test Notice.

#### Prior to performing any Test, Contractor shall deliver to Owner a written notice thereof (a “Test Notice”) specifying a date for commencement of any or all of the Tests. Contractor shall deliver a Test Notice at least ten (10) Business Days prior to the commencement of any Test. Owner shall, within five (5) Business Days after its receipt of such Test Notice, deliver to Contractor a written notice:

##### Accepting such Test Notice; or

##### Denying that the prerequisites for performing such Test have been completed and stating the facts upon which such reasonable denial is based.

#### Upon receipt of notice denying that the prerequisites for performing such Test have been completed, Contractor shall take such action as is appropriate to remedy the conditions described in such notice from Owner. Following any such remedial action, Contractor shall deliver to Owner a new Test Notice conforming to the requirements of this Section 10.1.2, and the provisions of this Section 10.1.2, shall apply with respect to such new Test Notice in the same manner as they applied with respect to the original Test Notice.

#### Contractor shall reschedule Tests as requested by Owner to reasonably accommodate the schedules of Persons whom Owner deems necessary to attend the Tests. Contractor shall promptly notify Owner of any proposed change in the schedule of Tests and may not conduct any such Test under such proposed changed schedule unless Owner receives reasonable advance notice of the actual date of commencement of such rescheduled Test. Owner shall be responsible for notifying the Utility, and the Independent Engineer for witnessing Tests.

## **Synchronization**

Together with the notice of the Scheduled Synchronization Date, Contractor shall provide Owner a start‑up and test schedule for the Project and copies of all manufacturers’ specifications, schedules of protection schemes, and protection relay settings. Contractor shall promptly give Owner notice of any expected change in the Scheduled Synchronization Date or other information provided with the notice as described above (or any modifications thereto); provided that Contractor shall provide at least ten (10) days’ prior written notice of the actual synchronization date. Contractor shall perform the synchronization procedures in accordance with the Scope of Work and Owner’s direction regarding Utility’s requirements. The Utility and its authorized representatives shall have the right to be present during the synchronization.

## **Mechanical and Electrical Completion**

Upon satisfaction of all requirements for Mechanical and Electrical Completion, Contractor shall provide Owner with a notice of Mechanical and Electrical Completion. Within three (3) Business Days of receipt of such notice, Owner shall notify Contractor in writing whether or not Contractor has fulfilled the requirements of Mechanical and Electrical Completion. If Contractor has not fulfilled such requirements for Mechanical and Electrical Completion, Owner shall specify in such notice to Contractor in reasonable detail the reasons that the requirements for Mechanical and Electrical Completion have not been met. Contractor shall promptly act to correct such deficiencies so as to achieve Mechanical and Electrical Completion as soon as possible (and no later than by the applicable date set forth in Appendix B, if such date has not already passed). Following any such remedial action, Contractor shall deliver to Owner a new notice of Mechanical and Electrical Completion and the provisions of this Section 10.3, shall apply with respect to such new Mechanical and Electrical Completion notice in the same manner as they applied to the original Mechanical and Electrical Completion notice so long as, if the Guaranteed Final Acceptance Date shall have passed, Contractor is paying Schedule Liquidated Damages when due in accordance with ARTICLE 11.

## **Performance Tests**

### Contractor is responsible for conducting the Tests and any required re‑tests for the purposes of determining achievement of the Final Acceptance Performance Level. Contractor shall conduct the Tests only after the Project:

#### Has achieved Mechanical and Electrical Completion;

#### Has been synchronized with the El Paso Electric Interconnection Facilities in accordance with the Scope of Work and Owner’s requirements;

#### Is capable of being operated safely, normally, reliably and continuously in accordance with the requirements of the Contract Documents at all operating conditions and modes specified in the Scope of Work (although minor portions of the Work not essential to its safe, continuous and reliable operation may remain to be completed); and

#### Is ready for the Tests to be performed in accordance with the Contract Documents.

### Each Test shall be conducted in accordance with the terms of the Contract Documents after complying with the notice provisions of Section 10.1.2. If the Project achieves the Final Acceptance Performance Level, Contractor shall, upon satisfaction of the other requirements to Final Acceptance, submit a notice of Final Acceptance in accordance with Section 10.6. If the Project fails all or any part of the Tests, Contractor shall take appropriate corrective action and the Tests shall be performed again. If the Project fails all or any part of the retest, Contractor shall take appropriate corrective action and the Tests shall be repeated. If Contractor fails to achieve the Final Acceptance Performance Level and satisfy all of the other requirements of Final Acceptance on or prior to the Guaranteed Final Acceptance Date, Contractor shall pay Schedule Liquidated Damages in accordance with Section 11.2. Contractor shall provide a written report of the results of each Test to Owner, which shall include the raw data.

## **Commercial Delivery of Power**

### Conditions. “Commercial Delivery of Power” shall be deemed to have occurred upon satisfaction of all of the following conditions:

#### The Plant has achieved Mechanical and Electrical Completion;

#### (i) all critical testing has been completed; (ii) the Final Acceptance Performance Level has been achieved (or, in Owner’s sole discretion, if such performance level has not been achieved prior to the Outside Completion Date, Owner has agreed to accept, and Contractor has paid in full, Capacity Shortfall Liquidated Damages calculated in accordance with Section 11.3); and (iii) all operating procedures for safe operation including start‑up, shutdown and emergency response are in place;

#### The Plant has been synchronized in accordance with Section 10.2 of this Agreement;

#### The metering system shall have been installed and calibrated and shall be functioning accurately;

#### The Plant is capable of being operated safely, normally, reliably and continuously in accordance with the requirements of the Contract Documents at all operating conditions and modes specified in the Scope of Work (although minor portions of the Work not essential to its safe, continuous and reliable operation may remain to be completed); and

#### All Applicable Permits required for ownership and use of the Plant have been obtained as required by Applicable Law, and, to the extent applicable to commence commercial operation of the Plant, are in full force and effect, and Contractor shall have provided to Owner copies of all such Applicable Permits, together with evidence reasonably satisfactory to Owner that, to the extent applicable, the respective Government Authority or its representative has “signed off” or otherwise approved such Applicable Permit.

Contractor shall provide a certificate to Owner, dated the date on which all of the above conditions have been satisfied, certifying as to completion of each of the items set forth in clauses (a) through (f) of this Section 10.5.1.

### Control; Operations. Upon the Plant having achieved Commercial Delivery of Power, the Parties agree that, without limiting in any way Contractor’s further obligations under this Agreement, Owner shall control the Plant and that the operations of the Plant shall be available to commence on a daily or regular basis.

## **Performance Shortfalls**

### If the Project fails to achieve all or any part of the Final Acceptance Performance Level after the Guaranteed Final Acceptance Date but all other requirements for Final Acceptance have been met, Contractor shall submit a Remedial Plan reasonably acceptable to Owner and take appropriate corrective action and repeat the Tests, at Contractor’s sole cost.

### Notwithstanding the foregoing and subject to the terms and conditions contained herein, Contractor may repeat the Tests until the earliest of:

#### the Outside Completion Date; or

#### achievement by Contractor of the Final Acceptance Performance Level.

Contractor shall provide a written report of the results of each Test to Owner.

## **Punch List**

### No later than thirty (30) days before the expected Final Acceptance Date, Contractor shall prepare and submit to Owner a comprehensive list (the “Punch List”) of items to be completed. The Punch List shall not include any item that affects the safety, reliability or operability of the Equipment, the Plant or any portion thereof or requires a shut‑down or reduced operation of the Equipment, the Project or any portion thereof to be completed. Contractor shall make such revisions to the Punch List as and when reasonably requested by Owner from time to time.

## **Final Acceptance**

### After successfully completing the Tests in accordance with Section 10.4 and submitting all Required Manuals, drawings and final cost report pursuant to Appendix Q, and after Contractor determines that all of the requirements for Final Acceptance have been completed, Contractor shall provide written notice thereof to Owner and shall submit a proposed Final Acceptance Certificate, in substantially the form attached hereto as Appendix D, to Owner.

### As soon thereafter as reasonably practicable, a team consisting of representatives of Owner, the Independent Engineer and Contractor shall make a final inspection of the Plant. Within ten (10) Business Days following such final inspection, Owner shall notify Contractor in writing whether Contractor has fulfilled the requirements of the Contract Documents for Owner to issue the Final Acceptance Certificate. If such requirements have been fulfilled, Owner will execute the proposed Final Acceptance Certificate, which shall be delivered as described in Section 7.9. If the requirements for issuance of the Final Acceptance Certificate have not been fulfilled, then Owner shall deliver a written notice to such effect to Contractor describing in reasonable detail the deficiencies noted and corrective action recommended, including projected target dates for the completion of such incomplete or remedial Work. Contractor shall promptly act to correct any such deficiencies. The procedure set forth in this Section 10.8.2 shall be repeated as necessary until the earlier of: (i) the date on which Contractor has fulfilled the requirements for the issuance of the Final Acceptance Certificate and Owner executes such certificate and delivers it to Owner (the “Final Acceptance Date”); or (ii) termination of this Agreement. Throughout this process, if the Guaranteed Final Acceptance Date has passed, Contractor shall pay all Schedule Liquidated Damages when due.

## **Changes in Guaranteed Dates**

Except as otherwise set forth herein, no action by Owner or Contractor (unless Owner specifically agrees to the contrary in writing) required or permitted under this Article shall affect the Guaranteed Commercial Delivery of Power Date, the Guaranteed Final Acceptance Date, the Outside Completion Date or any other scheduled date described or defined under the terms of the Critical Path Schedule or other Contract Document.

## **Test Revenues**

Any revenues and renewable energy credits (or other environmental attributes) for Test Energy shall be solely for the benefit of Owner.

# **COMPLETION GUARANTEE AND CERTAIN LIQUIDATED DAMAGES**

## **Completion Guarantee**

### Contractor hereby guarantees that Commercial Delivery of Power will occur no later than the Guaranteed Commercial Delivery of Power Date and Final Acceptance will occur no later than the Guaranteed Final Acceptance Date (subject only to delay or extension as expressly permitted under this Agreement).

### Subject to Owner’s other rights as set forth in this Agreement and subject to the provisions of this ARTICLE 11, in the event that Commercial Delivery of Power or Final Acceptance occurs after the Guaranteed Commercial Delivery of Power Date or the Guaranteed Final Acceptance Date, respectively, Contractor shall pay and Owner shall accept as its sole remedy for each and every day of such delay after the Guaranteed Commercial Delivery of Power Date or Guaranteed Final Acceptance Date (up to and including, but not after, the Outside Completion Date) the Schedule Liquidated Damages described in Section 11.2.

### Notwithstanding anything to the contrary in this Agreement, Contractor shall be entitled to an extension of the Guaranteed Delivery of Power Date and the Guaranteed Final Acceptance Date in the event that (i) Owner has not already issued the Notice to Proceed on or prior to the date contained in the Critical Path Schedule and (ii) Regulatory Approval is received after the Notice to Proceed issuance date in the Critical Path Schedule.  The change to the Critical Path Schedule to accommodate the change in Guaranteed Delivery of Power Date and Guaranteed Final Acceptance Date caused by a delay in Regulatory Approval contemplated by this Section 11.1.3 shall be made through a Change Order issued in accordance with Section 6.1.

## **Schedule Liquidated Damages; ITC Liquidated Damages**

### Owner and Contractor acknowledge and agree that if Commercial Delivery of Power is achieved after the Guaranteed Commercial Delivery of Power Date or Final Acceptance for the Project is achieved after the Guaranteed Final Acceptance Date but on or before the Outside Completion Date, Owner will directly suffer substantial damage that cannot be ascertained with reasonable certainty. Accordingly, Contractor shall pay to Owner, as liquidated and agreed damages and not as a penalty, $3,000 for each day after the Guaranteed Commercial Delivery of Power Date that Commercial Delivery of Power in not Achieved and is not excused and $1,500 for each day after the Guaranteed Final Acceptance Date that Final Acceptance for the Project is not achieved and is not otherwise excused (collectively, the “Schedule Liquidated Damages”). (Owner and Contractor further acknowledge and agree that if the Plant has not achieved Commercial Delivery of Power by the ITC Step Down Date, Owner will directly suffer substantial damage in the form of additional taxes owed by Owner. Accordingly, Contractor shall pay to Owner, as liquidated and agreed damages and not as a penalty, the ITC Liquidated Damages as calculated by Owner.)

### It is understood and agreed between the Parties that the terms, conditions and amounts fixed pursuant to this Article as Schedule Liquidated Damages are reasonable, considering the damages that Owner would sustain, and that these amounts are agreed upon and fixed as liquidated damages because of the difficulty of ascertaining the exact amount of damages that would be sustained by Owner. Payment of Schedule Liquidated Damages is the exclusive remedy for delays if and in the event the Project ultimately achieves Final Acceptance and the Final Acceptance Certificate is issued after the Guaranteed Final Acceptance Date and on or before the ITC Step Down Date; and the payment of Schedule Liquidated Damages shall not in any way affect Owner’s right to receive additional liquidated damages consisting of the ITC Liquidated Damages to compensate Owner for lost tax benefits due to any delay in the Project not achieving Commercial Delivery of Power on or prior to the ITC Step Down Date. Further, provided Contractor (a) has not otherwise materially breached the Agreement; and (b) is paying the assessed Schedule Liquidated Damages; the failure to achieve Final Acceptance by the applicable Guaranteed Final Acceptance Date but before the Outside Completion Date shall not be considered an event of default under the Contract Documents; however, in the event that Contractor has not achieved Final Acceptance by the Outside Completion Date, then Contractor shall be considered in default, and this Agreement may, at Owner’s sole and exclusive discretion, be terminated in accordance with ARTICLE 15.

### Although Schedule Liquidated Damages are Owner’s sole and exclusive remedy for Contractor’s delay in achieving Commercial Delivery of Power by the Guaranteed Commercial Delivery of Power Date or Final Acceptance by the Outside Completion Date, such exclusivity shall in no event affect Owner’s rights and remedies set forth in ARTICLE 15 for other Contractor Events of Default under this Agreement, including without limitation the failure to achieve Final Acceptance by the Outside Completion Date.

## **Capacity Shortfall Liquidated Damages**

In the event the Payment Output Percentage as determined by the final Guaranteed Performance Test conducted pursuant to Section 10.4.2 is less than 100%, then in addition to any other damages due under this Agreement, Contractor shall pay Owner liquidated damages as outlined in Appendix U (the “Capacity Shortfall Liquidated Damages”).

## **Payment of Liquidated Damages**

### Schedule Liquidated Damages, if any, under this Article shall accrue on a daily basis for each Day (or portion thereof) of delay. Contractor shall pay any Schedule Liquidated Damages pursuant to this Article within seven (7) Days after receipt of demand therefor. In addition, Contractor shall pay any Capacity Shortfall Liquidated Damages or ITC Liquidated Damages pursuant to this Article within seven (7) Days after receipt of demand therefor.

### Contractor’s obligation to pay Schedule Liquidated Damages, Capacity Shortfall Liquidated Damages or ITC Liquidated Damages when and as provided in this Article is an absolute and unconditional obligation, and shall not be released, discharged, diminished, or in any way affected by the assignment by Owner of the Contract Documents to any other Person.

### Owner shall have the right to offset any amounts owing to Owner under this Article against amounts owing to Contractor under this Agreement and to exercise its rights against any security provided by or for the benefit of Contractor, in such order as Owner may elect in its sole discretion.

## **Determination of Performance**

Contractor’s compliance with the conditions of Commercial Delivery of Power or Final Acceptance Performance Level, or the extent of its failure to comply therewith, for purposes of achieving Final Acceptance shall be determined on the basis of the Tests conducted in accordance with ARTICLE 10 and the Scope of Work, and the results of such Tests shall be conclusive for such purpose.

## **Security Fund**

### Not later than ten (10) days after the date hereof, Contractor shall establish a security fund pursuant to the provisions of this Section 11.6 (“Security Fund”), which shall be available to pay any amounts due to Owner pursuant to this Agreement, including to pay any liquidated damages owed by Contractor under this Agreement.

### In addition to any other remedy available to it under this Agreement or at law, Owner may draw from the Security Fund such amounts as are necessary to recover amounts owing to Owner pursuant to this Agreement. Such amounts include any damages due to Owner and any amounts for which Owner is entitled to indemnification under this Agreement. Any failure to draw upon the Security Fund or other security for any damages or other amounts due to Owner shall not prejudice Owner’s rights to recover such damages or amounts in any other manner.

### The Security Fund established as specified in Section 11.6.1 above (i) shall be maintained at Contractor’s sole expense and (ii) shall be originated by or deposited in a financial institution or company acceptable to Owner and meeting the requirements specified in Section 11.6.3(c) below (“Issuer”), and (iii) shall be in the form of the instrument described in Section 11.6.3(a), Section 11.6.3(b) or Section 11.6.3(c) below, as applicable:

#### An irrevocable standby letter of credit in a form and substance acceptable to Owner, from an Issuer that is a United States‑based commercial bank with at least $10 billion in assets and an unsecured bond rating (not enhanced by third‑party support) equivalent to A‑ or better as determined by Standard & Poor’s and a credit rating of A3 or better as determined by Moody’s, or, if either one or both are not available, equivalent ratings from alternate rating sources acceptable to Owner (“Letter of Credit”). In addition, if such unsecured bond rating of the Issuer is exactly equivalent to A‑, the Issuer must not be on credit watch or similar classification, or have a negative outlook (or the equivalent) by a rating agency. Such Letter of Credit must be consistent with this Agreement and shall include a provision for at least thirty (30) Days advance notice to Owner of any expiration or earlier termination of the Letter of Credit, so as to allow Owner sufficient time to exercise its rights under the Letter of Credit should Contractor fail to extend or replace the same. The form of the Letter of Credit must meet Owner’s requirements to ensure that claims or draw‑downs can be made unilaterally by Owner in accordance with the terms of this Agreement. Such security must be issued for a minimum term of three hundred and sixty‑five (365) Days. Contractor shall cause the renewal or extension of the security for additional consecutive terms of three hundred and sixty‑five (365) Days or more (or, if shorter, the remainder of the term during which Contractor’s obligations hereunder are outstanding) no later than thirty (30) Days prior to the expiration date of the Letter of Credit. If the Letter of Credit is not renewed or extended as required herein, Owner shall have the right to draw immediately upon the Letter of Credit and to place the amounts so drawn, at Contractor’s cost and with Contractor’s funds, in an interest bearing escrow account in accordance with Section 11.6.3(b) below. The Letter of Credit shall be governed by the Uniform Customs and Practice for Documentary Credits (2007 Revision), International Chamber of Commerce Brochure No. 500 (the “UCP”), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, in which case the terms of the Letter of Credit shall govern.

#### United States currency deposited with an Issuer, in which Owner holds a first and exclusive security interest perfected by control, either: (i) in an account under which Owner is designated as beneficiary with sole authority to draw from the account or otherwise access the security; or (ii) in an account held by Issuer as escrow agent with instructions to pay claims made by Owner pursuant to this Agreement, such instructions to be in a form satisfactory to Owner (each an “Account”). Security provided in this form shall include a requirement for immediate notice to Owner from Issuer and Contractor in the event that the sums held as security in the account do not at any time meet the required level for the Security Fund as set forth in this Section 11.6. Funds held in the account may be deposited in a money‑market fund, short‑term treasury obligations, investment‑grade commercial paper and other liquid investment‑grade investments with maturities of three months or less, with all investment income thereon to be taxable to, and to accrue for the benefit of, Contractor. After Final Acceptance is achieved and Contractor has no further obligations to Owner hereunder, funds in the Account (net of any taxes on such interest paid or payable by Owner) shall be remitted to Contractor.

#### A guaranty from a guarantor with a senior unsecured credit rating (not enhanced by third‑party support) equivalent to BBB‑ or better as determined by Standard & Poor’s or Baa3 by Moody’s, or if either one or both are not available, equivalent ratings from alternate rating sources acceptable to Owner (“Guaranty”). In addition, if such senior unsecured credit rating of the guarantor is exactly equivalent to BBB‑ by Moody’s or Baa3 by Standard & Poor’s, the guarantor must not be on credit watch or similar classification, or have a negative outlook (or the equivalent) by a rating agency. Owner may reevaluate from time to time the value of any Guaranty posted by Contractor for possible downgrade or for other negative circumstances. If the credit rating of the guarantor is downgraded or Owner otherwise has commercially reasonable grounds to believe that there has been a material adverse change in the creditworthiness of the guarantor, then Contractor shall be required to convert the Guaranty provided by such guarantor (i) to a Letter of Credit meeting the criteria set forth in Section 11.6.3(a) above, or, (ii) at Contractor’s election and at Owner’s reasonable discretion, to an Account or a Guaranty meeting the criteria set forth in Sections 11.6.3(b) above and 11.6.3(c), herein, respectively, no later than ten (10) Days after receiving notice from Owner that such conversion is required pursuant to this Section 11.6.3(c).

### Promptly following the satisfaction of all of Contractor’s obligations under this Agreement, Owner shall release the balance of the Security Fund (including any accumulated interest, if applicable and net of any taxes on such interest paid or payable by Owner) to Contractor.

### If there is an early termination of this Agreement that is not due to default by Contractor and no amounts remain outstanding and unpaid by Contractor under the Agreement, Owner shall take all actions necessary to release the balance of the Security Fund (including any accumulated interest, if applicable, and net of any taxes on such interest paid or payable by Owner) to Contractor.

### Contractor shall reimburse Owner for the incremental direct expenses (including the reasonable fees and expenses of counsel) incurred by Owner in connection with the preparation, negotiation, execution or release of any security instruments, and other related documents, used by Contractor to establish and maintain the Security Fund pursuant to Contractor’s obligations under this Section 11.6.

# **CONTRACTOR’S WARRANTIES**

## **Warranties**

### Contractor warrants to Owner that all Equipment shall:

#### Be new and of good quality;

#### Be free from improper workmanship and Defects;

#### Comply with all applicable requirements of all the Construction Documents, Applicable Laws and all Applicable Permits;

#### Be fit for Owner’s use in and as a solar photovoltaic power generation facility; and

#### Be free and clear of all Liens.

### Contractor warrants to Owner that the Work will be performed in a good and workmanlike manner, and that the Plant will:

#### Conform to and be designed, engineered and constructed in accordance with the Drawings, Scope of Work, all Applicable Laws and Applicable Permits, Prudent Utility Practices and other requirements of the Contract Documents;

#### Conform with, and be designed and engineered according to professional standards and skill, expertise and diligence of design professionals regularly involved in utility‑scale solar photovoltaic power projects similar to the Project; and

#### Contain the Equipment, supplies and materials described in the Scope of Work.

Contractor’s warranties in Section 12.1.1 and 12.1.2 expressly exclude Defects caused by Owner’s failure to comply with the Required Manuals and manufacturers’ guidelines applicable to the Equipment. Contractor shall ensure that the Work (including the installation of all Equipment) is performed in full compliance with the Required Manuals and the Equipment manufacturers’ guidelines applicable to the Equipment so that all Equipment warranties are validly assigned to Owner and in full force and effect as set forth in Section 12.1.3

### The following components of the Plant have Equipment warranties from manufacturers or suppliers, each of which shall be validly assigned to Owner:

#### Module Warranty, Appendix E‑1 (“Module Warranty”);

#### Tracker Warranty, Appendix E‑2 (“Tracker Warranty”);

#### Inverter Warranty, Appendix E‑3 (“Inverter Warranty”);

#### Transformer Warranty, Appendix E‑4 (“Transformer Warranty”); and

#### SCADA Monitoring System Warranty, Appendix E‑5 (“SCADA Warranty”), as applicable.

### Notwithstanding any limitation in duration of the warranties in Section 12.1.3, Contractor warrants that it shall remedy, in accordance with Section 12.2, any Defects or breaches of warranty which appear prior to the expiration of five (5) years from the Closing Date (the “Initial Warranty Period”).

### After the Initial Warranty Period, Owner agrees to look to the Equipment warranties in Appendix E during the warranty period provided by each manufacturer of the related Equipment (each an “Equipment Warranty Period”) with respect to the warranties set forth in Section 12.1.3.

### If and in the event Owner notifies Contractor of a Defect or breach of warranty, as applicable, within the Initial Warranty Period, Contractor, at Contractor’s expense, shall immediately respond to the notification and commence all Work with due diligence to remedy the Defect or breach of warranty. Contractor’s obligations to remedy any Defects or breaches of warranty, as applicable, which arise after the Initial Warranty Period shall be limited to the proceeds, if any, of any applicable insurance policy or amount collected from third parties. For the duration of each Equipment Warranty Period, Contractor agrees to reasonably cooperate with Owner to assert and pursue claims under the Equipment warranties and to affect the collection of any such insurance or third party proceeds.

### If, prior to or during the Initial Warranty Period, five percent (5%) or more of any type of component of the Work fails (for purposes hereof, a component shall be deemed to have failed if it contains a Defect or is in breach of other warranty set forth in Section 12.1, as applicable), then Contractor shall perform or cause to be performed a root‑cause analysis with respect to such component failure. Unless Contractor proves to Owner’s reasonable satisfaction that such incidence of failure is not a design fault, chronic manufacturing problem, a problem in installation, or other potentially system‑wide problem in such component, then Contractor shall replace such component or components (including, at Owner’s option, with equipment of a different type or grade, or from a different manufacturer) (“Replacement Equipment”). Notwithstanding the original expiration date for the Initial Warranty Period, the Initial Warranty Period for all Replacement Equipment shall expire twenty‑four (24) months after the date of completion of the installation of such Replacement Equipment, or the end of the Initial Warranty Period, whichever is later. If Contractor proves to Owner’s reasonable satisfaction that the failure is not due to a design fault, chronic manufacturing problem, a problem in installation, or other potentially system‑wide problem in such component, then the warranty period applicable for all such component or components in the Plant shall be automatically extended for an additional twelve (12) months beyond the Initial Warranty Period.

### THE WARRANTIES OF CONTRACTOR SET FORTH IN THIS AGREEMENT (INCLUDING IN ANY APPENDIX) ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER STATUTORY, EXPRESS OR IMPLIED (INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL WARRANTIES ARISING FROM COURSE OF DEALING AND USAGE OF TRADE). The foregoing sentence is not intended to disclaim any other obligations of Contractor set forth herein.

## **Repair of Nonconforming Work**

### Owner shall promptly give written notice (“Notice of Defect”) to Contractor upon discovery of any failure of any of the Work to satisfy any Warranty during the Initial Warranty Period or, if applicable, the Equipment Warranty Period. In the event of any such failure under circumstances in which there is an immediate need as defined in this Section 12.2, then Owner shall perform such warranty work for Contractor’s account in accordance with the Warranty Procedures; provided, however, that the failure to comply with such Warranty Procedures shall not void the applicable warranty. As used in this Section, an “immediate need” is a situation when there is (a) a threat of imminent harm to Persons or property on the Site, or (b) a situation that in Owner’s reasonable determination and consistent with Prudent Utility Practices could materially adversely impact the operation of the Project that in Owner’s reasonable determination requires immediate action for which Contractor has been notified of and, in Owner’s reasonable determination, Contractor cannot take such immediate action. In all other cases, Contractor shall, at its own cost and expense (except to the extent of insurance proceeds actually received), re‑perform any necessary engineering and purchasing relating to such Equipment, material, labor, and shipping, as well as the cost of removing any Defect and the cost of replacement thereof, including all costs of uncovering (including opening and closing) the Defect and any resulting damage to surrounding Work and/or adjacent property, equipment and facilities, as shall be necessary to cause the Work and the Project to conform to the applicable warranty. Within five (5) days after receipt by Contractor of a Notice of Defect from Owner specifying a failure of any of the Work to satisfy Contractor’s warranty and requesting Contractor to correct the Defect, Contractor and Owner shall mutually agree when and how Contractor shall remedy said Defect. If Contractor does not commence to use commercially reasonable efforts to proceed to complete said remedy within the time agreed to, or should Contractor and Owner fail to reach such an agreement within such five (5) day period, Owner shall have the right to perform the necessary remedy, or have third parties perform the necessary remedy, in accordance with the Warranty Procedures and the costs as established pursuant to the Warranty Procedures shall be borne by Contractor; provided, however, that the failure to comply with such Warranty Procedures shall not void the applicable warranty. Notwithstanding the foregoing, Contractor shall have the right to request Owner to perform all or any portion of Contractor’s obligations with respect to any warranty claim, and, if Owner determines that it has the capability and expertise to perform such obligations, Owner shall perform such obligations and the costs as established pursuant to the Warranty Procedures shall be borne by Contractor; provided, however, that the failure to comply with such Warranty Procedures shall not void the applicable warranty.

### If, during the given warranty period for any warranty provided hereunder, the Work or the Plant is found to contain Defects or Contractor is otherwise in breach of any of the warranties set forth in Section 12.1, as applicable, Contractor shall at its expense correct, repair or replace such Defect or otherwise cure such breach as promptly as practicable upon being given notice thereof. Within seventy‑two (72) hours of receipt of such notice, Contractor shall respond to Owner with an initial assessment of the anticipated warranty repair and the projected schedule to complete such repair. Owner shall provide Contractor with reasonable access to the Plant in order to perform its obligation under this Article and the Parties shall schedule such corrections or replacements as necessary so as to minimize disruptions to the operation of the Plant. Contractor shall bear all costs and expenses associated with correcting any Defect or breach of warranty, including, without limitation, necessary disassembly, transportation, reassembly and retesting, as well as reworking, repair or replacement of such Work, disassembly and reassembly of piping, ducts, machinery, Equipment or other Work as necessary to give access to improper, defective or non‑conforming Work and correction, removal or repair of any damage to other work or property that arises from the Defect or breach of warranty. If Contractor is obligated to repair, replace or renew any Equipment, item or portion of the Work hereunder, Contractor will undertake a technical analysis of the problem and correct the “root cause” unless Contractor can demonstrate to Owner’s reasonable satisfaction that there is not a risk of the reoccurrence of such problem. Contractor’s obligations under this Section shall not be impaired or otherwise adversely affected by any actual or possible legal obligation or duty of any Vendor or Subcontractor to Contractor or Owner concerning any Defect or breach of warranty. No such correction or cure, as the case may be, shall be considered complete until Owner shall have reviewed and accepted such remedial Work.

### If Contractor fails to commence to complete the correction of any Defect or cure of any breach of warranty as required herein within fifteen (15) days after receipt of notice from Owner to perform such obligations or thereafter fails to diligently continue to complete such corrections or cure, then Owner may correct (or cause to be corrected) such Defect or cure (or cause to be cured) such breach of warranty and Contractor shall be liable for all reasonable costs, charges, and expenses incurred by Owner in connection therewith (including attorneys’ and other consultants’ fees), and Contractor shall, within fifteen (15) days after request therefor, pay to Owner an amount equal to such costs, charges, and expenses. Any such request by Owner shall be accompanied by proper documentation evidencing such costs, charges and expenses. Such correction of a Defect or cure of a breach of warranty by Owner (or caused by Owner) shall be deemed performed by Contractor and the warranty period applicable thereto for such corrected or cured Work shall be extended in accordance with Section 12.1.7.

### If, during a given warranty period, Contractor shall change, repair or replace any Major Equipment item or component, Owner, in its reasonable discretion, may require Contractor to conduct and satisfactorily complete any test required by Owner with respect to the affected Equipment; provided, however, in connection with any performance of a test pursuant to this Section 12.2.4, appropriate allowance with respect to the performance of such Equipment shall be made for the fact that such Equipment may have operated prior thereto. If, after running such test pursuant to this Section, the results indicate a degradation in the performance of the Project or the Project fails to satisfy any other Test, then Contractor shall repair, correct or replace such affected Equipment and re‑run such test until the Project performs at a level consistent with the performance of the Project immediately prior to the change, repair or replacement of such Equipment.

## **Proprietary Rights**

Without limiting any of the provisions of this Agreement, if Owner or Contractor is prevented from completing the Plant, the Work or any part thereof, or from the use, operation, or enjoyment of the Plant, the Work or any part thereof as a result of a claim, action or proceeding by any Person for unauthorized disclosure, use, infringement or misappropriation of any Intellectual Property Right arising from Contractor’s performance (or that of its Subcontractors or Vendors) under the Contract Documents, including, without limitation, the Work, Equipment, the Contractor Deliverables or other items and services provided by Contractor or any Subcontractor or Vendor hereunder, Contractor shall promptly, but in no event later than thirty (30) days from the date of any action or proceeding, take all actions necessary to remove such impediment, including:

### Secure termination of the injunction and procure for Owner or its Affiliates or assigns, as applicable, the right to use such materials, Equipment or Contractor Deliverables in connection with the operation and maintenance of the Project, without obligation or liability; or

### Replace such materials, Equipment or Contractor Deliverables, with a non‑infringing equivalent, or modify same to become non‑infringing, all at Contractor’s sole expense, but subject to all the requirements of the Contract Documents.

## **Repairs and Testing by Owner**

During the Initial Warranty Period, without prior notice to Contractor and without affecting the warranties of Contractor hereunder, Owner shall be permitted to:

### Make repairs or replacements on Equipment so long as the repair or replacement involves the correct installation of spare parts and is otherwise conducted in accordance with the Required Manuals, and the manufacturer specifications; and

### Adjust or test Equipment as outlined in the Required Manuals provided by Contractor or any Subcontractor or Vendor.

## **Vendors and Subcontractors**

### Contractor shall, for the protection of Contractor and Owner, obtain from the Vendors and Subcontractors such guarantees and warranties with respect to Work performed and Equipment supplied, used and installed hereunder as are reasonably obtainable, which guarantees and warranties shall equal or exceed those set forth in Section 12.1, and shall be made available and assignable to Owner, Owner’s permitted assigns. Owner shall be an express third party beneficiary of all such guarantees and warranties. All such warranties obtained shall be in addition to, and shall not alter the warranties of, Contractor. Upon Owner’s request, Contractor shall use all reasonable efforts to assist Owner in enforcing the warranties. To the extent available, Owner shall have the right to require Contractor to secure additional warranty or extended guarantee protection pursuant to a Change Order issued in accordance with the provisions of ARTICLE 6. Upon the earlier of the Final Acceptance Date or termination of this Agreement, Contractor shall deliver to Owner copies of all relevant contracts providing for such guarantees and warranties.

### In the case of warranties from the manufacturers of the solar modules, the racking and tracking system and the inverters, the Vendors will acknowledge to Owner in writing prior to the Final Acceptance Date that their equipment has been properly installed and that their warranty is fully in effect on an “as built” or “as installed” basis and will remain in effect on the same basis when assigned by Contractor to Owner.

## **Assignment of Warranties**

As of the Closing Date (or Outside Completion Date, if earlier), Contractor shall assign to Owner or its designee all warranties received by it from Subcontractors and Vendors. The warranties of Contractor under this Agreement and all warranties from Subcontractors and Vendors (including any assignments of such warranties) must also allow Owner to further assign such warranties. Notwithstanding the assignment, in the event that Owner makes any warranty claim against Contractor with respect to Equipment or services supplied in whole or in part by any Subcontractor or Vendor, and Contractor fulfills its obligations with respect to such claim by Owner, Contractor shall be entitled to enforce for its own benefit any warranty given by such Subcontractor or Vendor with respect to such Equipment and services.

## **Survival of Warranties**

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

# **REPRESENTATIONS**

## **Representations and Warranties**

### Contractor represents and warrants to Owner that:

#### Contractor is a corporation, duly organized, validly existing, and in good standing under the laws of the \_\_\_\_\_\_\_\_\_\_\_\_\_\_, and is duly authorized and qualified to conduct business in the State of New Mexico;

#### Contractor has all requisite power and authority to conduct its business, own its properties and execute and deliver this Agreement and perform its obligations hereunder in accordance with the terms hereof;

#### The execution, delivery, and performance of the Contract Documents have been duly authorized by all requisite corporate action and this Agreement constitutes the legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, subject as to enforceability of remedies to limitations imposed by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the enforcement of creditors rights generally and general principles of equity;

#### The individual executing this Agreement on behalf of Contractor has been duly authorized to do so;

#### Neither the execution, delivery or performance of the Contract Documents conflicts with, or results in a violation or breach of the terms, conditions or provisions of, or constitutes a default under, the organizational documents of Contractor or any agreement, contract, indenture or other instrument under which Contractor or its assets are bound, nor violates or conflicts with any Applicable Law or any judgment, decree, order, writ, injunction or award applicable to Contractor;

#### Contractor is not in violation of any Applicable Law or Applicable Permit, which violations, individually or in the aggregate, would adversely affect its performance of its obligations under the Contract Documents;

#### Contractor is the holder of all governmental consents, licenses, permissions and other authorizations and Applicable Permits required to operate and conduct its business now and as contemplated by the Contract Documents, other than Applicable Permits which will be obtained in accordance with the terms of the Contract Documents;

#### There is no pending controversy, legal action, arbitration proceeding, administrative proceeding or investigation instituted, or to the best of Contractor’s knowledge threatened, against or affecting, or that could affect, the legality, validity and enforceability of the Contract Documents or the performance by Contractor of its obligations under the Contract Documents, nor does Contractor know of any basis for any such controversy, action, proceeding or investigation;

#### Contractor has the full experience and proper qualifications to design and perform the Work and to construct the Plant in accordance with the terms of the Contract Documents;

#### Contractor has reviewed all other documents and information necessary and available to Contractor in order to ascertain the nature, location and scope of the Work, the character and accessibility of the Site, the existence of obstacles to construction of the Plant and performance of the Work, the availability of facilities and utilities, and the location and character of existing or adjacent work or structures;

#### Contractor owns or has the right to use all patents, trademarks, service marks, trade names, copyrights, licenses, franchises, permits and intellectual property rights necessary to perform the Work without conflict with the rights of others;

#### Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital and access to credit lines to complete its obligations under this Agreement;

#### Owner may provide or may have provided Contractor with copies of certain studies, reports or other information (including oral statements) and Contractor represents and acknowledges that:

##### All such documents or information have been or will be provided as background information and as an accommodation to Contractor;

##### Owner makes no representations or warranties with respect to the accuracy of such documents or the information (including oral statements) or opinions therein contained or expressed; and

##### It is not relying on Owner for any information, data, inferences, conclusions, or other information with respect to the Job Site, including the surface conditions of the Job Site and the surrounding areas;

#### All Persons who will perform any portion of the Work have and will have all business and professional certifications required by Applicable Law to perform their respective services under this Agreement;

#### The access rights granted to or obtained by Contractor to the Job Site are adequate for the performance of the Work and operation of the Plant;

#### The Plant will be designed and constructed to achieve or exceed the Guaranteed Nameplate Capacity; and

#### Contractor and its representatives have not made any payment or given anything of value, and Contractor will not, and Contractor will direct its employees, agents, and Subcontractors and Vendors directly contracting with Contractor, and their employees or agents not, to make any payment or give anything of value, in either case to any government official (including any officer or employee of any Government Authority) to influence his or her decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. None of Contractor, its Subcontractors or Vendors, or any of their employees or agents shall take any action that in any way violates the United States Foreign Corrupt Practices Act or any similar Applicable Law. Contractor shall immediately notify Owner of any violation hereof.

### Owner represents and warrants to Contractor that:

#### Owner is a corporation, duly organized and validly existing under the laws of New Mexico and is duly authorized and qualified to conduct business in the State of New Mexico;

#### Owner has all requisite power and authority to conduct its business, own its properties and execute and deliver the Contract Documents and perform its obligations hereunder in accordance with the terms hereof;

#### The execution, delivery, and performance of the Contract Documents have been duly authorized by all requisite company action and this Agreement constitutes the legal, valid and binding obligation of Owner, enforceable against Owner in accordance with its terms, subject as to enforceability of remedies to limitations imposed by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the enforcement of creditors rights generally and general principles of equity;

#### Neither the execution, delivery or performance of the Contract Documents conflicts with, or results in a violation or breach of the terms, conditions or provisions of, or constitutes a default under, the organizational documents of Owner or any agreement, contract, indenture or other instrument under which Owner or its assets are bound, nor violates or conflicts with any Applicable Law or any judgment, decree, order, writ, injunction or award applicable to Owner;

#### The individual executing this Agreement on behalf of Owner has been duly authorized to do so;

#### Owner is not in violation of any Applicable Law or Applicable Permit, which violations, individually or in the aggregate, would adversely affect its performance of its obligations under the Contract Documents;

#### Owner is the holder of all governmental consents, licenses, permissions and other authorizations required to operate and conduct its business now and as contemplated by the Contract Documents, other than Applicable Permits which will be obtained in accordance with the terms of the Contract Documents; and

#### Owner is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital and access to credit lines to complete its obligations under this Agreement.

## **Survival of Representations and Warranties**

The representations and warranties of the Parties herein shall survive execution and termination of this Agreement.

# **FORCE MAJEURE**

## **Events of Force Majeure**

No failure or omission to carry out or observe any of the terms, provisions, or conditions of this Agreement shall give rise to any claim by either Party against the other, or be deemed to be a breach or default of this Agreement if such failure or omission shall be caused by, or arise out of, a Force Majeure Event. No obligations of either Party that arose before the occurrence of a Force Majeure Event causing the suspension of performance shall be excused as a result of such occurrence.

## **Notice**

If either Party’s ability to perform its obligations under this Agreement is affected by a Force Majeure Event, such Party shall, as promptly as reasonably possible, upon learning of such event and ascertaining that it will delay its performance hereunder (but in any event within ten (10) Business Days after the occurrence of such Force Majeure Event), give a Delay Notice to the other Party. The Delay Notice shall be in writing and state the nature of the Force Majeure Event, its anticipated duration and effect upon the performance of such Party’s obligations, and any action being taken to avoid or minimize its effect. The burden of proof shall be on the Party claiming to be affected by the Force Majeure Event.

## **Scope of Suspension; Duty to Mitigate**

The suspension of performance due to a Force Majeure Event shall be of no greater scope and of no longer duration than is reasonable in light of the nature and magnitude of such event. Suspension of performance due to a Force Majeure Event, and any related remedy therefor, shall be permitted (i) only if the affected Party could not have avoided the impacts of the Force Majeure Event by the exercise of due diligence, and (ii) only if by the exercise of due diligence, the affected Party is unable to overcome or obtain or cause to be obtained a substitute for suspension of performance. The excused Party shall use its reasonable efforts to: (a) mitigate the duration of, and the costs arising from, any suspension or delay in its performance; (b) continue to perform its obligations hereunder; and (c) remedy its inability to perform. When the affected Party is able to resume performance of its obligations under this Agreement, such affected Party shall give the other Party notice to that effect. All of the foregoing notwithstanding, a Force Majeure Event shall not under any circumstances extend either the Guaranteed Commercial Delivery of Power Date, the Guaranteed Final Acceptance Date or the Outside Completion Date.

## **Removal of Force Majeure**

If, within a reasonable time after a Force Majeure Event that has caused Contractor to suspend or delay performance of the Work, action to be undertaken has been identified and recommended to Contractor, and Contractor has failed within five (5) Business Days after receipt of written notice thereof from Owner to take such action as Contractor could lawfully and reasonably initiate to remove or relieve either the Force Majeure Event or its direct or indirect effects, Owner may, in its sole discretion and after written notice to Contractor, initiate such reasonable measures as will be designed to remove or relieve such Force Majeure Event or its direct or indirect effects and thereafter require Contractor to resume full or partial performance of the Work. To the extent Contractor’s failure to take such measures results in additional expense in addition to the amount Owner would have paid to Contractor (whether as part of the original Contract Price, as additional compensation to the extent the requested measures constituted a Change Order altering the scope of the Work, or as additional out of pocket expenses incurred by Owner), had Contractor taken such measures, such additional expense shall be for Contractor’s account.

## **Responsibility of Contractor**

Damages or injuries to Persons or properties resulting from a Force Majeure Event during the performance of the obligations provided for in this Agreement shall not relieve Contractor of the indemnity responsibility described in Section 16.1.

## **Notice**

Contractor’s sole remedy for the occurrence of a Force Majeure Event shall be for Contractor and Owner to process a Change Order for an extension of time only in accordance with ARTICLE 6. Notwithstanding the foregoing, if a Force Majeure Event delay continues for a period of more than sixty (60) consecutive days or one hundred twenty (120) days in the aggregate, either Party shall have the right to terminate this Agreement by then providing five (5) days’ written notice to the other Party, unless during such notice period the Force Majeure Event delay no longer is present within such 5‑day period.

# **TERMINATION**

## **Contractor Events of Default**

The occurrence of any of the following events shall constitute an event of default by Contractor (each a “Contractor Event of Default”):

### The failure of Contractor to achieve Final Acceptance by the Outside Completion Date;

### The failure by Contractor to pay Schedule Liquidated Damages, Capacity Shortfall Liquidated Damages or ITC Liquidated Damages as and when required herein;

### Any failure by Contractor to make any other payment or payments required to be made to Owner under the Contract Documents within five (5) Business Days after receipt of written notice from Owner of Contractor’s failure to make such other payment or payments (except, in the case of payments other than liquidated damages, to the extent Contractor disputes such other payment or payments in good faith and in accordance with the terms of this Agreement);

### Any of the following occurs:

#### Contractor fails to supply sufficient skilled workers or suitable materials or equipment, in Owner’s discretion;

#### Contractor fails to make prompt payments when due to Subcontractors or Vendors for labor, materials or equipment;

#### Contractor suspends performance of a material portion of the Work (other than as provided in: (i) ARTICLE 14; (ii) Section 15.5; or (iii) pursuant to a Change Order); or

#### Contractor fails to comply with any provision of any Applicable Law;

and if in each paragraph (a) through (d) of this Section, such condition remains unremedied for fifteen (15) days following the earlier of (i) Contractor’s actual knowledge thereof or (ii) written notice thereof by Owner, or for such longer period, not to exceed thirty (30) days, during which time Contractor diligently pursues the cure of such material breach, if such material breach is capable of being cured.

### Any material breach by Contractor of any representation or warranty made by Contractor in ARTICLE 13;

### Any material breach by Contractor of any obligation, covenant or agreement of Contractor hereunder other than those breaches specified in this Section 15.1, and:

#### Such breach is not cured by Contractor within fifteen (15) days after the earlier of (i) Contractor’s actual knowledge thereof or (ii) written notice thereof by Owner; or

#### If such breach is not capable of being cured within such fifteen (15) day period (as determined by Owner in its sole discretion), Contractor fails to:

##### Commence to cure such breach within such fifteen (15) day period;

##### Thereafter diligently proceed to cure such breach in a manner satisfactory to Owner in its sole discretion;

##### Cure such breach within thirty (30) days after notice thereof from Owner;

### Any of the following occurs:

#### Contractor consents to the appointment of or taking possession by, a receiver, a trustee, custodian, or liquidator of itself or of a substantial part of its assets, or fails or admits in writing its inability to pay its debts generally as they become due, or makes a general assignment for the benefit of creditors;

#### Contractor files a voluntary petition in bankruptcy or a voluntary petition or an answer seeking reorganization in a proceeding under any applicable bankruptcy or insolvency laws or an answer admitting the material allegations of a petition filed against it in any such proceeding, or seeks relief by voluntary petition, answer or consent, under the provisions of any now existing or future bankruptcy, insolvency or other similar law providing for the liquidation, reorganization, or winding up of corporations, or providing for an agreement, composition, extension, or adjustment with its creditors;

#### A substantial part of Contractor’s assets is subject to the appointment of a receiver, trustee, liquidator, or custodian by court order and such order shall remain in effect for more than thirty (30) days; or

#### Contractor is adjudged bankrupt or insolvent, has any property sequestered by court order and such order shall remain in effect for more than thirty (30) days, or has filed against it a petition under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction, whether now or hereafter in effect, and such petition shall not be dismissed within thirty (30) days of such filing;

### The dissolution of Contractor;

### The transfer by Contractor of:

#### any rights and/or obligations of Contractor hereunder, except for an assignment permitted hereunder; or

#### all or a substantial portion of the assets or obligations of Contractor, except where the transferee expressly assumes the transferred obligations and such transfer does not materially adversely affect the ability of Contractor or the transferee, as applicable, to perform its obligations under the Contract Documents, as determined by Owner in its sole discretion;

### Any failure by Contractor to maintain the insurance coverages required of it in accordance with ARTICLE 9;

### Any abandonment of the Work by Contractor, where “Abandonment” for the purposes of this Section shall mean that Contractor has substantially reduced personnel at the Job Site or removed required equipment from the Job Site such that, in the opinion of an experienced construction manager, Contractor would not be capable of completing the Milestones in accordance with the Critical Path Schedule; or

### Following approval of a Schedule Recovery Plan pursuant to Section 5.10, Contractor’s unexcused failure to stay within fifteen (15) days of the schedule set forth in the Schedule Recovery Plan (as determined from the revised Critical Path Schedule established by the Schedule Recovery Plan); provided, however, that if such failure to stay within fifteen (15) days is (i) caused by an insurable event covered by the insurance described in ARTICLE 9 or (ii) is caused by major equipment failure or damage and, in either case, Contractor promptly commences and diligently proceeds to stay on schedule, then such default shall not be a Contractor Event of Default until and unless Contractor fails to stay within fifteen (15) days of the revised Critical Path Schedule established by the Schedule Recovery Plan.

## **Termination by Owner Due to Contractor Default; Other Remedies**

### Upon the occurrence of a Contractor Event of Default, Owner may, at its option, terminate this Agreement, without prejudice to any other rights and remedies available to Owner under this Agreement, by giving written notice thereof to Contractor, which termination shall be effective upon the giving of such notice by Owner.

### In the event of termination by Owner under this Section 15.2, Contractor shall be responsible for and shall reimburse Owner for the following amounts, less the balance of the Contract Price unpaid at the time of the termination:

#### All reasonable costs and expenses incurred by Owner to complete (or cure deficiencies in) the Work, including, without limitation, overhead and legal, engineering and other professional expenses;

#### All reasonable costs and expenses incurred in connection with the termination of the Contract Documents, including costs and expenses incurred in connection with the obligations set forth under Section 15.2.4;

#### Schedule Liquidated Damages and/or Capacity Shortfall Liquidated Damages, to the extent owed but not previously paid; and

#### Additional liquidated damages consisting of the ITC Liquidated Damages to compensate Owner for lost tax benefits due to any delay in the Project not achieving Commercial Delivery of Power on or prior to the Outside Completion Date that is not (i) an Owner Caused Delay or (ii) due to a Force Majeure Event.

### If the balance due on the Contract Price that is unpaid at the time of termination pursuant to this Section 15.2 exceeds the sum total of all damages owed by Contractor under this Section 15.2, then Owner shall pay the difference to Contractor.

### In the event of termination by Owner under this Section 15.2:

#### Contractor shall clean up the Job Site as provided in Section 3.8.1 and leave the Job Site;

#### Owner shall take possession of the Job Site and of the Equipment (whether at the Job Site, in transit or otherwise);

#### Contractor shall promptly assign to Owner or its designee any contract rights (including warranties, licenses, patents and copyrights) that it has to any and all Equipment and the Work, including, without limitation, contracts with Subcontractors and Vendors, and Contractor shall execute such documents as may be reasonably requested by Owner to evidence such assignment, subject to Owner’s assumption of same and, if required, Owner’s adequate assurance to such Subcontractors or Vendors regarding Owner’s ability to pay;

#### Contractor shall promptly furnish Owner with copies of all Drawings and, to the extent available, Final Plans, and copies of all computer files containing Drawings or Final Plans;

#### Contractor hereby grants Owner and its designee with the right to use, free of charge, all patented, copyrighted and other proprietary information relating to the Work that Owner deems necessary to complete the Work, and Contractor shall execute such documents as may be reasonably requested by Owner to evidence such right;

#### Contractor shall assist Owner in preparing an inventory of all Equipment in use or in storage at the Job Site;

#### Contractor shall perform all Remediation Work requested by Owner; and

#### Contractor shall take such other action as required hereunder upon termination of this Agreement.

### Upon the occurrence and during the continuance of a Contractor Event of Default but prior to termination of this Agreement by Owner, Owner may, without prejudice to any of its other rights and remedies:

#### Seek equitable relief to cause Contractor to take action or to refrain from taking action pursuant to this Agreement, or to make restitution of amounts improperly received under this Agreement;

#### Make such payments or perform such obligations as are required to cure such Contractor Event of Default, and then draw on or make a claim against any security provided pursuant to this Agreement for the cost of such payment or performance and/or offset the cost of such payment or performance against payments otherwise due to Contractor under this Agreement; provided that Owner shall be under no obligation to cure any such Contractor Event of Default;

#### Seek damages as provided in Section 15.2.2, including proceeding against any bond, guarantee, letter of credit, or other security given by or for the benefit of Contractor for its performance under this Agreement;

#### Require direct payment or co‑payment to Subcontractors or Vendors and any such payments or co‑payments shall be credited against amounts due to Contractor under the Agreement;

#### Require Contractor to assign to Owner any agreement or purchase order with a Subcontractor or Vendor, provided that:

##### Owner shall assume the obligations under such agreement or purchase order accruing after the date of such assignment;

##### If requested by Owner, Contractor shall remain responsible for administering and managing such agreement or purchase order (including enforcing the warranty obligations thereunder); and

##### If Contractor continues to remain responsible to administer or manage the Project, then Contractor shall not be relieved of its obligation to achieve Final Acceptance as a result of such assignment; or

#### Take any other actions, including but not limited to other self‑help remedies, as may be necessary or advisable in Owner’s sole discretion and consistent with its obligations under this Agreement.

## **Termination by Owner for Convenience**

### Owner may terminate this Agreement prior to issuance of the Notice to Proceed because any of the following occurs:

#### Owner has not received adequate approvals or other assurances as to the Project from Governmental Authorities, including regarding the availability of applicable Tax Credits in an amount projected to be reasonably acceptable to Owner,

#### Owner has not concluded arrangements on interconnection and other matters upon which Owner must agree in connection with the Project, or

#### Owner has determined in its sole discretion that the Project has become unfeasible.

### If Owner exercises its right to terminate this Agreement pursuant to causes (a) or (b) of Section 15.3.1 after the issuance of a Limited Notice to Proceed, the Owner shall pay Contractor an amount equal to the Early Termination Payment. Any amount owed pursuant to this Section 15.3.2 shall be subject to adjustment to the extent any Work contains Defects.

## **Owner Events of Default**

The occurrence and continuation of any of the following events shall constitute an event of default by Owner (each, an “Owner Event of Default”):

### A failure by Owner to make payment of any undisputed amount when due, and such breach is not cured by Owner within fifteen (15) days after Owner’s receipt of notice thereof from Contractor; or

### Any material breach by Owner of any representation or warranty made by Owner in ARTICLE 13;

### Any of the following occurs:

#### Owner consents to the appointment of or taking possession by, a receiver, a trustee, custodian, or liquidator of itself or of a substantial part of its assets, or fails or admits in writing its inability to pay its debts generally as they become due, or makes a general assignment for the benefit of creditors;

#### Owner files a voluntary petition in bankruptcy or a voluntary petition or an answer seeking reorganization in a proceeding under any applicable bankruptcy or insolvency laws or an answer admitting the material allegations of a petition filed against it in any such proceeding, or seeks relief by voluntary petition, answer or consent, under the provisions of any now existing or future bankruptcy, insolvency or other similar law providing for the liquidation, reorganization, or winding up of corporations, or providing for an agreement, composition, extension, or adjustment with its creditors;

#### A substantial part of Owner’s assets is subject to the appointment of a receiver, trustee, liquidator, or custodian by court order and such order shall remain in effect for more than thirty (30) days; or

#### Owner is adjudged bankrupt or insolvent, has any property sequestered by court order and such order shall remain in effect for more than thirty (30) days, or has filed against it a petition under any bankruptcy, reorganization, arrangement, insolvency, readjustment of debt, dissolution or liquidation law of any jurisdiction, whether now or hereafter in effect, and such petition shall not be dismissed within thirty (30) days of such filing.

### Any material breach by Owner of any obligation, covenant or agreement of Owner hereunder other than those breaches specified in this Section 15.4; and:

#### Such breach is not cured by Owner within fifteen (15) days after notice thereof from Contractor; or

#### If such breach is not capable of being cured within such fifteen (15) day period (as determined by Contractor in its sole discretion), Owner fails to:

##### Commence to cure such breach within such fifteen (15) day period;

##### Thereafter diligently proceed to cure such breach in a manner satisfactory to Contractor in its sole discretion; or

##### Cure such breach within ninety (90) days after notice thereof from Contractor.

### The dissolution of Owner, except for the purpose of merger, consolidation or reorganization where the successor expressly assumes Owner’s obligations hereunder and such assignment and assumption does not materially adversely affect the ability of the successor to perform its obligations under the Contract Documents.

### The transfer by Owner of all or a substantial portion of the:

#### Rights and/or obligations of Owner hereunder, except for an assignment permitted hereunder; or

#### Assets or obligations of Owner, except where the transferee expressly assumes the transferred obligations and such transfer does not materially adversely affect the ability of Owner or the transferee, as applicable, to perform its obligations under the Contract Documents, as determined by Contractor in its sole discretion.

### Any failure by Owner to maintain the insurance coverages required of it in accordance with ARTICLE 9.

## **Termination by Contractor Due to Owner Default**

### Subject to Section 15.5.2, below, upon the occurrence and during the continuance of an Owner Event of Default beyond the applicable grace period, Contractor may terminate this Agreement thirty (30) Business Days after giving written notice thereof to Owner so long as the amount owed by Owner (other than any amount disputed in accordance with the terms of this Agreement) is not paid within such period.

### In the event of such termination prior to issuance of the Notice to Proceed, Contractor shall be entitled to receive an amount equal to the Early Termination Payment as its sole and exclusive remedy for such termination. In the event of such termination after issuance of the Notice to Proceed, Contractor shall be entitled to all damages and relief provided by law.

## **Continuing Obligations and Remedies During Event of Default**

In the event of the occurrence of any default hereunder:

### Neither Party shall be relieved of any of its liabilities or obligations hereunder, unless and until such liabilities and obligations are terminated in accordance with the provisions hereof; and

### Each Party shall have the right to pursue any right or remedy available to it hereunder.

## **Termination and Survival of Terms**

Upon termination of this Agreement pursuant to this Article, the rights and obligations of the Parties hereunder shall terminate, except for the rights and obligations:

### Accrued as of the date of termination;

### Arising out of events occurring prior to the date of termination; and

### Of the Parties which expressly survive termination, including the rights and obligations forth in ARTICLE 12, ARTICLE 13 and this ARTICLE 15.

# **INDEMNIFICATION**

## **Contractor Indemnification**

Contractor agrees to reimburse, indemnify, and hold Owner, Owner’s Affiliates, and each of their respective directors, officers, employees, representatives, agents, advisors, consultants, counsel and assigns (“Owner Indemnitees”) harmless from and against, any and all losses, claims, obligations, demands, assessments, penalties, liabilities, costs, damages and expenses (including reasonable attorneys’ fees and expenses) (collectively, “Damages”) asserted against or incurred by such Owner Indemnitees by reason of or resulting from the breach of its obligations under this Agreement and any negligent, reckless, or otherwise tortious act or omission (including strict liability) during the performance of the Work, or any curative action under any warranty following performance of the Work, of Contractor or any Affiliate thereof, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, including without limitation any and all of the following Damages:

### Any bodily injury, death or damage to property caused by any act or omission (including strict liability) or willful misconduct of Contractor or any Affiliate thereof, any Subcontractor or Vendor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable;

### Any third party claims relating to or arising out of the performance of the Work;

### Claims by any Government Authority for any Contractor Taxes;

### Any pollution or contamination which originates from sources in Contractor’s or its Subcontractors’ or Vendors’ possession, use or control or caused by the release by Contractor or its Subcontractors or Vendors (excluding Pre‑Existing Hazardous Material), including, without limitation, from Hazardous Material, toxic waste, industrial hazards, sanitary waste, fuel, lubricant, motor oil, paint, solvent, bilge and garbage;

### To the extent Owner has paid all undisputed amounts due pursuant to the Contract Documents, any Lien on the Equipment, the Job Site or any fixtures or personal property included in the Work (whether or not any such Lien is valid or enforceable) created by, through or under, or as a result of any act or omission (or alleged act or omission) of, Contractor or any Subcontractor, Vendor or other Person providing labor or materials in connection with the Work;

### Any claim, action or proceeding by any Person for unauthorized disclosure, use, infringement or misappropriation of any Intellectual Property Right arising from:

#### Contractor’s performance (or that of its Affiliates, Subcontractors or Vendors) under the Contract Documents, including, without limitation, the Work, Equipment, Drawings, Final Plans or other items and services provided by Contractor or any Subcontractor or Vendor hereunder;

#### The use or ownership of any Contractor Deliverable;

#### Any license granted hereunder; or

#### The design, engineering, construction, use, operation or ownership of the Plant or any portion thereof.

### Any vitiation of any insurance policy procured under ARTICLE 9, as a result of Contractor’s failure to comply with any of the requirements set forth in such policy or any other act by Contractor or any Subcontractor or Vendor;

### Any failure of the Project, as designed, constructed or completed by Contractor, to comply with, or be capable of operating in compliance with, Applicable Laws or the conditions or provisions of Applicable Permits;

### Any failure of Contractor to comply with Applicable Laws or the conditions or provisions of Applicable Permits; and

### Any claims with respect to employer’s liability or worker’s compensation filed by any employee of Contractor or any of its Subcontractors or Vendors.

## **Owner Indemnification**

Owner agrees to reimburse, indemnify, defend and hold Contractor and its Affiliates and each of their respective directors, officers, employees, representatives, agents, advisors, consultants and counsel (“Contractor Indemnitees”), harmless from and against, any and all Damages asserted against or incurred by such Contractor Indemnitees to the extent or resulting from the breach of its obligations under this Agreement and any negligent, reckless, or otherwise tortious act or omission (including strict liability) during the performance of the Work of Owner or any Affiliate thereof, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, including without limitation any and all of the following Damages:

### Any bodily injury, death or damage to property caused by any act or omission (including strict liability) or willful misconduct of Owner or its agents or employees or others under Owner’s direct control;

### Claims by any Government Authority for any Owner Taxes;

### Any Pre‑Existing Hazardous Material on the Site; and

### Any claims with respect to employer’s liability or worker’s compensation filed by any employee of Owner.

## **Conditions of Indemnification**

The respective rights and obligations of the Parties and Owner and Contractor Indemnitees under this Article with respect to claims resulting from the assertion of liability by third parties shall be subject to the following terms and conditions:

### *Notice of Proceedings*. Within fourteen (14) days (or such earlier time as might be required to avoid prejudicing the indemnifying Party’s position) after receipt of notice of commencement of any legal action or of any claims against such Owner or Contractor Indemnitee in respect of which indemnification will be sought, the Person claiming to be indemnified under the terms of this Section (the “Indemnified Person”) shall give the Party from which indemnification is sought (the “Indemnifying Party”) written notice thereof, together with a copy of such claim, process or other legal pleading. Failure of the Indemnified Person to give such notice will not reduce or relieve the Indemnifying Party of liability hereunder unless and to the extent that the Indemnifying Party was precluded from defending such claim, action, suit or proceeding as a result of the failure of the Indemnified Person to give such notice. In any event, the failure to so notify shall not relieve the Indemnifying Party from any liability that it may have to the Indemnified Person otherwise than under this Article.

### *Conduct of Proceedings*. Each Party and each Owner or Contractor Indemnitee shall have the right, but not the obligation, to assume and control the defense of, and to contest, and litigate any claim, action, suit or proceeding by any third party alleged or asserted against it arising out of any matter in respect of which it is entitled to be indemnified hereunder and the reasonable costs and expenses thereof (including reasonable attorneys’ fees and expert witness fees) shall be subject to the said indemnity; provided that the Indemnifying Party shall be entitled, at its option, to assume and control the defense of any claim, action, suit or proceeding that is related to the unauthorized disclosure, use, infringement or misappropriation of Intellectual Property Rights only, at its expense upon its giving written notice thereof to the Indemnified Person. The Indemnified Person shall provide reasonable assistance to the Indemnifying Party, at the Indemnifying Party’s expense, in connection with such claim, action, suit or proceeding. Upon such assumption, the Indemnifying Party shall reimburse the Indemnified Person for the reasonable costs and expenses previously incurred by it prior to the assumption of such defense by the Indemnifying Party. The Indemnifying Party shall keep the Indemnified Person informed as to the status and progress of such claim, action, suit or proceeding. Except as set forth in Section 16.3.3 below, in the event the Indemnifying Party assumes the control of the defense, the Indemnifying Party will not be liable to the Indemnified Person under this Article for any legal fees or expenses subsequently incurred by the Indemnified Person in connection with such defense. The Indemnifying Party shall control the settlement of all claims over which it has assumed the defense; provided, however, that the Indemnifying Party shall not agree to or conclude any settlement that affects the Indemnified Person without the prior written approval of the Indemnified Person, whose said approval shall not be unreasonably withheld.

### *Representation*. In the event the Indemnifying Party assumes control of the defense, the Indemnified Person shall have the right to employ its own counsel and such counsel may participate in such claim, action, suit or proceeding, but the fees and expenses of such counsel shall be at the expense of such Indemnified Person, when and as incurred, unless the:

#### Employment of counsel by such Indemnified Person has been authorized in writing by the Indemnifying Party;

#### Indemnified Person shall have reasonably concluded that there may be a material or important conflict of interest between the Indemnifying Party and the Indemnified Person in the conduct of the defense of such action; or

#### Indemnified Person shall have reasonably concluded and specifically notified the Indemnifying Party either that there may be a specific defense available to it which is different from or additional to those available to the Indemnifying Party.

If any of the preceding clauses (a) through (c) shall be applicable, then counsel for the Indemnified Person shall have the right to direct the defense of such claim, action, suit or proceeding on behalf of the Indemnified Person and the reasonable fees and expenses of such counsel shall be reimbursed by the Indemnifying Party.

## **Contributory Negligence**

Except as provided in Section 16.2.2, above, if the joint, concurring, comparative or contributory fault, negligence or willful misconduct of the Parties gives rise to Damages for which a Party is entitled to indemnification under this Article, then such Damages shall be allocated between the Parties in proportion to their respective degrees of fault, negligence or willful misconduct contributing to such Damages.

## **Remedies Not Exclusive**

The rights under this Article shall not be exclusive with respect to any other right or remedy provided for in the Contract Documents.

## **Payment**

All payments required to be made under this Article shall be made within thirty (30) days of demand therefor.

## **Survival of Indemnification**

The provisions of this Article shall survive the Closing Date and the termination of this Agreement.

# **DISPUTE RESOLUTION**

## **Good Faith Negotiation**

### Any disputes arising pursuant to this Contract that cannot be resolved between Owner’s Representative and Contractor’s Project Manager within fourteen (14) days after receipt by each of written notice of such dispute shall be referred, by Notice signed by Owner’s Representative and Contractor’s Project Manager, to the executive level officers of each entity comprising Owner and Contractor as their designated representatives (which shall not be the Owner’s Representative or Contractor’s Project Manager) for resolution. If Owner and Contractor, negotiating in good faith, fail to reach an agreement within a reasonable period of time, not exceeding ten (10) days after such referral, then Owner and Contractor agree that any and all disputes arising from, relating to or in connection with this Contract, whether based in contract, tort or otherwise shall be settled by binding arbitration in accordance with Section 17.1.3.

### The rights and obligations of the Parties under this Article shall not be impaired, reduced or otherwise affected as a result of any of the following:

#### Receipt by a Party from any third party of any amounts in reimbursement of Damages that are the subject of the Dispute; or

#### Assignment or transfer by either Party of any or all of its rights and/or obligations under the Contract Documents as permitted hereunder.

### Any Dispute that is not settled to the mutual satisfaction of the Parties within the applicable notice or cure periods provided in this Agreement or settled pursuant to Section 17.1 shall be settled by binding arbitration between the Parties conducted in El Paso, Texas, in accordance with the Commercial Arbitration Rules of the American Arbitration Association in effect on the date that a Party gives notice of its demand for arbitration under this Section. The submitting Party shall submit such Dispute to arbitration by providing a written demand for arbitration to the other Party and the Parties shall select a single neutral arbitrator with significant contract resolution experience and experience and understanding of the contemporary solar PV power industry and photovoltaic systems. If the Parties cannot agree on a single neutral arbitrator within fifteen (15) Business Days after the written demand for arbitration is provided, then the arbitrator shall be selected pursuant to the Commercial Arbitration Rules of the American Arbitration Association in effect on the date such selection is to be made. Once an arbitrator has been selected, the Parties may then commence with and engage in discovery in connection with the arbitration as provided by New Mexico statutes and shall be entitled to submit expert testimony or written documentation in such arbitration proceeding. The decision of the arbitrator shall be final and binding upon Owner and Contractor and shall be set forth in a reasoned, written opinion, and any award may be enforced by Owner or Contractor, as applicable, in a court of competent jurisdiction. Any award of the arbitrator shall include interest from the date of any damages incurred for breach or other violation of this Agreement, and from the date of the award until paid in full, at the rate of the lesser of one percent (1%) per month and the maximum rate allowed by Applicable Law. Each of Owner and Contractor shall bear its own cost of preparing and presenting its case; provided, however, the Parties agree that the prevailing party in such arbitration shall be awarded its reasonable attorney’s fees, expert fees, expenses and costs incurred in connection with the Dispute. The cost of the arbitration, however, including the fees and expenses of the arbitrator, shall initially be shared equally by Owner and Contractor, subject to reimbursement of such arbitration costs and attorney’s fees and costs to the prevailing party. The arbitrator shall be instructed to establish procedures such that a decision can be rendered within one hundred and twenty (120) days of the appointment of the arbitrator.

### In the event of any Dispute pursuant to this ARTICLE 17, the prevailing Party shall be entitled to recover its reasonable attorneys’ fees and costs and expenses incurred in connection therewith.

## **Continuing Obligations and Rights**

When any Dispute occurs, Contractor shall continue the Work in accordance with the Critical Path Schedule and the terms hereof, and the Parties shall otherwise continue to exercise their rights, and fulfill their respective obligations, under the Contract Documents.

## **Tolling Statute of Limitations**

All applicable statutes of limitation and defenses based upon the passage of time and similar contractual limitations shall be tolled while the procedures specified in this Article are pending. The Parties will take such action, if any, required to effectuate such tolling. Without prejudice to the procedures specified in this Article, a Party may file a complaint for statute of limitations purposes, if in its sole judgment such action may be necessary to preserve its claims or defenses. Despite such action, the Parties will continue to participate in good faith in the procedures specified in this Article.

## **Audit Rights**

In the event of a claim by Owner under this Agreement involving an amount greater than Ten Thousand Dollars ($10,000), Contractor shall grant audit rights to Owner with respect to all relevant documentation pertaining to such claim. The costs of such audit shall be paid by Owner unless the audit reveals an overpayment to Contractor of three percent (3%) of the amount originally paid, in which case Contractor shall reimburse Owner for the costs of the audit.

# **MISCELLANEOUS**

## **Assignment**

### Except as expressly permitted in the Contract Documents, Contractor may not assign this Agreement, the Contract Documents or any portion hereof, or any of the rights or obligations hereunder, without the prior written consent of Owner, which consent may be withheld at Owner’s sole discretion.

### Owner shall be entitled to assign the Contract Documents and its rights and obligations thereunder so long as such assignment does not alter the obligations of Owner thereunder, and the assignee becomes responsible for all of Owner’s duties and obligations thereunder: (a) to any Affiliate, without the consent of Contractor; (b) to a purchaser in connection with a transfer of the Project; and (c) to any other Person, with the consent of Contractor, which consent shall not be unreasonably withheld or delayed, and Contractor shall release Owner from all obligations thereunder upon any such assignment; provided, however, that notwithstanding any assignment pursuant to clause (a) above, Owner shall remain responsible for all financial obligations under this Agreement.

## **Good Faith Dealings; Authorship**

The Parties undertake to act fairly and in good faith in relation to the performance and implementation of the Contract Documents and to take such other reasonable measures as may be necessary for the realization of its purposes and objectives. The Parties collectively have prepared the Contract Documents, and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of the Contract Documents or any part hereof.

## **Confidentiality**

### For purposes of this Agreement, “Confidential Information” shall mean all:

#### financial, statistical, marketing, customer, and personnel data and information furnished by or obtained from Owner;

#### deliverables, output data, and information prepared for Owner under any Statement of Work;

#### working papers, proprietary software, tools, and other methodologies of each party;

#### software or other intellectual property licensed to Owner by any third party;

#### computer system and network security configuration and infrastructure, network diagrams and infrastructure (including network configuration), transmission data and information, information pertaining to systems defined as “Critical Cyber Assets” under the Critical Infrastructure Protection Standards promulgated by the North American Electric Reliability Corporation;

#### all “critical energy infrastructure information” and other information concerning “critical infrastructure” as such terms are defined by the Federal Energy Regulatory Commission pursuant to 18 C.F.R. § 388.113(c) as may be amended or codified from time to time;

#### other data or information identified by a party in writing as confidential, proprietary, or secure or bearing a similar legend affixed by a party; and

#### oral information that is designated as confidential, proprietary, or secure at the time of disclosure and which is summarized and reduced to a writing within ten (10) business days following disclosure.

### Each Party agrees to hold all Confidential Information disclosed to it by the other Party in confidence and not disclose it other than to its Affiliates, contractors (or potential contractors), subcontractors, vendors, consultants, advisors, potential financing parties, employees, directors, officers, agents, advisors or representatives (collectively, the “Personnel”) for purposes of the Project or to any purchaser of the Project or a direct or indirect interest in Owner. Each Party agrees that only Personnel who need to have access to Confidential Information in order to perform their duties will be authorized to receive the same, and then only to the extent needed and provided such Personnel have been advised of the obligations and restrictions set forth in this Section 18.3. Each Party shall be responsible for any breach of this Agreement by its Personnel.

### Notwithstanding the foregoing, information shall not be deemed to be Confidential Information where it:

#### Is or becomes public information or otherwise generally available to the public through no act of or failure to act by the receiving Party;

#### Was, prior to the date of this Agreement, already in the possession of the receiving Party and was not received by such Party directly or indirectly from the other Party;

#### Is rightfully received by the receiving Party from a third party who is not prohibited from disclosing it to such Party and is not breaching any agreement by disclosing it to such Party;

#### Is independently developed by the receiving Party without benefit of Confidential Information received from the other Party; or

#### Is necessary or advisable for Owner to exercise its Intellectual Property Rights under this Agreement.

Specific information shall not be deemed to be within the foregoing exceptions merely because it is embraced by more general information within such exceptions, nor shall a combination of features be deemed to be within such exceptions merely because the individual features are within such exceptions.

### Contractor shall coordinate with Owner with respect to, and provide advance copies to Owner for review of, the text of any proposed announcement or publication that includes any non‑public information concerning the Work prior to the dissemination thereof to the public or to any Person other than Subcontractors, Vendors or advisors of Contractor, in each case, who agree to keep such information confidential. If Owner delivers written notice to Contractor rejecting any such proposed announcement or publication within two (2) Business Days after receiving such advance copies, Contractor shall not make such public announcement or publication; provided, however, that Contractor may disseminate or release such information in response to requirements of Government Authorities.

### If a Party is required by Applicable Law or any Government Authority to disclose any Confidential Information, such Party shall promptly notify the other Party of such requirement prior to disclosure so that the other Party may seek an appropriate protective order and/or waive compliance with the terms of this Section 18.3. If such protective order or other remedy is not obtained, then such Party shall furnish only that portion of the Confidential Information which is legally required to be furnished by the Applicable Law or Government Authority; provided, however, that prior to making any such disclosure, such Party will:

#### Minimize the amount of Confidential Information to be provided consistent with the interests of the other Party; and

#### Make every reasonable effort (which shall include participation by the other Party in discussions with the Government Authority involved) to secure confidential treatment of the Confidential Information to be provided.

If efforts to secure confidential treatment are not successful, the other Party shall have the prior right to revise such information in a manner consonant with its interests and the requirements of the Government Authority involved.

### Each Party acknowledges that the other Party would not have an adequate remedy at law for money damages if the covenants contained in this Section 18.3 were breached and that any such breach would cause the other Party irreparable harm. Accordingly, each Party also agrees that in the event of any breach or threatened breach of this Section 18.3 by such Party or its Personnel, the other Party, in addition to any other remedies it may have at law or in equity, shall be entitled, without the requirement of posting a bond or other security, to equitable relief, including injunctive relief and specific performance.

### All right and title to, and interest in, Owner’s Confidential Information shall remain with Owner. Subject to Section 3.25, all Confidential Information obtained, developed or created by or for Contractor exclusively for the Project, including copies thereof, is the exclusive property of Owner whether delivered to Owner or not. No right or license is granted to Contractor or any third party respecting the use of Confidential Information owned by Owner by virtue of this Agreement, except to the extent required for Contractor’s performance of its obligations hereunder. Except for that Confidential Information which Owner requires to construct, operate, and/or maintain the Project, which Confidential Information shall not be subject to any obligation of return by Owner, at any time upon written request by a disclosing Party, the other Party shall promptly return to the disclosing Party all its Confidential Information, including all copies thereof, and shall promptly purge all electronic copies of such Confidential Information; provided that the other Party shall be entitled to keep one (1) copy of such Confidential Information for its legal records. The return of Confidential Information to the disclosing Party, the purging of electronic copies of Confidential Information or the retention of a copy of Confidential Information for legal records shall not release a Party from its obligations hereunder with respect to such Confidential Information.

## **Notice**

### Whenever a provision of the Contract Documents requires or permits any consent, approval, notice, request, or demand from one Party to another, the consent approval, notice, request, or demand must be in writing and delivered in accordance with this Section in order to be effective. Any such consent approval, notice, request or demand shall be delivered and received if:

#### Personally delivered or if delivered by telegram or courier service, when actually received by the Party to whom notice is sent;

#### Delivered by electronic mail, or facsimile, on the first Business Day following the day transmitted, but only if it is actually received;

#### Delivered by mail (whether actually received or not), at the close of business on the third Business Day following the day when placed in the mail, postage prepaid, certified or registered, addressed to the appropriate Party,

In each case, at the address and/or facsimile numbers of such Party set forth below (or at such other address as such Party may designate by written notice to the other Party in accordance with this Section):

##### If to Contractor:

Company Name  
Company Address.  
Attention:   
Fax:

With a copy to:

Company Name  
Company Address.  
Attention:   
Fax:

##### If to Owner:

Company Name  
Company Address.  
Attention:   
Fax:

With a copy to:

Company Name  
Company Address.  
Attention:   
Fax:

### Any Party may change its address, facsimile number or e‑mail number for the purposes of this Agreement by giving notice thereof to the other Party in the manner provided herein.

## **Waiver**

No delay, failure or refusal on the part of any Party to exercise or enforce any right under the Contract Documents shall impair such right or be construed as a waiver of such right or any obligation of another Party, nor shall any single or partial exercise of any right hereunder preclude other or further exercise of any right. The failure of a Party to give notice to the other Parties of a breach of the Contract Documents shall not constitute a waiver thereof. Any waiver of any obligation or right hereunder shall not constitute a waiver of any other obligation or right, then existing or arising in the future. Each Party shall have the right to waive any of the terms and conditions of the Contract Documents that are for its benefit. To be effective, a waiver of any obligation or right must be in writing and signed by the Party waiving such obligation or right.

## **Severability**

If any provision of the Contract Documents is held to be illegal, invalid, or unenforceable under present or future laws, such provision shall be fully severable; the Contract Documents shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of the Contract Documents; and the remaining provisions of the Contract Documents shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance from the Contract Documents. Furthermore, in lieu of such illegal, invalid or unenforceable provision, there shall be added automatically as a part of the Contract Documents a provision as similar in its terms to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable.

## **Governing Law**

The Contract Documents, and the rights and obligations of the Parties under or pursuant to the Contract Documents, shall be interpreted and construed according to the substantive laws of the State of New Mexico without reference to its rules governing conflicts of law or choice of laws that would require the application of the laws of a different state.

## **Entire Agreement; Amendments**

The Contract Documents contain the entire understanding of the Parties with respect to the subject matter hereof and supersede all prior agreements, arrangements, discussions and undertakings between the Parties (whether written or oral) with respect to the subject matter hereof. The Contract Documents may only be amended by written instrument signed by all the Parties.

## **Expenses and Further Assurances**

Each Party shall pay its own costs and expenses in relation to the negotiation, preparation, execution and carrying into effect of the Contract Documents. Each Party shall, from time to time on being requested to do so by, and at the cost and expense of, the other Party, do all such acts and/or execute and deliver all such instruments and assurances as are reasonably necessary for carrying out or giving full effect to the terms of the Contract Documents.

## **No Third Party Beneficiary**

Except as expressly provided in this Agreement:

### Nothing in the Contract Documents nor any action taken hereunder shall be construed to create any duty, liability or standard of care to any Person that is not a Party;

### No person that is not a Party shall have any rights or interest, direct or indirect, in the Contract Documents or the services to be provided hereunder; and

### The Contract Documents are intended solely for the benefit of the Parties, and the Parties expressly disclaim any intent to create any rights in any third party as a third‑party beneficiary to the Contract Documents or the services to be provided hereunder.

## **Counterparts**

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

## **Limitations of Liability**

### Except as expressly set forth in this Agreement, Contractor and Owner waive claims against each other for any indirect, special or consequential damages arising out of or relating to this Agreement. This mutual waiver includes:

#### Damages incurred by Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity, or the services of such persons; and

#### Damages incurred by Contractor for principal office expenses, including the compensation of personnel stationed there, for loss of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work, business and reputation, and for loss of management or employee productivity, or the services of such persons.

### This mutual waiver is applicable, without limitation, to all consequential damages due to either Party’s termination in accordance with ARTICLE 15.

The foregoing waiver shall not preclude or limit recovery (i) of Schedule Liquidated Damages, Capacity Shortfall Liquidated Damages, or ITC Liquidated Damages (ii) of damages payable by Contractor to Owner pursuant to Section 15.2.2, (iii) of the Early Termination Payment, or (iv) under any indemnity or reimbursement obligation hereunder related to claims of third parties. Notwithstanding anything to the contrary set forth herein, in no case shall the liability of any party hereunder exceed one hundred percent (100%) of the Contract Price; provided, however that such limitation of liability shall not apply to (i) claims for indemnification under Section 16.1.1, (ii) claims recoverable under requisite insurance policies or (iii) claims arising out of fraud, willful misconduct or gross negligence on the part of Contractor, any affiliate thereof, or any Subcontractor.

## **Time is of the Essence**

Contractor acknowledges that timely achievement by Contractor of Mechanical and Electrical Completion, Final Acceptance and the Final Acceptance Date by the applicable scheduled date therefore is essential to Owner, and therefore TIME IS OF THE ESSENCE in performing all of Contractor’s obligations set forth herein.

## **Records Retention**

Contractor agrees to retain for a period of five (5) years from the Closing Date all records relating to its performance of the Work or Contractor’s warranty obligations herein, and to cause all Subcontractors and Vendors engaged in connection with the Work or the performance by Contractor of its warranty obligations herein to retain for the same period all their records relating to the Work.

## **Successors and Assigns**

Subject to Section 18.1, this Agreement shall be binding on the Parties hereto and on their respective successors and assigns.

## **Acceptance or Rejection in Bankruptcy**

Notwithstanding anything contained in this Agreement to the contrary, if an order for relief under Chapter 11 of the Bankruptcy Code is entered with respect to Contractor during the term of the Agreement, then Contractor acknowledges and agrees that it will, subject to Bankruptcy Court approval, formally assume or reject, subject to the requirements of 11 U.S.C. §365, the Agreement within fourteen (14) days of delivery of written request for such action by Owner.

## **Incorporation of Federal Laws**

This Agreement incorporates the requirements of 29 C.F.R. § 471, 41 C.F.R. §§ 60‑1.4(a), 60‑250.5, 60‑300.5, and 60‑741.5, and 48 C.F.R. § 52‑219.9 if and to the extent applicable. Additionally, federal regulations require incorporation of the following into this Agreement:

**Contractor and each of its approved subcontractors shall abide by the requirements of** **41 CFR §§ 60‑300.5(a) and 60‑741.5(a). These regulations prohibit discrimination against qualified individuals on the basis of protected veteran status or disability, and require affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and individuals with disabilities.**

[REMAINDER OF PAGE INTENTIONALLY BLANK: SIGNATURE PAGE FOLLOWS]

**IN WITNESS WHEREOF** the Parties have executed and delivered this Agreement as of the date first above written.

|  |  |
| --- | --- |
| **BY:** | **BY:** |
| **NAME:** | **NAME:** |
| **TITLE:** | **TITLE:** |

APPENDIX A‑1

Scope of Work

APPENDIX A‑2

Technical Specifications

APPENDIX B

Critical Path Schedule Requirements

The Contractor shall prepare a Critical Path Schedule(s) meeting the following requirements:

a) The Critical Path Schedule shall be a time‑scaled, resource‑loaded critical path method, float‑ rate driven, logic diagram schedule of all design, procurement, construction and administrative Work activities for the Project.

b) The Critical Path Schedule shall include allowance for normal delays, difficulties and productivities that may be encountered in performing the Work including weather and holidays, employee training, safety stand‑downs, etc.

c) The Critical Path Schedule shall identify Contractor’s plan of execution for the engineering/design, procurement, equipment and material shipments and deliveries, erection, training, start‑up and testing and acceptance phases of the Work as, well as key permits and Major Subcontractor and utility interfaces and requirements necessary for the Work. The construction schedule must be coded in such a way as to provide individual progress and schedules in accordance with an agreed upon sequence.

The Critical Path Schedule shall be based on a predetermined work‑week hourly basis communicated to Owner.

d) A complete, fully functional and accurate electronic version including all functional levels on Primavera, or other agreed‑to scheduling program, (using the most current version acceptable to Owner and Contractor) of the Critical Path Schedule (and any updates thereto) shall be provided to the Owner as well as with the printed copy. Individual activity work hours and commodity quantities are not required to be included in this deliverable

e) The initial Critical Path Schedule shall be provided prior to the execution date of this Agreement. The Critical Path Schedule shall be updated monthly at a minimum. Periodic updates to the Critical Path Schedule shall be provided as part of the Monthly Progress Report.

f) In addition to providing the current Critical Path Schedule as part of the Monthly Report as set forth in Appendix N (Form of Monthly Progress Report), the Contractor shall make available the current Critical Path Schedule to the Owner upon request.

g) The Critical Path Schedule shall include all Critical Milestones as identified in Appendix M.

Note: Contractor’s accepted Critical Path Schedule will be set forth in this Exhibit.

APPENDIX C‑1

Approved Subcontractors

Vendors

Solar modules:   
Inverters:   
Racking/Tracking System:  
Transformers:

Subcontractors

APPENDIX C‑2

Assigned Warranties of Subcontractors

APPENDIX D

Form of Mechanical and Electrical Completion

The Undersigned, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Contractor”), does hereby deliver this Certificate of Mechanical and Electrical Completion, complete except for countersignature, to El Paso Electric Co. (“Owner”). Terms used but not otherwise defined herein shall have the meanings set forth in that certain TURNKEY ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT dated as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ by and between Contractor and Owner.

Contractor hereby certifies and represents that the following statements are true as of the date set forth below:

1. The Equipment for the Project has been installed and is structurally sound, including with the required connections and controls to produce electrical power;
2. All Equipment related to the solar tracking system has been installed and checked for alignment, lubrication and rotation;
3. All remaining electrical systems have been checked out and are ready for operation;
4. All electrical continuity and ground fault tests and all mechanical tests and calibrations have been completed;
5. The SCADA system has been installed and is fully operational to the satisfaction of Owner; and
6. All instrumentation is operational and has been calibrated in accordance with manufacturers’ standards and guidelines and, where possible, loop checked.

Executed this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

**[CONTRACTOR NAME]** **ACCEPTED BY EL PASO ELECTRIC CO.:**

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

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

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

Form of Certificate of Commercial Delivery of Power

The Undersigned, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Contractor”), does hereby deliver this Certificate of Commercial Delivery of Power, complete except for countersignature, to El Paso Electric Co. (“Owner”). Terms used but not otherwise defined herein shall have the meanings set forth in that certain TURNKEY ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT dated as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ by and between Contractor and Owner.

Contractor hereby certifies and represents that the following statements are true as of the date set forth below:

1. The Plant has achieved Mechanical and Electrical Completion;
2. (i) all critical testing has been completed; (ii) the Final Acceptance Performance Level has been achieved (or, in Owner’s sole discretion, if such performance level has not been achieved prior to the Outside Completion Date, Owner has agreed to accept, and Contractor has paid in full, Capacity Shortfall Liquidated Damages calculated in accordance with Section 11.3); and (iii) all operating procedures for safe operation including start‑up, shutdown and emergency response are in place;
3. The Plant has been synchronized in accordance with Section 10.2 of this Agreement;
4. The metering system shall have been installed and calibrated and shall be functioning accurately;
5. The Plant is capable of being operated safely, normally, reliably and continuously in accordance with the requirements of the Contract Documents at all operating conditions and modes specified in the Scope of Work (although minor portions of the Work not essential to its safe, continuous and reliable operation may remain to be completed); and
6. All Applicable Permits required for ownership and use of the Plant have been obtained as required by Applicable Law, and, to the extent applicable to commence commercial operation of the Plant, are in full force and effect, and Contractor shall have provided to Owner copies of all such Applicable Permits, together with evidence reasonably satisfactory to Owner that, to the extent applicable, the respective Government Authority or its representative has “signed off” or otherwise approved such Applicable Permit.

[SIGNATURES ON NEXT PAGE]

Executed this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

**[CONTRACTOR NAME]** **ACCEPTED BY EL PASO ELECTRIC CO.:**

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

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

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

Certificate of Final Acceptance

The Undersigned, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Contractor”), does hereby deliver this Certificate of Final Acceptance, complete except for countersignature, to El Paso Electric Co. (“Owner”). Terms used but not otherwise defined herein shall have the meanings set forth in that certain TURNKEY ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT dated as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ by and between Contractor and Owner.

Contractor hereby certifies and represents that the following statements are true as of the date set forth below:

1. The Tests, mechanical calibrations, electrical continuity and ground fault tests have been successfully completed and any Defects found have been corrected;
2. The Plant has been synchronized with the El Paso Electric Co. Interconnection Facilities in accordance with the Scope of Work and the Utility’s interconnection requirements;
3. Final Acceptance Performance Level has been met or exceeded (or, in Owner’s sole discretion, if such performance level has not been achieved prior to the Outside Completion Date, Owner has agreed to accept, and Contractor has paid in full, Capacity Shortfall Liquidated Damages calculated in accordance with Section 11.3);
4. All Work has been completed in accordance with the requirements of the Contract Documents;
5. The Plant has been constructed in accordance with the Contract Documents and the Drawings;
6. The Final Plans accurately reflect the Plant as constructed;
7. The Plant is capable of being operated in a safe, normal, reliable and continuous manner in accordance with Applicable Laws and Applicable Permits (excluding for this purpose all variances or waivers of any Applicable Permits) and the Contract Documents at all operating conditions and modes specified in the Scope of Work;
8. Contractor shall have delivered to Owner all Required Manuals and other operation and maintenance manuals, Final Plans in accordance with the Scope of Work and the Final Cost Report required by Appendix Q;
9. Contractor has provided Owner with copies of all Applicable Permits;
10. The training of O&M Personnel has been completed;
11. Contractor shall have paid all Schedule Liquidated Damages and any other amounts due under the Contract Documents, if any;
12. Any and all Liens in respect to the Plant, the Contract Documents, the Equipment, the Job Site or any fixtures, personal property or Equipment included in the Work created by, through or under, or as a result of any act or omission of, Contractor or any Subcontractor, Vendor or other Person providing labor or materials in connection with the Work shall have been released or bonded in form reasonably satisfactory to Owner;
13. Contractor has delivered to Owner a Final Release and Waiver of Claims from Contractor, each Subcontractor and each Vendor, in substantially the form of Appendix J;
14. All of Contractor’s cleanup and related obligations have been completed;
15. Contractor has delivered to Owner all Equipment warranties and assignments of such warranties;
16. Contractor has delivered all documentation required by Appendix P – Spare Parts and Special Tools;
17. All outstanding obligations of Contractor hereunder have been satisfied; and
18. All items on the Punch List have been completed.

Executed this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_\_.

**[CONTRACTOR NAME]** **ACCEPTED BY EL PASO ELECTRIC CO.:**

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

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

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

APPENDIX E‑1

Module Warranty

Provide the proposed module warranty duration, terms and conditions.

APPENDIX E‑2

Tracker Warranty (If applicable)

Provide the proposed tracker warranty duration, terms and conditions.

APPENDIX E‑3

Inverter Warranty

Provide the proposed inverter warranty duration, terms and conditions.

APPENDIX E‑4

Transformer Warranty

To be provided by Contractor once the transformer is selected, which shall be from El Paso Electric Co.’s list of approved transformers.

APPENDIX E‑5

SCADA Monitoring System and Security System Warranty

Provide the proposed SCADA Monitoring System warranty duration, terms and conditions. Provide the proposed security system warranty duration, terms and conditions.

APPENDIX E‑6

**Warranty Summary**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Company** | **Equipment** | **Term of Warranty** | **Warranty Commencement Date** | **Warranty Contact** |
|  |  |  |  |  |

APPENDIX F

MANUALS

Contractor shall provide Owner with six (6) paper copies and one editable electronic copy of the all manuals. Hard copy manuals shall be on standard 8‑1/2” x 11” paper. Drawings and schedules which are to be bound into the manual shall also be 8‑1/2” x 11” or 11” x 17” folded. Each manual shall be assembled and bound in heavy‑duty post binders designed for rough usage. Light duty and ring binders are not acceptable. Binder capacity shall not exceed four inches, nor shall material included exceed the designed binder capacity. If the material to be furnished exceeds this capacity rating, multiple volumes shall be furnished. Binders shall be sized to the material to be contained, and capacity should not be more than approximately one‑half inch greater than the thickness of material within the binder. All documents, illustrations, specifications, equipment data sheets, drawings, operating and maintenance instructions shall be in the English language. Use of the English system of units on documents is preferred; if the metric system of units is used, the drawing, data sheet, specification or illustration shall clearly indicate that the metric system of units is used. Each manual shall include a Table of Contents, front cover, side label and laminated index tabs and shall be of a consistent format.

The manuals to be provided are:

1. Design Manuals

Design manuals shall contain the following items:

* Drawing List, Drawing and Specification Identification System, Units of Measurement and Formats
* System List and Equipment Numbering System
* List of applicable drawings
* System design requirements
* System and equipment descriptions
* Equipment lists itemizing type, performance and technical requirements.
* Overall performance data

2. Start Up, Operation and Shutdown Manual for the Plant, including comprehensive and complete procedures for checkout, startup and testing of the Project and will include as a minimum the following items:

* Plant start‑up and shutdown procedures
* Startup schedule
* Startup organization chart
* Administrative procedures
* Data sheets
* Test procedures for all tests required for Mechanical and Electrical Completion and Final Acceptance.
* Turnover sequences and procedures
* Safety clearance procedure
* Work responsibility matrix

3. Installation, Operation, and Maintenance Manuals for the Equipment, including information typically supplied for equipment and/or systems such as the following items:

* System or equipment startup and shutdown procedures
* Description / design criteria of each item of equipment
* Nameplate information and shop order numbers for each item of equipment and components thereof
* Operating procedures and instructions for commissioning, startup, normal operation, shut down, standby and emergency conditions and special safety precautions for individual items of equipment or systems
* List of any start‑up prerequisites
* Normal range of system variables
* Operating limits and hazards for all equipment and systems including alarm and trip set points for all devices
* Testing and checking requirements
* Effect of loss of normal power
* Tolerance of electrical supply frequency variation
* Final performance and design data sheets, specifications and performance curves for all equipment including test data and test curves
* Preventive maintenance schedule and maintenance instructions for equipment including standard and special safety precautions
* Lubrication schedule showing requirements and specifications for lubricants for equipment
* Dismantling and assembly procedures for equipment with associated tests and checks prior to returning equipment to service.
* Detailed assembly drawings to complement assembly procedures mentioned above including parts lists and numbers for replacement ordering.
* Setting and running clearances and tolerances
* Cleaning procedures
* Specifications for any gases, chemicals, solvents or lubricants
* Drawing showing space provided for equipment maintenance for equipment and any fixed facilities for maintenance such as trolley beams, etc.
* Methods for trouble‑shooting
* List of maintenance tools furnished with equipment
* Installation instructions, drawings and details
* Vendor drawings as appropriate
* Installation, storage and handling requirements.

The above requirements are a minimum; however, requirements which are clearly not applicable to specific items or components may be deleted, however, any additional information which is necessary for proper operation and care of the equipment shall be included.

APPENDIX G‑1

Engineering Documents, Drawings and Other Deliverables

1.0 General

To facilitate Owner’s review in accordance with the terms of this Agreement, the following submission requirements shall be met by the Contractor.

All transmittals are to clearly indicate the Owner’s name, Contractor’s project number, Owner’s project number and name, how they are being sent, and the reason for the submittal. The transmittal should include a clear, concise description of all documents enclosed. Documentation by drawing number, revision number, and date should be indicated, if applicable. Distributions to other parties are to be shown on the face of the transmittal.

All documents prepared by Contractor or any of its Subcontractors shall be in English and shall bear the project number, name. Each document shall clearly indicate the applicable status, e.g. Preliminary, for Information, for Review, for Bid, for Construction, For Record Purpose.

Note: The following statuses are given to drawings and are shown on the drawing:

Manufacturer drawings:

A – Authorized  
E – Exceptions Noted  
R – Returned to manufacturer for correction  
I – Information Only

Engineered drawings:

T – Transmitted for approval  
C – Issued for construction  
F – For record purpose

All drawings, documents and manufacturer information shall indicate the Owner, Contractor shall ensure that the Owner is listed as the owner of record with all subcontractors and manufacturers providing any and all material or equipment for the project.

The measurement system shall be U.S. Customary System, and all drawings and dimensions shall be to scale. Non‑scale dimensions (NTS) on drawings will not be permitted on scalable drawings. A scale bar shall be included to permit use following photo‑reduction.

Upon completion of the Project, all deliverable drawing files will be in AutoCAD dwg format. Contractor’s vendor supplied drawings will be submitted in the same format (e.g. pdf) as submitted to the Contractor.

Drawings shall be prepared in such a way that photo‑reduction to B size shall result in a legible and useable drawing. When drawings larger than B size are submitted, a B size print shall also be submitted.

2.0 Design Review By Owner

Contractor shall provide to Owner any and all information upon which the design is based, including, but not limited to the results of survey, geotechnical and materials investigations, shop drawings, design drawings and manufacturers’ data. Engineering calculations are available for review by the Owner in the Contractor’s engineering design office.

Contractor and Subcontractor generated drawings and documents shall be issued to Owner for review. The final level of drawing and document review, including quantity required, shall be determined at the project kickoff meeting. Electronic AutoCAD files of drawings and other documents shall be submitted in addition to the hard copies as a part of the same transmittal and provided on Compact Disc (CD) or other electronic device as may be directed by the Owner. These electronic drawings will be checked by Owner for compliance to documentation requirements.

Except where expressly agreed otherwise by Owner, the following will apply to document submittals by Contractor or Subcontractors:

1. Drawings: At least one copy in “B” size (11” x 17” format) shall be submitted in electronic form (“PDF” or comparable for design and construction drawings only). Final drawings shall be AutoCAD and must not be a newer version than that which is currently being used by El Paso Electric Co.
2. Documents: Letter size hardcopies and one electronic copy shall be provided for written text such as letters, specifications, procedures design criteria, manuals, lists, etc. in Microsoft Word and / or Excel format.
3. Drawings and Documents: Contractor shall make reasonable efforts to secure electronically formatted drawings and documents from all Subcontractors. When electronic formatting as noted in “a” and “b” above is not obtainable due to supplier policies or procedures then Contractor shall have such materials converted and submitted in “.tif “ or “.pdf” format.
4. Instruction, Operation, Equipment and all other Manuals: PDF manuals and other multi‑page documents shall include a table of contents or index. It is recommended that all chapters or tabs be bookmarked. Once the files or documents are placed on a Compact Disc (CD) they should be organized in the order of the hard copy binder or as one PDF.

Subcontractor drawings and documentation shall also be submitted in hardcopy and electronic format to Owner as described above. Owner may make comments directed to Contractor on Subcontractor drawings and documents if items are found not to be in compliance with the requirements of this Agreement. Contractor shall be obligated to resolve any such compliance issues with Subcontractor in a timely manner and resubmit Subcontractor drawings and documents.

3.0 Deliverables

The Contractor shall submit general specifications covering the type and design of all principal components of the equipment when specifications have not been provided in the Contract.

All materials shall be fully identified by the Contractor.

The Contractor shall submit a complete bill of materials and list of all instruments and accessories supplied for each equipment category or specification. Contractor shall submit all bills of materials and equipment identification information electronically to the Owner.

The Contractor shall be responsible for coordination with Owner and / or Owner’s contractors for necessary interfaces. At the same time a copy of the interface information shall be submitted to the Owner for review. The Contractor shall plan for the exchange of information in order to ensure the completion of the whole project meets the schedule requirement of the Contract.

The Contractor shall submit detailed procedures for testing, commissioning and putting into operation all equipment and / or systems as required.

The Owner will not necessarily examine all details submitted by the Contractor and may at Owner option require submittal to be subject to review or regard them as for information and record purposes.

The Contractor shall be responsible for any discrepancies, errors, or omissions on the drawings, or other documents, supplied by Contractor or Subcontractors.

The Contractor shall complete any and all noted changes to the drawings and data which may be necessary to complete the Contract requirements.

Any work commenced prior to Owner’s review of the drawings and /or data shall be at Contractor’s risk and any necessary design changes to comply with the requirements and objectives of the Contract shall be made at no additional cost to the Owner or cause delay to the Critical Path Schedule.

Contractor deliverables supplied to Owner shall include but are not limited to the following:

* A complete drawing index, in an Excel compatible file format. Index shall include all Contractor and Sub‑Contractor drawings.
* Diagrams ‑ electrical one‑line, electrical three‑line, schematic, wiring including relay/control schematics, logic, SCADA and communication block diagrams.
* Physical arrangement and equipment drawings including site grading, equipment arrangement, building arrangement, civil, raceway and power, structure drawings, and underground utilities. The final list of drawings to be provided shall be determined by Owner after consultation with Contractor.
* Drawings of all equipment foundations showing all structure and equipment outline requirements including anchor bolts and foundation loads that are to be used in the design of the foundations.
* Internal panel component arrangement drawings including terminal block size, location, spacing and types.
* Equipment, instrument, device, cable/conduit/raceway, and electrical load lists and schedules.
* Instrument manuals and data sheets (including protective and auxiliary relays, etc.).
* Equipment manuals and data sheets.
* Complete system operating manuals.
* All drawings used for construction.
* Design Statements ‑ Overall design concept and detailed design criteria.
* All Subcontractor’s drawings, documentation, and manuals including outline drawings.
* Schedules, including engineering, procurement, construction and integrated Critical Path Schedule.
* Project procedures manual ‑ Procedures for design, review and comment or approvals, procurement, construction, scheduling, progress reports, etc.
* Quality assurance and quality control program manuals.
* Environmental protection manual.
* Construction safety assurance plan.
* Procurement specifications.
* Erection specifications and procedures.
* Material instruction bulletins and cut sheets.
* Contractor Acquired Permits.
* Progress Reports.
* Meeting minutes and reports.
* Instructions for handling, storage, and pre‑operational and operational maintenance of equipment.
* Testing and commissioning plans and reports.
* Site and shop inspection and testing plans and requirements.
* Material safety data sheets for all hazardous materials and equipment.
* Test procedures including site and shop testing plans and requirements.
* Test reports or other required reports.
* Final commissioning and acceptance reports / documents.

4.0 Final Drawings

Contractor shall provide detailed “as built” drawings for the entire project consisting of, but not limited to, plan and profile sheets, foundation detail drawings, mechanical, electrical, civil, one‑line, three‑line, schematics, control logic, wiring, raceways, conduits and duct banks. Documents shall be re‑drafted as necessary to incorporate final information. Mark‑up sketch, referencing, and other field marking techniques are not acceptable as final conformed drawings. Contractor shall prepare “For Record Purposes” of the original drawings or data sheets.

During construction, Contractor shall update and maintain on file in the field current mark‑ups of all drawings and data sheets to represent actual work completed.

Conformed drawings developed by the Contractor shall be issued as the next sequential revision from previous releases. The revision block shall state “For Record Purposes”. All clouds, revision diamonds, and other interim control markings shall be removed. All information listed as “later” or “hold” shall be completed. The conformed drawings shall be clear and readable in both full size and B size reduction. Contractor shall provide new versions of Subcontractor drawings if the Owner judges originals to be too damaged, deteriorated, or illegible.

All Subcontractors’ drawings shall be conformed to reflect actual installed configuration. These Subcontractor drawings shall be in sufficient detail to indicate the kind, size, arrangement, weight of each component, and operation of component materials and devices, the external connections, anchorages, and supports required; the dimensions needed for installation, and correlation with other materials and equipment. Final Subcontractor’s drawings shall be bound in the equipment operation and maintenance manuals. One electronic copy for each drawing shall be supplied in AutoCAD format in a version acceptable to El Paso Electric Co.

5.0 Lists

All lists, including but not limited to drawing lists, instrument lists, equipment lists, circuit lists, raceway lists, conduit lists, piping and accessories lists, bills of materials, etc. shall be furnished in an Excel compatible file format or other as may be approved by Owner.

Instrumentation Lists and Data Sheets:

* All instruments shall be given a “Tag Number” per the Instrumentation Society of American standards or other industry standard.
* The “Tag Number” will be used to reference all instruments on drawings, instrument indexes and data sheets.
* Data sheets for each instrument shall reference vendor, model numbers, conditions of service, construction material, specifications, etc.

Equipment Lists:

* All equipment shall be given a “Tag Number” identifying the type of equipment, the media that it services and a numeric reference.
* The “Tag Number” will be used to reference all equipment on drawings, equipment indexes and data sheets.
* Equipment indexes shall reference service location, drawing references, rating, manufactures, data sheet locations, etc.

Electrical Circuit Schedule:

* All electrical cables shall be given a “Circuit Number”.
* The “Circuit Numbers” will be used to reference all equipment on drawings, instrument indexes and data sheets.
* Circuit indexes shall reference service location, drawing references, rating, manufactures, data sheet locations, etc.

Piping Line List:

* All piping shall be given a “Line Number”
* The “Line Number” will be used to reference all pipes on area/routing drawings, indexes and line lists.
* The line list shall contain line sizes, description of starting and ending location, operating and design location, insulation, drawing references, etc.

6.0 Software Requirements

All Contractor Deliverables including final drawings, lists, and manuals shall be provided to the Owner in the appropriate file format listed below. This requirement pertains to both Contractor and / or original equipment manufacturer (OEM) developed deliverables.

All Contractor deliverable lists, provided in database format, shall be designed to be integrated into Owner’s existing applications. Owner will provide Contractor with formatting information as required.

Contractor shall provide electronic submittals in the following software formats:

|  |  |
| --- | --- |
|  |  |
| **Software Function** | **Software Name** |
| Word processing | Microsoft Word |
| Spreadsheets | Microsoft Excel |
| Database | Microsoft Access |
| Design/Construction & Original OEM Drawings | AutoCAD version no newer than that currently being used by El Paso Electric Co. Drawings in PDF format are only acceptable for design and construction phases of the project. |
| Project Schedules | Microsoft Project |
| Scannable Material | Adobe Acrobat “.pdf’ or “.tif’ |

7.0 Submission of Drawings and Data

The documents and drawings for review, comment, or approval, shall be submitted to the Owner at the address specified in the Agreement.

Additional copy (or copies) may be directed for submittal to other Owner Representative(s) as requested.

Drawings / documents shall be updated as the engineering and design progresses to reflect current design(s). Revisions shall be identified.

The Owner shall review all documents for conformance with the contract and mark or stamp said documents to indicate whether changes or corrections are required. Any and all necessary changes or corrections will be noted on the documents and returned to the Contractor. The Contractor shall resubmit the corrected or changed documents, with changes and corrections clearly indicated.

When no further corrections or changes to the drawings submitted by the Contractor are required, they shall be marked “Issued for Construction.” The Contractor shall supply one (1) reproducible and one (1) electronic copy for each of the “Issued for Construction” drawings to Owner for record. The Owner will inform the Contractor when the final drawings have been received.

Design information may later be included on the certified drawings. The fact that such design information may later be included in the instruction and/or operating manuals does not relieve the Contractor from compliance with this requirement.

APPENDIX G‑2

List of Applicable Permits and Permit Applications

Contractor to provide list of all permits and permit applications necessary to construct and operate the Plant.

APPENDIX H

Project Management Team ‑ Key Personnel

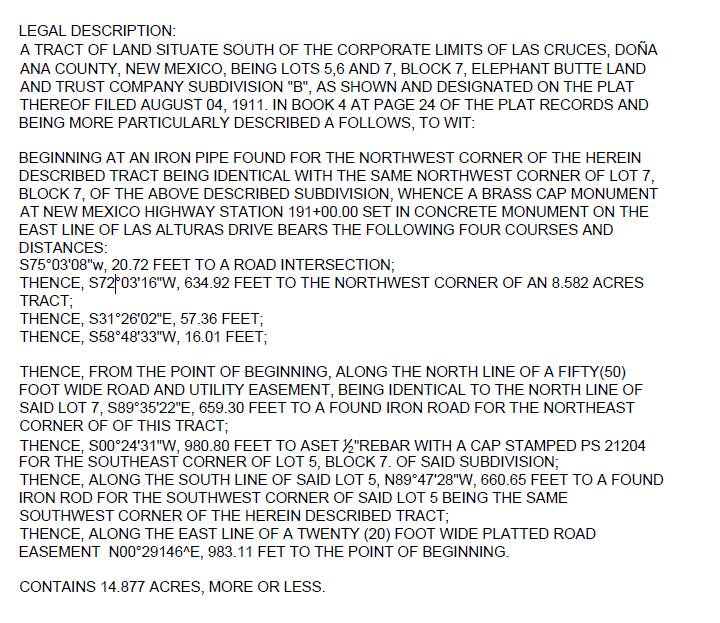
The following personnel are considered Key Personnel and will not be removed from the Project prior to the completion of their assignment without prior Owner approval. Contractor shall provide this list for Contractor and for all key Subcontractors for major equipment, engineering, and construction services.

|  |  |
| --- | --- |
| **Individual** | **Title** |
|  | Project Executive |
|  | Project Manager |
|  | Project Senior Superintendent |
|  | Project Superintendent |
|  |  |

APPENDIX I

Legal Description of Site

The following real property located in Doña Ana County, New Mexico:



APPENDIX J

Forms of Release and Waiver of Liens and Claims

J‑1

(Contractor Form)

FINAL

RELEASE AND WAIVER OF LIENS AND CLAIMS

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, the undersigned \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Contractor”), by contract dated \_\_\_\_\_\_\_\_\_\_\_\_ (the “Agreement”), with \_\_\_\_\_\_\_\_\_\_\_\_ (“Owner”), did furnish labor, equipment and/or materials utilized in connection with improvements to real property owned by Owner, which property and/or improvements are described or more commonly known as the \_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Project”), located in Doña Ana County, New Mexico.

NOW THEREFORE, this \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, for and in consideration of all sums paid heretofore under the Agreement Contract and the sum of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Dollars ($ ) the legal sufficiency of which is hereby acknowledged, the undersigned, on behalf of itself and anyone acting or claiming through or under it, and intending to be legally bound:

#### acknowledges that, except for the claims expressly set forth in Attachment 1 and for which Contractor has delivered a Dispute notice (the “Reserved Claims”), it has been, or upon full payment of the aforementioned amount will be, paid in full for all labor, services, materials, fixtures, equipment, apparatus or machinery furnished or work performed for the Project (collectively the “Work”) and,

#### does hereby, conditioned upon payment of the aforementioned amount, but otherwise unconditionally and without reservation, waive, release, remise and relinquish, except for the Reserved Claims, any and all actions, demands, debts, counterclaims, set‑offs, claims and any liability whatsoever relating to the payment of the Contract Price (as defined in the Agreement) or any event or circumstance that would constitute a Change (as defined in the Agreement) in respect of any Work, including without limitation claims for disputed work, extra work, impact costs, inefficiency or delay, whether known or unknown, whether accrued or unaccrued, arising out of or related, directly or indirectly, to the Work, the Agreement or the Project which it ever had or may now have against the Owner, the Owner’s lender (if any), and their officers, agents, attorneys, employees, successors and assigns, or any labor or material payment bond (if any) furnished in connection with the Project, and

#### on behalf of itself and anyone acting or claiming through or under it, hereby waives and releases, except for the Reserved Claims, any mechanic’s, materialman’s or similar liens or stop notices and all rights to file any such liens or notices in the future against the Project and on the monies or other consideration due or to become due from the Owner for the Work, and agrees to defend, indemnify and hold harmless the Owner from and against any and all costs and expenses (including reasonable attorney fees and costs) resulting from any such claim or lien.

(Subcontractor)

(Date) (Signature)  
  
 Title:

STATE OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)  
 ) ss  
COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

On the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, before me personally came \_\_\_\_\_\_\_\_\_\_\_; to me known, who being by me duly sworn, did depose and say that he/she resides at\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_; that he/she is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (title) of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, the [corporation] that executed the foregoing instrument and that he/she signed his or her name thereto with full authority to do so.

(Signature)

J‑2

(Subcontractor Form)

FINAL

RELEASE AND WAIVER OF LIENS AND CLAIMS

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, the undersigned (the “Subcontractor”), by contract dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Agreement “), with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Contractor”), did furnish labor, equipment and/or materials utilized in connection with improvements to real property owned by \_\_\_\_\_\_\_\_\_\_\_\_ (“Owner”), which property and/or improvements are described or more commonly known as the \_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the “Project”), located in Doña Ana County, New Mexico.

NOW THEREFORE, this\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, for and in consideration of all sums paid heretofore under the Agreement and the sum of \_\_\_\_\_\_\_\_\_\_\_\_\_ Dollars ($\_\_\_\_\_\_\_\_\_), the legal sufficiency of which is hereby acknowledged, the undersigned, on behalf of itself and anyone acting or claiming through or under it, and intending to be legally bound:

#### acknowledges that, except for the claims expressly set forth in Attachment 1 (the “Reserved Claims”), it has been, or upon full payment of the aforementioned amount will be, paid in full for all labor, services, materials, fixtures, equipment, apparatus or machinery furnished or work performed for the Project (collectively the “Work”), and

#### does hereby conditioned upon payment of the aforementioned amount, but otherwise unconditionally and without reservation waive, release, remise and relinquish, except for the Reserved Claims, any and all actions, demands, debts, counterclaims, set‑offs, claims and any liability whatsoever relating to the right to the payment under the Agreement, including without limitation claims for disputed work, extra work, impact costs, inefficiency or delay, whether known or unknown, whether accrued or unaccrued, arising out of or related, directly or indirectly, to the Work, the Agreement or the Project which it ever had or may now have against the Contractor, Owner, the Owner’s lender (if any), and their officers, agents, attorneys, employees, successors and assigns, or any labor or material payment bond (if any) furnished in connection with the Project, and

#### on behalf of itself and anyone acting or claiming through or under it, hereby waives and releases, except for the Reserved Claims, any mechanic’s, materialman’s or similar liens or stop notices and all rights to file any such liens or notices in the future against the Project and on the monies or other consideration due or to become due from the Contractor or the Owner for the Work, and agrees to defend, indemnify and hold harmless the Contractor and Owner from and against any and all costs and expenses (including reasonable attorney fees and costs) resulting from any such claim or lien.

(Subcontractor)

(Date) (Signature)  
  
 Title:

STATE OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)  
 ) ss  
COUNTY OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

On the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, before me personally came \_\_\_\_\_\_\_\_\_\_\_; to me known, who being by me duly sworn, did depose and say that he/she resides at\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_; that he/she is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (title) of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, the [corporation] that executed the foregoing instrument and that he/she signed his or her name thereto with full authority to do so.

Signature)

APPENDIX K

Form of Request for Change Order

Change Order No.: Date Issued:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Description (Attach Appropriate Documentation):

Cost of Change:

Non‑Manual Labor Man‑hours Cost:

Non‑Manual Labor Expenses:

Manual Labor Man‑hours Cost:

Material Cost:

Subcontracts Cost:

Mobilization/Demobilization Cost:

Equipment Cost:

Other Cost (if any)

Mark‑up (Profit and Overhead):

Total Cost of Change:

Impact on Project Guarantee Dates:

Impact on Critical Path Schedule:

Impact on Progress Payment Schedule:

Impact on the Warranties:

Anticipated Differences in the Costs of O & M Following Substantial Completion:

Other Impacts on Contract:

Revised Contract Amount (Including Change):

Owner Approval: Contractor Approval:

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

Distribution: Owner: Contractor:

APPENDIX L

Compliance with Electric Safety Code

All Work shall be performed and provided in compliance, conformance, and accordance with (i) the National Electrical Safety Code edition dated 2007 published by the Institute of Electrical and Electronic Engineers, Inc. or any more recent applicable version thereof, (ii) the National Electric Code edition dated 2008 published by the National Fire Protection Association 850 edition dated 2005 or any more recent applicable version thereof, and (iii) EPE’s safety manual (including other EPE safety materials provided to Contractor at the time of execution of this Agreement), as such codes and safety manual are in effect from time to time. EPE shall have the right to make changes to its safety manual and site rules at any time and may require Contractor to comply with such rules in the performance of the Work.

APPENDIX M

Critical Milestones and Milestones

CONTRACTOR MILESTONES

|  |  |
| --- | --- |
| **Milestones** | **Date** |
| Mechanical and Electrical Completion |  |
| Final Acceptance |  |
|  |  |
| Additional Milestones as mutually agreed upon by Owner and Contractor. There will be a total of no less than 10 Contractor Milestones as characterized by examples identified below and as mutually agreed upon by Owner and Contractor upon completion of the Critical Path Schedule and prior to Notice to Proceed. | See Note 1 below. |

Examples of Contractor Milestones include:

|  |  |
| --- | --- |
| **Milestone** | **Date** |
| Completion of Layout drawings |  |
| Completion of single line drawings |  |
| Major equipment specifications ready for issue |  |
| Safety & Security Program Delivered to Owner |  |
| Quality Assurance Program Delivered to Owner |  |
| Panel purchase order issued |  |
| Inverters purchase order issued |  |
| Support steel purchase order issued |  |
| Tracker purchase order issued |  |
| Construction drawings issued |  |
| Construction permits received |  |
| Mobilization to site |  |
| Grounding grid installed |  |
| Support steel installed |  |
| Pads poured |  |
| Underground cabling installed |  |
| Panel racks assembled on support steel |  |
| Panels installed and cabling |  |
| Trackers installed |  |
| Inverters delivered and mounted |  |
| Commissioning of String X |  |
| Final testing and commissioning |  |
| Site O&M staff training completed |  |
| Final Acceptance |  |
|  |  |

Note 1:

Dates to be finalized upon completion of the Critical Path Schedule as required by the Agreement.

APPENDIX N

Progress Reports

Contractor shall submit to Owner, on a periodic basis, Progress Reports including an updated Critical Path Schedule(s) as defined in the Agreement. The Critical Path Schedule shall be progressed against the baseline schedule (or agreed updates thereof as may be confirmed through a Change Order), and all significant variances to baseline explained. Electronic copies of the complete and final periodic Progress Report shall be provided in Microsoft Word, Microsoft Excel, Primavera (for schedules) or Adobe Acrobat as appropriate.

**Monthly Progress Reports**

The Contractor shall prepare Monthly Progress Reports meeting the following minimum requirements:

a) Table of Contents

b) Executive Summary ‑ Current Month

The executive summary shall consist of a synopsis of the project status addressing specific aspects of the Project to include construction, engineering, procurement (issuance of major purchase orders and subcontracts), shipment/delivery of major items, substantial and final completion dates and key concerns facing the Project.

c) Personnel Safety

The Safety section shall consist of a synopsis of the Contractor’s safety performance for the month including numbers and types of injuries and lost time accidents. If there were any, audit results and site safety initiatives shall be provided.

d) RFIs and Change Orders

The RFIs and Change Orders section shall consist of a synopsis of the RFIs and Change Orders issued during the period as well as the status on any contemplated Change Orders or RFIs.

e) Environmental Report

The Environmental section shall consist of a synopsis of the Contractor’s environmental compliance for the month, including a description of any deviations and reporting from applicable regulations, codes and standards.

f) Summary of Progress

Current Month ‑‑ A synopsis of the Project progress completed as of the current month. Reporting format shall be based on completion of Milestones and other critical path activities, and construction, engineering, procurement (issuance of purchase orders), shipment of materials and equipment to the Job Site, manpower loading (including actual versus planned), status of Contractor acquired permits or regulatory approvals, status of material and equipment in storage, training and start‑up.

Next Month ‑‑ The expected progress for the Project in the next thirty days shall be provided in outline form based on engineering, procurement, shipment, construction and equipment installation and commissioning.

g) Priorities/Issues/Concerns

Identification and evaluation of problem areas that are anticipated to have Contractor require a modification of to the Agreement, if any, including site coordination issues requiring Owner support or resolution or community relations issues requiring Owner support or involvement.

h) Schedule Update

Report important items and events, such as purchases and dates of arrival of major equipment components, identify completion of Milestones.

i) Project Financial Status

Billing, forecast, and accrual breakdowns for the current month.

j) Meeting Minutes

Minutes of the Owner meetings pursuant to Section 3.18.4 since the last progress report shall be attached. This section will not be required in the Monthly Reports once Owner requests Weekly Reports.

**Weekly Progress Reports**

The Contractor shall prepare Weekly Progress Reports meeting the following minimum requirements:

1. Table of Contents
2. Executive Summary – Current Week

The executive summary shall consist of a synopsis of the project status addressing specific aspects of the Project to include construction, engineering, procurement (issuance of major purchase orders and subcontracts), shipment/delivery of major items, substantial and final completion dates and key concerns facing the Project.

1. Personal Safety

The Safety section shall consist of a synopsis of the Contractor’s safety performance for the week including numbers and types of injuries and lost time accidents. If there were any, audit results and site safety initiatives shall be provided.

1. Construction Matrix

The Construction Matrix shall consist of an Excel spreadsheet containing the following fields.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Weekly Progress Report Date** | **Equipment Installed or Work Completed** | **Project Total** | **Previous Total** | **Current Total** | **% Complete** |
|  |  |  |  |  |  |

1. Two Week Look Ahead

The expected progress for the Project in the next fourteen days shall be provided in outline form based on engineering, procurement, shipment, construction and equipment installation and commissioning.

1. Progress Photos

The Progress Photos section shall consist of photographs in electronic format demonstrating progress made on the Project.

1. Procurement

The Procurement section shall consist of an Excel spreadsheet and may be an additional tab in the same Excel document containing the Construction Matrix. The Excel spreadsheet shall consist of the following fields.

|  |  |  |  |
| --- | --- | --- | --- |
| **Equipment** | **Scheduled Delivery Date** | **Actual Delivery Date** | **Notes** |
|  |  |  |  |

1. Meeting Minutes

Minutes of the Owner meetings pursuant to Section 3.18.4 since the last progress report shall be attached.

APPENDIX O

Warranty Procedures

1. Contractor warranties concerning the Work are specified in ARTICLE 12 of the Agreement.

2. In addition to the warranty requirements of ARTICLE 12 of the Agreement, the following procedures shall be observed in all cases where the Owner has performed warranty work for the Contractor’s account pursuant to Section 12.2:

(a) A failure report, which shall contain technical and logistical information sufficiently detailed to enable Contractor to assess the damage of the Work and to evaluate appropriate corrective action, shall be provided by Owner within a reasonable period of time after the occurrence of any event giving rise to a warranty claim.

(b) Warranty claims shall be submitted in accordance with paragraph (c) below, and Owner shall include, as a required minimum, the following documents:

(i) applicable failure report;

(ii) list of equipment and materials purchased or used in accomplishing the repair, schedule of operations, 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;

(iii) Owner’s maintenance and repair records with respect to the equipment for which the claim is being made, including the manufacturer/vendor part number and serial number and the identification by part number and serial number of the next major assembly call out (such as electrical cabinet); and

(iv) copies of invoices received or prepared for costs and expenses claimed.

(c) All warranty claims pertaining to failure of the equipment for which Owner has undertaken corrective action pursuant to Section 12.2 of the Agreement and paragraph 3.0 of this Appendix during any calendar month shall be submitted by Owner to Contractor on or before the last day of the following calendar month. Claims shall be paid by Contractor on a net 30‑day basis. Any warranty claim submitted by Owner that is not disputed by Contractor within ninety (90) days shall be deemed to have been accepted by Contractor.

(d) Owner shall maintain adequate records to support all warranty claims and allow Contractor access to such records within ten (10) days of notice.

3. Pursuant to Section 12.2 of the Agreement, if Owner performs repairs for Contractor, Owner shall invoice Contractor in accordance with paragraphs 2.0(c) and (d) above.

APPENDIX P

Spare Parts and Special Tools

1.0 INTRODUCTION

Contractor shall obtain from each supplier a priced listing of recommended spare parts needed for the first five (5) years of operation and first necessary overhaul of the equipment supplied as part of the Project. Pricing shall be valid for as long a period (e.g. two to five years) as reasonably available from suppliers. Contractor shall include this provision in each of its purchase orders and subcontracts. Each listing shall include the manufacturer of each part, a description of each part (including industry standard part number if available), the assembly or equipment in which each part will be used, and recommended quantities to be stocked. Each listing should also classify the relative criticality of parts based on the manufacturer’s experience; and shall list the lead‑time required for manufacture and delivery of each part. In each case Contractor shall make recommendations to Owner on specific items and quantities for purchasing spare parts.

All spare parts lists and equipment identification information shall be submitted electronically in Excel format. The spare parts lists shall be submitted no less than three (3) months prior to substantial completion.

2.0 SPARE PARTS AND SPECIAL TOOLS

Contractor shall supply, at Contractor’s expense, all spare parts and operating consumables Contractor deems necessary for the installation, startup and commissioning, operation, and maintenance of equipment prior to Final Acceptance. Owner shall not be liable in any way for Contractor’s inability to achieve Final Acceptance due to lack of any parts. In the event Owner directs Contractor to purchase any spare parts, such spare parts shall be handled as follows:

* Spare parts require clear identification and shall be identified by part number.
* Spare parts shall be packaged and shipped in containers appropriate for the parts. Separate containers shall be used for the spare parts for each major piece of equipment. Where applicable, containers shall be designed and constructed for return shipment of damaged or worn components for repair.
* Spare parts shall be protected from damage due to moisture and dirt accumulation during an extended storage period by use of special coatings, airtight membranes, bags of desiccant, or other means acceptable to Owner.
* A weatherproofed itemized list of the contents shall be attached to the outside of each container. A similar weatherproof list shall be inside each container.

2.1. Spare Parts

The list of spare parts submitted shall be completed by Contractor and be accompanied by detailed descriptions to identify the spare parts (including the supplier and the address of the supplier) and the specific item or items to which it applies. Contractor shall indicate the minimum recommended inventory for routine maintenance at installation, startup, and continuous operation based on manufacturer’s recommendations. Contractor shall also indicate whether the recommended spare is a stock item or special‑order item, the location of the nearest supply point, and approximate lead‑time required for shipment.

Any spares supplied by Contractor shall be strictly interchangeable with the parts which they are intended to replace and shall be of the same or better quality as the original parts. Each spare shall be clearly marked with the description, purpose, supplier’s name, and supplier’s part number.

2.1.1. Recommended Spare Parts

The recommended spare parts shall be listed and shall be those considered desirable by Contractor.

The recommended spare parts shall include a quotation of the unit price, quantity, description, catalog number, part number, drawing reference(s) etc., for each recommended spare part to completely identify the item and the equipment component for which it is recommended.

Owner may order all or any of the spare parts at its own discretion. Owner shall reimburse Contractor for any spare parts purchased by Contractor.

2.2. Consumable Parts and Materials

Contractor shall supply a sufficient quantity of consumable parts and materials as may be required prior to Final Acceptance.

2.3. Tools and Equipment

Any special tools and test equipment required to adjust, dismantle, re‑assemble, or maintain any equipment shall be provided by Contractor.

Tools and test equipment shall be of suitable quality. All special tools for normal maintenance will be turned over to Owner no later than Final Acceptance.

Contractor shall provide a list and supply to Owner all special tools. The list shall be detailed to identify the function of the tools and the specific item or items for which it applies.

Tools and test equipment shall be neatly arranged in a box and shall be shipped to the site in a suitable separate container clearly marked with the name of the equipment for which the tools and test equipment are intended. The separate container shall be shipped along with the equipment that they will be used on.

Maintenance tools for each piece of equipment shall be boxed separately and the boxes shall be marked.

APPENDIX Q

Final Cost Report Requirements

Contractor shall prepare a Final Cost Report at the conclusion of the Project. Completion of this Final Cost Report will be a condition of Final Acceptance. This Final Cost Report shall breakdown significant components of the system into property retirement units.

The Final Cost Report will consist of the total project cost broken down into individual retirement units. Individual retirement units include all material, installation labor, engineering, and overheads associated with each major component of the Project. The final cost report will list the total cost and break that cost down into the above major components. All costs in the Agreement will need to be allocated to discrete identified retirement units. Where costs are added to an existing system, such as an upgrade to a common fire protection system, the costs will be so identified so that Owner can update existing retirement unit costs. Where costs cannot be associated with an existing retirement unit the costs will be identified by a description of the new equipment.

Attached is a list of typical retirement units proposed for this project. It is recognized that this list is somewhat incomplete as it applies to this Project and is included for information only. In preparation for the Final Cost Report Contractor will submit a proposed breakdown of project retirement units based on the final design approximately three (3) months before Final Acceptance. After review by Owner a final list of retirement units will be developed jointly. A final list of approved retirement units will be approved no less than three (1) month before Final Acceptance. The final list will include a breakdown of property retirement units using percentages or dollars for each retirement unit.

|  |  |  |
| --- | --- | --- |
| **Location Description** | **SYSTEM** | **SUBSYSTEM** |
| Common | Buildings | **Buildings**, storage sheds, misc. structures, fire protection |
| Common | Grounds | **Roads**, landscaping, paving, fencing, outdoor lighting, site civil improvements |
| Common | Electrical System | **Weather Station** |
| Block 1 | Structures | **Supports** ‑ piles, supports, panel racks and racking hardware |
| Block 1 | DC Electrical System | **PV panels**, cabling, combiner boxes, isolation switches |
| Block 1 | DC Electrical System | **Inverters** and any self‑contained AC transformer located in inverters |
| Block 1 | AC Electrical System | **Trackers**, tracker motors, bearings and counterweights |
| Block 1 | AC Electrical System | **Transformers** and AC Cabling and disconnects |
| Block 1 | DC Electrical System | **Controls** |
| Block 1 | AC Electrical System | **Data acquisition** and monitoring systems, modems |
| Block 1 | AC Electrical System | **Overhead AC** line and disconnects and electrical meters |

APPENDIX R‑1

CONTRACTOR REQUIRED INSURANCE

Contractor shall maintain or cause to be maintained the following types of insurance subject to the general provisions included in Appendix R‑3.

(1) Workers’ Compensation/Employers’ Liability Insurance.

* Contractor shall maintain statutory limits for Workers’ Compensation to the extent required by Applicable Laws, during the entire time that any persons are employed by them on the Job Site in connection with the Work.
* Contractor shall maintain Employers’ Liability Insurance in the amount of $1,000,000 bodily injury each accident, $1,000,000 disease policy limit and $1,000,000 disease each employee.

(2) Automobile Liability Insurance. Contractor shall at all times keep in force automobile liability insurance in respect of all mechanically propelled vehicles used on public highways or in any circumstances such as to be liable for compulsory motor insurance in accordance with Applicable Laws of New Mexico or the applicable State that the vehicle will operate. The limit of liability shall be US $1,000,000 combined single limit each accident for all owned, non‑owned and hired vehicles. If applicable, the policy shall include an MCS‑90 endorsement if hazardous waste transportation or disposal is performed as part of the Work.

(3) Commercial General Liability insurance for the Contractor’s legal liability arising out of all the engineering, procurement and construction activities of the Contractor, Subcontractors and lower‑tier Subcontractors with bodily injury (including mental anguish and death) and property damage limits of $1,000,000 per occurrence and $2,000,000 annual general aggregate applicable to the Project. Such insurance shall include, but not be limited to contractual liability encompassing bodily injury, personal injury and property damage claims related to the indemnity provisions of Section 16.1 of this Agreement, premises and operations, products and completed operations, personal injury (with the contractual exclusion removed), independent contractors coverage, explosion, collapse and underground property damage occurring at the Job Site, and broad form property damage. Coverage is required to be written on an occurrence form.

(4) Contractor’s Pollution Liability with a limit of $5,000,000 each claim/$5,000,000 annual Aggregate. Including sudden and gradual pollution liability with coverage for bodily injury, sickness, disease, mental anguish sustained by any person, including death and property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, cleanup costs and any related legal and defense costs.

(5) Professional Liability insurance covering damages arising out of negligent acts, errors, or omissions committed by Contractor or other party providing engineering and design in the performance of this Agreement, with a liability limit of $1,000,000 each claim/$1,000,000 annual aggregate. Contractor shall maintain this policy for a minimum of two (2) years after the Final Acceptance Date or shall arrange for a two-year extended discovery (tail) provision if the policy is not renewed. The intent of this policy is to provide coverage for claims arising out of the performance of design or engineering Services under this Agreement and caused by any error, omission, breach or negligent act for which the Contractor is held liable. Alternatively, Contractor shall require that Subcontractors or licensed design professionals providing such design services to carry and maintain insurance during the course of the Work. Contractor may satisfy the Professional Liability insurance requirement through its design subcontractor. Evidence of insurance from design Subcontractor to Owner is required prior to acceptance of this requirement.

(6) Umbrella or Excess Liability insurance with a limit of ten million ($10,000,000) occurrence and in the annual aggregate in excess of the limits of insurance with coverage at least as broad as insurance provided in paragraphs 1) (b) Employers’ Liability, 2) (a) Automobile Liability, and 3) Commercial General Liability. Commercial General Liability Coverage general aggregate on a per project basis is required to be written on an occurrence form.

(7) Insurance providing coverage for Contractor’s own equipment being used at the Job Site and not becoming permanent works of the Project.

(8) All other insurance required by Applicable Laws.

(9) For any materials shipped from overseas with an aggregate cost of $2 million or more, Ocean Marine Cargo Insurance (“OMC”) covering imports from manufacturers/suppliers not otherwise agreeing to carry risk of loss until delivery F.O.B. Project Site. Coverage will insure equipment, machinery and materials intended to become a permanent part of the Work.

* Coverage is to be on the basis of Institute Cargo Clauses (A) plus war, plus strike, riot and civil strife perils and should include storage off the Job Site. The sum insured with respect to each shipment shall not be less than the replacement value of the largest single shipment. OMC coverage to include all voyages (land, water or air) sourced overseas, in Canada and Mexico, if not covered under the Builder’s All Risk policy and attaches from the time of leaving the manufacturers’/suppliers’ warehouses (including inland marine), until being unloaded at the final Project Site.
* Deductibles shall not be greater than $50,000 for any one shipment or conveyance.
* Contractor shall have obtained such OMC coverage on or prior to the date on which the exposure to the risk covered by the OMC coverage arises.
* The only permissible cancellation is as follows: (i) cancellation on 7 days’ notice for war, strikes, civil commotion, (ii) cancellation on 48 hours’ notice for strikes, riots, and civil commotion preventing passage to or from the United States, and (iii) cancellation on 10 days’ notice for non‑payment of premium.
* Coverage to continue during storage until Builder’s All Risk policy is in force.

(10) Builder’s All Risks (“BAR”) insurance on an all‑risk basis including inland transit covering loss or damage to the Work during the construction, and testing and commissioning periods and until transfer of title to the Project to Owner, covering all property used in the fabrication, assembly, installation, erection or alteration of and intended to become a permanent part of the Work described herein; provided that Owner shall reimburse Contractor for the daily pro rata cost of the BAR premium for each day that Closing is delayed more than three Business Days after Contractor has completed its deliveries pursuant to Section 7.9.1. Coverage to include the interest of Owner, Contactor and Subcontractors of every tier, and shall cover the full replacement cost for the values of the Work at risk and subject to the sub‑limits as described below, including earthquake, flood, debris removal, demolition and expediting expenses. The policy will include the Owner, Contractor, Subcontractors and other parties that have an insurable interest and is to be on an “all risk” basis including terrorism coverage subject to normal and customary policy exclusions, terms and conditions and subject to normal and customary sub‑limits as shown below. Coverage shall also provide inland transit and include on and off‑site storage to and from locations requiring equipment needing fabrication/repairs (to the extent storage coverage is not provided under the OMC policy or by manufacturers’ and suppliers’ insurance).

a) BAR sub‑limits shall be as follows:

**

b) Coverage to include testing (including hot testing for the necessary duration) and commissioning period and resultant damage from faulty design, materials and workmanship (LEG 2).

c) Deductibles shall not be greater than $250,000 per occurrence, except that hot testing deductible of $1,000,000 is acceptable and earthquake deductible of 5% value of risk at time of loss ($250,000 minimum deductible) is acceptable.

d) The only permissible cancellation is as follows: (i) 10 days for non‑payment of premium and 30 days for material change in the risk profile of the project after coverage commences.

APPENDIX R‑2

OWNER REQUIRED INSURANCE

Owner shall maintain or cause to be maintained the following types of insurance, subject to the general provisions included in Appendix R‑3.

(1) Worker’s Compensation/Employer’s Liability.

* Owner shall maintain statutory limits for Workers’ Compensation to the extent required by Applicable Laws, during the entire time that any persons are employed by them on the Job Site in connection with the Project.
* Owner shall maintain Employer’s Liability Insurance in the amount of $1,000,000 bodily injury each accident, $1,000,000 disease policy limit and $1,000,000 disease each employee. Owner may self‑insure where permitted by Applicable Laws.

(2) General Liability and Automobile Liability.

* Liability Insurance for the Owner’s legal liability arising out of its operations at the Job Site.
* Auto Liability Insurance covering owned, non‑owned and hired vehicles of the Owner; each policy with limits of not less than one million ($1,000,000) per occurrence and in the annual aggregate. Such limits may be achieved by applying limits from an Excess or Umbrella Liability policy. Owner may self‑insure General Liability and Auto Liability where permitted by applicable law.

(3) All other insurance required by Applicable Laws.

APPENDIX R‑3

GENERAL INSURANCE PROVISIONS

(1) All insurance may be carried through the worldwide insurance programs of Owner or Contractor or their respective Affiliates.

(2) All insurance required to be maintained in Appendix R‑l shall be endorsed to the effect that Owner, the Contractor and such other persons as Owner may specify in writing shall be included as additional insured’s thereon to the extent of Contractor’s indemnity obligations under Section 16.1 of this Agreement except for workers’ compensation, employers’ liability, and professional liability. Third party liability policies shall provide for a cross liability clause applicable to additional insured’s. Such insurance is primary insurance with respect to the interests of Owner and that any other insurance maintained by Owner is excess and not contributory insurance with the insurance required hereunder. Vendors, suppliers, material dealers and others who merely transport, pick up, deliver or carry materials, personnel, parts or equipment, or any other items or persons to or from the Site shall not be considered “subcontractors” for purposes of insurance coverage.

(3) In the event any insurance described herein (including the limits or deductibles thereof), other than insurance required by Applicable Laws, shall not be available on commercially reasonable terms in the commercial insurance market for facilities having a similar risk profile, the Parties shall consent to waive the requirement to maintain such insurance to the extent the maintenance thereof is not so available on such terms, but the Parties shall continue to remain obligated to maintain any such insurance up to the level, if any, at which such insurance can be maintained on commercially reasonable terms in the commercial insurance market for facilities with a similar risk profile.

(4) All insurance required to be maintained in accordance with Appendices R‑1, R‑2 and R‑3 shall be placed with financially sound and reputable insurers having an A.M. Best rating of A‑IX or better and with coverage forms reasonably acceptable to the Parties.

(5) Contractor will be responsible to schedule and pay for Marine Cargo Surveys required by the Ocean Marine Cargo (“OMC”) for equipment specified under the insurance. If Contractor fails to schedule the required survey, Contractor will be responsible for any reduction in, or loss of, coverage that results from such failure.

(6) Contractor shall require Subcontractors of any tier who perform Work at the Site to carry liability insurance (auto liability, commercial general liability) and workers’ compensation/employers’ liability insurance in amounts customary for Contractor to require of its Subcontractors and where available meeting the requirements of this Appendix R‑3 (excess limits of Subcontractor may be in accordance with Contractor’s normal procurement practices), provided however, Contractor shall remain responsible and indemnify the Owner for any claims, lawsuits, losses and expenses including defense costs that exceed any of its Subcontractor’s insurance limits or for uninsured claims or losses to the extent required by Contractor’s indemnification obligations in Section 16.1 and subject to the limitation of liability provisions set forth in this Agreement.

(7) Owner and Contractor shall each be solely responsible for determining the appropriate amount of insurance, if any, in excess of amounts required under this Agreement. The required amounts of insurance shall not operate as limits on recoveries available under this Agreement.

(8) Evidence of insurance required hereunder in the form of certificates of insurance shall be furnished by each Party when required to be delivered no later than the date on which coverage is required to be in effect pursuant to this Appendix R‑3, as applicable; provided, however, a copy of the OMC and BAR insurance policies or other such evidence of the terms of coverage acceptable to Owner shall be provided by Contractor to Owner not less than thirty (30) days prior to the date on which coverage is required to be in effect. It is hereby understood and agreed that the policy wording to be provided by the Contractor in the case of policies purchased specific to this Project, is confidential and privileged information, and is intended for the use of the Owner in order to satisfy and validate the terms and conditions of this Agreement. Not later than the one‑year anniversary of the date of delivery of the certificates of insurance hereunder or the expiration date of the policy if for a term of more than one year, and not later than each one‑year anniversary or policy renewal date thereafter, each Party shall deliver copies of the certificate of insurance of the renewal insurance policies.

(9) The OMC and BAR insurance carried by Contractor shall be primary and not excess to or contributing with any property insurance or self‑insurance maintained by Owner with regard to the Project.

APPENDIX S

MILESTONE PAYMENT SCHEDULE AND SCHEDULE OF VALUES

APPENDIX T

SURVEYS, GEOTECHNICAL REPORTS, CULTURAL

AND ENDANGERED SPECIES STUDIES

APPENDIX U

PERFORMANCE TEST PROTOCOL

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1. Definitions
   * 1. **“Available**” is defined per the intent of the ANSI/IEEE 762-1987 Standard Definition for Use in Reporting Electric Generating Unit Reliability, Availability, and Productivity, Section 3.1.2:

“Equipment is in an Unavailable state when the equipment is not capable of operation because of operational or equipment failures, external restrictions, testing, work being performed, or some adverse condition. The unavailable state persists until the unit is made available for operation by being synchronized to the system in service state.”

* + 1. **“Availability”** is defined as the periods when the Plant is Available.
    2. **“Capacity Guarantee”** has the definition given in Section 3.2.1.1.
    3. **“Capacity Test Protocol”** has the definition given in Section 2.2.
    4. **“Capacity Test Tolerance”** is defined as 5%.
    5. **“Excusable Events”** has the definition given in Section 2.3.7
    6. **“Final Capacity Test”** has the definition given in Section 2.1.5.
    7. **“Guaranteed AC Nameplate Capacity”** is defined as the AC nameplate capacity for each plant detailed in Table 3.
    8. **“Guaranteed DC Nameplate Capacity”** is defined as the DC nameplate capacity for each plant detailed in Table 4.
    9. **“Guarantee Level”** shall mean 95% of the Pro forma 8760 Dataset (the un-margined Pro forma Production Model).
    10. **“Initial Capacity Test”** has the definition given in Section 2.1.2
    11. **“Plant”** has the meaning set forth in the preamble to this Agreement.
    12. **“Pro forma Production Model”** - the Pro forma Production Model is an extensive model of plant performance across all possible operating conditions. The Pro forma Production Model consists of the technical model and the inputs and assumptions (including meteorological data) used to evaluate the technical model. The hourly energy simulation tool, PVSyst, has been selected for use as the technical model for this contract. The inputs and assumptions used to evaluate the technical model of the plant to produce the Pro forma 8760 Dataset and the Pro forma Energy Yield are documented in their entirety in Addendum A: Inputs, Assumption and Technical Model.
    13. **“Pro forma 8760 Dataset”** – the Pro forma 8760 Dataset for the plant is the hourly dataset produced by the Pro forma production Model (e.g. the dataset produced by PVSyst for the plant using the inputs and assumptions detailed in Addendum A: Inputs, Assumption and Technical Model.)
    14. **“Pro forma Term”** – the Project financial evaluation period used in the Owner’s economic model.
    15. **“Reporting Conditions”** – shall have the definition given in Section 3.2.4 of ASTM E2848-11. Reporting Conditions are used along with the appropriate regression coefficients to determine the Guaranteed Capacity and Measured Capacity. Reporting Conditions are selected for each month based on the Pro forma 8760 Dataset and is detailed in Table 1. The same reporting conditions are used to determine BOTH the Guaranteed Capacity and the Measured Capacity.
    16. **“Unavailability”** – periods when Plant equipment is not Available.

1. Performance Guarantee Tests

The EPC Performance Guarantees shall be based on a demonstration of the plant’s production capability at the point of Final Completion with the Final Capacity Test. Achievement of Commercial Delivery of Power will include the successful completion of the Initial Capacity Test, the Reliability Demonstration, and other testing as defined in this Exhibit.

* 1. Summary of Performance Testing
     1. Commercial Delivery of Power includes the completion of the DC Nameplate Verification, AC Nameplate Verification, the Initial Capacity Test and the Reliability Demonstration. Final Completion includes the completion of the Final Capacity Test. The One-Year Verification Test shall be conducted at the end of the first year of system operation.
     2. Initial Capacity Test: 5-day capacity demonstration conforming to the latest version of ASTM 2848 using the Pro forma 8760 Dataset *times* (1 - Capacity Test Tolerance) *equals* the Guaranteed Capacity for the period. Measured Capacity during the test period shall be compared to the Guaranteed Capacity to determine any Capacity Shortfall Liquidated Damages.
     3. DC and AC Nameplate Verification: validation of plant DC and AC nameplate capacity.
     4. Reliability Demonstration: plant availability must be 98% for a period of five (5) consecutive days.
     5. Final Capacity Test: 7-day capacity demonstration conforming to ASTM 2848 using the Pro forma 8760 Dataset *times* (1 - Capacity Test Tolerance) *equals* the Guaranteed Capacity for the period. Measured Capacity during the test period shall be compared to the Guaranteed Capacity to determine any Capacity Liquidated Damages.
     6. Test tolerance will be applied in the inputs and assumptions to the Pro forma Production Model.
  2. Capacity Test Protocol

The Capacity Test shall use the Standard Test Method ASTM E2848. This test method uses a multi-linear regression of plant power against global in-plane irradiance, ambient temperature and wind speed to determine system capacity in the prevailing environment (the Measured Capacity).

* + 1. Guaranteed Capacity is determined by performing the regression presented in ASTM E2848 on a sub-set of the Pro Forma 8760 Dataset data adjusted for the Capacity Test Tolerance, as described in Capacity Test Protocol in this section. Guaranteed Capacity varies on a monthly basis, with values detailed in Table 1 as-adjusted for the Capacity Test Tolerance. The Guaranteed Capacity value to which the Measured Capacity is compared will be determined based on the start date of the Capacity Test using Table 1 as a guide.
    2. Table 1 sets forth the guaranteed values by month for the plant. The Guaranteed Capacity values have been determined by performing the regression presented in Section 4 of ASTM E2848-13 on a sub-set of the Pro Forma 8760 Dataset data and *adjusted* for the Capacity Test Tolerance. The subset of data used to determine the Guaranteed Capacity for each month includes only data with irradiance within 20% of the reporting irradiance from the period beginning on the first day of the month and ending on the last day of the month. In addition, the sub-set of data excludes any data in which the array experiences shading of the beam component of irradiance and any data in which the inverter is not tracking the array maximum power point (e.g., inverter is “clipping”).
    3. Reporting Conditions for each month were chosen as follows from the Pro forma 8760 Dataset:
       1. Prior to determining the reporting irradiance, data from the Pro forma Production Model was filtered as follows:
          1. Any hourly data with Near Shading Factor on Beam < 1 will be excluded
          2. Any hourly data with any inverter clipping will be excluded

Inverter Loss due to Power Threshold >0

Inverter Loss due to Voltage Threshold >0

Inverter Loss Over Nominal Inverter Power >0

Inverter Loss Over Nominal Inverter Voltage >0

* + - 1. For each month, a subset of the filtered Pro forma 8760 Dataset (filtered per 2.2.2.5) beginning on the first day of the month and ending on the last day of the month was inspected to determine the highest value of reporting irradiance (Eo) for which the number of data points in the range Eo\*0.8 < Irradiance < Eo is nearly equal to the number of data points in the range Eo < Irradiance < Eo\*1.2 (discrepancy not to exceed 40%/60% distribution)and for which the total number of data points in the range Irradiance = Eo\*0.8 - Eo\*1.2 is at least 50. As an example, if the chosen reporting irradiance Eo = 800 W/m2, then there must be between 20 - 25 data points between 640 – 800 W/m2 with the remainder of the data points between 800-960 W/m2.
      2. Upon selecting the reporting irradiance, the reporting temperature was determined to be the average temperature for all rows of data for which irradiance is within 20% of the reporting irradiance.
      3. The reporting wind speed is set to 1 m/s in all cases.
      4. The reporting irradiance, reporting temperature, and reporting wind speed (together, the Reporting Conditions) determined for each month using the above procedure, along with the regression coefficients determined via the method described in 2.2.1 above, were used to evaluate Equation 2 in ASTM E2848-11to determine the Guaranteed Capacity value for each month. The Reporting Conditions for the month appropriate to the actual Capacity Test start date shall be used along with the regression coefficients obtained from the actual plant data measured during the Capacity Test to evaluate Equation 2 in ASTM E2848-13 to determine the Measured Capacity, Therefore, the Guaranteed Capacity and Measured Capacity that will be compared to determine whether the plant passes or fails the Capacity Test will be determined using the same set of Reporting Conditions.
    1. To determine the Measured Capacity of the plant, the methods outlined in ASTM E2848-13 shall be carried out. The Reporting Conditions and Guaranteed Capacity to which the Measured Capacity is compared will be determined using Table 1 as a guide.
    2. Irradiance for the Capacity Test shall be measured using at least two independently-calibrated Secondary Standard pyranometers. The irradiance used to compute the plant capacity shall be the average of the measurements except where one measurement is determined to be erroneous. If more than one of the measurements is determined to be erroneous, the data point in question shall be excluded from the test. If one irradiance sensor’s reading is more than 5% different from the other(s’) readings, then both values must be inspected to determine which (or both) is erroneous. Pyranometers shall be cleaned daily during the test period.
    3. Typically, the Capacity Test should not be conducted during the months of November, December and January.
    4. Periods in which the array or irradiance sensors are obscured by snow or frost will be excluded based on ASTM E2848-13 Section 9.1.9. No adjustments to the soiling loss assumptions included in the Pro forma Production Model will be made for the Capacity Test.
    5. The test period should be 5 days in length.
    6. The measured data shall be in 5-minute (or more frequent) averages. The regression on measured data may be run on the as-measured 5-minute data, with no aggregation into hourly intervals required.
    7. The Measured Capacity (kW) must be greater than or equal to the Guaranteed Capacity (kW) in order for the Contractor to avoid paying any Capacity Shortfall Liquidated Damages
  1. Test Protocol
     1. Pro forma Energy Yield values by plant are detailed in Table 2 below.
     2. Test Data Sufficiency
     3. Irradiance shall be measured in the horizontal plane using at least two independently-calibrated Secondary Standard pyranometers. The irradiance used as input to the Pro forma Production Model for purposes of calculating the Weather-Adjusted Energy Yield shall be the average of the measurements except where one measurement is determined to be erroneous. If more than one of the measurements is determined to be erroneous, the data point in question shall be excluded from the test. Pyranometers shall be cleaned weekly during the test period.
     4. Care shall be taken in the placement of ambient temperature and wind speed sensors to ensure that measurements are not biased by proximity to unrepresentative conditions (such as exhaust from inverter shelters, or shielding of wind by physical obstructions).
     5. Data shall be collected in 5-minute (or more frequent) averages. The measured data shall be aggregated into hourly averages to enable import to the Pro Forma Production Model. For the purpose of computing hourly average data for import into the Pro Forma Production Model for the computation of the Weather-Adjusted Energy Yield, an hourly average value may be computed if 45 minutes or more of the hour are available.
     6. Measured meteorological and measured energy data shall be excluded symmetrically from all calculations. Data may be excluded from the calculations if it meets any of the criteria for Excusable Events outlined in this section 2.3.7. All data to be excluded will be excluded from the measured meteorological dataset prior to inputting it to the Pro Forma Production Model. (This ensures that the Guaranteed Energy and Measured Energy include the same hours for an “apples-to-apples” comparison).
     7. Excusable Events
        1. Excusable Events shall include, but are not necessarily limited to:
           1. Failures of sensors or monitoring equipment critical to collection of the test data set (more than one irradiance sensor, ambient temperature, or power meter). Sensor failures include stuck values, lack of values, and out of range values. For irradiance sensors, if one irradiance sensor’s reading is more than 5% different from the other(s’) readings, then both values must be inspected to determine which (or both) is erroneous.

A failure of one pyranometer must be remedied within 4 days

A failure of two or more pyranometers must be remedied within 48 hours

A failure of monitoring equipment (loggers) must be remedied within 24 hours

* + - * 1. Out of Contractor control system outages (including utility curtailment of system and utility shut-down for maintenance)
        2. Disconnection by the Owner or as a result of an order issued to the Owner by a court or public authority.
        3. Disconnections due to errors or unavailability of the power supply, unless Contractor is responsible for this.
        4. Operational disruption by grid disconnections or disruptions in the grid of the grid operator, unless Contractor is responsible for this.
        5. Disconnections or power regulation by the grid operator, unless Contractor is responsible for this.
        6. Force majeure events as defined in the EPC Agreement.
        7. Accumulation of snow or ice on the PV modules and/or the irradiance sensors.
        8. Damage to the PV System (including the cables up to the feed-in point) caused by the Owner or third parties (unless they are sub-contractors or vicarious agents of Contractor), especially but not limited to vandalism.
        9. Failure times cause by Owner to adhere to recommendations provide by Contractor or manufacturers, including but not limited to acts of third parties who are outside of Contractor’s control, i.e. engage directly by Owner.
        10. Ambient conditions outside the permissible value of the Technical Specifications, Exhibit 1, and damage caused by a deviation of the expected air quality from class 3S2 of the standard EN 60721-3 as amended at any time, or any legal provisions which may replace this standard.
        11. Weather conditions that do not permit troubleshooting or repairs for safety reasons (when such troubleshooting and repairs are necessary). This condition shall be deemed to apply if the weather conditions pose a danger for the life or the physical well-being of the deployed personnel.
        12. Equipment where a serial manufacturer defect arising from a single cause, has repeatedly led to a failure of the PV System, or for which the manufacturer has issued a recall, or the manufacturer becomes bankrupt, insolvent or otherwise defaults on its obligations under its warranty the captured data during his time frame shall be excluded from tests conducted under Section 2.3. If data is excluded for this reason, the One-Year Verification Test shall be extended for a length of time equal to the length of time excluded.
  1. DC Nameplate verification
     1. The plant’s actual DC nameplate will be verified by inspection of the manufacturer’s flash test data for the module serial numbers installed on Site. The list of module serial numbers and corresponding flash test data for the Site will include exactly the number of modules that have been installed on that Site (the lists will not include spares that may be stored on Site). The actual DC nameplate for the Site shall be calculated by summing the manufacturer’s flash test values for each of the modules’ peak power points at STC.
     2. In addition, the DC nameplate capacity of the system will be verified via inspection of manufacturer’s module flash test data and on-site inspection of the module field, and the AC nameplate capacity of the system will be verified via inspection of the plant inverters.
     3. The list of module serial numbers installed on the Site will be verified via on-site visual inspection and sampling. On-site visual inspection will include:
        1. confirming that the number of modules installed of each type or nameplate is equal to that specified in the as-built system layout and
        2. sampling the serial numbers of 30 modules at random to confirm that these serial numbers are contained in the list provided for the Site
     4. In order to pass the DC nameplate verification, the following criteria must all be met:
        1. actual DC nameplate for the Site must equal or exceed the Guaranteed DC Nameplate
        2. for the Site, the number of modules of each type or nameplate actually installed on Site must equal the number and types specified on the system layout AND the number and type included in the list of module serial numbers installed on-site
     5. The Guaranteed DC Nameplate Capacity for the Site is detailed Table 4 below. The Guaranteed DC Nameplate Capacity is subject to change as described in Addendum A: Inputs, Assumption and Technical Model.
  2. AC Nameplate verification
     1. The plant’s AC nameplate will be verified by on-site visual inspection of the plant’s inverters. The sum of the nameplate capacity of all inverters incorporated in the system on the Site shall be equal to the Guaranteed AC Nameplate Capacity for that Site. The Guaranteed AC Nameplate Capacity for the Site is detailed in Table 3 below. The Guaranteed AC Nameplate Capacity is subject to change as described in Addendum A: Inputs, Assumption and Technical Model.

1. Performance Guarantees and Liquidated Damages
   1. Overview
      1. Capacity Guarantee
         1. The Contractor guarantees the Project capacity values listed in Table 1 (the “Guaranteed Capacity”) subject to any adjustments per the Capacity Test Protocol in Section 2.3. The Contractor guarantees that 100% of the Guaranteed Capacity for the Project will be achieved as demonstrated by the 5-Day Capacity Test for the Project. If the Measured Capacity is less than the Guaranteed Capacity for a project, Capacity Shortfall Liquidated Damages will apply and be calculated in accordance with Section 3.2, below.
   2. Calculation of Liquidated Damages
      1. Capacity Shortfall Liquidated Damages Calculation
         1. Contractor guarantees that, upon the conclusion of the Capacity Test described in this Appendix U and the attachments hereto conducted in accordance with the Capacity Test Procedures, Measured Capacity shall be at least equal to the Guaranteed Capacity (the “Capacity Guarantee”).
         2. Following completion of the data analysis associated with the Capacity Test, the determination of whether Contractor shall pay Owner any Capacity Shortfall Liquidated Damages, shall be based on the following calculations (a “Capacity Guarantee LD Calculation”) for the project:
            1. X = Capacity Ratio where the Capacity Ratio is calculated as follows: Measured Capacity *divided* by Guaranteed Capacity (defined as the Actual Pro Forma 8760 Dataset data *adjusted* for the Capacity Test Tolerance, see section 1.1.10) (expressed as a percentage).
            2. If X is less than 100%, Capacity Shortfall Liquidated Damages shall be payable by Contractor to Owner. The Capacity Shortfall Liquidated Damages = (100% - X) \* Contract Price \* 1.25 [as specified in the EPC]
            3. Contract Price
         3. Contractor shall provide a Capacity Performance Test Report to the Owner within fifteen (15) days following the test completion. Such test report shall include the Capacity Guarantee LD Calculation and shall include all supporting documentation for the calculations. Owner shall have seven (7) Business Days to review the test report and Capacity Guarantee LD Calculation. The amount due therein, if any, shall be payable by the Contractor as a condition to achieving Commercial Delivery of Power.
2. Table 1: Reporting Conditions and Guaranteed Capacity Values for:

(TO BE UPDATED PRIOR TO PERFROMANCE TEST)



1. Table 3: Guaranteed AC Nameplate Capacity for the Plant

|  |  |
| --- | --- |
| Guaranteed AC Nameplate Capacity | 2.00 MW AC |

1. Table 4: Guaranteed DC Nameplate Capacity for the Plant

|  |  |
| --- | --- |
| Guaranteed DC Nameplate Capacity | 2,661,120 watts DC @ STC |

1. Addendum A: Inputs, Assumption and Technical Model

The PVSyst reports included in this Addendum list the inputs and assumptions to the technical model used to generate the pro forma energy expectation for the Site. In the event that changes to the design are required, the Pro forma Production model may change to accommodate the design changes subject to the limitations below, and subject to the approval of the Owner. In the event that the Pro forma Production Model changes, this Appendix U will be amended to reflect the change, particularly with respect to the Pro forma Energy Yield, Pro forma 8760 Dataset, Guaranteed Capacity, Guaranteed DC Capacity, Guaranteed AC Capacity, and Weather-Adjusted Energy Yield values and Tables A1 and A2 in this Appendix U.

* 1. Inputs and Assumptions that may be modified
     1. The inputs and assumptions to the Pro forma Production Model that may change are as follows:
        1. Module Manufacturer
        2. Inverter Manufacturer
        3. Module tilt
        4. Module azimuth
        5. PVSyst “Field Type” and “Near Shadings” definition
        6. Number of rows of modules per rack
        7. Module orientation on rack (e.g. landscape vs. portrait)
        8. Ground coverage ratio (e.g. row spacing relative to row width)
        9. Module PAN file
        10. Number of modules per string
        11. Number of strings per inverter
        12. Number of inverters
        13. Total DC Nameplate Power
        14. Total AC Nameplate Power
        15. Inverter (OND) file for PVSyst
     2. No other aspects of the Pro forma Production Model may be changed.
  2. Additional Pro forma Model documentation
     1. Table A1 details average hourly energy production by month for the plant.
     2. Table A2 documents the details of the module PAN file used in the Pro forma Production Model.

*For the Site, a reference output table is needed from PVSyst in the form of Table A1 below, as well as the final PVSyst output reports used to define the capacity and energy guarantees*.

Table A1-1: Reference PVSyst Output (Average Power in kW by Hour and Month)

Table A2: Module PAN File details for First Solar Series 4 module as used in pro forma simulation.

|  |  |
| --- | --- |
| **Parameter** | **Value** |
| Nominal Power | 120 |
| Technology (PVSyst parameter) | CdTe |
| Cells in Series | 108 |
| Cells in Parallel | 2 |
| Vmpp | 70.70 |
| Impp | 1.695 |
| Voc | 88.70 |
| Isc | 1.840 |
| mIsc (muIsc mA/degC) | 0.7 |
| mVco (muVoc mV/degC) | -219.2 |
| mPmpp (Temper. Coeff. %/degC) | -0.280 |
| Rsh 0 (Rshunt at Ginc=0) | 12000 |
| Rsh exp (Exponential Parameter) | 8.0 |
| R shunt | 3500 |
| R series | 3.708 |
| Diode Saturation Current IoRef (nA) | 0.016 |
| Diode quality factor Gamma | 1.26 + 0.001/K |
| Vmax | 1500 IEC 1000 UL |
| By-pass diode | 1 |
| Brev (mA/V^2) | 3.2 |
| Length (mm) | 1200 |
| Width (mm) | 600 |
| Depth (Thickness mm) | 7.0 |

1. Addendum B – Sample Liquidated Damage Calculation

The following are for illustrative purposes only and shall not modify any terms or conditions in the Agreement.

* 1. Capacity Shortfall Liquidated Damages Example Calculation:
     1. Example: If, from the results of the Capacity Test Report, the “Measured Capacity” = 4,850 kWac and “Guaranteed Capacity” = 5,000 kWac, then Capacity Ratio (X) = 4,850 kWac /5,000 kWac, or 97.0%.
     2. Then: Capacity Shortfall Liquidated Damages = (100% - X) \* Contract Price, or (1.00 – 0.97 = 0.03) \* $15,000,000 = **$450,000**.
     3. Where: Contract Price = $15,000,000.

SCHEDULE 1

Definitions

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

“**Affiliate**” means, in relation to any Person, any other Person:

#### Which directly or indirectly controls, or is controlled by, or is under common control with, such Person; or

#### Which directly or indirectly beneficially owns or holds fifty percent (50%) or more of any class of voting stock or other equity interests of such Person; or

#### Which has fifty percent (50%) or more of any class of voting stock or other equity interests that is directly or indirectly beneficially owned or held by such Person, or

#### Who either holds a general partnership interest in such Person or such Person holds a general partnership interest in the other Person.

For purposes of this definition, the word “controls” means possession, directly or indirectly of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of voting securities or otherwise.

“**Agreement**” means this agreement, including the appendices, exhibits and other attachments hereto, as same may be amended, supplemented or modified from time to time.

“**Applicable Laws**” means any act, statute, law, regulation, permit, license, ordinance, rule, judgment, order, decree, directive, guideline or policy (to the extent mandatory) or any similar form of decision or determination by, or any interpretation or administration of, any of the foregoing by any Government Authority with jurisdiction over the Plant, the Job Site, the performance of the Work or other services to be performed under the Contract Documents, as such Applicable Laws are in effect from time to time.

“**Applicable Permits**” means any and all permits, clearances, licenses, authorizations, consents, filings, exemptions, rulings or approvals from or required by any Government Authority that are necessary for the performance of the Work or ownership or use of the Plant.

“**Applicable Standards**” means those sound and prudent practices, acts, methods, specifications, codes and standards of design, engineering, assembly, erection, installation, construction, performance, safety and workmanship prudently and generally engaged in or observed by the majority of the professional engineering and construction contractors performing engineering and construction services for utility‑grade, grid‑connected photovoltaic solar electric generating facilities in the United States that, in the exercise of good judgment, would have been expected to accomplish the desired result in a manner consistent with Applicable Laws, Applicable Permits, reliability, safety, environmental protection, local conditions, economy and efficiency, as such Applicable Standards are in effect from time to time.

“**Application for Payment**” has the meaning set forth in Section 7.2.1.

“**Assigned Warranties**” has the meaning set forth in Section 7.2.1.

“**Business Day**” means any day other than a Saturday, Sunday or a legal holiday in New Mexico, United States.

“**Capacity Shortfall Liquidated Damages**” has the meaning set forth in Section 11.3.

“**Change Order**” has the meaning set forth in Section 6.1.

“**Changes**” has the meaning set forth in Section 6.1.

“**Closing**” has the meaning set forth in Section 7.2.

“**Closing Date**” has the meaning set forth in Section 7.2.

“**Completion Date**” means either the Mechanical and Electrical Completion Date or the Outside Completion Date, as the context requires.

“**Confidential Information**” has the meaning set forth in Section 18.3.

“**Contract Documents**” means this Agreement and all appendices, exhibits, and other documents incorporated into the Agreement, as the same may be amended, supplemented or modified from time to time.

“**Contract Price**” means the total sum payable by Owner as stated in Section 7.1.

“**Contractor**” means \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_ (as referenced in the opening paragraph hereof), and includes its legal successors and permitted assignees pursuant to the terms of the Contract Documents.

“**Contractor Deliverables**” means each of the design criteria, system descriptions, Required Manuals, Drawings, Final Plans, “as‑built” drawings, photographs, design calculations, quality assurance reports and all other material documents relating to the Project to be delivered to Owner in accordance with the requirements of Appendix A, Appendix F, Appendix G, Appendix N, Appendix P, Appendix Q and the Contract Documents.

“**Contractor Equipment**” means all of the equipment, materials, apparatus, structures, tools, supplies and other goods provided and used by Contractor and its Subcontractors and Vendors for performance of the Work, but which is not intended to be incorporated into the Plant.

“**Contractor Event of Default**” has the meaning set forth in Section 15.1.

“**Contractor Indemnitees**” has the meaning set forth in Section 16.2.

“**Contractor Project Manager**” means the person designated by Contractor as having the centralized responsibility, authority and supervisory power of Contractor for design, procurement, construction, testing and start‑up of the Plant, as well as all matters relating to the administration of the provisions of the Contract Documents.

“**Contractor Taxes**” has the meaning set forth in Section 3.23.

“**Contractor’s Representative**” has the meaning given in Section 3.11.2.

“**Critical Cyber Assets**” has the meaning set forth in Section 18.3.

“**Critical Path Schedule**” means the critical path schedule in the form of Appendix B.

“**Damages**” has the meaning set forth in Section 16.1.

“**Day**” or “**day**” means a period of twenty‑four (24) consecutive hours from 12:00 midnight (Mountain Standard time), and shall include Saturdays, Sundays and all holidays except that in the event a time period set forth in the Contract Documents expires on a Day that is not a Business Day, such period shall be deemed to expire on the next Business Day thereafter.

“**Defect**” means, any designs, engineering, software, drawings, components, tools, Equipment, installation, construction, workmanship or Work that, in Owner’s reasonable judgment:

#### Do not conform to the terms or requirements of Appendix A, Appendix G, the Contract Documents or the Drawings approved by Owner;

#### Are not of uniform good quality, free from defects or deficiencies in design, application, manufacture or workmanship, or that contain improper or inferior workmanship; or

#### Would adversely affect the:

##### Performance of the Plant under anticipated operating conditions;

##### Continuous safe operation of the Plant during the Plant’s design life;

##### Structural integrity of the Plant;

##### Economic value of Owner’s investment in the Plant, all as determined by reference to Prudent Utility Practices.

Work shall be considered to be defective if it does not conform to Applicable Standards.

“**Delay Notice**” means a Notice of a Force Majeure Event, and the estimated delays associated with such event, as set forth in Section 14.2.

“**Deliverables Schedule**” means the schedule identifying the documents to be delivered by Contractor, and Owner’s period for review thereof, prepared by Contractor and agreed to by Owner in accordance with Section 5.5 and the requirements of Appendix A, Appendix B, Appendix F, Appendix G and the other applicable provisions of this Agreement.

“**Dispute**” means any dispute, controversy or claim between the Parties arising out of or relating to the Contract Documents, or the breach, termination or invalidity thereof, or that arises out of or relates to any subcontract or sub‑subcontract.

“**Drawings**” means all:

#### Specifications, calculations, designs, plans, drawings, engineering and analyses that are described in Appendix A or Appendix G or otherwise under the Contract Documents, and other documents which determine, establish, define or otherwise describe the scope, quantity, and relationship of the components of the Plant, including the structure and foundation thereof; and

#### Technical drawings, operating drawings, specifications, shop drawings, diagrams, illustrations, schedules and performance charts, calculations, samples, patterns, models, operation and maintenance manuals, piping and instrumentation diagrams, underground structure drawings, conduit and grounding drawings, lighting drawings, conduit and cable drawings, electric one‑line’s, electric schematics, connection diagrams and technical information of a like nature, prepared or modified by Contractor or any of its Subcontractors or Vendors all of which are required to be delivered by Contractor, or any Subcontractor or Vendor, from time to time under the Contract Documents or at Owner’s request which illustrates any of the Equipment or any other portion of the Work, either in components or as completed.

“**Early Termination Payment**” shall mean such amounts as are necessary to reimburse Contractor for its reasonable and documented out‑of‑pocket costs incurred in connection with the performance of the Work (or any part thereof) in accordance with the applicable Limited Notice to Proceed and the Milestones for the Work set forth in Appendix B.

“**Effective Date**” means the date first noted above on which this Agreement becomes effective.

“**El Paso Electric Co.**” means El Paso Electric Co., an Texas corporation, an investor owned utility.

“**El Paso Electric Interconnection Facilities**” means the facilities owned by El Paso Electric Co. and used to interconnect the Project to the [transmission grid][[1]](#footnote-2), [distribution system], as described further in Appendix A.

“**Environmental Plan**” has the meaning set forth in Section 3.18.2.

“**Equipment**” means all of the equipment, materials, apparatus, structures, tools, supplies, goods and other items provided by Contractor and its Subcontractors and Vendors that are installed or incorporated into the Plant or otherwise form or are intended to form part of the Work or the Plant (other than Contractor Equipment).

“**Equipment Warranty Period**” has the meaning set forth in Section 12.1.5.

“**Final Acceptance**” means that all of the following have occurred as of the most recent applicable Tests:

#### The Tests, mechanical calibrations, electrical continuity and ground fault tests have been successfully completed and any Defects found have been corrected;

#### The Plant has been synchronized with the El Paso Electric Co. Interconnection Facilities in accordance with the Scope of Work and the Utility’s interconnection requirements;

#### Final Acceptance Performance Level has been met or exceeded (or, in Owner’s sole discretion, if such performance level has not been achieved prior to the Outside Completion Date, Owner has agreed to accept, and Contractor has paid in full, Capacity Shortfall Liquidated Damages calculated in accordance with Section 11.3);

#### All Work has been completed in accordance with the requirements of the Contract Documents;

#### The Plant has been constructed in accordance with the Contract Documents and the Drawings;

#### The Final Plans accurately reflect the Plant as constructed;

#### The Plant is capable of being operated in a safe, normal, reliable and continuous manner in accordance with Applicable Laws and Applicable Permits (excluding for this purpose all variances or waivers of any Applicable Permits) and the Contract Documents at all operating conditions and modes specified in the Scope of Work;

#### Contractor shall have delivered to Owner All Required Manuals and other operation and maintenance manuals, Final Plans in accordance with the Scope of Work and the Final Cost Report required by Appendix Q;

#### Contractor has provided Owner with copies of all Applicable Permits;

#### The training of O&M Personnel has been completed;

#### Contractor shall have paid all Schedule Liquidated Damages and any other amounts due under the Contract Documents, if any;

#### Any and all Liens in respect to the Plant, the Contract Documents, the Equipment, the Job Site or any fixtures, personal property or Equipment included in the Work created by, through or under, or as a result of any act or omission of, Contractor or any Subcontractor, Vendor or other Person providing labor or materials in connection with the Work shall have been released or bonded in form reasonably satisfactory to Owner;

#### Contractor has delivered to Owner a Final Release and Waiver of Claims from Contractor, each Subcontractor and each Vendor, in substantially the form of Appendix J;

#### All of Contractor’s cleanup and related obligations have been completed;

#### Contractor has delivered to Owner all Equipment warranties and assignments of such warranties;

#### Contractor has delivered all documentation required by Appendix P – Spare Parts and Special Tools;

#### All outstanding obligations of Contractor hereunder have been satisfied; and

#### All items on the Punch List have been completed.

“**Final Acceptance Certificate**” means the certificate issued by Owner indicating that Final Acceptance has been achieved by Contractor.

“**Final Acceptance Date**” means the date on which the Final Acceptance Certificate is issued pursuant to Section 10.8.2.

“**Final Acceptance Performance Level**” means that, at a minimum, the Measured Capacity is equal to 100% of the Guaranteed Capacity when corrected to Guarantee Design Conditions.

“**Final Plans**” means hard and electronic versions of final Drawings and final specifications, as revised to reflect the changes during construction, and shall include as‑built drawings, underground structure drawings (including all utilities, and critical hidden items), electric one‑lines, electric schematics, connection diagrams, and photographs, all in form and substance reasonably satisfactory to Owner.

“**Final Release and Waiver of Liens and Claims**” means a sworn statement and waiver of liens prepared by Contractor and each Subcontractor, as applicable, which provides that such Person unconditionally waives and releases all mechanic’s liens, stop notices and bond rights with respect to all Work for which Contractor requested final payment in the form set forth in Appendix J.

“**Force Majeure Event**” means an event not reasonably anticipated as of the date of this Agreement, which is not within the reasonable control of the Party affected thereby, could not have been avoided by the exercise of due diligence, is not the result of the failure to act or the negligence or willful misconduct of such Party and which, by the exercise of due diligence, the affected Party is unable to overcome or obtain or cause to be obtained a commercially reasonable substitute therefor. To the extent that such event satisfies the test set forth in the preceding sentence, Force Majeure includes: any war, declared or not, hostilities, belligerence, blockade, revolution, insurrection, riot, terrorist act, public disorder, strikes or general labor disturbances of a national or regional nature and not specific to Contractor’s personnel or Subcontractor’s personnel at the Site, expropriation, requisition, confiscation or nationalization, hurricanes, tornadoes, earthquakes, flood, explosion, civil disturbance, sabotage, acts or threats of terrorism, war, action, inaction or restraint by court order or public or Government Authority; provided, however, that none of the following constitute Force Majeure: (a) strikes or labor disturbances by Contractor or Subcontractor personnel occurring at the Site or Contractor’s or Subcontractor’s facilities except to the extent such strikes or labor disturbances at the Site or Contractor’s or any Subcontractor’s facilities are directly related to strikes or labor disturbances that are (A) on a regional or national level and are (B) simultaneously disrupting other business operations in the applicable regional or national area, but only to the extent there are other like business operations in the applicable regional or national area; (b) shortages (real or perceived) of labor unless such shortage is caused by a direct and local Force Majeure Event that prevents labor from accessing the Work; (c) delay or failure by Contractor to obtain the requirement for or properly apply for any Applicable Permit which is customarily obtained by Contractor in connection with the Work as contemplated by this Contract other than the delay or failure to obtain an Applicable Permit occasioned by (x) revocation, stay or similar action by a Government Authority of an Applicable Permit after issuance thereof by a Government Authority, (y) the failure of a Government Authority to comply with rules, procedures or Applicable Law applicable to such Government Authority or (z) an Force Majeure Event; (d) economic hardship including lack of money or credit and changes in exchanges rates; (e) utility interruptions, unless caused by an independent Force Majeure Event; (f) transportation or shipping accidents that are not of themselves caused by an Force Majeure Event; or (g) unavailability of preferred shipping methods, unless caused by an independent Force Majeure Event.

“**Government Authority**” means any and all foreign, national, federal, state, county, city, municipal, local or regional (or equivalent) authorities, departments, bodies, commissions, corporations, branches, directorates, agencies, ministries, courts, tribunals, judicial authorities, legislative bodies, administrative bodies, regulatory bodies, autonomous or quasi‑autonomous entities or taxing authorities or any department, municipality or other political subdivision thereof.

“**Guaranteed Capacity”** means the Measured Capacity the Project is guaranteed to produce as determined in accordance with Appendix U.

“**Guaranteed Commercial Delivery of Power Date**” means [\_\_\_\_\_\_\_\_\_\_\_\_], 2019.

“**Guarantee Design Conditions**” means standard test conditions of photovoltaic module power ratings established at 1,000 W/m2 solar irradiance and 25°C module temperature.

“**Guaranteed Final Acceptance Date**” means [\_\_\_\_\_\_\_\_\_\_\_\_], 2019.

“**Guaranteed Nameplate Capacity**” means two (2) MWac.

“**Guaranteed Performance Test**” means the test performed by Contractor in order to determine the Measured Capacity of the Plant.

“**Hazardous Material**” means any hazardous or toxic chemicals, hazardous materials, hazardous waste, hazardous constituents, hazardous or toxic or radioactive substances or petroleum products (including crude oil or any fraction thereof) defined or regulated as such under any Applicable Laws.

“**Health Plan**” has the meaning set forth in Section 3.18.2.

“**Immediate Need**” has the meaning set forth in Section 12.2.1.

“**Indemnified Person**” has the meaning set forth in Section 16.3.

“**Indemnifying Party**” has the meaning set forth in Section 16.3.

“**Independent Engineer**” means the Person appointed by Owner to ensure that the Work is completed in accordance with the Contract Documents.

“**Industry Standards**” means those practices, methods and standards of care, safety, performance and diligence normally practiced or approved by a significant portion of solar engineering, construction and installation firms experienced in the engineering, procurement and construction of utility‑scale solar PV power plants in performing services of a similar nature in the United States and are consistent with good engineering, design, procurement and construction practices, Applicable Permits, Applicable Laws and other standards established for such Work. Industry Standards are not intended to be limited to optimum standards, to the exclusion of others, but rather are intended to include a range of acceptable standards generally accepted in the utility‑scale solar PV power plant engineering, procurement and construction industry.

“**Initial Site Mobilization**” means the first instance when any of Contractor or its Subcontractors’ or Vendors’ Labor or other representatives begin Work on the Site after the date of this Agreement.

“**Initial Warranty Period**” has the meaning set forth in Section 12.1.4.

“**Intellectual Property Rights**” has the meaning set forth in Section 3.25.

“**ITC Liquidated Damages**” means any additional federal, state, and local taxes owed by Owner, if any, that result from the Plant not achieving Commercial Delivery of Power prior to or on the ITC Step Down Date.

“**ITC Step Down Date**” means the date after which Owner would cease to be able to claim an investment tax credit equal to at least 30% of the basis of the eligible property included in the Project under Section 48 of the Internal Revenue Code of 1986, as amended.

“**Job Site**” means the Site and any other areas (including any laydown areas) where Contractor may temporarily obtain care, custody and control, use, easement or license for purposes directly, indirectly or incidentally related to performance of, or as an accommodation to, the Work.

“**Key Personnel**” means the natural persons named in Appendix H.

“**Labor**” means the workforce of the relevant Person, including its staff and employee and non‑employee and skilled and unskilled workers.

“**Lien**” means any lien, security interest, mortgage, hypothecation, encumbrance or other restriction on title or property interest.

“**Limited Notice to Proceed**” has the meaning set forth in Section 5.1.1

“**Major Equipment**” means any item or component, or set of items or components, of the Project used or obtained in connection with the construction, testing, or start‑up of the Plant and specifically including items or components, the proper or efficient function of which materially affects the Plant’s output or reliability.

“**Measured Capacity**” means electrical power output of the Plant, in MWAC, measured at the point of delivery to the El Paso Electric Co. Interconnection Facilities determined via the methods outlined in the latest version of ASTM E2848, using Reporting Conditions defined in Appendix U, Table 1.

“**Mechanical and Electrical Completion**” means that:

#### The Equipment for the Project has been installed and is structurally sound, including with the required connections and controls to produce electrical power;

#### All Equipment related to the solar tracking system has been installed and checked for alignment, lubrication and rotation;

#### All remaining electrical systems have been checked out and are ready for operation;

#### All electrical continuity and ground fault tests and all mechanical tests and calibrations have been completed;

#### The SCADA system has been installed and is fully operational to the satisfaction of Owner; and

#### All instrumentation is operational and has been calibrated in accordance with manufacturers’ standards and guidelines and, where possible, loop checked.

“**Milestones**” means the activities, events and targets, or combination thereof, set forth in Appendix B.

“**Monthly Progress Report**” means a written monthly progress report prepared by Contractor in form and content generally in accordance with Appendix N.

“**Notice of Defect**” has the meaning set forth in Section 12.2.

“**Notice to Proceed**” means the written notice given from Owner to Contractor directing Contractor to commence performance of the Work, in accordance with ARTICLE 5.

“**Notice to Proceed Date**” has the meaning set forth in Section 5.1.3.

“**O&M Agreement**” means the Operations and Maintenance Agreement to be executed between Owner and Operator.

“**O&M Personnel**” has the meaning set forth in Section 3.21.

“**Occupational Safety and Health Act**” shall mean the Act cited as 29 U.S.C. Chapter 15.

“**Operating Guidelines**” means the guidelines or requirements specified in the Interconnection Agreement.

“**Operator**” means the Person hired by Owner to operate the Project pursuant to the O&M Agreement.

“**Outside Completion Date**” means [\_\_\_\_\_\_\_\_\_\_\_\_], 2019.

“**Owner**” means El Paso Electric Company (as referenced in the opening paragraph hereof) and it includes its legal successors and those assignees as may be designated by Owner, in writing, pursuant to the terms of this Agreement.

“**Owner Caused Delay**” means a delay in Contractor’s performance of the Work which is actually and demonstrably caused by Owner’s failure to perform any covenant of Owner hereunder or interference or delay by Owner or its contractors; provided, however, Owner Caused Delay shall exclude: (a) any delay caused by a Force Majeure Event; (b) any delay caused by the Owner’s exercise of rights under this Contract with respect to Contractor; and (c) any delay to the extent caused by Contractor.

“**Owner Event of Default**” has the meaning set forth in Section 15.4.

“**Owner Indemnitees**” has the meaning set forth in Section 16.1.

“**Owner Materials**” means the materials that Owner will use for other activities at the Job Site.

“**Owner’s Representative**” has the meaning set forth in Section 3.11.

“**Owner Taxes**” has the meaning set forth in Section 4.5.

“**Parties**” means collectively, Owner and Contractor.

“**Party**” means individually, Owner or Contractor.

“**Payment Output Percentage**” means the Measured Capacity divided by the Guaranteed Capacity and expressed as a percentage, determined pursuant to the last Guaranteed Performance Test performed under Section 10.4.

“**Person**” means an individual, partnership, corporation, limited liability company, company, business trust, joint stock company, trust, unincorporated association, joint venture, Government Authority or other entity of whatever nature.

“**Personnel**” has the meaning set forth in Section 18.3.

“**Plant**” means the solar photovoltaic electrical generating facility, to be located on the Site, including the solar photovoltaic panels, the solar tracking system, if any, and all structures, facilities, appliances, lines, conductors, instruments, apparatus, components, roads and other equipment comprising and integrating the entire facility as more particularly described in Appendix A.

“**Pre‑Existing Hazardous Material**” means Hazardous Material that existed on or in the Site prior to Initial Site Mobilization by Contractor, as identified on the Phase I Environmental Assessment with respect to the Project.

“**Progress Report**” means a written progress report prepared by Contractor in form and content generally in accordance with Appendix N.

“**Project**” means the Plant and all equipment, services and utilities related thereto which must be designed, constructed, assembled, erected, commissioned, started, tested and otherwise completed by, or through, Contractor as part of the Scope of Work and in strict accordance with the provisions of the Contract Documents.

“**Protected Areas**” has the meaning set forth in Section 3.15.3.

“**Prudent Utility Practices**” means those sound and prudent practices, acts, methods, specifications, codes and standards generally followed by the United States electric utility industry with respect to design, construction, operation, and maintenance of first class, major electric generating, transmission, and distribution facilities (including but not limited to, the engineering, operating and safety practices generally followed by the electric utility industry) that, in the exercise of good judgment, would have been expected to accomplish the desired result in a manner consistent with Applicable Laws, Applicable Permits, reliability, safety, environmental protection, local conditions, economy and efficiency.

“**Punch List**” has the meaning set forth in Section 10.7.

“**Qualifying Manufacturing Equipment**” means any Equipment incorporated into the Plant that is used directly in the production of electricity, including without limitation solar photovoltaic panels, tracking systems, inverters, transformers, and related parts and Equipment.

“**Regulatory Approval**” has the meaning set forth in Section 4.8.

“**Remediation Work**” means work required by Owner to remove all Work and Contractor Equipment from the Site and restore the Site to the condition of the Site immediately prior to Initial Site Mobilization.

“**Remedial Plan**” means a plan of corrective action, submitted by Contractor pursuant to Section 10.5.

“**Replacement Equipment**” has the meaning set forth in Section 12.1.7.

“**Required Manuals**” means all operating data and manuals, spare parts manuals, integrated and coordinated operation and maintenance manuals and instructions, and training aids reasonably necessary to safely, effectively and efficiently commission, test, start up, operate, maintain and shut down the Project, including the manuals listed on Appendix F.

“**Safety Plan**” has the meaning set forth in Section 3.18.2.

“**Safety Violations**” has the meaning set forth in Section 3.14.

“**Schedule Liquidated Damages**” has the meaning set forth in Section 11.2.

“**Schedule Recovery Plan**” has the meaning set forth in Section 5.9.

“**Scheduled Synchronization Date(s)**” means the date identified by Contractor in a notice to Owner as being the date on which Contractor will first attempt to cause the generating equipment of the Project to be electrically synchronized and connected to the El Paso Electric Co. Interconnection Facilities.

“**Scope of Work**” means the services and work to be provided, or caused to be provided, by or through Contractor under the Contract Documents for the Contract Price, as more particularly described in Appendix A‑1, as the same may be amended from time to time in accordance with the terms hereof.

“**Site**” means that certain piece of property located in Doña Ana County, New Mexico, as more particularly described in Appendix I.

“**Subcontractor**” means any contractor, constructor or material man who performs any portion of the Scope of Work other than Contractor.

“**Tax**” or “**Taxes**” means all fees, taxes, including sales taxes, use taxes, stamp taxes, value‑added taxes, ad valorem taxes and property taxes (personal and real, tangible and intangible), customs, duties, tariffs, levies, assessments, withholdings and other charges and impositions of any nature, plus all related interest, penalties, fines and additions to tax, now or hereafter imposed by any Applicable Law or Government Authority (including penalties or other amounts payable pursuant to subtitle B of Title I of ERISA).

“**Tax Credits**” means the applicable state tax credits and/or federal tax credits applicable to the Project.

“**Test Energy**” means energy generated by the Project during the performance of any start‑up, synchronization, operation and testing or otherwise.

“**Test Notice**” has the meaning set forth in Section 10.1.2.

“**Tests**” means the tests of the Plant required by Appendix A, and the Guaranteed Performance Test.

“**Third Party Reports**” has the meaning set forth in Section 4.6.

“**United States Foreign Corrupt Practices Act**” means 15 U.S.C. Section 78dd‑1, et seq.

“**Utility**” means El Paso Electric Co.

“**Vendor**” means any supplier, manufacturer or vendor of Equipment to Contractor or any Subcontractor.

“**Warranty Procedures**” means those warranty procedures detailed in Appendix O.

“**Weekly Progress Report**” means a written weekly progress report prepared by Contractor in form and content generally in accordance with Appendix N.

“**Work**” has the meaning set forth in Section 3.1.

1. As applicable for each Project. [↑](#footnote-ref-2)