

**ENGINEERING, PROCUREMENT AND CONSTRUCTION SERVICES AGREEMENT**

**BY AND BETWEEN**

**DERWICK ASSOCIATES CORP.**

**AND**

**PROENERGY SERVICES INTERNATIONAL, INC.**

**FOR THE EDC GUARENAS POWER FACILITY**

**DATED AS OF MARCH 26, 2010**

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## **ENGINEERING, PROCUREMENT AND CONSTRUCTION SERVICES AGREEMENT**

THIS ENGINEERING, PROCUREMENT AND CONSTRUCTION SERVICES AGREEMENT (this "Contract"), dated as of March 26, 2010 (the "Effective Date"), between DERWICK ASSOCIATES CORP., a company organized under the laws of Barbados ("Contractor") and PROENERGY SERVICES INTERNATIONAL, INC., a company organized under the laws of the United States of America ("Subcontractor").

### **RECITALS:**

WHEREAS, Contractor intends to enter into an EPC contract with C.A. LA ELECTRICIDAD DE CARACAS, a Venezuelan State owned power generation company (EDC)("Owner"), to design, engineer, procure and construct a nominal 100 MW power generation facility known as the Guarenas Power Facility (the "Facility") utilizing the Owner supplied, previously stored but never installed, 2 x GE LM2500+ Dual Fuel and 1 x GE LM6000 Dual Fuel Combustion Turbo Generator Sets;

WHEREAS, Subcontractor has the financial, technical and operational capabilities to perform certain services in connection with the design, engineering, procurement and construction of the Facility;

WHEREAS, Contractor desires to have Subcontractor provide certain engineering, procurement, construction, commissioning, start-up and testing services outside of Venezuela in connection with the building, commissioning and startup of the Facility (the "Work" as further defined hereinbelow); and

WHEREAS, because of the Parties' mutual desire to finalize and execute this Contract without further delay so that the Work can commence, the Facility be completed, and power be delivered to the Owner as quickly as possible, Contractor and Subcontractor acknowledge and agree that the terms, provisions and exhibits of this Contract will be deemed modified, interpreted and construed to the fullest extent possible to evidence the fact that Subcontractor's Work is being performed outside of Venezuela.

NOW, THEREFORE, taking into account the above considerations, Contractor and Subcontractor agree as follows:

### **ARTICLE 1** **DEFINITIONS AND CONSTRUCTION**

#### **1.1. Definitions.**

Terms appearing herein with their first letter capitalized and without other definition shall have the meanings specified in this Section 1.1, unless the context requires otherwise.

"Affiliate" means, with respect to any Person, any other Person that (a) owns or controls, directly or indirectly, the first Person, (b) is owned or controlled by the first Person, or (c) is under common ownership or control with the first Person, where "own" means ownership of fifty percent (50%) or more of the equity interests or rights to distributions on account of equity of the Person and "control" means the power to direct the management or policies of the Person, whether through the ownership of voting securities, by contract, or otherwise.

"Business Day" means any day other than a Saturday, a Sunday, or a holiday on which banks in Caracas, Venezuela are authorized or required by law to be closed.

"Change" means any change in the Scope of Work, Contract Price, Schedule, and any other addition, alteration, deletion or modification of the Work pursuant to this Contract.

"Change In Law" means the occurrence of any of the following events after the Notice to Proceed Effective Date: (a) repeal, amendment, modification, supplementation or replacement of any existing Governmental Authorization or Law affecting the Work, Contractor or Subcontractor or any of their Affiliates or Suppliers in relation to the Work, (b) promulgation or enactment of any new Governmental Authorization or Law affecting the Work, Contractor, Subcontractor or any of their Affiliates or Suppliers in relation to the Work, (c) cancellation or non-renewal or a change in the conditions applicable to any Governmental Authorization, (d) commencement of the effectiveness of any Law affecting the Work, Contractor, Subcontractor or any of their Affiliates or Suppliers in relation to the Work or imposition of a requirement for a Governmental Authorization that has not yet entered into effect or is not required at the Notice To Proceed Effective Date, (e) change in the manner in which a Law or Governmental Authorization is enforced, applied or interpreted with respect to the Work, Contractor, Subcontractor or any of their Affiliates or Suppliers in relation to the Work, or in the enforcement, application or interpretation thereof, (f) after the date of grant of any of the Governmental Authorizations a change in the terms and conditions attaching to any such Governmental Authorization or the attachment of any new terms or conditions to such Governmental Authorization or any renewal thereof, or (g) any of the Governmental Authorizations not being granted on a timely basis on application therefore having been duly made.

"Change In Taxes" means the occurrence of any of the following after the Notice To Proceed Effective Date that relates to Contractor Applicable Taxes other than corporate income taxes: (a) the repeal, amendment, modification, supplementation or replacement of any existing Law, (b) the promulgation or enactment of any new Law, (c) commencement of the effectiveness of any Law; (d) the change in the manner in which any Law is enforced, applied or interpreted, or (e) a change in rate or amount of Taxes.

"Change Order" means an instrument effecting a Change that is requested by Owner or Contractor and (a) agreed between and executed by Contractor and Subcontractor pursuant to Article 6 or (b) issued pursuant to the resolution of a dispute in accordance with Article 18, in each case setting forth the details of any Change or Changes effected by such instrument.

"Change Order Request" means a notice from the Contractor to the Subcontractor issued pursuant to Section 6.2.1 or a notice from the Subcontractor to the Contractor issued pursuant to Section 6.3.1, in each case setting forth the details of the Change or Changes requested.

"Confidential Information" has the meaning set forth in Section 19.3.

"Contract" means this Engineering, Procurement and Construction Services Agreement, including all exhibits, attachments, and schedules hereto, as amended, modified or supplemented from time to time in accordance with its terms.

"Contractor" means Derwick Associates Corp.

"Contractor Delay" means any delay occasioned solely by Contractor in performing its obligations set out in Article 4 and elsewhere in this Contract other than a suspension of such obligation in accordance with Article 16 (Force Majeure) or pursuant to Owner's instruction.

"Contractor Indemnitees" means Contractor, Owner and their Affiliates, and each of their successors, assigns, officers, directors, employees and agents.

"Contract Price" has the meaning set forth in Section 7.1.

“Contractor’s Representative” means the person designated by Contractor in writing to Subcontractor.

“Day” or “day” means a calendar day and shall include Saturdays, Sundays and holidays.

“Default Rate” means the Prime Rate as in effect from time to time plus five percent (5%).

“EDC Equipment” means all machinery, equipment, computer hardware and software, apparatus, materials, balance of plant equipment, and things of all kinds to be provided by Owner and that are to be incorporated into the Facility or to form a part of the Work to be delivered to Contractor including but not limited to the Gas Turbine Equipment, and as further described in Article 4 and Exhibit A.

“Effective Date” is the date above specified in the Recitals of this Contract.

“Facility” means the power generation plant and related facilities described in the Recitals above and as further described in Exhibit A including all equipment, materials and services furnished under this Contract.

“Final Completion” has the meaning set forth in Section 10.2.

“Final Completion Certificate” has the meaning set forth in Section 10.3.

“Force Majeure” has the meaning set forth in Section 16.1.

“Gas Turbine Equipment” means the previously stored but never installed, 2 x GE LM2500+ Dual Fuel and 1 x GE LM6000 Dual Fuel Combustion Turbo Generator Sets supplied by Owner as part of the EDC Equipment.

“Good Industry Practice” or “GIP” means the exercise of that degree of skill, diligence and prudence that would reasonably and ordinarily be expected from a skilled and experienced contractor applying the standards generally adopted by contractors for the construction of independent (non-utility) power generation facilities of a type, location, condition and scale similar to the Facility and the Equipment, and taking into account the fast-track nature of the Schedule, unless the result of such exercise would violate any applicable Law.

“Governmental Authority” means all authorities of any nation, province, state, city, municipality, local government and any subdivision thereof, whether of an executive, legislative, judicial, administrative, military or police nature and any other Person under the direct or indirect control of any of the foregoing, including any court, tribunal, department, instrumentality, agency, board or commission and officials of any of the foregoing.

“Governmental Authorizations” means all permits, consents, decisions, licenses, clearances, approvals, no-action or no-objection certificates, certificates, confirmations or exemptions from, and all applications, notices and other filings with any Governmental Authority that are necessary for the design, engineering, procurement, construction, start-up, commissioning, testing, financing, ownership and operation of the Facility, including the performance of the Work.

“Hazardous Substances” means any substance or material regulated or governed by any Governmental Authority having jurisdiction as, or any substance, emission or material now or hereafter deemed by any Governmental Authority having jurisdiction to be, a “regulated substance”, “hazardous substance”, “toxic substance”, “pesticide”, “hazardous waste”, or any similar classification, including by reason of deleterious properties, ignitability, corrosivity, reactivity, carcinogenicity or reproductive toxicity.

"ICC" has the meaning set forth in Section 18.2.

"Indemnatee" has the meaning set forth in Section 17.4.

"Indemnitor" has the meaning set forth in Section 17.4.

"Law" means any constitution, charter, act, statute, law, ordinance, code, rule, regulation, order, treaty, decree, announcement or published practice or any interpretation thereof, or other action of any Governmental Authority, or specified standards or objective criteria contained in any applicable Governmental Authorization, or any decree, judgment or order of a court, or any engineering, construction, safety or electrical generation code applicable to the Work, the Facility or any part of either of them.

"Mechanical Completion" means the physical completion, except for Punchlist Items, of the Work so that the EDC Equipment and Subcontractor Equipment and related operating systems are ready for initial operation, adjustment and testing, in all such cases as may be necessary to permit the Facility to be started up, operated, adjusted and tested safely and without damage to the Facility, the EDC Equipment, the Subcontractor Equipment or any other property and without injury to any person.

"Minimum Performance Guaranty" has the meaning set forth in Section 12.3.

"Month" or "month" means a calendar month (in accordance with the Gregorian calendar).

"Notice To Proceed" has the meaning set forth in Section 5.1.1.

"Notice To Proceed Effective Date" means the date upon which all conditions to the effectiveness of the Notice To Proceed have been satisfied or waived in accordance with Section 5.1.1.

"Operator" means Owner or its appointed designee.

"Out of Scope Work" has the meaning set forth in Section 3.14.

"Owner" means C.A. La Electricidad De Caracas (EDC).

"Party" means Contractor or Subcontractor.

"Parties" means Contractor and Subcontractor.

"Performance Guaranty" shall have the meaning set forth in Section 12.3.

"Person" means any natural person, corporation, company, partnership (general or limited), limited liability company, business trust, or other entity or association.

"Prime Rate" means, at the time any determination thereof is to be made, the fluctuating rate per annum announced from time to time by Citibank N.A., New York and any successor thereto as its "prime rate" (or, if otherwise denominated, such bank's reference rate for interest rate calculations on general commercial loans), which rate is not necessarily the lowest or best rate which such bank may at any time and from time to time charge any of its customers. If such bank ceases to announce such a rate, then "Prime Rate" shall mean, at the time any determination thereof is to be made, the fluctuating per annum rate of interest then most recently reported in the Wall Street Journal as the "Prime Rate" (the base rate on corporate loans at large U.S. money center commercial banks) and if reported as a range, the interest rate shall be the mid-point of the range.



"Punchlist" has the meaning set forth in Section 10.4.1.

"Punchlist Item" means any uncompleted part of the Work that (considered individually or in the aggregate of all Punchlist Items) does not and will not adversely affect the performance of the Facility or the ability of Operator to operate the Facility safely and in the ordinary course of business in accordance with GIP.

"Punchlist Withholding" has the meaning set forth in Section 10.4.2.

"Related Persons" has the meaning set forth in Section 13.6.

"Replacement Subcontractor" has the meaning set forth in Section 15.1.2.

"Representatives" has the meaning set forth in Section 19.1.

"Schedule" has the meaning set forth in Section 5.1.2.

"Schedule Guaranty" has the meaning set forth in Section 12.1.

"Scope of Work" means the description of Work to be performed by Subcontractor as set forth in Section 3.1 and as further identified as those scope items to be provided by Subcontractor on Exhibit A.

"Site" means the Owner's real property at the Facility as described in the site survey to be furnished to Subcontractor, and located in or near Guarenas, Venezuela and which is to be prepared by Owner pursuant to the terms and conditions of Contractor's technical and economic offer to Owner.

"Site Variations" has the meaning set forth in Section 3.15.3.

"Subcontract" means an agreement between Subcontractor and a Supplier for the performance of any portion of the Work.

"Subcontractor" means ProEnergy Services International, Inc.

"Subcontractor Applicable Taxes" has the meaning set forth in Section 3.11.1.

"Subcontractor Equipment" means all appliances or things of whatever nature required by Subcontractor and its Suppliers for the performance of the Work, excluding the EDC Equipment.

"Subcontractor Indemnitees" means Subcontractor, Suppliers and each of their respective Affiliates, successors, assigns, officers, directors, employees and agents.

"Substantial Completion" has the meaning set forth in Section 10.1.

"Substantial Completion Certificate" has the meaning set forth in Section 10.3.

"Supplier" means any subcontractor, vendor or supplier of equipment, materials or services to Subcontractor or any subcontractor or any Person engaged or employed by any such subcontractor, vendor or supplier in connection with the performance of any portion of the Work.

"Taxes" means any taxes, duties, imposts, fees, levies and similar charges imposed by Governmental Authorities, including income taxes, branch profits taxes or remittances, gross receipts taxes, withholding taxes, sales taxes, excise taxes, value added taxes, import duties or taxes, export duties or taxes, municipal taxes, consumption taxes, stamp taxes, superintendency

or equivalent registration taxes, license fees, taxes on the movement of goods, assets taxes, capital taxes, taxes resulting from inflation accounting, profession taxes, works contract taxes and ad valorem taxes.

“USD,” “U.S. Dollars” or “\$” means lawful currency of the United States of America.

“Warranties” means the express warranties provided by Subcontractor in Article 11.

“Warranty Period” has the meaning set forth in Section 11.2.

“Work” means all equipment and other structures, instruments, facilities, materials and services performed or otherwise to be delivered to Contractor by Subcontractor pursuant to this Contract and all obligations, duties and responsibilities assigned to or undertaken by Subcontractor with respect thereto pursuant to this Contract. In no event shall Work include any EDC Equipment or any materials or services of any kind or nature provided by or on behalf of Contractor directly or indirectly with respect to the development, engineering, construction, startup and commissioning of the Facility, other than as contracted directly herein to be furnished by Subcontractor to Contractor.

## 1.2. Rules of Construction.

In this Contract:

- (a) the singular includes the plural and vice versa;
- (b) the masculine gender includes the female gender and vice versa;
- (c) the word “including” means including without limitation;
- (d) references to Articles, Sections and Exhibits are, unless the context otherwise requires, references to Articles of, Sections of and Exhibits to this Contract;
- (e) Article, Section and Exhibit headings are for ease of reference only;
- (f) Any reference to a statute shall be construed as a reference to such statute as the same may have been, or may from time to time be, amended or re-enacted; and
- (g) Unless otherwise provided herein, whenever a consent or approval is required by one Party from the other Party, such consent or approval shall not be unreasonably withheld or delayed.

## **ARTICLE 2** **RELATIONSHIP OF CONTRACTOR, SUBCONTRACTOR AND SUPPLIERS**

### 2.1. Status of Subcontractor.

In performing the Work hereunder, Subcontractor shall at all times be an independent contractor and shall have sole responsibility for and control over the details and means and methods of performing the Work, subject to the other provisions of this Contract.

### 2.2. Suppliers.

Contractor acknowledges and agrees that Subcontractor may have portions of the Work accomplished by Suppliers. Subcontractor shall cause all Suppliers to perform their work in

conformity with all relevant provisions of this Contract. No contractual relationship shall exist between Contractor and any Supplier with respect to the Work to be performed pursuant to this Contract, and no Supplier is intended to be or shall be deemed a third-party beneficiary of this Contract. No Supplier, agent, or employee of Subcontractor shall be deemed to be the agent, subcontractor, representative or employee of Contractor. Subcontractor agrees that it shall be as fully responsible to Contractor for the acts and omissions of Suppliers with respect to the Work as Subcontractor is for its own acts or omissions under this Contract. Unless Contractor expressly agrees in writing, Contractor shall not be obligated to pay or see to the payment of any Supplier and Subcontractor agrees to defend and indemnify Contractor and Owner accordingly. Entry into any Subcontract shall not relieve Subcontractor of any of its obligations to perform the Work in accordance with this Contract.

2.3. Subcontract Provisions.

Subcontractor shall ensure that all of its Subcontracts between Subcontractor and any its Suppliers are in writing. Each Subcontract for any major Subcontractor Equipment shall provide that all Subcontractor's rights, including all warranties and obligations of Supplier under such Subcontract, are assignable to Contractor and/or to Owner and each of their successors and assigns upon Contractor's written request, without further consent of Supplier following any termination of this Contract.

**ARTICLE 3**  
**SUBCONTRACTOR'S RESPONSIBILITIES**

3.1. Scope of Work.

3.1.1. General Description of Work. Subcontractor shall complete the Work so that it complies with the requirements set forth in this Contract, including the requirements of Mechanical Completion, Substantial Completion and Final Completion. In the event of any conflict or inconsistency between the requirements of this Contract and GIP, the requirements of this Contract shall prevail. In the event of any conflict or inconsistency between the requirements of Exhibit A or any other provision of this Contract with respect to the Scope of Work, the requirements of Exhibit A shall prevail. Subcontractor shall at all times abide by Contractor's instructions and any Owner requirements.

3.1.2. Specific Responsibilities. Without duplication of or limiting the generality of Section 3.1.1 or any other provision of this Contract, and except as set forth in Article 4, Subcontractor shall in accordance with the provisions of this Contract:

(a) provide the Scope of Work in accordance with the terms of this Contract; Contractor instructions and Owner requirements for Contractor to timely perform all its obligations under its contract with Owner provided such instructions or requirements are not in conflict or otherwise impact the cost or schedule of Subcontractor completing the Work.

(b) subject to the provisions of Section 3.15 and Exhibit A, perform any required improvements to the Site necessary for the completion of the Work in accordance with this Contract;

(c) provide all reasonable assistance to Contractor in connection with the procurement, supply and transport, handling, and storage of any EDC Equipment and the Parties further agree that Owner is responsible for and shall handle and pay for the transportation of the EDC Equipment to the Site; and

(d) provide Site management, Subcontractor Equipment, construction utilities and consumables, including lubricants, chemicals, construction consumables and construction equipment fuel necessary for the Work in accordance with this Contract except for those items to be furnished by Contractor or Owner as set forth in Exhibit A.

(e) perform all its obligations hereunder pursuant to the terms and conditions provided under Exhibit A to this Contract.

3.2. Tools. Subcontractor shall provide all tools necessary for completing the Work.

3.3. Compliance with Drawings. Subcontractor shall perform the Work in accordance with the drawings and documents furnished in connection with the Work or otherwise furnished by or on behalf of the Contractor and/or Owner.

3.4. Subcontractor's Personnel and Labor Relations.

3.4.1. Site Staff. Subcontractor shall ensure sufficient suitably qualified and experienced personnel are at all times present at the Site to supervise and perform the Work at the Site.

3.4.2. Key Personnel. Subcontractor shall appoint suitably qualified and experienced personnel to fill the positions at the Site. The person holding the post designated as "Project Manager" shall have full authority to act on behalf of Subcontractor for all purposes in connection with the performance and administration of this Contract, and such person shall have authority to agree to a Change Order, but shall not have authority to otherwise amend this Contract unless Subcontractor has given written notice to Contractor of such express authority. Subcontractor shall notify Contractor of the normal workplace(s) of the person who holds the post designated as Project Manager, and such person shall receive all instructions related to Site activities given by or on behalf of Contractor. Whenever the Project Manager is absent from the Site, Subcontractor shall nominate a suitable person to act as his or her deputy.

3.4.3. Labor Relations. Subcontractor shall use all reasonable efforts in the employment of labor and Suppliers (whether directly or indirectly employed) so as not to cause any conflict or interference with relations between the various trades or any delay in the performance of Subcontractor's obligations. Subcontractor shall be exclusively responsible for all labor relations matters of its employees and those of its Suppliers relating to the Work and shall at all times use and cause its Suppliers to use reasonable efforts to maintain harmony among their workforces. Subcontractor at all times shall use and cause its Suppliers to use reasonable efforts and judgment as an experienced contractor to adopt and implement policies and practices designed to avoid work stoppages, slowdowns, disputes and strikes. Subcontractor reserves the right to hire non-union and/or non-prevailing wage labor to the extent permitted under applicable Laws.

3.5. Governmental Authorizations and Subcontractor Assistance.

Subcontractor shall use reasonable efforts (including the provision of documents and information requested by Contractor) to assist Contractor in its efforts to obtain the Governmental Authorizations that Contractor is required to obtain in connection with the construction and operations of the Facility.

### 3.6. Control of the Work.

Except as otherwise provided with respect to Contractor's actions under Sections 3.8.3 and 3.15, Subcontractor shall be solely responsible for all construction means, methods, techniques, sequences, and procedures in connection with the performance of the Work.

### 3.7. Cleanup.

Subcontractor at all times shall keep the Site reasonably free from waste materials or rubbish caused by its activities. As soon as practicable after Substantial Completion, Subcontractor shall remove all of its waste material and rubbish from the Site.

### 3.8. Safety and Emergencies.

3.8.1. Precautions. Subcontractor shall be solely responsible for the safety of its operations and the operations of each Supplier. Subcontractor shall initiate and maintain reasonable safety precautions and programs designed to promote health and safety and prevent injury to persons or damage to property on, about or adjacent to the Site. Subcontractor shall erect and maintain reasonable safeguards for the protection of workers and the public. Subcontractor shall exercise reasonable efforts to eliminate or abate all reasonably foreseeable safety hazards created by or otherwise resulting from performance of the Work.

3.8.2. Emergencies. In the event of any emergency endangering life or property, Subcontractor shall take such action as may be necessary to deal with such emergency in accordance with GIP to prevent, avoid or mitigate injury, damage or loss and promptly shall notify Contractor of any such emergency and the actions taken by Subcontractor.

3.8.3. Contractor Actions. Whenever Subcontractor has not complied with its obligations set forth in Section 3.8.1 or 3.8.2, thereby creating an emergency requiring immediate action, then Contractor may take reasonable precautions in accordance with GIP to deal with such emergency, but the taking of such action by Contractor, or Contractor's failure to do so, shall not limit Subcontractor's liability or its obligations under this Contract. Subcontractor shall reimburse Contractor for the reasonable costs incurred by Contractor in taking such precautions.

### 3.9. Compliance with Applicable Laws.

3.9.1. Compliance and Indemnity. Subject to the other provisions of this Section 3.9 (i) in the performance of this Contract and all Work hereunder, Subcontractor shall comply with all Laws applicable to the Work, and (ii) Subcontractor agrees to indemnify, defend and hold harmless Contractor Indemnitees from and against any and all fines, penalties, related costs and expenses attributable to any failure of Subcontractor or any Supplier to comply with such applicable Laws in connection with the performance of the Work.

3.9.2. Divergences from Applicable Law. If Subcontractor becomes aware of any divergence between any applicable Law and the Scope of Work or Subcontractor's performance of this Contract, it shall promptly give Contractor written notice specifying the divergence and any corrections deemed appropriate for remedying such divergence.

3.9.3. Changes in Law, Changes in Tax. If and to the extent that any Change in Law or Change in Tax gives rise to a requirement for a Change or if Subcontractor otherwise incurs any increased cost due to Change in Law or Change in Tax, Subcontractor shall be entitled, in accordance with Article 6, to a Change Order to recover any direct costs reasonably incurred in mitigation or as a consequence of any such Change in Law or Change in Tax and to evidence other appropriate Changes in respect of any such Change in Law or Change in Tax; provided, however, no such Change Order shall be in duplication of any Change afforded Subcontractor for a Change in Law pursuant to Section 16.4. and Subcontractor will provide all assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs.

3.10. Books and Records.

Subcontractor shall keep and shall cause its Suppliers to keep such books, records and accounts as may be necessary for compliance with Subcontractor's obligations under this Contract, including those under Section 7.5. Subcontractor will prepare the necessary invoices to be presented to Contractor for Contractor to provide to Owner.

3.11. Taxes and Fees.

3.11.1. Subcontractor shall be responsible within the Contract Price for the U.S. corporate income taxes imposed on Subcontractor ("Subcontractor Applicable Taxes").

3.11.2. If Subcontractor fails to pay when due any Subcontractor Applicable Taxes and Subcontractor's failure to pay such taxes will result in an economic loss for Contractor, then unless Subcontractor has filed a written protest regarding the application of such taxes with the relevant Government Authority, Contractor, upon five (5) days' notice from Contractor to Subcontractor, may pay such taxes and shall be entitled to immediately recover from Subcontractor the amount paid together with all expenses incurred in connection therewith or to set off all such amounts against any sums owed by Contractor to Subcontractor.

3.12. Access and Inspections; Correction of Defects.

3.12.1. Right to Inspect. Subject to compliance with Subcontractor's safety policies and precautions, and at Contractor's cost, Contractor, Owner and their authorized representatives shall have the right to (a) maintain a reasonable presence at the Site and (b) upon reasonable advance notice to Subcontractor, have access at all reasonable times to any place where Work is being performed by Subcontractor or any Supplier to observe the Work, and upon notice from Contractor, Subcontractor shall make arrangements and provide for such access. All such Persons shall have the right to be present during the performance of the Work, and shall, by way of example and not limitation, have access to all test procedures, quality control reports and test reports and data.

3.12.2. Correction of Defects. Before Substantial Completion, Subcontractor shall, at its sole cost and expense, promptly correct any part of the Work that is defective or not in accordance with this Contract, regardless of the stage of its completion or the time or place of discovery of such errors. In the event that any part of the Work is discovered to be in a defective condition or not conforming to this Contract after Substantial Completion, correction of such defective condition shall be governed by Article 11.

3.12.3. Tear-Out. Before Substantial Completion, Contractor and/or Owner may request Subcontractor to tear out previously covered Work. In the event Contractor and/or Owner request Subcontractor to tear out Work to permit Contractor and/or Owner to inspect previously covered Work and such Work inspected is defective, then Subcontractor shall bear the cost of such tear-out, repair and replacement. Except in the case of the prior sentence, Subcontractor shall be entitled to a Change Order in accordance with Article 6 pursuant to which Subcontractor shall be reimbursed for all additional costs reasonably incurred on account of, and schedule delays resulting from, such tear-out, and shall receive other appropriate Changes in respect of compliance with any request from Contractor to tear out Work.

3.13. Storage and Security.

Until Substantial Completion, Subcontractor shall warehouse or otherwise provide appropriate storage for all Subcontractor Equipment at or in the vicinity of the Site. All Subcontractor Equipment that is stored at a location other than on the Site shall be segregated from other goods, and Subcontractor shall be responsible for the security and protection of all Subcontractor Equipment stored or warehoused off the Site.

3.14. Out of Scope Work; Cooperation.

Subcontractor acknowledges and accepts that Owner may engage other Persons to perform work or provide services in connection with the Facility that are not part of the Work but may be performed in whole or in part at or adjacent to the Site (the "Out of Scope Work"). Subcontractor agrees to cooperate and use its reasonable efforts to coordinate performance of the Work with any Person performing Out of Scope Work provided that (a) Subcontractor shall have no other liability or responsibility with respect to any Out of Scope Work and (b) Subcontractor shall be entitled to a Change Order in accordance with Article 6 pursuant to which Subcontractor shall be entitled to appropriate Changes in respect of any additional costs reasonably incurred on account of such cooperation and any delay suffered as a result of interference with Subcontractor's execution of the Work in accordance with this Contract.

3.15. Hazardous Substances, Archaeological Discoveries and Ground Risk.

3.15.1. Hazardous Substances of Contractor, Archaeological Finds. Upon the discovery of any Hazardous Substances on the Site that were not brought onto the Site by a Subcontractor Indemnitee during construction activities, including any Hazardous Substances that were existing on the Site at or before the Notice To Proceed Effective Date, or upon the discovery of any article of value or antiquity or of archaeological or geotechnical interest, Subcontractor shall (a) promptly cease work in the affected area and direct its workers and Suppliers not to remove or further disturb any such substances or articles; (b) promptly notify Contractor of such discovery; (c) use all reasonable efforts to mitigate the effects of any such discovery to other areas of the Site, any Person and the performance of the remainder of the Work; and (d) follow any and all directions of Contractor or its representatives with respect to such discoveries; provided, however, Subcontractor shall not under any circumstances be instructed or required to remediate any such existing Hazardous Substances. Subcontractor shall be entitled, in accordance with Article 6, to a Change Order to recover additional costs reasonably incurred, schedule delays resulting from, and to other appropriate Changes in respect of any the effects of any such substances or articles and Subcontractor's compliance with its obligations under this Section 3.15.1 and/or Contractor's directions with respect to such discovery, in each case other than as a result of Subcontractor's breach of its obligations under this Section 3.15.1. The property of any such article of value or

archaeological or geotechnical interest shall, as between Contractor and Subcontractor, be deemed to belong to Contractor, consistent with local law provisions.

3.15.2. Hazardous Substances of Subcontractor. Prior to Substantial Completion, Subcontractor shall be responsible for the removal from the Site, or for otherwise making the Site safe in accordance with applicable Laws, with respect to any Hazardous Substances brought onto the Site by a Subcontractor Indemnitee during construction activities at the Site. Contractor and/or Owner shall notify the Subcontractor immediately upon the discovery of any such materials and shall provide such assistance as may be reasonably requested by the Subcontractor to facilitate the measures to be implemented by the Subcontractor pursuant to this Section 3.15.2.

3.15.3. Site Conditions. If during performance of the Work, Subcontractor encounters conditions at the Site other than those anticipated by Subcontractor as of the Effective Date or that are described in the site survey, geotechnical study or Sections 3.15.1 and 3.15.2 that increase Subcontractor's cost or time for performance of the Work, which conditions include geological or geotechnical conditions, manmade underground obstructions or endangered animals or plants (the "Site Variations"), Subcontractor shall be entitled to a Change Order in accordance with the provisions of Article 6, and Subcontractor will provide all assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs. If and to the extent that any Site Variation gives rise to the requirement to make a modification to the Facility or to a Change in the Work or the schedule, manner or sequence of execution of the Scope of Work as described in the Specifications or if Subcontractor otherwise incurs any additional costs in respect of any Site Variation, Subcontractor shall be entitled, in accordance with Article 6, to a Change Order to recover any costs reasonably incurred and schedule delays suffered in mitigation of such Site Variations and to evidence other appropriate Changes in respect of such Site Variations.

3.16. Notice Obligation.

Subcontractor shall give immediate notice to Contractor of any event or circumstance of which Subcontractor has knowledge that constitutes Contractor Delay, Change in Law, or Force Majeure affecting Subcontractor's ability to perform its obligations under this Contract.

3.17. Traffic and Special Loads.

Subcontractor shall carry out the Work so as not to interfere unnecessarily or improperly with access to and use of public roads. Subcontractor shall liaise with, and ascertain the requirements of, all Governmental Authorities in relation to vehicular access to and use of public roads and shall comply with those requirements. Subcontractor shall use all reasonable means to prevent damage to any highway or bridge by any traffic of Subcontractor or any Supplier, and, in particular but without limitation, shall select routes, choose and use vehicles, and restrict and distribute loads so as to avoid damage to public highways and bridges.

3.18. Waterborne Traffic.

Where the nature of the Work is such as to require the use by Subcontractor of waterborne transport, the provisions of Section 3.17 shall apply *mutatis mutandis* and be construed as though the terms "road", "bridge" and "highway" include each lock, dock, terminal, sea wall or other structure related to a waterway and the term "vehicle" includes watercraft and shall have effect accordingly.



3.19. Site Survey and Geotechnical Study.

Subcontractor shall have a survey and geotechnical study of the Site prepared by qualified and experienced professional surveying and engineering firms and provide a copy to Contractor.

**ARTICLE 4**  
**CONTRACTOR'S RESPONSIBILITIES**

4.1. Contractor Assistance to Subcontractor; EPC Contract.

Contractor shall perform its covenants under this Contract, including the specific Contractor responsibilities set forth in Exhibit A and this Article 4, as well as its obligations under the EPC contract that it has entered into with Owner with respect to the Facility, in a timely manner and so as to cooperate with and assist Subcontractor in the performance of the Work.

4.2. Contractor's Services.

In addition to its other obligations under this Contract, Contractor shall, within the time schedule provided under its contract with the Owner and as agreed by Subcontractor, perform the obligations and provide the facilities, services, consumables and utilities as further identified as Contractor or Owner responsibilities on Exhibit A, subject always to Owner's performance and cooperation. Contractor shall provide and shall coordinate delivery of required fuel, and/or fuel delivery system to the Site in a manner consistent with its contract with Owner and as agreed by Subcontractor. Contractor shall also coordinate with local utilities and provide construction utilities (including construction water, construction electricity, telephone service and start-up and testing fuel) and shall provide suitable staging, laydown and Site groundwater discharge containment areas. Contractor shall use its best efforts to ensure the timely delivery of the EDC Equipment to the Site so as to not delay or cause Subcontractor to incur additional costs in completing the Work.

4.3. Payment.

Contractor shall timely pay all sums required to be paid by it to Subcontractor pursuant to the terms of this Contract, in each case in accordance with the provisions of Article 7.

4.4. Access to Site, Rights of Way.

Contractor shall use its best efforts to provide at Contractor's expense, continuous, uninterrupted and unrestricted access to and use of the Site, subject always to Owner's requirements. Contractor shall continue to provide Subcontractor and Suppliers with such access to the Site at Contractor's expense until Substantial Completion and thereafter as may be reasonably required to permit Subcontractor to fulfill its warranty obligations under Article 11 and to complete the Punchlist Items and to effect clean up and removal activities pursuant to Section 3.7. In addition, Contractor will use its best efforts to provide at Contractor's expense all easements or other rights of way required for such access to the Site and for performance of the Work.

4.5. Governmental Authorizations.

Contractor shall be responsible for obtaining (a) all of the Governmental Authorizations that are required in order for the Facility to be located, constructed and operated at the Site or that applicable Laws require to be issued in Contractor's/Owner's name. Contractor promptly shall, upon receipt of such documents from Owner, deliver copies of all such Governmental Authorizations to Subcontractor. Contractor shall use its best efforts to ensure that Owner obtains all necessary custom licenses, permits and clearances and payment of corresponding

import duties, taxes and fees with respect to the Facility or the performance of the Work except for the Subcontractor Applicable Taxes.

4.6. Grid Coordination.

Contractor will use its best efforts to ensure that Owner provides all necessary information and coordination with respect to the tie-in of the 69kv transmission lines to the Facility and shall arrange for the grid access, dispatch and export of electrical energy from the Facility in order for Subcontractor to fulfill its obligations under the Contract.

4.7. Contractor Representative.

The Contractor's Representative has been appointed as the Contractor's project manager in relation to the engineering, procurement and construction of the Facility and is authorized to act on behalf of Contractor with respect to all matters pertaining to the terms of this Contract, with whom Subcontractor shall directly consult at all times and whose instructions, approvals, requests and decisions shall be binding upon Contractor. For the avoidance of doubt, any reference to Contractor under this Contract shall also mean Contractor's Representative as it relates to any Change Orders, Change Order Requests, notices, communications, meetings, instructions, approvals, requests, and decisions of any kind or nature with or by the Contractor. Contractor's Representative shall have authority to agree to a Change Order, but shall not have authority to otherwise amend this Contract unless Contractor has given written notice to Subcontractor of such express authority.

4.8. Divergences from Applicable Law.

If Contractor becomes aware of any divergence between any applicable Law or Governmental Authorization and the Scope of Work or any other provision of this Contract, Contractor shall give Subcontractor written notice specifying the divergence.

4.9. Contractor Delay.

In the event of any Contractor Delay, Subcontractor shall be entitled to a Change Order pursuant to Article 6 under which Subcontractor shall be paid by Contractor, on a monthly basis, in accordance with the invoicing and payment provisions set forth in Section 7.2, for any additional costs reasonably incurred on account of such Contractor Delay, and Subcontractor will provide all assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs.

4.10. Compliance with Laws.

In the performance of its obligations under this Contract, Contractor shall ascertain and comply with all Laws and Government Authorizations that relate to the Contractor and the performance of its obligations hereunder. Contractor agrees to indemnify, defend and hold harmless Subcontractor and Subcontractor Indemnitees from and against any and all fines, penalties, related costs and expenses, including reasonable legal expenses and costs, attributable to any failure of Contractor to comply with such Laws and Governmental Authorizations in connection with the performance of its obligations under this Contract and Subcontractor will provide all assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs.

4.11. Suppliers.

Contractor shall not direct or manage any of the Suppliers and shall communicate with the Suppliers only through and in coordination with Subcontractor.

4.12. Notice Obligation.

Contractor shall give timely notice to Subcontractor of any event or circumstance that constitutes, or Contractor reasonably believes will constitute, Contractor Delay, Change in Law, Force Majeure, or any other matter affecting Contractor's ability to perform its obligations under this Contract.

4.13 Spare Parts and Consumables.

Contractor will use its best efforts to ensure that Owner provides adequate storage of all spare parts and consumables necessary to operate the Facility once Substantial Completion is achieved.

4.14 Performance Bond.

Contractor agrees to pay for and provide to Owner all required bonds and forms of security under its EPC contract with Owner in connection with the Work performed by Subcontractor, including the following: a bond to guarantee adequate use of down payment, a performance bond, a bond for compliance with all labor related obligations, and good quality bond.

4.15 Taxes.

4.15.1 Other than for Subcontractor Taxes, Contractor shall be responsible for all Taxes imposed in connection with this Contract or the Work performed by Subcontractor hereunder.

4.15.2 If Contractor fails to pay when due any such Taxes pursuant to Section 4.15.1 and Contractor's failure to pay such Taxes will result in an economic loss for Subcontractor, then unless Contractor has filed a written protest regarding the application of such Taxes with the relevant Government Authority, Contractor, upon five (5) days' notice from Subcontractor to Contractor, may pay such taxes and shall be entitled to immediately recover from Contractor the amount paid together with all expenses incurred in connection therewith or to set off all such amounts against any sums owed by Subcontractor to Contractor.

**ARTICLE 5**  
**COMMENCEMENT OF WORK**

5.1. Commencement of Work.

5.1.1. Issuance of Notice to Proceed. Contractor, consistent with its contract with the Owner, shall deliver a written notice to proceed that authorizes Subcontractor to commence performance of the full Scope of Work ("Notice to Proceed") and Subcontractor shall commence the Scope of the Work and thereafter shall proceed diligently to perform such Work. Such Notice to Proceed shall be delivered no later than thirty (30) days from the Effective Date and shall not be effective until each of the following conditions have been satisfied by Contractor or Owner or waived in a writing signed by the Subcontractor (the "Notice To Proceed Effective Date"):

(a) the initial thirty-five percent (35%) down-payment of the Contract Price has been received by Subcontractor; and

(b) Contractor shall have furnished evidence reasonably satisfactory to Subcontractor that Contractor or Owner has obtained those Governmental

Authorizations described in Section 4.5 that are necessary for the Work to proceed.

5.1.2. Schedule. The Schedule attached hereto as part of Exhibit A shall cover the engineering, procurement and construction activities comprising the Work (the "Schedule").

5.1.3. Revision and Updating. Subcontractor shall immediately inform Contractor of any proposed material Change in the Schedule and shall furnish Contractor with a proposed revised schedule. The Schedule shall be kept up to date, taking into account the actual progress of the Work, and shall be revised, if necessary, and included with the progress report required by Section 5.2.

5.2. Progress Reports and Consultation.

5.2.1. Progress Reports. Commencing with the second month following the month in which Notice To Proceed Effective Date occurs, Subcontractor shall submit to Contractor, on or before the 10th day of each month, a written report on the progress of the Work through the end of the preceding month that shall include, at a minimum, a description of the progress of the Work, the status of the supply of goods, materials and equipment necessary for the completion of the Work, a comparison of the actual schedule of the Work with the Schedule, and an evaluation of problems and deficiencies and a description of any planned corrective action with respect thereto, and with any additional information as may be required for Contractor to meet its reporting obligations with Owner. If Contractor so directs, Subcontractor also shall at reasonable intervals conduct appropriate review meetings at mutually agreeable locations with representatives of Contractor to review the status of the Work. Subcontractor shall immediately notify Contractor in writing if at any time Subcontractor has reason to believe that a material deviation in the Schedule will occur and Subcontractor shall specify in such notice or as promptly as possible thereafter any necessary corrective action.

5.2.2. Additional Reports. Should any material problem, emergency, strike, injury, work stoppage or legal problem be anticipated, or should any unanticipated event occur that might adversely affect Subcontractor's ability to perform its obligations hereunder in a timely manner, in addition to all other reports required hereunder, Subcontractor shall promptly prepare a written significant event report detailing all available information and steps being taken to correct or mitigate the consequences of such problem or event and shall deliver the significant event report to Contractor as soon as reasonably practicable for Contractor to meet its obligations under its contract with the Owner.

**ARTICLE 6**  
**CHANGES AND CHANGE ORDERS**

6.1. Changes.

6.1.1. Every Change shall be evidenced by a Change Order that is subject to Owner approval.

6.1.2. Except to the extent a Change Order specifically evidences a Change, all provisions of this Contract shall apply to all Changes, and no Change shall be implied as a result of any other Change.

## 6.2. Contractor Changes.

6.2.1. Contractor, on its own accord or at the request of Owner, may from time to time during the performance of the Work request the Subcontractor to make a Change provided that such Change:

- (a) is within the general scope of this Contract,
- (b) would not cause a violation of any applicable Law or Government Authorization,
- (c) is technically feasible,
- (d) would not have an adverse effect upon the Subcontractor's liability under the Warranties, and
- (e) would not have an adverse effect upon Subcontractor's ability to complete the Work so that, when the Facility is constructed in accordance with the terms of this Contract, the Facility will achieve the expected operational and performance criteria.

6.2.2. Any Change requested by Contractor pursuant to this Section 6.2 shall be the subject of a Change Order Request delivered by Contractor to Subcontractor, and Subcontractor shall be entitled to receive an appropriate adjustment in the terms of this Contract in respect of such Change, and Subcontractor will provide all assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs.

6.2.3. As promptly as possible following receipt of Contractor's Change Order Request in compliance with Section 6.2.1, Subcontractor shall supply the information required pursuant to Section 6.4 and propose a form of Change Order evidencing proposed Changes.

6.2.4. After Contractor's receipt of the information required pursuant to Section 6.4, Contractor shall, by notice to Subcontractor, either: (a) accept and execute Subcontractor's proposed Change Order; (b) request reasonable additional information, documentation or cost detail to further assess the proposed Changes; (c) withdraw the Change Order Request or (d) direct Subcontractor to proceed with the Changes in the Work as set forth in the Change Order Request subject to the concurrence of Subcontractor.

## 6.3. Subcontractor Changes.

6.3.1. Upon Subcontractor's submission of a Change Order Request and the information required in Section 6.4, Subcontractor shall be entitled to a Change Order evidencing appropriate Changes in respect of the occurrence of any event or circumstance constituting Change in Law and/or Change in Tax (pursuant to Section 3.9.3), uncovering of Work (pursuant to Section 3.12.3), Out of Scope Construction costs and/or delay (pursuant to Section 3.14), differing Site conditions (pursuant to Sections 3.15.1 and 3.15.3) or due to the findings under the survey or geotechnical study of the Site, Contractor Delay (pursuant to Section 4.9), suspension of the Work (pursuant to Section 15.3), Force Majeure (pursuant to Section 16.4), and any other event or circumstance for which this Contract entitles Subcontractor to a Change and Subcontractor will provide all

assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs. Such Changes shall include any Change appropriate to reflect the effect of the event or circumstance referred to in this Section 6.3.1 upon any obligation or performance of Subcontractor under this Contract and shall include, as appropriate, Changes in Contract Price, Schedule, and Warranties, all in a manner that is commercially and technically reasonable and appropriate in light of the event or circumstance giving rise to the Change Order Request and the rights and obligations of the Parties under this Contract with respect to the Work.

6.3.2. Following receipt of Subcontractor's Change Order Request pursuant to Section 6.3.1, a proposed form of Change Order and the other information required pursuant to Section 6.4, and Contractor's or Owner's response thereto, Contractor shall by notice to Subcontractor either: (a) accept and execute the Subcontractor's proposed Change Order; (b) request reasonable additional information, documentation or cost detail to further assess the Changes; or (c) reject the Change Order Request.

6.3.3. If Contractor rejects Subcontractor's Change Order Request pursuant to Section 6.3.2 or if the Parties are otherwise in dispute over any such Change Order Request or any part thereof, Subcontractor shall diligently perform all other obligations under the Contract. Either Party may refer the dispute to resolution in accordance with the provisions of Article 18.

#### 6.4. Information Supplementing Change Order Request.

6.4.1. Upon receipt of Contractor's Change Order Request that complies with Section 6.2.1, Subcontractor shall prepare and submit to Contractor a form of proposed Change Order and a report indicating in reasonable detail (a) the Changes in the Schedule, Contract Price, and other aspects of the Work and the Subcontractor's obligations to perform the Work in accordance with the Contract resulting from such Change Order Request, and (b) any other appropriate Changes sought by Subcontractor as a result of such Change Order Request, in each case accompanied, when available, by supporting documentation. If at such time it is impracticable to specify all Changes that Subcontractor may claim with respect to such event or circumstance, then Subcontractor shall provide Contractor with periodic supplemental information to keep Contractor informed of any change, development, progress or other relevant information concerning such event or circumstance and its effect.

6.4.2. Within 5 days following initiation of any Subcontractor's Change Order Request pursuant to Section 6.3.1, Subcontractor shall prepare and submit to Contractor a form of proposed Change Order and a report indicating in reasonable detail: (a) a description of the event or circumstance giving rise to such Change Order Request, (b) the effect on the Schedule, Contract Price, and other aspects of the Work and Subcontractor's ability to perform the Work in accordance with the Contract resulting from such event or circumstance, and (c) the Changes sought by Subcontractor as a result of such event or circumstance, in each case accompanied, when available, by supporting documentation. If at such time it is impracticable to specify all Changes that Subcontractor may claim with respect to such event or circumstance, then Subcontractor shall provide Contractor with periodic supplemental information to keep Contractor informed of any change, development, progress or other relevant information concerning such event or circumstance and its effect.

6.4.3. If, at any time after Subcontractor has provided to Contractor the information required by Section 6.4.1 with respect to any Change Order Request from Contractor pursuant to Section 6.2.2, Contractor decides not to proceed with such Change Order Request, Contractor shall pay to Subcontractor the costs reasonably incurred by Subcontractor as a result of proceeding with the Contractor Change Request prior to notice to the Subcontractor of Contractor's decision (but excluding any cost or expense in preparing such information and Subcontractor will provide all assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs.

## **ARTICLE 7**

### **CONTRACT PRICE; PAYMENTS TO SUBCONTRACTOR**

#### **7.1. Contract Price.**

Subcontractor agrees to perform the Work for the total lump sum amount of Thirty-Six Million Three Hundred Forty Thousand Five Hundred Sixteen U.S. Dollars (\$36,340,516.00), as may be adjusted according to the express terms of this Contract, to be paid in accordance with the payment terms set forth in Section 7.2 below and Exhibit B (the "Contract Price").

#### **7.2 Payment of Contract Price.**

7.2.1 Subject to Contractor's receipt of payment from Owner and as soon as practicable after the Effective Date, but in no event later than thirty (30) days following the Effective Date, Contractor shall pay to Subcontractor Thirty Five Percent (35%) of the Contract Price in U.S. Dollars to one or more accounts designated by Subcontractor.

7.2.2 The balance of the Contract Price shall be paid in U.S. Dollars according to the milestone payment schedule set forth in Exhibit B. If required by Subcontractor, in its sole and absolute discretion, all payments of the Contract Price, other than the initial payment under Section 7.2.1 will be paid out of an escrow account to be established in Houston, Texas by the parties (the "Escrow Account"). The Subcontractor shall submit invoices for the Work to Contractor no later than fifty (50) days prior to the anticipated payment date, after which Contractor shall no later than five (5) days of receipt submit its corresponding invoice to Owner for payment under its EPC contract with Owner. Funds due to Subcontractor shall be paid out of the Escrow Account after such Escrow Account has been funded in an amount sufficient to satisfy each payment required from time to time by Exhibit B and the Contractor and Subcontractor shall jointly issue written authorizations to the escrow agent to release such funds promptly after the Escrow Account is funded (the "Escrow Payment Authorization"). Upon the escrow agent's receipt of the Escrow Payment Authorization, the escrow agent shall release the funds then due. The fee charged by the escrow agent for setting up and administering the Escrow Account shall be shared equally between Contractor and Subcontractor. Any and all interest earned on funds in the Escrow Account shall be shared equally by Contractor and Subcontractor. Contractor and Subcontractor shall enter into a separate escrow agreement respecting the Escrow Account (the "Escrow Agreement"), but the material terms of such Escrow Agreement shall not differ from the requirements of this Contract. In the event of any conflict between the terms of the Escrow Agreement and the terms of this Contract, the terms of this Contract shall prevail. The Escrow Account will be established and the Escrow Agreement will be executed no later than thirty (30) days following the date Subcontractor receives the payment under Section 7.2.1. Contractor will instruct

Owner to directly deposit all payments to be made under the EPC contract with Contractor into the Escrow Account other than the payment to be made under Section 7.2.1.

### 7.3 Payment of Suppliers.

Subcontractor shall promptly pay, in accordance with the terms and conditions set forth in the respective subcontract, each Supplier the amount to which said Supplier is entitled. Subcontractor shall, by an appropriate agreement with each Supplier, require each Supplier to make timely payments to its laborers, suppliers and subcontractors in a similar manner.

### 7.4 Late Payments and Disputed Invoices.

Amounts not paid when claimed due under any provision of this Contract, including the provisions of this Article 7, shall bear interest from the date payment was originally due to and including the actual date of payment at the Default Rate or at the rate earned on funds in the Escrow Account, as the case may be. Any delay in Subcontractor receiving payment by the fiftieth (50<sup>th</sup>) day following submission of an invoice with respect to the Contract Price, regardless of whether Contractor has received payment from Owner under the EPC contract, shall result in a day-for-day extension to the Schedule. If there is any dispute about any amount invoiced by Subcontractor, the amount not in dispute shall be promptly paid and any disputed amount that is ultimately determined to have been payable shall be paid with interest at the Default Rate from the date the item was payable to and including the actual date of payment.

### 7.5 Inspection of Records.

Subcontractor shall maintain in accordance with generally acceptable accounting practices complete, accurate and up-to-date records, books and accounts relating to the performance of the Work, and as necessary to verify the incurring and payment of all costs and expenditures and performance of Subcontractor's obligations hereunder. Subcontractor shall retain all such books and records for two (2) years or longer, if required by Applicable Laws. Contractor or its designee shall have the right to carry out audit tasks of a financial, technical or other nature in relation to the performance of the Work upon not less than three (3) days (or such shorter period if required by Applicable Law) prior notice to Subcontractor. Subcontractor shall make available, at Subcontractor's home office location, to Contractor or its designee, and Contractor or its designee shall have the right to review, all contracts, purchase orders, settlements, books, records, and other documents relating to the Work, and Contractor or its designee may make such copies thereof or extracts therefrom as Contractor or such designee may deem appropriate. Subcontractor shall use reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things reasonably required to be done, in connection with any financial report prepared by or on behalf of Contractor, including preparing for or providing to Contractor reports, certificates, schedules and opinions. Any financial reporting required of Subcontractor shall be limited to the Work paid by Contractor on a cost-reimbursable basis notwithstanding the foregoing terms of this Section 7.5.

## **ARTICLE 8** **TITLE AND RISK OF LOSS**

### 8.1. Title.

8.1.1. Warranty of Title. Subcontractor warrants to Contractor and Owner good title to all Work including the Subcontractor Equipment and warrants and guarantees that title, when it passes to and vests in Contractor and Owner as described in this Section 8.1, will be free and clear of any and all liens, claims,



charges, security interests, encumbrances and rights of other Persons arising as a result of any actions or failure to act of Subcontractor, its Suppliers, or their employees or representatives.

8.1.2. Title to Work. Title to all Work including the Subcontractor Equipment will pass to Contractor and Owner upon performance, or in the case of equipment, materials and goods included as part of the Work, upon delivery of such equipment, materials or goods to the Site.

8.1.3. Title to Drawings. Title to drawings, designs, plans, specifications and like materials specifically prepared as part of the Work will remain with Subcontractor. Subcontractor grants Contractor and Owner an irrevocable, non-exclusive, royalty-free license to use and reproduce Subcontractor's and Supplier's drawings, designs, plans, specifications and other design documentation to which Subcontractor has title or has the right to grant sub-licenses; provided, however, such licensing and use shall be solely at Contractor's risk and cost, without any liability to Subcontractor.

8.1.4. Control of Software and Other Proprietary Material. Contractor recognizes that the software and other proprietary intellectual software and other intellectual property provided by Subcontractor to Contractor and Owner as part of the Scope of Work carries with it certain restrictions on use and copying of such software and other intellectual property and that such software and other intellectual property will not be duplicated, used, printed, displayed, modified or disclosed or provided to a third party without Subcontractor's express written authorization, provided that Contractor shall have the right to assign the benefit of such software and other intellectual property and the license granted below to a purchaser of the Facility, or to any subsequent assignee of the same. Subcontractor represents and warrants that it has all rights and licenses necessary for it to provide such software and other intellectual property to Contractor and Owner as contemplated in this Contract and grants to Contractor and Owner an irrevocable, non-exclusive and royalty-free license to use and reproduce such software and other intellectual property in connection with the construction and operation of the Facility. Such license allows Contractor and Owner the right to use and reproduce the software and other intellectual property as contained herein but shall not convey any title to or ownership in the software and other intellectual property to Contractor, Owner or any Person to whom Contractor or Owner is permitted to assign its license.

## 8.2. Risk of Loss.

8.2.1. Before Substantial Completion. Notwithstanding passage of title as provided in Section 8.1, Subcontractor shall bear the risk of loss of and damage to, and shall be obligated to repair, replace, or reconstruct, all or any portion of the Work or Subcontractor Equipment that is procured by Subcontractor that is lost, damaged or destroyed prior to Substantial Completion.

8.2.2. After Substantial Completion. After Substantial Completion Contractor and Owner shall bear the risk of loss of and damage to, and shall be obligated to replace, repair or reconstruct, any previously completed and turned-over Work and Subcontractor Equipment.

## **ARTICLE 9** **INSURANCE**

### **9.1. Subcontractor's Insurance.**

9.1.1. **Required Coverages.** From the Notice To Proceed Effective Date and thereafter until Substantial Completion, Subcontractor will obtain and maintain at its expense the insurance described on Exhibit C and to include employer related obligations insurance, general liability insurance, and all risk insurance.

9.1.2. In addition to the coverages set forth in Exhibit C, Subcontractor shall obtain adequate builder's risk insurance with respect to the Facility and Contractor shall assist Subcontractor in placing such insurance through brokers and/or underwriters in Venezuela. Subcontractor shall pay the first U.S.\$150,000 of the cost in securing such insurance and Contractor will pay for the balance of the cost in securing such insurance. Subcontractor's liability for any damages or losses relating to the Facility howsoever occasioned will be limited to any proceeds actually recovered under such insurance (less reasonable expenses incurred to secure said proceeds).

9.1.3. **Requirements of Subcontractor's Insurance.** The insurance provided by Subcontractor pursuant to this Section 9.1 shall be primary as respects to the Contractor and Owner and their respective directors, officers, representatives, agents and employees, and any other insurance obtained and maintained by Contractor and Owner shall be excess of and shall not contribute with such insurance. In addition, all such insurance (a) shall be with an insurance company or companies licensed to do business as required by applicable Law; (b) shall contain customary cut through provisions and waivers of subrogation and shall name Contractor and Owner as an additional or named insured; and (c) shall include such other provisions and endorsements as are set forth on Exhibit C.

### **9.2. Certificates and Cancellations.**

9.2.1. **Subcontractor Certificates.** Subcontractor shall, on or prior to the Notice To Proceed Effective Date and commencement of activities on the Site, deliver to Contractor and Owner certificates of insurance evidencing compliance with the requirements of Section 9.1.

9.2.2. **Notice of Cancellation.** All policies of insurance to be secured and maintained hereunder shall provide, by endorsement or otherwise, that the other Party and any additional insured, where required in writing, shall be provided 30 days prior written notice of any material policy changes or cancellations (except 10 days for non-payment of premium), and that no such cancellation or change shall be effective without such notice.

9.2.3. **Notice of Loss, etc.** Subcontractor shall immediately notify Contractor regarding the occurrence of any of the following events: (a) any significant loss covered by a policy required to be maintained by this Article 9; (b) any significant dispute with an insurer; (c) the early cancellation of any policy; (d) the failure to pay any premium payment; (e) the failure, for any reason, to maintain any policy required to be maintained by this Article 9; and (f) any significant change in any insurance coverage contracted for by Subcontractor.

9.3. Failure to Pay.

Irrespective of the requirements for insurance to be secured and maintained hereunder, the insolvency, bankruptcy or failure of any insurance company carrying insurance of any Party or the failure of any such insurance company to pay claims accruing, shall not affect, negate or waive any of the provisions of this Contract, including, without exception, the indemnity obligations of any Party.

9.4. Miscellaneous.

9.4.1. Non-waiver. Subcontractor's failure to comply with the foregoing insurance requirements shall in no way waive its obligations or liabilities under this Contract or the rights of Contractor hereunder against Subcontractor.

9.4.2. Right to Insure. Should Subcontractor fail to provide or maintain any of the insurance coverage required under this Article 9, Contractor and Owner shall have the right to provide or maintain such coverage at Subcontractor's expense, either by direct charge or set-off.

9.4.3. Supplier Insurance. Before permitting any major Supplier to perform any Work, Subcontractor shall obtain a certificate of insurance from each such Supplier evidencing that such Supplier has obtained, from insurance carriers licensed to do business as required by applicable Laws, insurance in such amounts and against such risks as is prudent in light of the work to be performed by such Supplier, subject to the commercial availability of such insurance and commensurate with normal practices in the location where such Work is performed.

**ARTICLE 10**  
**COMPLETION**

10.1. Substantial Completion.

The Facility shall be considered substantially complete ("Substantial Completion") upon the Subcontractor's satisfaction of all the following conditions:

- (a) Mechanical Completion of the Facility has been achieved;
- (b) All performance tests which Subcontractor is required to carry out as part of its commissioning and startup Scope of Work under the terms of the Contract have been satisfactorily completed unless such tests cannot be carried out through no fault of Subcontractor;
- (c) the Punchlist has been prepared by Subcontractor and delivered to Contractor; and
- (d) Owner has issued the final acceptance record (Acta de Aceptación Definitiva) or, through no fault of Subcontractor, Owner has failed to issue said final acceptance record within three (3) days of Subcontractor notifying Contractor that the conditions for Substantial Completion have been satisfied.

10.2. Final Completion.

The Facility shall be considered to be finally complete ("Final Completion") upon the Subcontractor's satisfaction of the following conditions:

- (a) Substantial Completion has occurred and all Punchlist Items have been completed;
- (b) Subcontractor's obligations under Section 3.7 (Cleanup) have been completed; and
- (c) Subcontractor has provided any release and waiver of liens requested by Contractor or Owner.

#### 10.3. Completion Certificates.

Upon achieving Substantial Completion, the Subcontractor shall deliver to Contractor a certificate (the "Substantial Completion Certificate"), and upon achieving Final Completion, the Subcontractor shall deliver to Contractor a certificate (the "Final Completion Certificate"). The effective date of Substantial Completion and Final Completion shall be the day on which the requirements for Substantial Completion or Final Completion, as the case may be, have been completed, as evidenced by the Substantial Completion and Final Completion Certificates except that Subcontractor will not incur any penalty or added cost or loss of funds due to a delay in Owner issuing its final acceptance record on the day all other conditions for Substantial Completion have been satisfied

#### 10.4. Punchlist.

10.4.1. Punchlist Preparation. Prior to Substantial Completion, Contractor and Subcontractor shall inspect the Work and Subcontractor shall prepare a listing of the outstanding Punchlist Items (the "Punchlist"), and provide it to Contractor together with an estimate of the cost and time to complete or correct each such Punchlist Item. Such Punchlist Items shall not be grounds for Substantial Completion not occurring or for Contractor not accepting the Substantial Completion Certificate. The draft Punchlist shall be prepared in accordance with Subcontractor's quality assurance manual and submitted to Contractor for review. Contractor shall review and comment on the Punchlist within 20 days after receiving Owner's comments thereof, and Subcontractor shall issue a revised Punchlist to Contractor that takes into account or responds to Contractor's comments not later than five days after Subcontractor's receipt of such comments, consistent with Contractor's obligations under its EPC contract with Owner.

10.4.2. Punchlist Withholding. An amount equal to the estimated cost of correcting all outstanding Punchlist Items (the "Punchlist Withholding") shall be withheld by Contractor from the payment due to Subcontractor and retained until all the Punchlist Items are corrected.

10.4.3. Correction of Punchlist Items. Promptly after receipt by Contractor of the revised Punchlist, Subcontractor and Contractor shall agree upon a schedule, consistent with Contractor's obligations under its EPC contract with Owner, for Subcontractor's completion of the Punchlist Items that will allow Subcontractor to complete such Punchlist Items within a reasonable period of time without interfering with the operation of the Facility. Contractor shall use its best efforts to provide Subcontractor reasonable access to the Facility to perform such Work in accordance with such schedule to the extent that such access does not unduly interfere with the operations of the Facility.

10.4.4. Right of Waiver. Contractor shall have the right, but shall have no obligation, to waive, defer or reduce any of the requirements stated in this Article

10 at any time. However, Contractor's exercise of any rights hereunder shall apply only to such requirements as Contractor may specify in writing and shall in no event relieve Subcontractor of any requirements or other obligations not so specified.

## **ARTICLE 11** **WARRANTY**

### **11.1. General Warranty.**

Subcontractor represents and warrants that it is and will be at all times during the term of this Contract duly qualified and capable of performing the Work in accordance with the terms of this Contract. Subcontractor warrants that:

- (a) the Work and Subcontractor Equipment shall be of good quality and shall be free of defects in materials and workmanship;
- (b) the Work shall be performed in accordance with GIP;
- (c) the Work shall conform in all material respects to the Scope of Work and all applicable Laws and Governmental Authorizations in effect at Substantial Completion.

### **11.2. Warranty Period.**

The warranty set forth in Section 11.1 shall extend for a period of 12 months following Substantial Completion (the "Warranty Period"). The Warranty Period with respect to any Work that is repaired, replaced, modified or otherwise altered or corrected afterwards shall extend for 12 months from the date of completion of such repair, replacement, modification, correction or alteration, provided that in no event shall any Warranty Period extend beyond 24 months following Substantial Completion.

### **11.3. Remedy.**

Contractor or Owner shall give notice to Subcontractor of the discovery during the Warranty Period of any defect that constitutes a breach of Subcontractor's warranties under Section 11.1. Subcontractor shall correct or replace the applicable Work at no cost to Contractor or Owner. Promptly after receipt by Subcontractor of such notice, Subcontractor and Contractor shall agree upon a schedule for Subcontractor's performance of its warranty obligations that will allow Subcontractor to complete such work within a reasonable period of time without unreasonably interfering with the operation of the Facility. Contractor shall use its best efforts to provide Subcontractor with full and free access to the Facility to perform such warranty obligations in accordance with such schedule. Notwithstanding another provision hereof or under applicable Law, Subcontractor's liability for breach of warranty shall be limited to the correction or replacement of the defective portion of the Work, and Subcontractor shall have no other liability in connection with such breach to Contractor or Owner.

### **11.4. EDC Equipment.**

The Parties acknowledge and agree that Subcontractor is not providing any warranty of any kind or nature with respect to any of the EDC Equipment or any other equipment or services not otherwise furnished by Subcontractor in connection with performing the Work. Subcontractor agrees to provide all reasonable assistance to Contractor in administering warranty claims with respect to the EDC Equipment or such other equipment, goods, parts, or materials furnished by Contractor.

11.5. Warranty Exclusions.

The duties, liabilities and obligations of Subcontractor under this Article 11 or otherwise do not extend to any repairs, adjustments, alterations, replacements or maintenance that may be required as a result of normal wear and tear in the operation of the Facility, normal degradation in the performance of any equipment, or as a result of (a) improper repair or alteration by Contractor or Owner or other Persons, (b) misuse, negligence or damage by Contractor or Owner or other Persons, (c) excessive operation at peak capacity, frequent starting, type of fuel, detrimental air inlet conditions, or erosion, corrosion or material deposit of fluids. The warranty and remedies are further conditioned upon (i) the proper storage, installation, operation and maintenance of the equipment and conformance with the operation and instruction manuals provided by the suppliers and manufacturers and (ii) repair or modification pursuant to the instructions of the suppliers and manufacturers and as otherwise directed by Subcontractor. Contractor and Owner shall keep proper operation and maintenance records of the Facility during the warranty period and shall be submitted to Subcontractor upon request. **THE EXPRESS WARRANTIES SET FORTH IN THIS CONTRACT ARE EXCLUSIVE AND NO OTHER WARRANTIES OF ANY KIND, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED (INCLUDING WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY AND IMPLIED WARRANTIES OF CUSTOM OR USAGE) SHALL APPLY.**

**ARTICLE 12**  
**NOT USED**

**ARTICLE 13**  
**LIMITATION OF LIABILITY**

13.1. Maximum Liability. Notwithstanding any provision of this Contract to the contrary, Subcontractor's maximum aggregate liability to Contractor and Owner arising out of or related to the Work, the Facility, or this Contract, and the performance, nonperformance and/or defective performance hereunder shall be an amount equal to the total amount of the Contract Price (the "Aggregate Limit") which limit applies to any and all liabilities of Subcontractor to Contractor or Owner under or in connection with this Contract, including liability for liquidated damages, warranty and indemnity obligations, tort (including negligence and strict liability) and breach of contract (including any breach resulting in termination), and any and all other liabilities based on any legal or equitable theory or basis of recovery, except whenever caused by Subcontractor's gross negligence or willful misconduct.

13.2. Consequential Damages.

In no event shall Subcontractor or Contractor be liable to the other, nor shall Subcontractor be liable to any of the Contractor Indemnitees or Contractor be liable to any of the Subcontractor Indemnitees, either individually or jointly and irrespective of whether alleged to be by way of indemnity, as a result of breach of contract, breach of warranty, tort (including negligence), strict liability, or any other legal or equitable theory, and whether arising before or after completion of the Work, for, and each of Subcontractor and Contractor hereby waives any right to, damages that constitute consequential, incidental, special, indirect, or other damages of any consequential or remote nature whatsoever, including losses or damages caused by reason of unavailability of the Facility, shutdowns or service interruptions, loss of use, non-operation of the Facility or any EDC Equipment or Subcontractor Equipment, loss of power or cost of replacement power, loss of opportunity, profits or revenue, loss of contracts, cost of capital, inventory or use charges, cost of purchased or replacement power, loss of fuel, interest charges or claims of Owner's customers.

13.3. Releases Valid in All Events.

Releases, disclaimers and limitations on liability expressed herein shall apply even in the event of the negligence, strict liability, fault or breach of contract (including other legal bases of responsibility such as fundamental breach) of any person whose liability is released, disclaimed or limited.

13.4. Exclusive Remedies.

**CONTRACTOR AND SUBCONTRACTOR INTEND THAT THEIR RESPECTIVE RIGHTS, OBLIGATIONS AND LIABILITIES AS PROVIDED FOR IN THIS CONTRACT SHALL BE EXHAUSTIVE OF THE RIGHTS, OBLIGATIONS AND LIABILITIES OF EACH OF THEM TO THE OTHER ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS CONTRACT OR THE WORK, WHETHER SUCH RIGHTS, OBLIGATIONS AND LIABILITIES ARISE IN RESPECT OR IN CONSEQUENCE OF AN INDEMNITY OR WARRANTY OR BY REASON OF ANY BREACH OF CONTRACT OR OF STATUTORY DUTY OR BY REASON OF TORT (INCLUDING NEGLIGENCE AND STRICT OR ABSOLUTE LIABILITY) OR BY REASON OF ANY OTHER LEGAL OR EQUITABLE THEORY. ACCORDINGLY, THE REMEDIES EXPRESSLY STATED IN THIS CONTRACT ARE INTENDED TO BE AND SHALL CONSTITUTE THE SOLE AND EXCLUSIVE REMEDIES OF THE PARTIES TO THIS CONTRACT FOR THE LIABILITIES OF SUCH PARTIES ARISING OUT OF OR IN CONNECTION WITH THE WORK OR THIS CONTRACT, NOTWITHSTANDING ANY REMEDY OTHERWISE AVAILABLE AT LAW OR IN EQUITY. SUBCONTRACTOR MAKES NO WARRANTIES OR GUARANTEES REGARDING THE TIME FOR COMPLETING THE WORK OR THE PERFORMANCE OF THE FACILITY OR THE EQUIPMENT, INCLUDING BUT NOT LIMITED TO, ANY GUARANTEES FOR OUTPUT, HEAT RATE, RELIABILITY, AVAILABILITY, NOISE, OR EMISSIONS, AND CONTRACTOR HEREBY RELEASES SUBCONTRACTOR FROM ANY AND ALL LIABILITY IN CONNECTION THEREWITH.**

13.5. Liability of Related Persons.

In the event either Contractor or Subcontractor asserts a claim or claims against any of the other Party's partners, shareholders, Affiliates, and/or their directors, officers, agents, employees, Suppliers or subcontractors (collectively, "Related Persons"), the aggregate recovery of the asserting Party pursuant to such claim or claims against a Party and its Related Persons shall, except to the extent prohibited by law, be limited by the waivers and disclaimers of liability, releases from liability, limitations on liability, indemnities, and exclusive remedy provisions set forth in this Contract, even in the event of the fault, negligence (in whole or in part), strict or absolute liability, or other basis of liability of any of the Related Persons.

**ARTICLE 14**  
**REPRESENTATIONS OF SUBCONTRACTOR AND CONTRACTOR**

14.1. Subcontractor Representations.

Subcontractor represents and warrants that:

14.1.1. Standing. It is duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation, qualified to do business in all jurisdictions in which the nature of the business conducted by it makes such qualification necessary and where failure so to qualify would have a material adverse effect on its financial condition, operations, prospects or business or the performance of its obligations under this Contract.

14.1.2. No Violation of Law; Litigation. It is not in violation of any applicable Law, which violations, individually or in the aggregate, would materially and adversely affect its performance under this Contract. There are no legal or arbitration proceedings or any proceeding by or before any court or Governmental Authority now pending or (to its best knowledge) threatened against it which, if adversely determined, could reasonably be expected to have a material adverse effect on its financial condition, operations, prospects or business as whole, or ability to perform all its obligations under this Contract.

14.1.3. Governmental Authorizations. It is (or will be prior to performing any Work for which such Governmental Authorization is required) the holder of all material Governmental Authorizations required to permit it to enter into and perform its obligations under this Contract.

14.1.4. No Breach. None of the execution and delivery of this Contract, the consummation of the transactions herein contemplated or compliance with the terms and provisions hereof and thereof will conflict with or result in a breach of, or require any consent under its charter, bylaws or any material agreement or material instrument to which it is a party or by which it is bound or to which it or any of its respective assets are subject, or constitute a default under any such agreement or instrument.

14.1.5. Authority to Act. It has all necessary corporate power and authority to execute, deliver and perform its obligations under this Contract; its execution, delivery and performance of this Contract has been duly authorized by all necessary action on its part; and this Contract has been duly and validly executed and delivered by it and constitutes its legal, valid and binding obligation, enforceable in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganization or moratorium or other similar laws relating to the enforcement of creditors' rights generally and by general equitable principles.

14.2. Contractor Representations.

Contractor represents and warrants that:

14.2.1. Business Organization. It is duly organized and validly existing under the laws of its jurisdiction of formation, is qualified to do business in all jurisdictions in which the nature of the business conducted by it makes such qualification necessary and where failure so to qualify would have a material adverse effect on its financial condition, operations, prospects or business or the performance of its obligations under this Contract.

14.2.2. No Violation of Law; Litigation. It is not in violation of any applicable Law, which violations, individually or in the aggregate, would materially and adversely affect its performance under this Contract. No legal or arbitration proceedings or any proceeding by or before any court or Governmental Authority are now pending or (to its best knowledge) threatened against it which, if adversely determined, reasonably could be expected to have a material adverse effect on its financial condition, operations, prospects or business, as a whole, or on its ability to perform all its obligations under this Contract.

14.2.3. Governmental Authorizations. It is or will be the holder of all material Governmental Authorizations required to permit it to enter into and perform its obligations under this Contract.



14.2.4. No Breach. None of the execution and delivery of this Contract, the consummation of the transactions herein contemplated or compliance with the terms and provisions hereof and thereof will conflict with or result in a breach of, or require any consent under, its charter, bylaws or any material agreement or material instrument to which it is a party or by which it is bound or to which it or its assets are subject, or constitute a default under any such agreement or instrument.

14.2.5. Authority to Act. It has all necessary partnership power and authority to execute, deliver and perform its obligations under this Contract; the execution, delivery and performance by Contractor of this Contract has been duly authorized by all necessary action on its part; and this Contract has been duly and validly executed and delivered by Contractor and constitutes the legal, valid and binding obligation of Contractor enforceable in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganization or moratorium or other similar Laws relating to the enforcement of creditors' rights generally and by general equitable principles.

## **ARTICLE 15**

### **DEFAULT, TERMINATION AND SUSPENSION**

#### **15.1. Default by Subcontractor.**

15.1.1. Termination for Subcontractor's Inability to Perform. If any proceeding is instituted against Subcontractor seeking to adjudicate Subcontractor as a bankrupt or insolvent and such proceeding is not dismissed within 15 days of filing, or if Subcontractor makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of the insolvency of Subcontractor, or if Subcontractor files a petition seeking to take advantage of any other applicable law relating to bankruptcy, insolvency, reorganization, dissolution, winding up or composition or readjustment of debts, or if Subcontractor is unable to pay its debts when due or as they mature, if Subcontractor executes any fraudulent act or willful misconduct, if Subcontractor is affected by a merger that affects its performance of the Work, or if an order or attachment, seizure, arrest or equivalent is issued against Subcontractor's and/or Supplier's assets and which affects performance of the Work, then Contractor may terminate this Contract effective immediately upon giving written notice of such termination to Subcontractor. Any such termination shall be without prejudice to any accrued rights, powers or remedies of either Party under this Contract.

#### **15.1.2. Termination for Subcontractor's Failure to Perform**. If:

(a) Subcontractor abandons the Work following Notice To Proceed Effective Date; or

(b) Subcontractor, despite previous warnings in writing from Contractor, has wrongfully refused or has materially failed or neglected at any time to execute the Work in accordance with this Contract, or is failing to proceed with the Work with due diligence or is neglecting to carry out its other obligations under this Contract, in each case so as to affect materially and adversely the carrying out of the Work;

then, in the case of a default under Sections 15.1.2(a) or (b), provided Subcontractor fails to correct such condition within 10 days of receipt of written notice from Contractor stating the nature of the condition and requiring

Subcontractor to remedy the same or, if such default is not capable of being remedied within such 10 days, to diligently commence to correct such condition within 15 days of receipt of such written notice and to complete the correction within 20 days after receipt of such notice, Contractor may, after giving Subcontractor three Business Days' notice thereof, so long as such default remains uncured, terminate this Contract, enter the Site, expel the Subcontractor there from, complete the Work or employ any other Subcontractor (the "Replacement Subcontractor"), to complete the Work. Any such termination shall be without prejudice to any accrued liability of Subcontractor under this Contract.

**15.1.3. Subcontractor Continuing Obligations.** If Contractor elects to terminate this Contract pursuant to this Section 15.1, then as of the effective date of such termination, Subcontractor shall be released from any further obligation to perform the Work under this Contract and Subcontractor shall thereupon:

(a) immediately discontinue the Work except for such Work as Contractor may specify in the termination notice as may be reasonably necessary to preserve and protect Work already in progress and to protect the EDC Equipment and Subcontractor Equipment at the Site;

(b) place no further orders or enter into Subcontracts for Work;

(c) assist Contractor in preparing an inventory of all the EDC Equipment and Subcontractor Equipment in use or in storage at the Site;

(d) terminate all Subcontracts, except those Contractor has designated to be assigned pursuant to Section 15.1.3(e);

(e) assign to Contractor or to any Replacement Subcontractor, title to all Work not already owned by Contractor, together with all Subcontracts and other contractual agreements (including warranties) as may be designated by Contractor;

(f) assign to Contractor or to any Replacement Subcontractor, to the extent assignable and further, subject to Section 8.1.3 and Section 8.1.4, all issued Governmental Authorizations, patents and other proprietary rights, if any, then held by Subcontractor pertaining to the Facility or the Work;

(g) remove from the Site all Subcontractor Equipment that is not going to be taken over by the Contractor; and

(h) deliver to Contractor all information prepared hereunder with respect to the Facility or Work as may be reasonably requested by Contractor and which has been paid for by Contractor, including all drawings, plans, specifications, studies, reports and other information prepared hereunder as of the date of termination for the completion and operation of the Facility.

**15.1.4. Contractor's Exclusive Remedy, Payment Obligations.** As soon as practicable after the Contractor has terminated this Contract pursuant to this Section 15.1, the Contractor shall deliver to Subcontractor a certificate setting forth all sums due to Contractor by Subcontractor as of the date of termination and the value of the Work in place and materials on Site not included in prior payments to Subcontractor. Any dispute by the Subcontractor of amounts set forth in such certificate shall be resolved pursuant to Section 18.1. If Contractor terminates this Contract pursuant to this Section 15.1, Contractor shall not be

liable to make any further payment to Subcontractor until after reaching the equivalent of Final Completion, whereupon Contractor shall determine the total reasonable and necessary expenses incurred by Contractor in connection with the termination of this Contract (including reasonable legal fees and expenses) and the completion of the Work (together the "Costs of Completion"), including all amounts charged by any Replacement Subcontractor to complete the Work in accordance with the Scope of Work and the terms of this Contract.

The Subcontractor shall be entitled to be paid by Contractor with respect to any unpaid portion of the Contract Price attributable to the Work executed by Subcontractor prior to the date of termination, and the value of any unused or partially used materials on the Site furnished by Subcontractor which are taken over by Contractor and have not already been paid for as part of the Contract Price paid to Subcontractor, and the costs, if any, incurred by Subcontractor in protecting the Work pursuant to Section 15.1.3(a), provided that any sums due to Contractor from Subcontractor accruing prior to the date of termination shall be deducted from the amount to be paid to Subcontractor pursuant to the foregoing. If the Costs of Completion exceed the balance of the Contract Price unpaid at the date of termination, then Subcontractor shall be liable for and shall pay to Contractor upon written demand by Contractor the amount of such excess, which shall constitute Contractor's sole and exclusive remedy for all damages associated with such termination pursuant to Section 15.1 and shall be subject to the Aggregate Limit. Any such amount payable by Subcontractor may be deducted by Contractor from any portion of the Contract Price or other amounts due to Subcontractor under this Section 15.1.4.

15.1.5. Termination for Convenience. Contractor may terminate this Contract at any time for convenience, and provided Owner has likewise terminated for convenience its EPC contract with Contractor, by providing ten (10) days advanced notice to Subcontractor. Whenever Contractor provides notice of termination for convenience, Subcontractor shall:

- (a) Cancel all and any equipment purchase orders;
- (b) Require Suppliers to provide reasonable termination costs in writing within the 10 day term; and
- (c) Inform Contractor regarding its own reasonable termination costs regarding all services and equipment with respect to the Work.

Following receipt of the above mentioned complete information from Subcontractor, under Sections 15.1.5(b) and (c) Contractor will decide what Subcontracts will be maintained and which will be terminated.

Whenever this Contract is terminated by Contractor for convenience Contractor will pay Subcontractor within ten (10) days of receipt of all such information (i) any unpaid and previously invoiced amounts for Work completed plus the amount for any partially completed Work not yet invoiced and (ii) the termination costs pursuant to Sections 15.1.5(b) and (c) but in no case will said amounts include compensation whatsoever for damages, loss of earnings, moral damages, or any other consequential damages under any jurisdiction.

15.1.6. Force Majeure Termination. Whenever Contractor terminates this Contract due to a Force Majeure event under Section 16.6, Subcontractor is not entitled to any compensation whatsoever, may not recover any damages

whatsoever, and its sole right is to be paid as if the termination was for convenience under Section 15.1.5.

15.1.7 Termination for Contractor's Inability to Perform. If any proceeding is instituted against Contractor seeking to adjudicate Contractor as a bankrupt or insolvent and such proceeding is not dismissed within 15 days of filing, or if Contractor makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of the insolvency of Contractor, or if Contractor files a petition seeking to take advantage of any other applicable law relating to bankruptcy, insolvency, reorganization, winding up or composition or readjustment of debts, or if Contractor is unable to pay its debts when due or as they mature, then Subcontractor may terminate this Contract effective immediately upon giving written notice of such termination to Contractor. Any such termination shall be without prejudice to any accrued rights, powers or remedies of either Party under this Contract.

15.2. Default by Contractor.

15.2.1. Termination for Contractor's Failure to Perform. If:

- (a) Contractor fails to pay Subcontractor any amount due under any invoice within 15 days after the amount became due and payable (and regardless whether Contractor has received payment from Owner under the EPC contract),
- (b) Contractor fails to observe or perform any of its material covenants or agreements contained in this Contract (other than for payments to Subcontractor), or
- (c) any material representation or warranty of Contractor shall have been incorrect as of the date made and shall remain incorrect at the time in question,

then, provided Contractor fails to correct such condition within 10 days of receipt of written notice from Subcontractor stating the nature of the condition and requiring Contractor to remedy the same or, if such default is a default not capable of being remedied within such 10 days, to diligently commence to correct such condition within 15 days of receipt of such written notice and to complete the correction within 20 days after receipt of such notice, Subcontractor may, after giving Contractor three days notice thereof, so long as such default continues uncured, terminate this Contract.

15.2.2 Subcontractor's Remedies. If this Contract is terminated pursuant to the provisions of this Section 15.2, the Subcontractor shall become entitled to receive any unpaid and previously invoiced amounts for Work completed plus the amount for any partially completed Work not yet invoiced. In addition to such amount, the Subcontractor shall be entitled to receive, without duplication: (A) the sum of (i) the amount of any expenditure reasonably incurred by Subcontractor in the expectation of the performance of this Contract subject to Subcontractor's efforts to mitigate such expenditures, including amounts spent in respect of materials to be delivered to Contractor and Owner that are not incorporated into the Work; (ii) the amount of any liabilities owing by Contractor to Subcontractor as of the date of termination, and (iii) any expenditure reasonably incurred by Subcontractor in consequence of the termination of this Contract (including reasonable legal fees and expenses), less (B) the amount of liabilities owing by Subcontractor to Contractor as of the date of such termination. Payments for termination under this Section 15.2 shall be due Subcontractor within 10 days of Owner's receipt of a substantiated, itemized invoice and the

delivery of any Work executed as of the date of termination. If this Contract is terminated pursuant to the provisions of Section 15.2 Contractor shall be entitled to remove immediately the Subcontractor Equipment and the temporary Work that is on the Site.

15.3. Suspension of Work.

The following terms applies with respect to any suspension of the Work:

- (a) Contractor may, at any time and from time to time and for any reason, by written notice to Subcontractor, suspend the carrying out of the Work or any part thereof. Subcontractor shall, on such written notice of Contractor, suspend the carrying out of the Work or any part thereof for such time and in such manner as Contractor may require and shall during any such suspension properly protect and secure the Work in accordance with GIP.
- (b) Subcontractor may by ten (10) days prior written notice to Contractor, suspend the carrying out of the Work or any part thereof on account of Contractor's failure to pay or authorize the payment of any undisputed amount under any invoice within 15 days of the invoice due date (regardless of whether Contractor has received payment from Owner under the EPC contract).
- (c) Contractor may at any time following a suspension give notice (and provided Contractor has paid all sums due and owing to Subcontractor in case of suspension under Section 15.3(b)) to Subcontractor to proceed with the Work previously suspended.
- (d) Upon receipt of any such notice to proceed under Section 15.3(b), and any payment required under Section 15.3(c), Subcontractor shall examine any Work that was adversely affected by the suspension and shall, at Contractor's expense, make good any deterioration of or damage to such Work that may have occurred during the suspension (unless resulting from any breach by Subcontractor of its obligations to protect and secure the Work) and, subject to Section 15.3(e), shall proceed with the Work previously suspended.
- (e) In the event of a suspension of the Work pursuant to this Section 15.3(a), Subcontractor and Contractor shall negotiate in good faith to agree the level of staff and labor to be retained by Subcontractor on or near the Site and a monthly fee to be paid to Subcontractor by Contractor during the period of any such suspension. In the event that the Parties do not agree within 15 days following such suspension, the notice of suspension shall be treated as a Change Order Request delivered by Contractor to Subcontractor pursuant to Section 6.2.1 and Subcontractor shall proceed to maintain staff and labor on or near the Site as requested by Contractor subject to the provisions of Sections 6.2, and Subcontractor will provide all assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs. Upon receipt of notice to proceed pursuant to Section 15.3(c), and any payment required under Section 15.3(c), Subcontractor shall be entitled to a Change Order pursuant to Section 6.3.1 to reflect any Changes appropriate in respect of such suspension and Subcontractor will provide all assistance and documentation to support Contractor's rights to seek reimbursement from the Owner for said additional costs.

**ARTICLE 16**  
**FORCE MAJEURE**

16.1. Force Majeure.

“Force Majeure” shall mean any events or circumstances, or any combination of events or circumstances, that are beyond the reasonable control of the affected Party, that could not have been prevented by the exercise of reasonable skill and care, and that have, or any consequences thereof have, a material and adverse effect upon the performance by the affected Party of its obligations under this Contract (including the cost and time for such performance) including the following:

- (a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, religious strife or civil commotion;
- (b) Any sabotage, terrorism, general or organized objections, protests or unrest or the threat of any such acts;
- (c) Except to the extent that they constitute remedies or sanctions lawfully exercised by a Governmental Authority as a result of a breach by the affected Party, its contractors or subcontractors, servants or agents of applicable Laws, any act of state or other exercise of a sovereign or executive prerogative by any Governmental Authority, including expropriation, nationalization or compulsory acquisition and acts claimed to be justified by executive necessity;
- (d) Any explosion, chemical or radioactive contamination or ionizing radiation;
- (e) Any strike, work stoppage, slowdown or other industrial action or labor dispute at or extending beyond the Site;
- (f) Any Change in Law, including the imposition after the Notice To Proceed Effective Date of export or import controls affecting the export or import of goods, materials, equipment or technical data for incorporation in the Facility or Work;
- (g) Any lightning, earthquake, tempest, flooding, fire, cyclone, hurricane, typhoon, tidal waves, whirlwind, storm, drought or lack of water and other unusual or extremely adverse weather or environmental conditions or action of the elements, meteorites, aircraft or objects falling from aircraft or other aerial devices, the occurrence of pressure waves caused by aircraft or other aerial devices traveling at supersonic speeds;
- (h) epidemic or plague;
- (i) act of God; and
- (j) to the extent that the same are caused by events or circumstances that are themselves a Force Majeure, shortage of labor; delay in delivery, loss or damage to materials or EDC Equipment or Subcontractor's Equipment in transit or on Site; delay in performance of a Supplier and breakdown of EDC Equipment or Subcontractor's Equipment.

#### 16.2. Excused Performance.

Except for the obligation to timely pay money for Work actually performed or for other payment obligations or liabilities hereunder, either Party shall be excused from the performance or delay in performance of its obligations hereunder (and shall not be considered to be in default with respect thereto) if and to the extent that its failure to perform or delay in the performance of each such obligation is due to Force Majeure, provided, that:

- (a) the affected Party gives the other Party written notice describing in reasonable detail, to the extent then available, the Force Majeure as soon as is reasonably practicable, but in no event later than ten (10) days after such Party first becomes aware of the occurrence or commencement of such Force Majeure; and
- (b) the suspension of performance is of no greater scope and of no longer duration than is reasonably required by the Force Majeure, including a reasonable recovery period within which to restart performance.

#### 16.3. Performance Continuation.

Upon the occurrence of any Force Majeure, Subcontractor shall use reasonable efforts to continue to perform its obligations under this Contract and to minimize the adverse effects of such circumstances. Subcontractor shall notify Contractor of the steps it proposes to take, including any reasonable alternative means for performance.

#### 16.4. Change of Contract Terms.

Upon the occurrence of any Force Majeure, Subcontractor shall be entitled to an equitable adjustment to the Schedule and Contract Price, subject always to Owner's requirements and approval unless it is determined that the Force Majeure is due to the fault of Contractor, or in Subcontractor's opinion, Contractor fails to diligently pursue the approval of Owner.

#### 16.5. Suspension of the Work, Resumption of Performance.

Subject to Section 15.3, in the event of a suspension of the Work due to a Force Majeure, Subcontractor and Contractor shall negotiate in good faith to agree the level of staff and labor to be retained by Subcontractor on or near the Site. When a Party whose performance has been suspended due to Force Majeure becomes able to resume performance of its obligations under this Contract, such Party shall give the other Party written notice to that effect and shall promptly resume performance hereunder.

#### 16.6. Termination for Force Majeure.

Notwithstanding that Subcontractor may have become entitled to an extension of time in which to perform its obligations hereunder due to Force Majeure, and consistent with the provisions of the EPC contract between Owner and Contractor, if by virtue of Section 16.2 either Party shall have been excused from the performance of any material obligation under this Contract for a continuous period of 2 months or performance of the Work shall have been suspended for two or more non-continuous periods that in the aggregate exceed 3 months occurring following Notice To Proceed Effective Date, then either Party may at any time thereafter, provided such performance is still excused, by notice to the other terminate this Contract; provided, however, under no circumstances may Subcontractor terminate this Contract in the event where (i) Contractor is not able to similarly terminate its EPC contract with the Owner and (ii) Subcontractor is reimbursed for any additional liabilities, costs and expenses incurred as a result thereof and is not otherwise penalized for the extended delay. In the event of a termination under

this Section 16.6, as of the effective date of termination, Subcontractor shall be released from any further obligation to perform the Work and Subcontractor shall thereupon:

- (a) immediately discontinue the Work except for such Work as may be reasonably necessary to preserve and protect Work already in progress and to protect the EDC Equipment and Subcontractor Equipment at the Site;
- (b) place no further orders or enter into Subcontracts for Work;
- (c) assist Contractor in preparing an inventory of all Subcontractor Equipment and EDC Equipment in use or in storage at the Site;
- (d) terminate all Subcontracts, except those Contractor has designated to be assigned pursuant to Section 16.6(e);
- (e) assign to Contractor title to all Work not already owned by Contractor, together with all Subcontracts and other contractual agreements (including warranties) as may be designated by Contractor;
- (f) assign to Contractor, to the extent assignable and further subject to Section 8.1.3 and Section 8.1.4, all issued Governmental Authorizations, patents and other proprietary rights, if any, then held by Subcontractor pertaining to the Facility;
- (g) remove from the Site all Subcontractor's Equipment subject to the consent of Contractor; and
- (h) deliver to Contractor all information prepared hereunder with respect to the Facility or Work as may be reasonably requested by Contractor and which has been paid for by Contractor, including all drawings, plans, specifications, studies, reports and other information prepared hereunder as of the date of termination for the completion and operation of the Facility.

16.7. Payment on Termination.

If this Contract is terminated pursuant to Section 16.6, Contractor will pay Subcontractor pursuant to Section 15.1.6.

**ARTICLE 17**  
**INDEMNITIES**

17.1 Subcontractor Indemnity.

Subcontractor agrees to indemnify, defend and hold harmless Contractor Indemnitees from and against any and all claims, demands, losses, damages, causes of action, suits, and liabilities (including all expenses of litigation, court costs and reasonable attorneys' fees):

- (a) attributable to bodily injury (including death) of any person or property damage of third parties to the extent caused by the negligence or willful misconduct of any of the Subcontractor Indemnitees, or
- (b) attributable to any bodily injury (including death) or property damage (including property of Subcontractor, Contractor and third parties) caused by any spill or release of Hazardous Substances for which Subcontractor is responsible under



Section 3.15 other than any such spill or release caused by the negligence or willful misconduct of any Contractor Indemnitee,

Subcontractor is liable to pay compensation for any and all damages caused to Contractor or any third parties, unless it may prove that damages were caused by Contractor, Force Majeure or may be attributed to third party's fault. Subcontractor will defend and indemnify Contractor against any third party claim, except when damages are caused by Contractor's fault.

17.2. Contractor Indemnity.

Contractor agrees to indemnify, defend and hold harmless Subcontractor Indemnitees from and against any and all claims, demands, losses, damages, causes of action, suits, and liabilities (including all expenses of litigation, court costs and reasonable attorneys' fees):

- (a) attributable to bodily injury (including death) of any person or property damage of third parties to the extent caused by the negligence or willful misconduct of any of the Contractor Indemnitees, or
- (b) attributable to bodily injury (including death) or property damage (including property of any Contractor Indemnitee and of third parties) caused by any Hazardous Substances for which Owner is responsible under Section 3.15 unless such injury or damage is caused by the negligence or willful misconduct of any Contractor Indemnitee.

17.3. Notice.

Each Party shall promptly notify the other in writing of any claims which may be covered by the indemnities set forth hereunder. Without limiting the generality of the foregoing, Contractor shall notify Subcontractor in writing as soon as Contractor shall receive notice of any claims of infringement of patents or other proprietary rights occurring in connection with Subcontractor's performance of the Work. In turn, Subcontractor shall timely notify Contractor in writing of any claims which Subcontractor may receive alleging infringement of patents or other proprietary rights which may affect Subcontractor's performance of the Work.

17.4. Conduct and Administration of Claims.

The indemnifying Party, hereunder (the "Indemnitor") shall have sole charge and direction of conduct of the prosecution, defense and settlement of any suit or proceeding based on any claim, demand, loss, damage, cause of action, suit on liability for which Indemnitor is responsible under any Section of this Contract. The indemnified Party (the "Indemnitee") shall provide such assistance as the Indemnitor may reasonably require in such defense, and shall have the right to be represented in such defense by counsel of its own choice at its own expense. If the Indemnitor fails to defend any such suit or proceeding, then following 15 days notice to Indemnitor of such election, the Indemnitee shall have the right, in its reasonable discretion, either to defend such suit or proceeding or to settle the claim which is the basis thereof, without further consent from the Indemnitor and without releasing the Indemnitor from its obligations hereunder and in either case the Indemnitor shall reimburse the Indemnitee for its expenses, costs and reasonable attorneys' fees. If any claim described in Section 17.3 is held to constitute an infringement of any patent or other proprietary rights and use of any Work is enjoined, Subcontractor shall at its own expense and at Subcontractor's option (i) procure for Contractor the right to continue to use the infringing Work, (ii) replace such Work with non-infringing equipment or process of equivalent utility and efficiency, or (iii) modify such Work so that it becomes non-infringing without affecting its utility or efficiency.

## **ARTICLE 18**

### **DISPUTE RESOLUTION**

#### **18.1. Arbitration.**

Except for remedies regarding Confidential Information under Section 19.4, any claim, dispute or controversy arising out of or relating to this Contract or the breach, termination or repudiation thereof shall be resolved exclusively by submission to binding arbitration in Caracas, Venezuela administered by the International Chamber of Commerce ("ICC") in accordance with its rules then in effect, and the language of such arbitration shall be English. There shall be three arbitrators, with each Party selecting one; the third arbitrator, who shall be the chairman of the panel and need not be a national of a country other than those of the Parties, shall be selected by the two arbitrators appointed by the Parties. The claimant shall name its arbitrator in the demand for arbitration and the responding Party shall name its arbitrator within 30 days after receipt of the demand for arbitration. The third arbitrator shall be named by the first two arbitrators within 30 days after the appointment of the second arbitrator. Each arbitrator must be qualified by having at least 10 years' experience in the construction and engineering of power generation facilities or in the electric utility industry. Should any Party fail timely to name its arbitrator or should the first two arbitrators named fail timely to name a third arbitrator, any such arbitrator not timely named shall be appointed by the ICC. The arbitration proceeding and all correspondence and documents submitted thereto shall be conducted and prepared in the English language. The award of the arbitrators shall be based upon principles of law and shall be final and binding upon the Parties without the right of appeal to the courts. Judgment on the award may be entered by any court having jurisdiction thereof. The costs and expenses of the arbitration (including reasonable attorney's fees) shall be borne by the losing Party, unless the arbitrators determine that it would be manifestly unfair to honor this agreement of the Parties and determine a different allocation of costs.

#### **18.2. Submission to Jurisdiction.**

This Article 18 and any arbitral award hereunder shall be enforceable, and any action in aid of dispute resolution hereunder may be brought, in any federal or state court in the United States having jurisdiction, and the Parties each consent to the nonexclusive jurisdiction of, and to the laying of venue in, such court for such purpose. Each Party irrevocably waives any objection to this venue on any ground, including that it is an inconvenient forum.

#### **18.3. Applicable Law; Waiver of Punitive Damages.**

All procedural aspects of the agreement to arbitrate, including, but not limited to, the construction and interpretation of the agreement to arbitrate, the scope of the arbitrable issues, allegations of waiver, delay, or other defenses as to arbitrability, and the rules governing the conduct of the arbitration, shall be governed by and construed pursuant to the rules of the ICC. In deciding the substance of any such claim, dispute or controversy, the arbitrators shall apply the substantive laws of the Republic of Venezuela without reference to any rule thereof that would require the application of the law of another jurisdiction; provided, however, that the arbitrators shall have no authority to award punitive damages under any circumstances (whether it be exemplary damages, treble damages, or any other penalty or punitive type of damages) regardless of whether such damages may be available under any law, the Parties hereby waiving their right, if any, to recover punitive damages in connection with any such claims, disputes or disagreements.

#### **18.4. Continuation of Services.**

Except as otherwise provided hereunder, pending final resolution of any dispute, whether or not submitted to arbitration hereunder, the Parties shall continue to fulfill their respective obligations under this Contract.

**ARTICLE 19**  
**CONFIDENTIAL INFORMATION**

19.1. Confidential Information.

From the Effective Date until two (2) years following Substantial Completion or the earlier termination of this Contract, neither Subcontractor, Contractor nor any licensee of Contractor pursuant to Section 8.1.4 shall disclose any Confidential Information other than to its Representatives, to the arbitrators in any arbitration pursuant to Section 18.1 and to any court (with an appropriate protective order) in any litigation pursuant to Section 18.2 or Section 19.4. "Representatives," as used in this Contract, shall include Affiliates, Suppliers, and their respective directors, officers, employees, auditors, and counsel. It is understood (a) that any Representative receiving Confidential Information shall be informed of the obligation of nondisclosure pursuant to this Contract and (b) Contractor and Subcontractor each shall be responsible for any breach of this Contract by its Representatives.

19.2. Notice Preceding Compelled Disclosure.

If Subcontractor, Contractor or any Representative of either is requested or required (by oral question, interrogatory, request for information or documents, subpoena, civil investigative demand or other law or legal process) to disclose any Confidential Information, such Party will promptly notify the other Party of such request or requirement so that the other Party may seek an injunction, appropriate protective order or grant a waiver of compliance with the provisions of this Contract. If, in the absence of an injunction, protective order or the receipt of a waiver hereunder, such Party is compelled by such law or legal process to disclose any Confidential Information, then such Party may disclose only such of the Confidential Information as is required, provided that if it exercises reasonable efforts to obtain an order or other reliable assurance that confidential treatment will be accorded to the disclosed Confidential Information, there shall be no liability for the disclosure of Confidential Information pursuant to this sentence.

19.3. Definition of "Confidential Information".

The term "Confidential Information" shall mean all written information relating to the Facility and furnished by one Party to the other after the Effective Date of this Contract. Confidential Information also shall include all written information generated by a Party or its Representatives that contains, reflects or is derived from furnished Confidential Information. The term "written information" shall include information recorded or stored in a digital format on electronic, magnetic or optical media. The following shall not constitute Confidential Information for purposes of this Contract: (a) information that is or becomes publicly available other than as a result of a disclosure in violation of this Contract, (b) information that already was known to the recipient prior to being furnished pursuant to this Contract, and (c) information that becomes available on a non-confidential basis from a source other than the disclosing Party if such source was not subject to any prohibition against transmitting the information to the recipient.

19.4. Remedies.

Money damages would not be a sufficient remedy for any breach of the above provisions of this Article 19 and the disclosing Party shall be entitled to seek specific performance and injunctive relief as remedies for any such breach. Such remedies shall not be deemed to be the exclusive remedies for any such breach, but shall be in addition to all other remedies available at law or in equity. The Parties agree that any action or application for such remedies may be brought either in a federal or state court in the United States having jurisdiction, and the Parties each consent to the nonexclusive jurisdiction of, and to the laying of venue in, such court for such purpose. Each Party irrevocably waives any objection to this venue on any ground, including that it is an inconvenient forum.

**ARTICLE 20**  
**MISCELLANEOUS PROVISIONS**

20.1. Governing Law.

This Contract shall be governed by, construed and enforced in accordance with, the laws of the Republic of Venezuela (without giving effect to the principles thereof relating to conflicts of laws). The Parties further agree that the United Nations Convention on the International Sale of Goods does not apply to this Contract.

20.2. Notice.

Any notice, demand, offer, correspondence, email, or other written instrument required or permitted to be given pursuant to this Contract shall be in writing signed by the Party giving such notice and shall be in the English language and shall be hand delivered or sent by registered letter or telefax (subject to confirmation of receipt) to the address or telefax number set forth below.

To Contractor:

DERWICK ASSOCIATES CORP.  
13, 8th Avenue Belleville  
St. Michael, Barbados  
Attn: Alejandro Betancourt Lopez  
Telefax: 58 212 9777399

To Subcontractor:

PROENERGY SERVICES INTERNATIONAL, INC.  
2001 ProEnergy Blvd.  
Sedalia, Missouri 65301  
Attn: Jeff Canon  
Telefax: 660-829-1160

Each Party to this Contract shall have the right to change the place to which notice shall be sent or delivered by similar notice sent in like manner to the other Party. The effective date of a notice issued pursuant to this Contract shall be as of the addressee's receipt of such notice.

20.3. Assignment.

Except as set forth hereinafter in this Section 20.3, this Contract may be assigned only with the prior written consent of the other Party to this Contract. Subcontractor may assign this Contract to any Affiliate of Subcontractor; provided that such Affiliate assumes Subcontractor's obligations under this Contract and Subcontractor unconditionally guarantees the performance of such Affiliate's obligations under this Contract. Any purported assignment not in compliance with this Section 20.3 shall be void and without force or effect.

20.4. No Unlawful Payments.

Subcontractor and Contractor each covenants and agrees not to act in violation of the U.S. Foreign Corrupt Practices Act, and in connection therewith, shall not directly or indirectly receive, authorize, make, or promise to make any offer, payment, or gift of anything of value that would violate the laws of the United States of America, or the laws of the country or countries in which any of the Work is performed, to or for the use or benefit of (a) any official, candidate for political office, or employee of any agency or instrumentality of any government, political party, public

international organization, or any other Person, or (b) any Person, while knowing that all or a portion of such money or thing of value will be directly or indirectly offered, given, or promised to any official, candidate for political office, or employee of any agency or instrumentality of any government, political party, public international organization, or any other Person.

Subcontractor agrees to indemnify, defend and hold harmless Contractor Indemnitees from and against any and all fines, penalties, related costs and expenses, including reasonable legal expenses, attributable to any failure of Subcontractor (including its Suppliers and their officers, directors, and representatives) to comply with this Section. Contractor agrees to indemnify, defend and hold harmless Subcontractor Indemnitees from and against any and all fines, penalties, related costs and expenses, including reasonable legal expenses, attributable to any failure of any of the Contractor Indemnitees or any direct or indirect owners of or investors in Contractor to comply with this Section.

#### 20.5. Miscellaneous.

20.5.1 Entire Agreement. This Contract, and any provisions of the EPC contract between Contractor and the Owner that by reference herein apply to Subcontractor, contains the entire understanding of the Parties with respect to the subject matter hereof and reflects the prior agreements and commitments with respect thereto. There are no other oral understandings, terms or conditions and neither Party has relied upon any representation, express or implied, not contained in this Contract. Notwithstanding the foregoing, the Parties hereby confirm that Contractor and ProEnergy Services De Venezuela C.A. ("ProEnergy Venezuela"), an Affiliate of Subcontractor, have entered into a separate agreement of same date whereby ProEnergy Venezuela will be furnishing certain engineering, procurement, construction, commissioning, start-up and testing services in Venezuela in connection with the building, commissioning and startup of the Facility (the "Local Services Agreement"). Contractor and Subcontractor agree for each of themselves and their Affiliates that (i) Subcontractor shall not be required to replicate any portion of the Work under the Contract where such work is being performed by ProEnergy Venezuela under the Local Services Agreement and (ii) it shall not be entitled to recover in connection with any claim or dispute arising under either or both this Contract and the Local Services Agreement (including but not limited to any disputes or claims for payment, default, termination, suspension, force majeure, change order, indemnity, liquidated damages or other damages) to the extent that it or any of its Affiliates has recovered such payment with respect to the same claim or dispute. All communications, whether in writing or oral, between the Parties shall be in the English language.

20.5.2 Amendments. No change, amendment or modification of this Contract shall be valid or binding upon the Parties hereto unless such change, amendment or modification shall be in writing and duly executed by both Parties hereto.

20.5.3 Joint Effort. Preparation of this Contract has been a joint effort of the Parties and the resulting document shall not be construed more severely against one of the Parties than against the other.

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

20.5.5 Severability. The invalidity of one or more phrases, sentences, clauses, sections or articles contained in this Contract shall not affect the validity of the

remaining portions of the Contract so long as the material purposes of this Contract can be determined and effectuated. If any material provision is held to be invalid, the Parties agree to negotiate an equitable amendment to the provisions of this Contract to give effect to the underlying purposes of the invalid portion or provisions of this Contract.

20.5.6 No Waiver. Any failure of any Party to enforce any of the provisions of this Contract or to require compliance with any of its terms at any time during the pendency of this Contract shall in no way affect the validity of this Contract, or any part hereof, and shall not be deemed a waiver of the right of such Party thereafter to enforce such provisions or require compliance with such terms.

20.5.7 Successors and Assigns. This Contract shall be binding upon and shall inure to the benefit of the Parties hereto and their successors and permitted assigns.

20.5.8 Obligations. Nothing contained in this Contract shall be construed as constituting a joint venture or partnership between Subcontractor and Contractor.

20.5.9 Further Assurances. Subcontractor and Contractor agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party that are not inconsistent with the provisions of this Contract and that do not involve the assumptions of obligations other than those provided for in this Contract, in order to give full effect to this Contract and to carry out the intent of this Contract.

20.5.10 Performance of Obligations. If an obligation to be performed under this Contract falls due on a day other than a Business Day, the obligation shall be due on the next Business Day.

20.5.11 Exhibits, Schedules. Subject to Section 20.5.12, all exhibits and schedules referenced in this Contract shall be incorporated into this Contract by such reference.

20.5.12 Priority. In the event of any conflict or inconsistency between the body of this Contract and the exhibits, attachments and schedules incorporated herein or any other incorporated or associated documentation including the provisions of the EPC contract between Owner and Contractor, the terms and conditions of this Contract shall control notwithstanding such incorporation.

20.5.13 Counterparts. This Contract may be signed in any number of counterparts and each counterpart shall represent a fully executed original as if signed by both Parties.

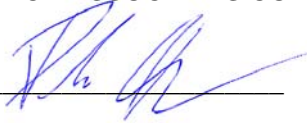
20.5.15 Survival, Termination of Obligations. The indemnities set forth in this Contract shall survive the completion of the Work and any termination of this Contract; provided, however, that on the earlier of the date two years following (i) Substantial Completion or (ii) the termination of this Contract, all liability of Contractor and Subcontractor under this Contract shall fully terminate and expire except for any liability for claims that are the subject of litigation or other proceedings pending on such date.

IN WITNESS WHEREOF, Contractor and Subcontractor executed this Contract as of the date first written above.

Contractor:

**DERWICK ASSOCIATES CORP.**

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



Name: Pedro Trebbau Lopez

Title: Director



Subcontractor:

**PROENERGY SERVICES INTERNATIONAL, INC.**

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

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

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

## **EXHIBIT A**

### **TECHNICAL SCOPE DOCUMENT (TSD)**

(Note: In addition to the Work to be performed by Subcontractor outside of Venezuela as further described in this TSD, certain additional services and materials are to be furnished in Venezuela by an Affiliate of Subcontractor under separate written agreement and any description of such additional services and materials in this TSD is simply for clarification purposes only, and in no case shall such services and materials be included or interpreted as part of the Work to be furnished by Subcontractor under this Contract.)



**EXHIBIT B**  
**PAYMENT SCHEDULE**

|  |   |     |
|--|---|-----|
| Down Payment Due Upon Signing            |   | 35% |
|  |   |     |
| Milestone 1                              |   | 10% |
| Civil works                              |   |     |
|  | Site Preparation Complete                                 |     |
|  | Gas Turbine Foundations Poured for Equipment              |     |
|  |   |     |
| Milestone 2                              |   | 10% |
| Gas Turbine 1 Erection Complete          |   |     |
|  | Assembly of Major Gas Turbine Modules Complete            |     |
|  | Exhaust Stack Erected                                     |     |
|  |   |     |
| Milestone 3                              |   | 10% |
| Gas Turbine Unit 2 Erection Complete     |   |     |
|  | Assembly of Major Gas Turbine Modules Complete            |     |
|  | Exhaust Stacks Erected                                    |     |
|  |   |     |
| Milestone 4                              |   | 10% |
| Mechanical                               |   |     |
|  | Gas Turbine Unit 3 Erection Complete                      |     |
|  | Gas Turbine Auxiliary Equipment Set                       |     |
|  | Interconnect Piping Installed                             |     |
|  |   |     |
| Electrical                               |   |     |
|  | All Major Electrical Equipment Set and Installed          |     |
|  |   |     |
| Milestone 5                              |   | 10% |
| Mechanical                               |   |     |
|  |   |     |
|  | Water treatment System Installed                          |     |
|  | Interconnect Piping Installed                             |     |
|  |   |     |
| Electrical Completion                    |   |     |
|  | All Electrical Interconnect Cabling Installed Units 1 & 2 |     |
| Precommissioning Complete on Units 1 & 2 |   |     |
|  | All Mechanical Equipment Flushed and Checked              |     |
|  | All Hydrostatic Testing Complete                          |     |
|  | All Pumps Rotated and Tested                              |     |
|  | All Mechanical Systems Ready for Startup                  |     |
|  | All Electrical Equipment Statically Tested                |     |
|  | All Electrical Systems Ready for Startup                  |     |
|  |   |     |

|   |   |      |
|---|---|------|
| Milestone 6                                   |   | 5%   |
| Unit 1 & 2 Commissioning and Testing Complete |   |      |
|   | Unit 1 & 2 Tested and Ready for Commercial Operation  |      |
|   | All Mechanical Auxiliary Ready for Commercial Operation   |      |
|   | All Electrical Auxiliary Equipment Tested and Ready for Commercial Operation                      |      |
|   |   |      |
| Milestone 7                                   |   | 5%   |
| Mechanical                                    |   |      |
|   | All Plant Fuel and Water Tanks Complete   |      |
|   | All Plant Fuel and Water Piping Complete  |      |
| Electrical                                    |   |      |
|   | All Electrical Balance of Plant Complete  |      |
|   | All Plant Interconnect Cabling Complete   |      |
| Precommissioning Complete on Unit 3           |   |      |
|   | All Mechanical Equipment Flushed and Checked  |      |
|   | All Hydrostatic Testing Complete  |      |
|   | All Pumps Rotated and Tested  |      |
|   | All Mechanical Systems Ready for Startup  |      |
|   | All Electrical Equipment Statically Tested  |      |
|   | All Electrical Systems Ready for Startup  |      |
|   |   |      |
| Milestone 8                                   |   | 5%   |
| Plant Commissioning and Testing Complete      |   |      |
|   | GT Unit 3 Ready to be Tested and Ready for Commercial Operation                                   |      |
|   | All Mechanical Auxiliary and Balance of Plant Equipment Ready for Commercial Operation            |      |
|   | All Electrical Auxiliary and Balance of Plant Equipment Tested and Ready for Commercial Operation |      |
|   | All Buildings Finished and Complete   |      |
|   | All Driveways and Finish Grading Complete   |      |
|   |   |      |
| Total (U.S.\$36,340,516.00)                   |   | 100% |

## EXHIBIT C

### INSURANCE

#### 1.0. Subcontractor's Insurance

1.1 Workers' Compensation and Employers' Liability Insurance. Subcontractor shall (i) maintain workers' compensation insurance as required by the law of the jurisdiction where the Work is performed, and (ii) maintain employers' liability insurance with a \$1,000,000 minimum limit per accident.

1.2 Commercial General Liability Insurance. Subcontractor shall procure and carry commercial general liability insurance on a claims made or occurrence basis against claims for personal injury (including bodily injury and death) and property damage. Such insurance shall provide coverage for products-completed operations, blanket contractual, premises/operation, explosion, collapse and underground hazard coverage, broad form property damage, broad form contractual liability, personal injury insurance, independent contractors liability, hostile fire liability and include a severability of interests or cross liability clause. The policy shall provide for a \$2,000,000 minimum limit per occurrence and \$2,000,000 minimum limit in the aggregate.

1.3 Automobile Liability Insurance. Subcontractor shall procure and carry liability insurance against claims for personal injury (including bodily injury and death) and property damage covering all vehicles owned, leased or non-owned and hired by the Subcontractor, including loading and unloading, with a \$1,000,000 minimum limit per occurrence.

1.4 Excess Liability Insurance. Subcontractor shall procure and carry excess liability insurance on a claims made or occurrence basis against claims for personal injury (including bodily injury and death) and property damage and applying in excess of the limits of insurance prescribed for the policies required in Sections 1.1 (ii), 1.2, and 1.3. Such insurance shall provide coverage for products-completed operations, blanket contractual, premises/operation, explosion, collapse and underground hazard coverage, broad form property damage, broad form contractual liability, personal injury insurance, independent contractors liability, hostile fire liability and include a severability of interests or cross liability clause. The policy shall provide for a \$5,000,000 minimum limit per occurrence and \$5,000,000 minimum limit in the aggregate.