

AGREEMENT NO. SC-33-20

BY AND BETWEEN

WÄRTSILÄ NORTH AMERICA, INC.

AND

US VIRGIN ISLANDS WATER AND POWER AUTHORITY

FOR THE ENGINEERING, PROCUREMENT, AND CONSTRUCTION, WITH RESPECT TO  
THE RANDOLPH HARLEY POWER PLANT (RHPP) NEW GENERATION, OF A 36 MW  
(GROSS CAPACITY) POWER FACILITY AND A 9 MW/18 MWh BESS (BATTERY  
ENERGY STORAGE SYSTEM) LOCATED IN ST. THOMAS

Dated as of June 30, 2020

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AGREEMENT

This Engineering, Procurement, and Construction Agreement (hereinafter "**Agreement**") is made on June 30, 2020 (the "**Effective Date**"), by and between **WARTSILA NORTH AMERICA, INC.**, a corporation formed under the laws of Maryland, with its offices at 11710 N. Gessner Rd., Suite A, Houston, Texas 77064 USA (hereinafter referred to as the "**Contractor**"),

And

**US VIRGIN ISLANDS WATER AND POWER AUTHORITY**, an autonomous governmental instrumentality incorporated under the laws of the United States Virgin Islands with principal offices located at 9720 Estate Thomas, St. Thomas, Virgin Islands 00801 (hereinafter referred to as the "**Owner**"),

Singularly referred to as the "**Party**" and collectively referred to as "**Parties**",

**RECITALS**

WHEREAS, Owner wishes to engage Contractor to design, engineer, procure equipment for, construct, start-up and test a multi-fuel engine power plant fired with a mix of liquid propane (LP), and Ultra Low Sulfur fuel oil (ULSD), or with ULSD alone, with a gross installed capacity of 36 MW Gross Capacity Power Facility (the "Plant") and a 9MW 18 MWh Energy Storage System ("BESS") to be located at the Randolph Harley Generating Complex in St. Thomas, U.S. Virgin Islands;

WHEREAS, Contractor wishes to provide design, engineering, procurement of equipment, construction, start-up and testing for the Plant and BESS (as defined herein) under the terms and conditions of this Agreement;

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

**1. DEFINITIONS.**

For the purposes of this Agreement, the following words and terms shall have the meanings specified below (other words and abbreviations that have well-known technical or trade meanings are used in this Agreement in accordance with such recognized meanings):

**1.1. *Acceptable Providers*** shall have the meaning set forth in Section 5.2(w)

**1.2. *Agreement*** shall mean this Agreement, including all Attachments and Appendices attached hereto.

**1.3. *Amended Subrecipient Agreement*** shall have the meaning set forth in Section 4.1.16.

**1.4. *Applicable Codes and Standards*** means any and all applicable codes, standards or requirements set forth herein (including the Technical Specifications) or in any applicable Laws, which codes, standards and requirements shall govern Contractor's performance of the Work, as provided herein. In the event of an inconsistency or conflict between any of the Applicable Codes and Standards, the highest performance standard as contemplated therein shall govern Contractor's performance under this Agreement.

**1.5. *Business Day*** means any day other than a Saturday, a Sunday, or a day on which banks in New York are authorized or required by law to be closed. Any time the word "day" appears in this Agreement in lower case, it is intended to refer to a calendar day.

**1.6. *Capacity Guarantee*** means capacity guarantee for the BESS defined in Appendix 12 which will be tested in accordance with Appendix 7B.

**1.7. *CEMS*** means the continuous emissions monitoring systems to be installed by Contractor on each Engine to measure such Engine's emissions (with respect to NO<sub>x</sub>, CO, and O<sub>2</sub>) on an on-going basis following Substantial Completion. Compliance with VOC emissions shall be by means of recording Regenerative Thermal Oxidizer combustion zone temperature (measured continuously and averaged for each hour) compared with a base-line temperature of 900 degrees Celsius (i.e., 1650 degrees Fahrenheit).

**1.8. *Change*** means a change in or adjustment to the Scope of Supply, the Technical Specifications, the Project Schedule or the services to be performed by Contractor to construct and complete the Plant and the BESS.

**1.9. *Change in Law*** means (a) any change or adoption of any laws that apply to the Plant the BESS, Work, and/or the Equipment, which is materially inconsistent or that vary with any Laws in effect on the Effective Date, (b) the adoption of any judicial or administrative resolution, which is materially inconsistent or that vary with any Governmental Approval given from time to time during the term of this Agreement or (c) the imposition of any condition or requirement not required as of the Effective Date affecting materially the issuance, renewal or extension of any Governmental Approval.

**1.10. *Change Order*** means a written order agreed to and signed by Owner and Contractor allowing a Change, and if applicable, an adjustment to the Contract Price, the Project Schedule and/or the Substantial Completion Deadline.

**1.11. *Commercial Operation of the BESS*** means the operation of the BESS or any Inverter by the Purchaser or by an operator on behalf of Owner, beyond that required under this Agreement for commissioning or Performance Tests from all four (4) Inverters comprising the BESS. Commercial Operation can also be met on an Inverter-by-Inverter basis, in which case all payment and other obligations triggered by the reaching of Commercial Operation shall be reduced pro-rata (i.e., by 25%) (the "BESS Pro-Rata Percentage") for each Inverter that has not yet reached Commercial Operation.

**1.12. *Commercial Operation of the Plant*** means the production of electrical power in conformity with the Technical Specifications, except for electricity produced in order to conduct the Start-up, Commissioning and Performance Tests, from all four (4) Engines

comprising the Facility, once they have been synchronized and connected to the grid. Commercial Operation can also be met on an Engine-by-Engine basis, in which case all payment and other obligations triggered by the reaching of Commercial Operation shall be reduced pro-rata (i.e., by 25%, the "Plant Pro-Rata Percentage") for each Engine that has not yet reached Commercial Operation.

1.13. **Commissioning of the BESS** means the tests to be performed by Contractor to confirm conformance of the BESS equipment as set forth in Appendix 1B.

1.14. **Construction Equipment** means the equipment, machinery, structures, scaffolding, materials, tools, supplies and systems, purchased, owned, rented or leased by Contractor or its Subcontractors for use in accomplishing the Work, but not intended for incorporation into the Project.

1.15. **Consumables** shall have the meaning set forth in Section 4.1(j)

1.16. **Continuous Emissions Monitoring** means the emissions monitoring conducted by the CEMS, in accordance with the procedures established by the United States Environmental Protection Agency and the US Virgin Island Department of Planning and Natural Resources, to measure compliance with the Emissions Guarantee during the Plant operation.

1.17. **Contract Interest Rate** means the 3-month US-Treasury bill rate plus 6%.

1.18. **Contract Price** shall have the meaning set forth in Section 7.1 hereof.

1.19. **Contractor** means Wärtsilä North America, Inc.

1.20. **Contractor Event of Default** shall have the meaning set forth in Section 17.1 hereof.

1.21. **Contractor Indemnitee** shall have the meaning set forth in Section 20.1.

1.22. **Contractor's Representative** means the individual appointed by the Contractor who will act as the primary point of contact for Contractor with respect to the performance of the Work.

1.23. **Defects** means any failure, flaw, omission, fault, inadequacy, discrepancy or inefficiency in the Work or any component of the Work to conform to the requirements of this Agreement, including any breach of the warranty set forth in Article 13.

1.24. **Delay Liquidated Damages** shall have the meaning set forth in Section 11.2 hereof.

1.25. **Direct Costs** means all direct, out-of-pocket costs incurred by the Contractor in performing the Work, as reasonably and sufficiently documented by Contractor, including, as applicable:

**1.25.1.** the reasonable costs required to mitigate the effects of an Owner Caused Delay or Force Majeure in Contractor's performance which obligates Contractor to mitigate;

**1.25.2.** the costs reasonably incurred by Contractor in the removal and, subject to Contractor's duty to mitigate, return to country of origin, of any Equipment from the Facility Site and in the repatriation of Contractor's and its Subcontractor's personnel;

**1.25.3.** any reasonable amounts to be paid by Contractor to its Subcontractors in connection with the termination of any subcontract, including any reasonable cancellation charges for subcontracts expressly provided for in such contracts;

**1.25.4.** the reasonable costs incurred by Contractor in protecting the Work and leaving the Facility Site in a clean and safe condition;

**1.25.5.** the reasonable standby, demobilization and remobilization costs of Contractor and Subcontractor's personnel;

**1.25.6.** the reasonable internal hourly charge-out rates of Contractor's personnel providing services in relation to the Work.

Notwithstanding the foregoing, all Direct Costs shall be exclusive of

**1.25.7.** fees and expenses of the Contractor's legal counsel, and any travel expenses (including transportation, lodging and food) incurred by any of the Contractor's legal counsel in conjunction with the Work;

**1.25.8.** any Taxes applicable to Contractor (except to the extent Owner bears responsibility for such Taxes under the terms of this Agreement);

**1.25.9.** all costs incurred or paid by the Contractor to cure Defects in the Work;

**1.25.10.** all costs incurred to participate in a Dispute resolution process pursuant to Article 19, except to the extent provided therein;

**1.25.11.** any amounts paid pursuant to Contractor's indemnity obligations hereunder; and

**1.25.12.** all costs incurred to cure any default by Contractor or any Subcontractor of a duty or obligation under this Agreement.

Contractor shall use reasonable efforts to minimize Direct Costs and shall provide Owner with options for reducing such costs whenever possible.

- 1.26. **Dispute** shall have the meaning set forth in Section 19 hereof.
- 1.27. **Dollars** or \$ means the lawful currency of the United States.
- 1.28. **Effective Date** shall have the meaning set forth in the preamble to this Agreement.
- 1.29. **Emissions Guarantee** means the guarantee by Contractor to Owner that the Equipment will meet all of the New Source Performance Standards of Subpart IIII of the US Code CFR 40 Part 60 and the National Emissions Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines Subpart ZZZZ requirements of the US Code 40 CFR Part 63 and that average specific flue gas emissions of the Equipment, as measured during the Stack Emissions Test and during the Continuous Emissions Monitoring, will not exceed the stated emissions limitations set forth in Appendix 11, Annex A. Notwithstanding the above, the Parties agree that the obligation to comply with the conditions of the operating permit for the Facility shall rest solely with the Owner.
- 1.30. **Engine(s)** means Wärtsilä model W20V32LG reciprocating engine(s).
- 1.31. **Environmental Laws** means any applicable Laws concerning the environment or the health or safety of human beings and includes: (a) any Law relating to environmental planning and land use; (b) any Law relating to the extraction and/or disposition of any natural resource in the environment; (c) any Law relating to occupational health and safety; and (d) any Law relating to discharges of, contamination of any aspect of the environment with, or releases or threatened releases of, pollutants, contaminants, chemicals or industrial, toxic or Hazardous Materials or wastes into the environment including ambient air, surface water, ground water, or land, or otherwise relating to the treatment, storage, disposal, transport or handling of pollutants, contaminants, chemicals or industrial, toxic or Hazardous Materials or wastes.
- 1.32. **Equipment** shall mean all the equipment and materials that is to become part of the Facility and necessary to provide Owner with an electrical power generating plant and battery energy storage system in accordance with Appendix 1A, 1B, 2A and 2B, and successfully completing the Performance Tests.
- 1.33. **Event of Contractor Default** shall have the meaning set forth in Section 16.1 hereof.
- 1.34. **Event of Owner Default** shall have the meaning set forth in Section 16.3 hereof.
- 1.35. **Extended Warranty Period** shall have the meaning set forth in Section 13.3 hereof.
- 1.36. **Facility** means the 36 MW (gross capacity) generating plant based on four (4) Engines and the 9MW 18MWh Battery Energy Storage System to be located at the Randolph Harley Power Plant in St. Thomas, U.S. Virgin Islands; and to be constructed and

delivered to Owner in accordance with the Technical Specifications, the Scopes of Supply and pursuant to this Agreement.

1.37. **Facility Site** means that certain parcel of real property in Randolph Harley Generating Complex in St. Thomas, U.S. Virgin Islands.

1.38. **Final Completion of the BESS** means completion of the BESS in accordance with and to the extent set forth in Section 10.6.2 of this Agreement.

1.39. **Final Completion of the Plant** means completion of the Plant in accordance with and to the extent set forth in Section 10.6.1 of this Agreement.

1.40. **Final Completion Certificate** means the written certificate signed by Contractor and Owner, substantially in the form of Appendix 4

1.41. **Force Majeure** shall have the meaning set forth in Section 15 hereof.

1.42. **Fuel** means liquid propane fuel and Ultra Low Sulfur Diesel fuel meeting the criteria set forth in Appendix 1A and Appendix 11.

1.43. **Good Engineering and Construction Practice** means those reasonable practices, methods or acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with safety, expedition and compliance with Laws and that are commonly used in power plants and battery energy storage systems like the Facility. Good Engineering and Construction Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a spectrum of reasonable and prudent practices, methods, standards and procedures.

1.44. **Governmental Approval** means any authorizations, consents, approvals, rulings, permits, including environmental permits and occupancy permits, licenses, tariff rates, certificates, certificates of approval, completion certificates, certifications, re-certifications, variances, exemptions, immunities, grants, ordinances, waivers, filings, registrations, contracts, leases, easements, franchises, rights-of-way or other rights of Governmental Units or required by Law, or which are otherwise material to or necessary for the development, financing, ownership, design, engineering, procurement, construction, start-up, testing, commissioning, operation and maintenance of the Facility or the Facility Site.

1.45. **Governmental Units** means any national, state or local government, any political subdivision thereof, or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or other entity (including, without limitation the United States and the United States Virgin Islands) having jurisdiction over, the performance of the Work, the Equipment or its manufacture, use, sale, import, export, shipment and transportation, the Facility or its operations, transmission and/or generation of electricity, or the health, safety or environmental conditions of the Facility or the Facility Site or otherwise over the Parties hereto.



1.46. **Gross Electrical Capacity Guarantee** shall have the meaning set forth in Appendix 11.

1.47. **Gross Electrical Capacity Liquidated Damages** shall have the meaning set forth in Section 11.2(a) hereof.

1.48. **Gross Heat Rate Guarantee** shall have the meaning set forth in Appendix 11.

1.49. **Gross Heat Rate Test** means the test conducted in accordance with the Performance Test Procedures to measure the Heat Rate of the Plant, during a twenty-four (24) hour period.

1.50. **Hazardous Materials** means any hazardous or toxic substance or hazardous or toxic waste, contaminant, or pollutant as defined in or regulated by Governmental Units.

1.51. **Heat Rate Liquidated Damages** shall have the meaning set forth in Section 11.2(b) hereof.

1.52. **HUD** means the U.S Department of Housing and Urban Development.

1.53. **Imported Materials** shall have the meaning set forth in Section 7.2.

1.54. **Inverter** shall mean: Energy Storage Power Conversion System (PCS) output considered in MVA or MW during commissioning.

1.55. **Law** means (a) any applicable statute, law, rule, regulation, code, ordinance, judgment, decree, writ, order or the like, of any national, state or local court or other Governmental Unit having jurisdiction in respect of this Agreement, either Party, the Work, the Equipment or the Facility, and the interpretations thereof, including any Environmental Law, or (b) any requirements or conditions on or with respect to the issuance, maintenance, or renewal of any Governmental Approval or applications therefore.

1.56. **Liquidated Damages** means the amounts set forth in Article 11 to be paid by the Contractor to Owner with respect to certain performance failures of the Contractor set forth herein.

1.57. **Loses** shall have the meaning set forth in Section 16.2.

1.58. **Material Subcontract** means any contract pursuant to which Contractor acquires goods or services in the United States the value of which or the consideration or compensation under which in the aggregate is equal to or exceeds Two Million Dollars.

1.59. **Maximum Liquidated Damages Amount** shall have the meaning set forth in Section 12.1 hereof.

1.60. **Mechanical Completion for Plant** means the time when Contractor has certified in writing to Owner that Contractor has completed all procurement, fabrication,

assembly, erection, installation and pre-commissioning checks and tests of all Equipment, materials, components and systems of the Plant necessary for the Plant's start-up, synchronization, and Performance Tests, to ensure that all such Equipment, Materials, components and systems was correctly fabricated, assembled, erected and installed and is capable of being operated safely and reliably within the requirements and Specifications contained in this Agreement, including in accordance with Applicable Codes and Standards, applicable Law, Governmental Approvals, Good Engineering and Construction Practice, and applicable operating manuals, and Owner has accepted and countersigned such certification.

1.61. ***Mechanical Completion for BESS*** means the time when Contractor has certified in writing to Owner that all BESS Equipment necessary for the safe energization, commissioning and testing of the BESS shall have been constructed and installed in accordance with this Agreement, and all pre-commissioning checks and tests of the BESS Equipment, materials, components and systems of the BESS necessary for the BESS's energization, and Performance Tests to ensure that all such BESS Equipment, Materials components and systems were correctly fabricated, assembled, erected and installed and are capable of being operated safely and reliably within the requirements and Specifications contained in this Agreement, including in accordance with Applicable Codes and Standards, applicable Law, Governmental Approvals, Good Engineering and Construction Practice, and applicable operating manuals, have been successfully completed, and Owner has accepted and countersigned such certification.

1.62. ***Milestone*** means those milestones set forth and described in Appendix 3A and Appendix 3B.

1.63. ***Milestone Completion Certificate*** means a certificate, in the form set forth in Appendix 26, delivered by Contractor to Owner, certifying that a Milestone has been completed entitling Contractor to a Milestone Payment in accordance with the provisions of Article 8.

1.64. ***Minimum Performance Criteria for the Plant*** shall have the meaning set forth in Appendix 11.

1.65. ***Minimum Performance Criteria for the BESS*** shall have the meaning set forth in Appendix 12.

1.66. ***Mobilization Payments*** means the payments identified as "**Mobilization**" in the Payment Schedule attached hereto as Appendices 3A and 3B.

1.67. ***Net Electrical Capacity*** shall have the meaning set forth in Appendix 11.

1.68. ***Net Electrical Capacity Test*** means the test conducted in accordance with the Performance Test Procedures to measure the Net Gross Electrical Capacity of the Plant (or the electrical capacity of an individual Engine, if measured separately), during a twenty-four (24) hour period.

1.69. ***Noise Guarantee for the Plant*** shall have the meaning set forth in Appendix 11.

1.70. **Noise Test** means the test conducted in accordance with the Performance Test Procedures to measure the noise emissions of the Plant to verify the Noise Guarantee.

1.71. **Notice or Notified** means a written communication between the Parties given pursuant to Section 28 hereof, as the context may require.

1.72. **Notice of Substantial Completion** shall have the meaning set forth in Section 10.3(e).

1.73. **Notice to Proceed** means the Notice delivered by Owner to Contractor that Contractor is entitled to access to the Facility Site and can begin the Work in accordance with this Agreement.

1.74. **Owner** means the U.S. Virgin Islands Water and Power Authority and its successors and permitted assigns.

1.75. **Owner Caused Delay** means a delay in Contractor's performance of the Work which is caused by (i) Owner's failure to perform a covenant of Owner hereunder, (ii) Owner's violation of Laws, or (iii) the imposition by a Governmental Unit of additional requirements as a result of the discovery of archeological relics, artifacts of historical significance, or fossils on the Facility Site; provided, however, an Owner Caused Delay shall exclude any delay caused by Force Majeure or a Change in Law.

1.76. **Owner Indemnitee** shall have the meaning set forth in Section 20.1.

1.77. **Owner's Representative** means the individual designated by Owner, who shall have the authority and responsibility all pursuant to Section 4.1(c).

1.78. **Performance Guarantees** means the Plant and BESS guarantees listed in Appendices 11 and 12.

1.79. **Performance Liquidated Damages** means the liquidated damages payable by the Contractor as a result of failing to comply with the Plant and BESS guarantees, as such liquidated damages are listed in Appendices 11 and 12.

1.80. **Performance Test Delay** shall have the meaning set forth in Section 10.4

1.81. **Performance Test Procedures** means the written procedures for the conduct of the Performance Tests which procedures will be based on the preliminary written procedures set forth in Appendix 7A and Appendix 7B.

1.82. **Performance Test Readiness Notice** shall have the meaning set forth in Section 10.4

1.83. **Performance Tests** means the tests performed pursuant to the Performance Test Procedures to test the Performance Guarantees listed in Appendices 11 and 12.

1.84. **Plant Reliability Test** means the reliability test defined in Appendix 7A.

1.85. **Project** means, in the aggregate, the Equipment and Work necessary for the design, engineering, procurement, transportation, handling and installation of Equipment, construction, commissioning, start-up, testing, and services to be performed by Contractor to obtain Final Completion of the Facility in accordance with this Agreement.

1.86. **Project Schedule** shall have the meaning set forth in Section 5.2(k).

1.87. **Punch List** means the list of Work that Owner and Contractor identify and mutually agree (as evidenced by their respective signatures) requires completion or contains Defects; provided, however, that such work identified in the Punch List does not impede the ability of Owner to operate the Facility safely and consistent with Applicable Codes and Standards.

1.88. **Regulated Materials** means any materials regulated by Governmental Units.

1.89. **Scope of Supply** means all of the terms, details, undertakings, services, materials, supplies, equipment and other scope of Work set forth in Appendix 2A and Appendix 2B.

1.90. **Stack Emissions Test** means the emissions test conducted in accordance with the Performance Test Procedures and in accordance with the procedures established by the United States Environmental Protection Agency and the US Virgin Island Department of Planning and Natural Resources, to measure compliance with the Emissions Guarantee as part of the Performance Tests, as a condition to Substantial Completion of the Plant.

1.91. **Starting Date** means the date that last condition set forth in Section 9.2 hereof has been satisfied.

1.92. **Subcontractor** means any Person other than Contractor performing any portion of the Work, hired by Contractor providing or supplying all or a portion of the Equipment or other items, or labor or services required to perform the Work under this Agreement, including any supplier or vendor.

1.93. **Subrecipient Agreement** shall have the meaning set forth in section 1.101.

1.94. **Substantial Completion of the BESS** shall have the meaning set forth in Section 10.3.2 hereof.

1.95. **Substantial Completion of the Plant** shall have the meaning set forth in Section 10.3.1 hereof.

1.96. **Substantial Completion Certificate for the BESS** means the written certificate delivered by Contractor to Owner, substantially in the form of Appendix 8B.

1.97. **Substantial Completion Certificate for the Plant** means the written certificate delivered by Contractor to Owner, substantially in the form of Appendix 8A.

**1.98.** *Substantial Completion Deadline for the BESS* means the date which is 16 calendar months after the Starting Date, subject to possible extension in accordance with this Agreement.

**1.99.** *Substantial Completion Deadline for the Plant* means the date which is 21 calendar months from the Starting Date, subject to possible extension in accordance with this Agreement.

**1.100.** *Taxes* has the meaning set forth in Section 7.2.

**1.101.** *Technical Specification(s)* means the technical specifications, standards, drawings and description of the Work set forth in Appendix 1A and Appendix 1B.

**1.102.** *VIHFA* means the Virgin Islands Housing Authority which was named by HUD as the administrator for the HUD Community Development Block Grant Disaster Recovery funding that will be used to fund the Project. VIHFA and Owner have signed the Community Development Block Grant Disaster Recovery 2017 Funds, Subrecipient Agreement No. SA-DR(WAPA)-003-2019 dated July 19, 2019 defining the first allocation of HUD funds allocated for the Project (“Subrecipient Agreement”).

**1.103.** *Work* has the meaning set forth in Section 5.1.

## **2. GENERAL PROVISIONS.**

**2.1. Agreement’s Scope.** In accordance with the terms and conditions set out below, the Contractor shall assemble the Facility and Owner agrees to buy and undertakes to accept delivery, upon Final Completion of the Plant and BESS as specified in this Agreement.

**2.2. Independent Contractor.** Contractor is an independent contractor and nothing contained herein shall be construed as constituting any relationship with Owner other than that of owner and independent contractor, nor shall it be construed as creating any relationship whatsoever between Owner and Contractor’s employees. Neither Contractor, nor any Subcontractor, nor any of their employees, are or shall be deemed to be an agent, representative or employee of Owner. Contractor has sole authority and responsibility to employ, discharge and otherwise control its employees.

**2.3. Interpretation.** Unless the context of this Agreement otherwise requires:

**2.3.1.** The singular includes the plural and the plural includes the singular.

**2.3.2.** Words of any gender include the other gender.

**2.3.3.** A reference to a Law includes any amendment or modification to such Law.

**2.3.4.** A reference to a Person includes its permitted successors and permitted assigns.

2.3.5. The words “include,” “includes” and “including” are not limiting.

2.3.6. References to a time of day shall mean such time in St. Thomas, US Virgin Islands

2.3.7. References to Recitals, Appendices, Attachments, Articles, Sections and Paragraphs are, unless the context otherwise requires, references to recitals, appendices, attachments, articles, sections and paragraphs to and/or contained in this Agreement.

2.3.8. In the event of any conflict, discrepancy or inconsistency between the body of this Agreement and any of the Appendices, or among any of the Appendices, the relevant provisions shall be construed as complementary rather than conflicting wherever possible. Otherwise, the text in the body of this Agreement shall prevail.

2.3.9. The Parties shall act reasonably and shall perform their obligations hereunder in accordance with the principles of good faith and fair dealing.

2.3.10. Nothing in this Agreement shall create, or be construed to create, any right, claim or remedy, express or implied, in favor of any Person other than the Parties hereto.

2.3.11. This Agreement was negotiated and prepared by both Parties with advice of counsel to the extent deemed necessary by each Party. The Parties have agreed to the wording of this Agreement and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Agreement or any part hereof.

### 3. AGREEMENT DOCUMENTS.

The Parties agree that the following Attachments and Appendices form an integral part of this Agreement and which are attached hereto as:

<u>Appendix 1A</u>	Plant Technical Specifications
Annex A	Electrical Single Line
Annex B	Engine Site Layout Drawing
Annex C	Design Criteria
<u>Appendix 1B</u>	BESS Technical Specifications
Annex A	Electrical Single Line
Annex B	BESS Site Layout Drawing
Annex C	Design Criteria
<u>Appendix 2A</u>	Plant Scope of Supply
<u>Appendix 2B</u>	BESS Scope of Supply
<u>Appendix 3A</u>	Plant Milestone Payment Schedule
Annex A	Design Drawing Lists (Civil, Mechanical, Electrical)

<u>Appendix 3B</u>	BESS Milestone Payment Schedule
Annex A	Design Drawing Lists (Civil, Electrical)
<u>Appendix 4A</u>	Plant Form of Final Completion Certificate
<u>Appendix 4B</u>	BESS Form of Final Completion Certificate
<u>Appendix 5</u>	Interconnection Points
<u>Appendix 6</u>	Intentionally Omitted
<u>Appendix 7A</u>	Plant Draft Test Guidelines
<u>Appendix 7B</u>	BESS Draft Test Guidelines
<u>Appendix 8A</u>	Form of Substantial Completion Certificate for the Plant
<u>Appendix 8B</u>	Form of Substantial Completion Certificate for the BESS
<u>Appendix 9</u>	Software License Agreement
<u>Appendix 10</u>	Form of Final Lien Waiver
<u>Appendix 11</u>	Plant Performance Guarantees & Liquidated Damages
Annex A	Fuel Specification
Annex B	ULSD Specification
<u>Appendix 12</u>	BESS Performance Guarantees & Liquidated Damages
<u>Appendix 13</u>	Form of Change Order
<u>Appendix 14A</u>	Health, Safety and Environmental Plan
<u>Appendix 14B</u>	Contractor Alcohol and Drug Policy
<u>Appendix 15</u>	Key Personnel
<u>Appendix 16</u>	Preliminary Project Schedule
<u>Appendix 17</u>	Contractor's USVI Business License
<u>Appendix 18</u>	Performance Bond
<u>Appendix 19</u>	Payment Bond
<u>Appendix 20</u>	Form of Intermediate Lien Waiver
<u>Appendix 21</u>	HUD Requirements
<u>Appendix 22</u>	Contractor Insurance Requirements
<u>Appendix 23</u>	Operator Training Program
<u>Appendix 24</u>	Owner General Contract Requirements
<u>Appendix 25</u>	List of Approved Providers and Types and Quantities of Consumables
Annex A	Approved Vendor List

#### 4. OWNER'S RESPONSIBILITIES.

4.1. Owner shall, at its own cost and on a timely basis:

4.1.1. Designate and furnish the Facility Site and provide Contractor, all Subcontractors, and their respective employees and

representatives, subject to agreed upon scheduling, the ingress and egress to and from the Facility Site necessary for performance of the Work.

**4.1.2.** Provide: (i) the fuel supply interconnection point, as set forth on Appendix 5; (ii) the electrical interconnection point from the low voltage delta ( $\Delta$ ) terminal of Bus Tie Transformer 1 (BTT1) or Bus Tie Transformer 2 (BTT2), as set forth on Appendix 5; (iii) temporary construction power; (iv) sewer service; (v) potable and industrial water service; (vi) waste water lines; (vii) firefighting water supply; (viii) communications telemetry equipment (SCADA RTU fiber optic connection); (ix) a limited number of local telephone and fax lines; and (x) the switchyard.

**4.1.3.** Five (5) Business Days after the Effective Date, designate, by Notice to Contractor, an Owner's Representative, who shall act as the primary point of contact for Contractor with respect to the performance of the Work. Owner's Representative shall have the authority, with the consent of Owner's executive director or his designee (which consent shall not be unreasonably delayed), to approve any and all changes to the Work on behalf of Owner, including Change Orders.

**4.1.4.** Obtain all necessary Governmental Approvals for the Facility's construction, assembly, start up, testing and operation, including all applicable environmental permits and/or licenses.

**4.1.5.** Provide personnel with operating experience to assist with start-up, testing and permanent operations of the Plant, not later than five (5) Business Days following receipt by Owner of Contractor's Notice of the commencement of the Performance Tests. Owner will also provide personnel for BESS, if requested by Contractor, to assist with the commissioning of the BESS no later than five (5) Business Days following receipt by Owner of Contractor's notice of commencement of the BESS Performance Tests.

**4.1.6.** Have the full responsibility for care, custody and control of, and risk of loss of, the Plant and BESS, as applicable, including any and all Consumables provided by Owner in accordance with the specifications set forth in Appendix 25, from the earlier of Substantial Completion or Commercial Operation of the Plant and/or BESS, as applicable.

**4.1.7.** Owner shall perform the tasks identified under the heading "**Responsibility of Owner**" in Appendix 2A and Appendix 2B.

**4.1.8.** Provide to Contractor and its Subcontractors safe and continuous access and egress to the Facility Site and to a lay down area for the work of at least 100.0 meters by 100.0 meters within 0.5 miles of the Facility Site.



**4.1.9.** Not unreasonably interfere with Contractor's performance of the Work.

**4.1.10.** Supply sufficient and stable load (including back-up power from the electricity grid), all fuels, chemicals (excluding water treatment chemicals), lubricants (excluding start-up lube oil), and other liquid or viscous consumables (the "*Consumables*"), from the list of Acceptable Providers, in each case as set forth on Appendix 25, that are required for start-up and to conduct Performance Tests, including the re-running of the Performance Tests, if necessary.

**4.1.11.** Be solely responsible for selecting the Facility Site. Contractor's scope of Work is based on a leveled Facility Site, cleared of all trees, water, inadequate soils, and other natural fauna that may impact the Contractor's and Subcontractor's ability to conduct the Work pursuant to this Agreement.

**4.1.12.** Provide and maintain, until Substantial Completion of the Plant and/or BESS, as applicable, reasonable security at the Facility Site and at the lay down area to prevent access to the Facility Site by unauthorized persons and safety of property (including Equipment), and personnel.

**4.1.13.** Excluding any components that may be replaced by Contractor during the Warranty period, Owner shall be responsible for the recycling or disposal of the battery modules delivered by Contractor under this Agreement. The Owner shall perform the recycling or disposal in accordance with any applicable Governmental Unit rules. Owner shall indemnify and hold harmless Contractor and its affiliates from and against any costs, claims and/or liability arising from or associated with the recycling or disposal of batteries pursuant to this Section. The provision of this clause 4.1 (m) shall survive the termination or expiration of this Agreement.

**4.1.14. Cybersecurity.** After Substantial Completion of the Plant and the BESS, the Owner shall be solely responsible for any system integrations to any equipment not forming part of the Work and/or system security engineering. It is the Owner's sole responsibility to protect, where physically located on the Owner's Work site or Owner's premises or within the control of the Owner, the Work and its logic-bearing system components (e.g., hardware, firmware, and software, hereinafter referred to as the "Critical Components") from any threat, act, attack or other incident which would negatively affect the reliable workings of the Facility, whether originated outside or inside of the physical site housing of the Critical Components, including against hardware and software vulnerabilities. In recognition of the foregoing, the Owner agrees and covenants that it shall use the degree of care appropriate to prevent unauthorized access, use, or hacking of the Critical Components provided in connection with the Equipment or the Work and shall do so in a manner that is no less rigorous

than any recommendations provided by the Contractor and accepted industry practices

**4.1.15. HUD and VIHFA Reporting.** The Owner shall appoint an individual to be responsible for compiling applicable reporting requirements of the United States Department of Housing and Urban Development and the United States Virgin Islands Housing Finance Authority relating to funds made available pursuant to the Community Development Block Grant-Disaster Recovery Program under the Disaster Relief Appropriations Act, 2017.

**4.1.16. Amended Subrecipient Agreement.** The Owner shall provide Contractor an amended Subrecipient Agreement ("Amended Subrecipient Agreement") reflecting the full Contract Price prior to the Contractor achieving completion of Milestone number A16 for the Plant or B9 for the BESS, whichever occurs later.

## **5. CONTRACTOR'S RESPONSIBILITIES.**

5.1. Except as otherwise expressly set forth in Article 4 and as otherwise delineated as Owners' responsibility in Appendix 2A and Appendix 2B, Contractor shall perform or cause to be performed all obligations, duties and responsibilities of Contractor pursuant to this Agreement, including all work and services required in connection with the design, engineering, procurement, fabrication, erection, construction, initiation, demonstration and testing of the Facility, and provide or cause to be provided all Equipment and materials, Construction Equipment, labor, transportation, construction fuels, chemicals, administration and other services and items required to complete the Facility, as set forth in Appendix 1A, Appendix 1B, Appendix 2A and Appendix 2B and any tasks set forth on the Punch List or otherwise required to achieve Commercial Operation, Substantial Completion of the Plant and BESS and Final Completion of the Plant and BESS in accordance with the requirements of the Agreement, including in achieving the Minimum Performance Criteria and the Performance Guarantees, all on a firm fixed price unless adjusted in accordance with the terms of this Agreement, turnkey basis and otherwise in accordance with the Agreement (the "*Work*"); provided that the Work shall not include any activities to be performed, or equipment and materials to be supplied by Owner as set forth in this Agreement. Certain details of the Work are described in this Article 5 and the Plant Scope of Supply and BESS Scope of Supply. It is the intent of the Parties that Contractor perform the Work and put into operation a fully functional Facility in accordance with the Technical Specifications, any applicable Laws and the other terms of this Agreement. Contractor shall perform all of the Work specified in the Agreement. In addition, Contractor's performance under the Agreement shall include everything requisite and necessary to complete the entire Facility so as to operate in accordance with the Technical Specifications, notwithstanding the fact that every item necessarily involved may not be specifically mentioned or the description of the item mentioned may be inadequate or incomplete for its intended purposes. Details and items not indicated by the Technical Specifications (and items specified therein that are inadequate or incomplete for their intended purposes) shall be adequately and properly performed by Contractor at no extra cost if such details or items are incidental to the Technical Specifications and can reasonably be inferred as required and necessary to complete

the Work in accordance with the Technical Specifications. The intent of the Agreement is to relieve Owner of the necessity of engaging or supplying any labor, service or material to complete the Facility unless the labor, service or material is deemed excluded from the Work according to the foregoing standard, or expressly specified in Article 4 of this Agreement as being furnished by Owner, not to frustrate or exclude permissible Change Orders under this Agreement.

**5.2.** Without limiting the generality of the foregoing in Section 5.1 or the requirements of any other provision of this Agreement, Contractor shall, at its own cost and on a timely basis:

**5.2.1.** Provide for the handling of Equipment and materials to be incorporated into the Facility in addition to the Construction Equipment, including, as necessary, shipping, inspection, expediting, transportation, unloading, receiving and storage at the Facility Site and at the lay down area.

**5.2.2.** Make recommendations to Owner for the purchase of spare parts for the Facility's maintenance and operation no later than thirty (30) days prior to the scheduled date of Mechanical Completion.

**5.2.3.** Ensure that all Equipment and materials incorporated into the Facility shall be new, in workable condition and meet the requirements of the Technical Specifications and the Applicable Codes and Standards. References in the Technical Specifications to Equipment and materials, articles or patented processes by trade name, make or catalog number, shall be regarded as establishing a standard of quality expected by Owner, except that previously agreed make and model number of such Equipment and materials will not be changed to an equivalent type unless specifically agreed in writing by Owner.

**5.2.4.** Establish health safety policies, practices and rules at the Facility Site, consistent with Owner's standards and compliant with Applicable Codes and Standards to prevent accidents and injuries, all in accordance with the Health, Safety and Environmental Plan set forth on Appendix 14A and the Alcohol and Drug Policy set forth on Appendix 14B, and exercise all reasonable efforts to cause its employees and Subcontractors to abide by such policies, practices and rules and all applicable Laws relating to safety and security applicable at the Facility Site. Owner's review and approval of Contractor's safety and security procedures, rules and regulations shall not in any way relieve Contractor of its responsibility regarding safety, and Owner, in reviewing and approving such procedures, rules and regulations, assumes no liability for such safety program. Contractor shall erect and maintain, as required by existing conditions and the progress of the Work, all safeguards for safety, including lights, barriers, fences and railings. Contractor shall maintain all accident, injury and any other records required by applicable Law and this Agreement.

Contractor recognizes that Owner may request Contractor to comply with additional safety requirements beyond those included in Appendix 14A. Upon receipt of said request Contractor will schedule a meeting to discuss the additional requirement with Owner and agree on the implementation of the additional safety requirements. In the event the additional safety requirement results in additional costs or schedule delays, Contractor will be entitled to submit a Change Order request in accordance with Section 6.

**5.2.5.** Be solely responsible for all construction means, methods, techniques, sequences, procedures, and safety programs in connection with the performance of the Work, in accordance with Applicable Codes and Standards.

**5.2.6.** Keep the Facility Site free from accumulation of waste materials, rubbish and other debris resulting from performance of the Work. Contractor shall, within thirty (30) days after Final Completion of the BESS and Plant, in conformity with all applicable Laws, remove from the Facility Site all waste materials, rubbish and other debris, as well as all tools, Construction Equipment, machinery and surplus material brought to the Facility Site by Contractor or its Subcontractors, and leave the Facility Site in a neat and clean condition. In the event of Contractor's failure to comply with any of the foregoing, Owner may accomplish the same; provided that Contractor shall remain liable for and pay to Owner all costs associated with such removal and/or restoration of the Facility Site.

**5.2.7.** Appendix 15 sets forth a list of key personnel ("**Key Personnel**" or "**Key Persons**") from Contractor's organization who will be assigned to the Work. In the event Owner reasonably believes that a Key Person assigned to the Work should be on a watch list for possible replacement, Owner may furnish a notice to Contractor setting forth the reasons for this belief. Contractor shall use reasonable commercial efforts to improve the performance of said Key Person. If said performance does not, in the good faith opinion of Owner, improve, Owner may require that Contractor replace such Key Person without additional expense to Owner. Key Personnel shall not be removed or reassigned without Owner's prior written approval. Notwithstanding the foregoing, Contractor expressly retains the right to provide substitute personnel, without prior written approval, but upon consultation with Owner, in the event that any of the Key Personnel quits or becomes incapacitated, or as otherwise required for business reasons as reasonably determined by Contractor.

**5.2.8.** Provide all commissioning spare parts for the Facility to achieve Commercial Operation and the special tools identified in Appendix 1A, make recommendations for the purchase of spare parts for maintenance and operation and keep possession of such special tools and purchased spare parts for maintenance and operation until turned over to Owner in accordance with this Agreement and as a condition of achieving Final

Completion of the Plant and Final Completion of the BESS as applicable. Owner shall be entitled to purchase any commissioning spare parts that are surplus after achievement of Commercial Operation as set forth in Section 5.3. All spare parts provided by Contractor pursuant to this Section which are not used in the Facility's commissioning and Performance Test operations and not purchased by Owner pursuant to Section 5.3 shall remain the property of the Contractor.

**5.2.9.** Designate, by written notice to Owner at or before commencement of the Work, a Contractor's Representative who shall have full supervision over the completion of the Work and shall act as the primary point of contact with Owner regarding all matters relating to the Work, and who shall have full authority to bind Contractor. Contractor's Representative shall be a Key Person.

**5.2.10.** Provide all engineering and design Work necessary for the completion of the Facility in conformity with this Agreement and Appendix 1A and Appendix 1B, including (a) preparation of (i) conceptual design and (ii) the engineering and detailed design necessary to describe the Facility, (b) provision of specifications and criteria for the detailed design by suppliers of Equipment and materials for incorporation into the Facility, and (c) preparation of drawings, plans, bills of material, schedules and estimates and all other engineering and design Work set forth in this Agreement. Contractor shall perform all engineering and design Work in accordance with applicable Law and Applicable Codes and Standards. The following mechanical and engineering design documents shall be signed and stamped by design professionals licensed in the United States: (i) Mechanical (for the Plant only): Process Flow Diagrams for plant auxiliary systems (compressed air, instrument air, cooling water, lubricating oil, fuel system including liquid propane and ULSD, exhaust gas and intake air system, oily water system); (ii) Electrical: Electrical single line diagram medium voltage system; electrical single line diagram low voltage system; and automation system layout. The following Engineering and design Work relating to civil engineering shall be signed and stamped by design professionals licensed in the U.S. Virgin Islands: (i) site layout drawing; (ii) power house plant drawing; (iii) power house section drawing; (iv) Structural calculations for power house and ancillary buildings; (v) engine generator set foundation drawings, (vi) foundation drawings for BESS equipment, and (vii) any structural drawings associated with the BESS equipment.

**5.2.11.** Appendix 16 sets forth the preliminary version of the Project Schedule. Within forty-five (45) days following the Effective Date, Contractor will develop and provide to Owner a detailed project schedule (the "**Project Schedule**"), which shall be substantially consistent with the preliminary version and which shall be subject to Owner's approval. Contractor shall oversee, coordinate and ensure the expeditious construction

of the Facility in accordance with Appendix 1A and Appendix 1B, the Project Schedule, and the other terms and provisions of this Agreement.

**5.2.12.** Procure and pay for, in Contractor's name as an independent contractor and not as agent for Owner, all Contractor and Subcontractor labor, Equipment and Materials, manufacturing and related services for construction of and incorporation into the Facility which are required for completion of the Facility in accordance with the Agreement and are not explicitly specified to be furnished by Owner pursuant to Article 4.

**5.2.13.** Furnish all Construction Equipment necessary and appropriate for the timely and safe completion of the Work in strict compliance with this Agreement. Notwithstanding anything to the contrary contained in this Agreement, Contractor shall be responsible for damage to or destruction or loss of, from any cause whatsoever (other than the negligence or willful misconduct of Owner and or it/s subcontractors), all Construction Equipment owned, rented or leased by Contractor or its Subcontractors for use in accomplishing the Work.

**5.2.14.** Provide to Owner within a reasonable period information requested by Owner to enable it to fulfill its obligations under this Agreement, including such assistance as is requested by Owner in dealing with any Governmental Unit in matters relating to the Work and the Facility.

**5.2.15.** Provide Owner and Owner's Representative with a monthly progress report (a "**Progress Report**"), not later than the tenth (10<sup>th</sup>) day of each calendar month detailing the progress of the Work for the immediately preceding month.

**5.2.16.** Provide cooperation and assistance to Owner in obtaining Governmental Approvals for which Owner is responsible.

**5.2.17.** Contractor shall permit Owner to witness the Engines' factory tests. Owner and its agents shall have access to Contractor's factory to witness such tests. For the avoidance of doubt, Owner's right to inspect as described in this Section shall not obligate Contractor to delay any part of the Work.

**5.2.18.** Have the full responsibility for care, custody and control of, and risk of loss of the Plant and BESS, as applicable, including any and all Consumables provided by Owner in accordance with the specifications set forth in Appendix 25 for the Plant, until Substantial Completion of the Plant and/or BESS, as applicable.

**5.2.19.** Comply with, and require that all Subcontractors and all personnel of Contractor and each Subcontractor comply with, all Laws applicable to the Work.

**5.2.20.** At the request of Owner upon reasonable advanced Notice, meet with Owner or Owner's Representative during regular business hours to discuss and respond to Owner inquiries with respect to the Work.

**5.2.21.** Contractor shall be responsible for giving Owner training and familiarization of the Facility in accordance with the Operator Training Program as specified in Appendix 23.

**5.2.22.** Provide the Equipment, technical, professional and construction personnel and supervision for completing the Work in accordance with the terms of this Agreement.

**5.2.23.** Attached as Appendix 25 is a list provided by Contractor of acceptable providers of Consumables (the "**Acceptable Providers**") together with a list of recommended types and quantities of Consumables required for start-up and to conduct Performance Tests, including the re-running of the Performance Tests, if necessary.

**5.2.24.** Cooperate with owner as necessary, and provide Owner in a timely manner with all documents and information necessary, to permit Owner to comply with its obligations set forth in Section 4.1.15 of this Agreement.

**5.3. Surplus Materials.** It is understood that in performing the Work, it may be necessary and inevitable that certain surplus material be purchased. Contractor shall, as soon as it is feasible to do so, determine and advise Owner what materials are surplus. Owner shall have the right to purchase any or all such materials at a mutually agreed upon price. Should Owner elect not to purchase any or all of the surplus material, Contractor shall remove such material from the Facility Site as soon as practicable.

**5.4. Emissions.** Notwithstanding anything to the contrary in this Agreement, wherever in this Agreement the Contractor makes a representation, or has any obligation to ensure, that the Facility will be in compliance with any Environmental Law relating to noise or ambient air emissions, or with any Governmental Approval respecting noise or ambient air emissions, any such representation or obligation shall be deemed satisfied to the extent that, (a) pursuant to the Stack Emissions Test and the Continuous Emissions Monitoring the Emissions Guarantee is met, and (b) pursuant and to the Noise Test the Noise Guarantee is met.

**5.5. Employment of Licensed Personnel and Labor Relations.** Contractor agrees to employ licensed personnel to perform engineering, design, architectural or other professional services needed in the performance of the Work. Contractor shall at all times use its all reasonable efforts and judgment as an experienced contractor to adopt and implement policies and practices designed to avoid work stoppages, slowdowns, disputes and strikes. Notwithstanding the foregoing, Contractor shall have the full responsibility and discretion to exercise its management rights in performing the Work. Such management rights shall include, but not limited to, the right to hire, discharge, promote and transfer its employees; to select and

remove foremen or persons at other levels of supervision; to establish and enforce reasonable standards of production; to introduce, to the extent feasible, labor saving equipment and materials; to determine the number of craftsmen necessary to perform a task, job or project; and to establish, maintain and enforce rules and regulations conducive to efficient and productive operations. Contractor shall comply with Section 21, DAVIS-BACON ACT, in Appendix 21.

**5.6. Contractors Licenses.** Contractor has obtained all licenses required by the laws of the US Virgin Islands in order for it to implement and perform the Project, which licenses are attached hereto as Appendix 17. In addition, Contractor shall obtain any and all additional permits, visas, licenses and authorizations required for it and its personnel to do business in St. Thomas, US Virgin Islands. Notwithstanding the foregoing, Contractor shall not be responsible for Governmental Approvals for which Owner is responsible.

**5.7. Discovery of Hazardous Materials or Regulated Materials.** Contractor shall not, nor shall it permit or allow any Subcontractor to, bring any Hazardous Materials or Regulated Materials on the Facility Site and shall bear all responsibility and liability for such materials; provided, however, that Contractor may bring onto the Facility Site such Hazardous Materials as are necessary to perform the Work so long as the same is done in compliance with applicable Law, Applicable Codes and Standards and the requirements specified in this Agreement, and Contractor shall remain responsible and strictly liable for all such Hazardous Materials, and Contractor shall be responsible for the removal, remediation avoidance or other appropriate action with respect to any Hazardous Materials brought onto the Facility Site by the Contractor, any subcontractor, or any of their respective agents or employees. If Contractor encounters Hazardous Materials at the Facility Site, which creates a safety or health hazard for Contractor, any Subcontractor or any employee, agent or representative, and/or which may impact the performance of the Contractor's responsibilities under the Agreement, Contractor shall notify Owner of the presence of the Hazardous Materials, and Contractor may suspend the performance of Work to the extent required to avoid any such safety or health hazard and until action sufficient to protect employees of Owner, Contractor and Subcontractors has been taken. Contractor shall notify Owner immediately upon encountering any Hazardous Materials (or materials or substances which Contractor believes to be Hazardous Materials) in or on the Facility Site. Owner shall be solely responsible for the removal of all pre-existing Hazardous Materials from the Job Site, at its sole cost, and Contractor shall be responsible, at its sole cost, for the removal, remediation, avoidance or other appropriate action, with respect to any Hazardous Materials brought onto the Job Site by the Contractor, any Subcontractor, or their respective agents or employees.

**5.8. Inspection of Facility Site.** Contractor acknowledges that prior to the execution of this Agreement, Contractor (a) has made an examination of the Facility Site and the surrounding areas, drawings and Technical Specifications and other information set forth in Appendix 1A, Appendix 1B, Appendix 2A and Appendix 2B, and (b) has made an examination to determine the difficulties and hazards incident to the performance of the Work, in each case, to the extent necessary to perform the Work, including (i) the location of the Project, (ii) the proximity of the Facility Site to adjacent facilities and structures, (iii) the conditions of the ports, roads and waterways in the vicinity of the Facility Site, including the conditions affecting shipping and transportation, access, disposal, handling and storage of Equipment and materials, (iv) the BESS and urea tank sites' subsoil, topographical and geotechnical condition as shown



in the geotechnical studies prepared by Contractor (for the Plant site, Contractor is relying on the topographical information from its previous work with Owner at the Plant site), (iv) the qualifications of all Subcontractors, and (vi) all other matters that might affect Contractor's performance under the Agreement or the design, engineering, procurement, fabrication, erection, construction, start-up, demonstration and testing of the Facility. Contractor has determined, based on such examination to Contractor's satisfaction that the Facility Site is adequate for the location of the Facility in accordance with Applicable Codes and Standards.

**5.9. Performance Bond and Payment Bond.** In order to secure Contractor's performance obligations under this Agreement, Contractor shall deliver to Owner, concurrently with the execution of this Agreement, (a) a performance bond issued by Vigilant Insurance in the penal amount of fifty (50) percent of the Contract Price and substantially in the form of Appendix 18 and (b) a payment bond issued by Vigilant Insurance in the penal amount of fifty (50) percent of the Contract Price and substantially in the form Appendix 19.

**5.10. Access to Facility Site.** Contractor shall provide Owner and its designees with access to the Facility Site and any other location at which Work is being performed at all times and arrange for Owner's (and its designees') access (at reasonable times and upon reasonable notice) to the engineering, manufacturing and fabricating premises of Contractor and all major Subcontractors sufficient to permit Owner (or its designees) to inspect Work being performed and monitor compliance by Contractor and the Subcontractors with the terms of the Agreement.

**5.11. Employee Identification; Facility Site Security.** Contractor shall provide a method, which shall be subject to the prior approval of Owner, of checking the employees of Contractor and its Subcontractors in and out of the areas in which the Work at the Facility Site is to be performed. Contractor shall be responsible that the Work is being performed in compliance with such method. Owner's review and approval of Contractor's method shall not in any way relieve Contractor of its responsibility regarding safety and security, and Owner, in reviewing and approving such method, assumes no liability for such method. Contractor shall also ensure that all of Contractors and Subcontractors' employees comply with the requirements of the Transportation Security Administration of the Department of Homeland Security with regard to the Transportation Worker Identification Credential ("*TWIC*"), including, to the extent permitted by applicable Law, the opportunity to have groups of 10 employees covered by a single *TWIC* certification.

**5.12. Further Assurances.** Contractor shall execute and deliver all further instruments and documents, and provide further assistance that may be necessary or that Owner may reasonably request in order to enable Contractor to complete performance of the Work or to otherwise effectuate the purposes or intent of the Agreement.

**5.13. Cooperation with Others.** Contractor acknowledges that Owner, other Contractor and other subcontractors or other Persons may be working at the Facility Site during the performance of this Agreement and the Work or use of certain facilities may be interfered with as a result of such concurrent activities. Contractor shall conduct its Work and shall cause its Subcontractors to conduct their Work, so as to minimize interference with the work of any of the other parties at the Facility Site, and Owner shall conduct its activities at the Facility Site

so as to minimize interference with the work of the Contractor and its Subcontractors at the Facility Site.

**5.14. Inspections.** Owner shall have the option of being present at all inspections on and off the Facility Site, and Contractor shall provide reasonable advance notice of inspections that Owner has specifically identified as witness tests. Any inspections under this Section shall be governed by Section 11.1. VIHFA will have the option to attend and observe any inspection where the Owner is present.

## **6. CHANGES.**

**6.1.** If Owner orders or causes changes to or stoppage of the Work or Equipment consisting of additions, deletions or other revisions, or if an Owner Delay occurs, or if a Change in Law occurs, Contractor shall be entitled to a written order for the changes (a "**Change Order**"), as applicable, and the Contract Price, in the form of Appendix 13, to be signed by the Parties, and the Substantial Completion Deadlines shall be adjusted accordingly in accordance with the terms and conditions of this Agreement, as mutually agreed between Contractor and Owner; provided, however that Contractor shall provide Owner with information and other documentation substantiating such impacts to the Contract Price, the Project Schedule or other delivery and performance guarantees as soon as reasonably practicable. Contractor shall not be obligated to proceed with any changes or extra work until the price of such change or extra work and its effect have been agreed upon between Contractor and Owner in writing. Any adjustments to the Contract Price set forth in a Change Order shall be on a fixed fee basis (i.e., not simply an estimate), and Contractor shall be responsible for any and all costs incurred in connection with carrying out the work contemplated by any Change Order in excess of the fixed fee set forth in such Change Order.

**6.2.** All claims by Contractor for adjustments to one or more of the Contract Price or the Substantial Completion Deadlines shall be supported by such documentation as is reasonably sufficient for Owner to determine the accuracy thereof, including invoices from Subcontractors.

**6.3.** Contractor shall use reasonable commercial efforts to mitigate any delay or costs resulting from the events described in Section 6.1 in connection with any adjustment to the Project Schedule or the Contract Price.

## **7. CONTRACT PRICE.**

**7.1. Contract Price.** In consideration of the Contractor's performance of the Work, VIHFA shall, on behalf of Owner, pay Contractor US\$75,143,018, as may be adjusted pursuant to the terms of this Agreement (as so adjusted, the "**Contract Price**"), which comprises US\$62,889,030 for the Plant, of which US\$ 17,608,928 is on-island and US\$45,280,102 is off-island, and US\$12,253,956 for the BESS, of which US\$1,838,093 is on-island and US\$10,415,863 is off-island. Payments will be made in accordance with the Milestone Payment Schedule included under Appendix 3A and Appendix 3B.

The Contract Price is complete compensation for engineering, procurement and construction of the Facility, inclusive of all taxes, tariffs, fees, levies, duties, deductions, withholdings, adjustments, charges, impositions and liabilities (collectively, "**Taxes**") imposed by any authorities, whether national, Federal or local, of St. Thomas, US Virgin Islands and associated with the performance of the Work by the Contractor or any Subcontractor, including without limitation all excise taxes, import taxes or customs duties and gross receipts taxes, which may be required to be withheld by Owner. For the purposes of this Contract, Owner shall be considered the importer of record with respect to all imported Equipment, supplies, materials or parts that are to become property of the Owner pursuant to this Agreement (the "**Imported Materials**"), title to which Imported Materials is to transfer to Owner prior to the arrival of such Imported Materials in the U.S. Virgin Islands, and which Imported Materials, as Owner's property, are currently exempt from custom duties and related import taxes in the US Virgin Islands,. The Parties agree to use commercially reasonable efforts to ensure that the Imported Materials benefit from such tax exemption.

**7.2.1.** Without limiting the generality of the foregoing, Contractor shall also be responsible for:

7.2.1.1. withholding taxes on employees of the Contractor and its Subcontractors in St. Thomas, US Virgin Islands,

7.2.1.2. duties or imposts imposed on the importation into St. Thomas, US Virgin Islands of (i) personal effects of employees of the Contractor or (ii) tools or equipment for performance of the Work if the imposition of the duty or impost arises from the failure of the Contractor to re-export the tools or equipment after completion of the Work;

7.2.1.3. any income tax imposed on Contractor or any Subcontractor;

7.2.1.4. all Taxes imposed on Contractor or any Subcontractor by any Governmental Unit outside of St. Thomas, US Virgin Islands associated with performance of the Work.

**7.2.2.** Owner shall pay all real property Taxes assessed against the Facility, the Facility Site or the Equipment

## **8. PAYMENT TERMS.**

**8.1. Milestone Payments.** After consultation with Owner with respect to the status of each upcoming Milestone, Contractor shall notify Owner in writing when it believes it has reached a particular Milestone, as detailed in Appendix 3A and Appendix 3B, and provide the documentation required in Appendix 3A and Appendix 3B to evidence that the Milestone has been completed, which notice shall be countersigned by the Owner, confirming that the applicable Milestone has, in fact, been achieved. Appendix 3A and Appendix 3B shall be amended only by a Change Order pursuant to this Agreement.

Contractor shall have the right to terminate the EPC Contract if the Mobilization Payments are not received within ninety (90) days following signature of the EPC Contract.

## **8.2. Payment in General.**

**8.2.1.** Payments to be made by VIHFA on behalf of Owner to Contractor under this Agreement shall be paid to the following accounts and banks, as applicable:

### **Wire Transfer Information (USD)**

Beneficiary: Wartsila North America. Inc.  
Bank: Nordea Bank Abp (publ), NY Branch  
Address: 1211 Avenue of the Americas, New York, NY 10036  
Account #: 7049163001  
ABA #: 026010786  
SWIFT: NDEAUS3N

**8.2.2.** Contractor may designate from time to time a different bank or account by notice to Owner given not less than twenty-one (21) Business Days prior to the next payment date to which such payment instructions are to apply. Said notice must be transmitted to Owner on Contractor's letterhead and must be signed by two officers of Contractor's company. The notice must be transmitted both electronically and in original hardcopy sent via courier. If the date for any payment called for under this Agreement should fall on a day that is not a Business Day at the location designated for receipt of such payment, then such payment may be made on the next succeeding Business Day in such location with the same effect as if made on the date due.

**8.2.3.** While VIHFA will be making payments, on behalf of Owner, directly to Contractor in accordance with the subrecipient agreement No. SA-DR(WAPA)-003-2019 signed between Owner and VIHFA to fund this Project, failure by VIHFA to make payments in accordance with the terms of this Agreement shall in no way relieve Owner from any payment, or other obligations, under this Agreement.

## **8.3. Invoices.**

**8.3.1.** Upon Owner's receipt of Contractor's invoices, Owner shall forward Contractor's undisputed invoices to VIHFA for payment. Payment of such invoices shall be made within forty (40) days following Owner's receipt of each of Contractor's invoices (the "**Payment Due Date**"). If a payment which VIHFA, on behalf of Owner, is to pay the Contractor under this Agreement (other than the Mobilization Payments) is not received by the Contractor within such period, Owner shall pay overdue interest to the Contractor at a rate equal to the Contract Interest Rate until the payment is made in full. In addition, in the event payment of an undisputed invoice

(other than with respect to the Mobilization Payments) is not made within an additional thirty (30) days following the original due date, the Contractor, upon delivery of a written Notice to Owner, in addition to the right to terminate the Agreement pursuant to Section 16.3.2, shall have the right to suspend the Work until such undisputed invoice is paid in full

**8.3.2.** Each invoice (other than the final invoice) shall be accompanied by (i) all documentation supporting Contractor's request for payment as required under this Agreement, and (ii) a fully executed intermediate lien and claim waiver from Contractor substantially in the form of Appendix 20.

**8.4. No Discounts.** All sums invoiced by the Contractor shall be paid to Contractor in accordance with this Section 8, and are not subject to any settlement discounts or other special terms of payment. Banking charges imposed by Owner's bank, associated with payments in accordance to Section 8 shall be borne by Owner.

**8.5. Interest.** Amounts not paid by either Party to the other when due hereunder, except for the Mobilization Payments, shall bear interest from the date payment was due to the date of payment at the Contract Interest Rate.

**8.6. Payment Disputes.**

**8.6.1.** In case Owner disputes a portion of an invoice, but not all of any payment amount due and owing hereunder, Owner shall forward such invoice to VIHFA with the request that the undisputed portion be paid promptly in accordance with the provisions of this Agreement. Contractor's acceptance of partial payment shall not be deemed to constitute a waiver of the right to receive amounts which are then in Dispute. The disputed amount shall within five (5) Business Days after such amounts are in dispute be placed in a mutually acceptable escrow account at a bank reasonably acceptable to Contractor.

**8.6.2.** Subject to Section 8.6(a), in the event of a Dispute between the Parties regarding any entitlement to any payment hereunder, either Party shall have the right to refer the Dispute for resolution in accordance with Article 19. Pending resolution of any such Dispute, Contractor shall continue its performance of the Work in accordance with this Agreement, unless the amount in Dispute exceeds US\$300,000. Amounts determined by the dispute resolution process of Article 19 to have been properly due to any Party by any other Party shall be payable to such Party by the other Party, together with accrued interest thereon from the time payment was originally due to the date of payment, within ten (10) days after (i) the effective date of the Parties' negotiated settlement or (ii) absent such settlement, any award issued pursuant to Article 19.

**9. COMMENCEMENT OF THE WORK.**

**9.1. Effective Date.** This Agreement shall become effective from the time when this Agreement is signed by the Parties.

**9.2. Notice to Proceed and Starting Date.**

**9.2.1.** Contractor shall have no obligation to commence the Work until it has received: (i) the Mobilization Payments and (ii) Notice to Proceed ("**Starting Date**").

**9.2.2.** As of the Starting Date, Contractor shall commence the Work and thereafter diligently pursue the Work.

**9.3 Substantial Completion Deadlines.** The Substantial Completion Deadline for the Plant is the date which is 21 calendar months from the Starting Date, subject to possible extension in accordance with this Agreement. The Substantial Completion Deadline for the BESS is the date which is 16 calendar months after the Starting Date, subject to possible extension in accordance with this Agreement

**10. INSPECTION, PERFORMANCE TESTS AND COMPLETION.**

**10.1. Inspection.**

**10.1.1.** Owner and its agents and representatives shall have the right to inspect, at Owner's cost, the Work at the Facility Site, at the factory of Contractor's affiliates and any other location where the Work is being performed, prepared or fabricated (including any item of Equipment and materials, design, engineering, or other service or the workmanship associated therewith), and Contractor shall, at the request of Owner, arrange for any such inspection at reasonable times (during normal business hours) and upon reasonable advance notice. VIHFA will have the option to attend and observe any inspection where the Owner is present. Owner shall inform Contractor within ten (10) days after an inspection of the Work of any Defects in the Work it discovers during such inspection of the Work. Owner's right to conduct inspections pursuant to this Section 10.1 or elsewhere in this Agreement shall not obligate Owner, to do so. Neither the exercise by Owner, of any such right, nor any failure on the part of Owner to discover or reject any Defects shall be construed as an approval or acceptance of such Defect or a waiver of such Defect or any of Contractor's obligations, duties or liabilities under this Agreement. All such inspections shall be conducted in a manner that does not unreasonably interfere with the normal performance and progress of the Work. Owner shall have general access to the Facility Site, and each of Owner and Contractor agree to observe all safety and security regulations established by Contractor and by Owner for the Facility Site.

10.1.2. If, in the reasonable judgment of Owner, the progress and quality of the Work is not proceeding in accordance with this Agreement, Owner shall be entitled to bring such matters to the attention of Contractor. Any inspections under this Section shall be governed by Section 10.1.

**10.2. Performance Test Procedures.**

10.2.1. No later than one hundred and fifty (150) days after the Starting Date, Contractor shall submit to Owner Performance Test Procedures based on the Draft Test Guidelines (attached hereto as Appendix 7A and Appendix 7B) for Owner's review and approval. Owner shall have twenty (20) days from the date of receipt to review the Performance Test Procedures and by written Notice submit reasonable comments to Contractor. Contractor shall review Owner's comments and, where reasonable and not inconsistent with the Draft Test Guidelines, incorporate them into the Performance Test Procedures and deliver the final Performance Test Procedures to Owner within fifteen (15) days after receipt of Owner's comments.

10.2.2. Contractor shall, no later than fifteen (15) days prior to the date that Contractor will perform the Performance Tests for the Plant or BESS, as applicable, provide Notice to Owner stating the date and time when the Performance Tests will commence, which date shall be as soon after Mechanical Completion as is practical. The Performance Tests shall be conducted in accordance with the Performance Test Procedures and shall take place in the presence of Owner and/or Owner's Representative. Contractor shall perform the initial Performance Tests and if the results of such Performance Tests fail to satisfy the Performance Guarantees, then Contractor shall be allowed to re-run the Performance Tests. Notwithstanding anything to the contrary herein, Contractor will have the right to test the Plant or BESS, as applicable, including the right to re-conduct any Performance Test until the Plant or BESS, as applicable, meets the Performance Guarantees or the Minimum Performance Criteria. Should the Plant or BESS, as applicable, meet the Minimum Performance Criteria, Contractor may at any time opt to stop conducting any Performance Test and pay the applicable Performance Liquidated Damages to Owner. If Contractor decides, at its sole discretion, that it would like the opportunity to try to prove to Owner that Contractor can meet the Performance Guarantees notwithstanding an impending Substantial Completion Deadline, having already reached the Minimum Performance Criteria, Contractor may request a reasonably short extension of the otherwise applicable Substantial Completion Deadline in order to re-conduct any Performance Test on any Engine or on the BESS, at times and on conditions acceptable to both parties, in their respective sole discretion. Owner shall have the right, at its sole discretion, for any reason or for no reason whatsoever, to accept or reject Contractor's request for any such extension, and to impose any mutually acceptable conditions to the granting of any such extension.

**10.2.3.** Contractor and Owner acknowledge that Contractor may perform a product conformity test ("PCT") at its plant in Finland using light fuel oil (LFO) in lieu of LPG and Contractor shall perform a PCT at its plant in Finland using LPG on a 6L model, which Owner shall have the right to witness; provided, however, that Owner shall not be deemed to have accepted any aspect of the Work or the Equipment as a result of either PCT, or to have waived any of its rights with respect to Contractor's obligation to conduct and satisfy the Performance Tests at the Facility using LPG.

**10.3. Substantial Completion.**

**10.3.1. Substantial Completion of the Plant.** Contractor shall achieve Substantial Completion of the Plant by the Substantial Completion Deadline for the Plant. "*Substantial Completion of the Plant*" shall occur on the date that all of the following criteria have been satisfied, and Owner and Contractor have executed Substantial Completion Certificate for the Plant:

10.3.1.1. Mechanical Completion shall have occurred;

10.3.1.2. The Performance Tests shall have been successfully completed, meaning all Minimum Performance Criteria shall have been achieved and all Performance Guarantees shall have been achieved, and Contractor and Owner shall have signed the Performance Test Certificate; provided, however, that the Substantial Completion Deadline for the Plant shall be extended by the number of calendar days, between the date of successful completion of the Emissions Test and the date that the final emission report is received from the third party lab;

10.3.1.3. The Plant Reliability Test shall have been successfully completed, meaning the guaranteed value is achieved;

10.3.1.4. Owner shall have received all drawings (except as-built drawings of the Plant), test results and back-up data (in sufficient detail to permit Owner to verify successful completion of the Performance Tests);

10.3.1.5. Contractor shall have delivered to Owner a written plan for completing all Punch List items necessary to achieve Final Completion of the Plant and such plan has been agreed to by Owner as evidenced by the signing of the Punch List by both Parties; provided, however, that in the event Owner and Contractor are unable to agree on the Punch List for the Plant, and all other pre-conditions to Substantial Completion of the Plant as set forth in this Section 10.3.1 have been completed, the Substantial Completion Deadline for the Plant shall be extended by the number of calendar days that elapses between the last of the pre-conditions set forth in this Section 10.3 to be completed and the date on which Owner and Contractor agree on a Punch List for the Plant; and



10.3.1.6. Contractor shall have delivered to Owner written notice that it has achieved Substantial Completion of the Plant (a "**Notice of Substantial Completion of the Plant**"). Owner shall, as promptly as reasonably practical, but in no case longer than ten (10) Business Days after receipt of such Notice of Substantial Completion of the Plant, (i) confirm that Substantial Completion of the Plant has been achieved, whereupon Owner and Contractor shall execute a Substantial Completion Certificate of the Plant, dated to reflect the Substantial Completion date as the date on which the Notice of Substantial Completion of the Plant was delivered; or (ii) reject Contractor's Notice of Substantial Completion, respond in writing giving its reasonable objections to such Notice, and Contractor shall take the appropriate corrective action. Upon completion of such corrective action, Contractor shall provide to Owner a new Notice of Substantial Completion of the Plant for approval. This process shall be repeated on an iterative basis until Owner accepts the Notice of Substantial Completion of the Plant and Owner and Contractor execute a Substantial Completion of the Plant Certificate, at which point "**Substantial Completion of the Plant**" shall have been achieved.

**10.3.2. Substantial Completion of the BESS.** Contractor shall achieve Substantial Completion of the BESS by the Substantial Completion Deadline for the BESS. "**Substantial Completion of the Plant**" shall occur on the date that all of the following criteria have been satisfied, and Owner and Contractor have executed Substantial Completion Certificate for the BESS:

10.3.2.1. Mechanical Completion of the BESS shall have occurred;

10.3.2.2. The Performance Tests shall have been successfully completed, meaning all Minimum Performance Criteria shall have been achieved and all Performance Guarantees shall have been achieved;

10.3.2.3. Owner shall have received all drawings (except as-built drawings of the BESS), test results (in sufficient detail to permit Owner to verify successful completion of the Performance Tests);

10.3.2.4. Contractor shall have delivered to Owner a written plan for completing all Punch List items necessary to achieve Final Completion of the BESS and such plan has been agreed to by Owner as evidenced by the signing of the Punch List by both Parties; provided, however, that in the event Owner and Contractor are unable to agree on the Punch List for the BESS, and all other pre-conditions to Substantial Completion of the BESS as set forth in this Section 10.3.2 have been

completed, the Substantial Completion Deadline for the BESS shall be extended by the number of calendar days that elapses between the last of the pre-conditions set forth in this Section 10.4 to be completed and the date on which Owner and Contractor agree on a Punch List for the BESS; and

10.3.2.5. Contractor shall have delivered to Owner written notice that it has achieved Substantial Completion of the BESS (a "*Notice of Substantial Completion of the BESS*"). Owner shall, as promptly as reasonably practical, but in no case longer than ten (10) Business Days after receipt of such Notice of Substantial Completion of the BESS, (i) confirm that Substantial Completion of the Plant has been achieved, whereupon Owner and Contractor shall execute a Substantial Completion Certificate of the BESS, dated to reflect the Substantial Completion date as the date on which the Notice of Substantial Completion of the BESS was delivered; or (ii) reject Contractor's Notice of Substantial Completion of the BESS, respond in writing giving its reasonable objections to such Notice, and Contractor shall take the appropriate corrective action. Upon completion of such corrective action, Contractor shall provide to Owner a new Notice of Substantial Completion of the BESS for approval. This process shall be repeated on an iterative basis until Owner accepts the Notice of Substantial Completion of the BESS and Owner and Contractor execute a Substantial Completion Certificate of the BESS, at which point "*Substantial Completion of the BESS*" shall have been achieved.

#### **10.4. Use of the Facility Prior to Substantial Completion Prohibited.**

10.4.1 Owner expressly agrees not to use the Plant or any material part thereof before the conclusion and acceptance by Owner of the Performance Tests. If Owner generates electricity from the Plant or an Engine(s), and such electricity is exported through the outgoing feeders after having been synchronized and connected to the grid, without the formal written consent of the Contractor, Owner shall be regarded as having thereby accepted the Plant or such Engine(s), as the case may be; the Contractor shall be relieved of their duty to carry out the Performance Tests with respect to the Plant or that Engine(s); the Final Completion Certificate shall be deemed to have been issued and accepted by Owner with respect to the Plant or that Engine(s); and Owner request VIHFA to pay to Contractor all remaining amounts of the Contract Price for the Plant or the Plant Pro-Rata Percentage with respect to that Engine(s). The Warranty for the common systems shall be deemed to have commenced upon the entering into of Commercial Operation of the first of the four Engines. In the event that Owner fails to provide sufficient and stable load, or Consumables or Owner's work delays Performance Tests (a "*Performance Test Delay*") with respect to any Engine(s) by more than sixty (60) days following Contractor's written notice that it is prepared to undertake the Performance Tests with respect to one or more Engines (the "*Performance Test Readiness Notice*"), then at the end of such forty five (45) day period, , Owner shall be regarded as having

thereby accepted such Engine(s) and the Facility; the Contractor shall be relieved of their duty to carry out the Performance Tests with respect to the Facility; and Final Completion Certificate shall be deemed to have been issued and accepted by Owner with respect to the Facility, Owner shall request VIHFA to pay all remaining amounts of the Contract Price due to Contractor; and the Warranty Period for the Facility shall start; and care, custody and control over the Facility and the Equipment and all components and parts thereof shall pass to Owner, and Owner shall bear the risk of loss with respect thereto.

**10.4.2** Owner expressly agrees to not use the BESS or any part thereof before the conclusion and acceptance by the Owner of the Performance Tests. If (i) the Owner generates electricity from the BESS or an Inverter(s) or charges and discharges the BESS or an Inverter(s), and such electricity is exported through the outgoing feeders without the formal written consent of the Contractor, (ii) the Owner takes the BESS or such Inverter(s) or any of its components into Commercial Operation without the formal written consent of the Contractor; (iii) Owner fails to provide sufficient and stable interconnection with the ability to charge and discharge electricity; (iv) fails to provide consumables; (v) fails to schedule Training fifteen (15) days after Commissioning of the BESS or such Inverter(s); or (vi) Owner's work delays the Performance Tests by more than fifteen (15) days, Owner shall be regarded as having thereby accepted the BESS or the Inverter(s); the Contractor shall be relieved of its duty to carry out the Performance Tests; the Final Completion Certificate for the BESS or that Inverter(s) shall be deemed to have been issued and accepted by Owner; and Owner shall request VIHFA to pay to Contractor all remaining amounts of the Contract Price for the BESS or the BESS Pro-Rata Percentage with respect to that Inverter(s).

#### **10.5. Contractor's Access After Substantial Completion Date:**

**10.5.1 For the Plant.** The Contractor shall prepare a Punchlist and provide it to Owner together with an estimate of the time to complete and/or correct each Punchlist item. Owner shall notify the Contractor within five (5) Business Days after receipt of the Punchlist that it accepts such Punchlist and estimate or shall otherwise state its reasons for disagreement therewith in reasonable detail; provided, however, that the acceptance or rejection thereof shall not relieve the Contractor of its liability to complete or correct the Punch List Items. Contractor shall use all reasonable efforts to complete the Punch List Items no later than one hundred and twenty (120) days after Substantial Completion of the Plant. Owner shall provide Contractor with reasonable and timely access to complete Punch List Items and its other obligations hereunder following the date of Substantial Completion of the Plant. In the event Contractor fails to complete any Punch List Item within such one hundred and twenty (120) day period, Owner shall have the right to complete such Punch List Item and Contractor shall promptly reimburse Owner for any and all expenses incurred in connection therewith, as reasonably documented by Owner.

**10.5.2 For the BESS.** The Contractor shall prepare a Punchlist and provide it to Owner together with an estimate of the time to complete and/or correct each

Punchlist item. Owner shall notify the Contractor within five (5) Business Days after receipt of the Punchlist that it accepts such Punchlist and estimate or shall otherwise state its reasons for disagreement therewith in reasonable detail; provided, however, that the acceptance or rejection thereof shall not relieve the Contractor of its liability to complete or correct the Punch List Items. Contractor shall use all reasonable efforts to complete the Punch List Items no later than one hundred and twenty (120) days after Substantial Completion of the BESS. Owner shall provide Contractor with reasonable and timely access to complete Punch List Items and its other obligations hereunder following the date of Substantial Completion of the BESS. In the event Contractor fails to complete any Punch List Item within such one hundred and twenty (120) day period, Owner shall have the right to complete such Punch List Item and Contractor shall promptly reimburse Owner for any and all expenses incurred in connection therewith, as reasonably documented by Owner.

**10.6. Final Completion.**

**10.6.1** "*Final Completion of the Plant*" shall occur on the date that the Contractor satisfies the last of the following criteria:

**10.6.1.** The Plant has achieved Substantial Completion;

**10.6.2.** Contractor has completed all Punch List Items for the Plant. Notwithstanding Contractor's obligation to complete all Punch List Items for the Plant prior to the Final Completion of the Plant, Owner may waive such Punch List Items and declare Final Completion of the Plant; provided, however, that such declaration of Final Completion of the Plant shall not absolve Contractor of its obligation to complete such Punch List Items;

**10.6.3.** Contractor has delivered to Owner all "as-built" drawings for the Plant;

**10.6.4.** No Contractor Event of Default shall have occurred and be continuing;

**10.6.5.** Contractor has delivered to Owner (i) a waiver of any and all liens, charges and encumbrances whatsoever of Contractor related to the Plant substantially in the form of Appendix 10 and (ii) a waiver of any and all liens, charges and encumbrances from any Subcontractor with whom Contractor has a Material Subcontract;

**10.6.6.** All applicable Liquidated Damages due and owing shall have been paid; and

**10.6.7.** Contractor and Owner have signed the Final Completion Certificate for the Plant (which Owner's signature shall not unreasonably be withheld).

**10.6.2 “Final Completion of the BESS”** shall occur on the date that the Contractor the Contractor satisfies the last of the following criteria:

**10.6.1.** The BESS has achieved Substantial Completion;

**10.6.2.** Contractor has completed all Punch List Items for the BESS. Notwithstanding Contractor’s obligation to complete all Punch List Items for the BESS prior to the Final Completion of the BESS, Owner may waive such Punch List Items and declare Final Completion of the Plant; provided, however, that such declaration of Final Completion of the Plant shall not absolve Contractor of its obligation to complete such Punch List Items;

**10.6.3.** Contractor has delivered to Owner all “as-built” drawings for the Plant;

**10.6.4.** No Contractor Event of Default shall have occurred and be continuing;

**10.6.5.** Contractor has delivered to Owner (i) a waiver of any and all liens, charges and encumbrances whatsoever of Contractor related to the Plant substantially in the form of Appendix 10 and (ii) a waiver of any and all liens, charges and encumbrances from any Subcontractor with whom Contractor has a Material Subcontract;

**10.6.6.** All applicable Liquidated Damages due and owing shall have been paid; and

**10.6.7.** Contractor and Owner have signed the Final Completion Certificate for the Plant (which Owner’s signature shall not unreasonably be withheld).

**11. LIQUIDATED DAMAGES.** The Parties acknowledge and agree that it is of the utmost importance that Substantial Completion of the Plant and BESS be achieved no later than the Substantial Completion Deadline for the Plant and the Substantial Completion Deadline for the BESS as applicable.

**11.1. General Provisions.** The Parties acknowledge and agree:

**11.1.1.** that it is important to achieve Substantial Completion of the Plant on or before the Substantial Completion Deadline for the Plant;

**11.1.2.** that because of the unique nature of the Facility and the unavailability of a substitute facility, it is difficult or impossible to determine with precision the amount of Damages that would or might be incurred by Owner as a result of Contractor’s failure to achieve Substantial Completion of the Plant or Substantial Completion of the BESS on or before the

Substantial Completion Deadline for the Plant or the Substantial Completion Deadline for the BESS;

**11.1.3.** that a failure of the Facility to meet the Performance Guarantees will cause damage to Owner which may be difficult or impossible to determine with precision;

**11.1.4.** that any sums which would be payable under this Article 11 are in the nature of Liquidated Damages, and not a penalty, and are fair and reasonable and that payment of the same represents a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failure, and shall, without duplication, be the sole and exclusive measure of damages with respect to any failure by Contractor to meet the Performance Guarantees, to achieve Substantial Completion of the Plant or Substantial Completion of the BESS on or before the Substantial Completion Deadline for the Plant or the Substantial Completion Deadline for the BESS as applicable; and

**11.1.5.** that the provisions for Liquidated Damages under this Article 11 are without prejudice to Contractor's obligation to cause the Plant and the BESS to meet the Minimum Performance Criteria.

**11.2. Performance Liquidated Damages.**

**11.2.1. For the Plant**

**11.2.1.1. Net Electrical Capacity Liquidated Damages.** If the Plant fails to meet the Net Electrical Capacity Guarantee during the Net Electrical Capacity Test, Contractor shall pay to Owner US\$1,000.00 per kWe below the Net Electrical Capacity Guarantee.

**11.2.1.2. Heat Rate Liquidated Damages.** If the Plant fails to meet the Heat Rate Guarantee as measured during the Net Electrical Capacity Test, Contractor shall pay to Owner US\$6000.00 per BTU/kWh above the Gross Heat Rate Guarantee.

**11.2.2. For the BESS**

**11.2.2.1. Capacity Liquidated Damages.** If the Capacity of the Equipment is less than the Capacity Guarantee as measured during the Initial Capacity Test, Contractor shall pay to Owner US\$500 per KW and US\$500 per KWh below the Capacity Guarantee.

**11.2.2.2. Power Liquidated Damages.** Should the Power of the Equipment be less than the Power Guarantee, Contractor shall pay Owner US\$ 500 per kW, prorated for fractions thereof, below the Power Guarantee

### **11.3. Delay Liquidated Damages.**

#### **11.3.1. For the Plant**

**11.3.1.1. Liquidated Damages for Delay.** If Substantial Completion of the Plant does not occur on or before the Substantial Completion Deadline for the Plant (as extended pursuant to any provision of this Agreement), other than as a result of Owner Caused Delay, Force Majeure, or Change in Law, Owner shall be entitled to receive Delay Liquidated Damages of US\$15,000 per Engine per day until Substantial Completion has occurred in lieu of actual damages and not as a penalty.

**11.3.1.2. Cessation of Delay Liquidated Damages.** If Contractor is required to pay Delay Liquidated Damages under this Section 11.3.1, then such obligation to pay such Delay Liquidated Damages shall cease to accrue upon the occurrence of the date that the Plant achieves Substantial Completion or enters into Commercial Operation.

#### **11.3.2. For the BESS**

**11.3.2.1. Liquidated Damages for Delay.** If Substantial Completion of the BESS does not occur on or before the Substantial Completion Deadline for the BESS (as extended pursuant to any provision of this Agreement), other than as a result of Owner Caused Delay, Force Majeure, or Change in Law, Owner shall be entitled to receive Delay Liquidated Damages of US\$3,750 per Inverter per day until Substantial Completion has occurred in lieu of actual damages and not as a penalty.

**11.3.2.2. Cessation of Delay Liquidated Damages.** If Contractor is required to pay Delay Liquidated Damages under this Section 11.3.2, then such obligation to pay such Delay Liquidated Damages shall cease to accrue upon the occurrence of the date that the BESS achieves Substantial Completion or enters into Commercial Operation.

**11.4. Liquidated Damages Not Penalty.** The Parties acknowledge and agree that it would be difficult or impossible to determine with absolute precision the amount of damages that would or might be incurred by Owner as a result of Contractor's failure to perform those matters hereunder for which Liquidated Damages are provided. The Parties agree that the amounts of Liquidated Damages provided under this Agreement are in lieu of actual damages and are the Parties' reasonable estimates of fair compensation for the losses that may reasonably be anticipated from such failures in respect of such matters, and do not constitute a penalty. Payment of Liquidated Damages specified in this Article is Contractor's exclusive obligation and Owner's exclusive remedy with regard to Contractor's failure to meet the Plant: (i) Net Electrical Capacity Guarantee, (ii) Gross Heat Rate Guarantee or, (iii) Substantial Completion Deadline, or Contractor's failure to meet the BESS: (i) Capacity Guarantee, (ii) Power Guarantee or (iii) Substantial Completion Deadline, whether said claims are designated

as arising in contract, warranty, tort (including negligence), strict liability, indemnity or otherwise.

**11.5. Cumulative Remedies.** The remedies set forth in this Article 11 with respect to Contractor's failure to meet the Plant: (i) Net Electrical Capacity Guarantee, (ii) Gross Heat Rate Guarantee or (iii) Substantial Completion Deadline, and the BESS: (i) Capacity Guarantee, (ii) Power Guarantee or (iii) Substantial Completion Deadline are cumulative and exclusive of any other remedies available under this Agreement or applicable Law.

**11.6. Payment of Liquidated Damages.** All Liquidated Damages with respect to the Plant shall be paid by the Contractor no later than twenty (20) days following the date of Substantial Completion of the Plant, and all Liquidated Damages with respect to the BESS shall be paid by the Contractor no later than twenty (20) days following the date of the Substantial Completion of the BESS. In the event of a failure by Contractor to pay all relevant Liquidated Damages within such time frame, Owner shall have the right to set-off any and all amounts of Liquidated Damages due and owing from any Milestone Payments due with respect to the Plant or the BESS.

## **12. LIMITATION OF LIABILITY.**

**12.1. Liquidated Damages Cap.** The total aggregate amount of Liquidated Damages to be paid by the Contractor to Owner under this Agreement shall in no case exceed: (i) twenty percent (20%) of the contract value for the Plant for the Plant Liquidated Damages, (ii) twenty percent (20%) of the contract value for the BESS for the BESS Liquidated Damages. In no case shall the total aggregate amount of Liquidated Damages to be paid by Contractor to Owner under this Agreement exceed twenty percent (20%) of the Contract Price (the "*Maximum Liquidated Damages Amount*").

**12.2. Maximum Aggregate Liability.** Contractor's maximum aggregate liability to Owner, Owner's insurers or permitted assignees, if applicable, pursuant to this Agreement whether arising from tort (including simple negligence or strict liability) or breach of Agreement (including Performance Liquidated Damages and Delay Liquidated Damages) shall not exceed one hundred percent (100%) of the Contract Price. Notwithstanding the foregoing, this Section 12.2 shall not apply (i) to the indemnification provisions of Article 20 with respect to claims by third parties; (ii) in the event of Contractor's gross negligence, fraud, willful misconduct or violation of applicable Law. Additionally, to the extent that (i) Contractor is covered by insurance provided under this Agreement in amounts in excess of the Contract Price, or (ii) Contractor should have been covered by insurance in accordance with the terms of this Agreement but fails to procure and maintain said insurance in accordance with the terms of this Agreement, Contractor's maximum aggregate liability hereunder shall be increased to one hundred and twenty percent (120%) of the Contract Price, provided that any amount paid under the insurance (or out of pocket in the event Contractor failed to obtain the required insurance) will apply as credit towards Contractor's maximum aggregate liability.

**12.3. Consequential Damages.** Except for Liquidated Damages (if any) and except in the case of fraud, gross negligence or willful misconduct, in no event, whether as a result of a breach of this Agreement, a breach of warranty, tort liability (including negligence



or strict liability), or otherwise, and whether arising before or after completion of the Facility, shall the Parties be responsible for special, indirect, punitive, or consequential damages of any nature whatsoever, including losses or damages caused by reason of unavailability of the Facility, shutdowns or service interruptions, loss of use, loss of profits or revenue, inventory or use charges, cost of purchased or replacement power, or claims of Owner's customers. Notwithstanding the foregoing, the limitation of liability in this Section 12.3 shall not apply to the Parties' third party indemnification and intellectual property indemnification obligations pursuant to Article 20.

### 13. WARRANTY.

**13.1. Contractor's Warranty.** Contractor represents and warrants that the Work, including the Equipment and materials and other items constituting the Facility, will (a) be new (except as otherwise agreed or permitted by Owner in writing), complete, fit for the purposes of generating electrical power in accordance with the Technical Specifications, when operated in accordance with this Agreement (b) be free of Defects in design, materials and workmanship; (c) conform to the Technical Specifications and other requirements of this Agreement, and (d) be performed in a good and workmanlike manner.

#### 13.2. Remedies.

**13.2.1.** Upon receipt of written notice thereof from Owner, Contractor, at its sole cost (including the cost of such repair, replacement, correction or re performances, any transportation, handling, shipping, replacement parts, labor and other expenses), shall promptly correct, repair, re-perform or, at its discretion, replace any part or component of the Work which is defective (the "**Corrective Work**") during the Primary Warranty Period (defined below) or, if applicable, Extended Warranty Period (defined below) as a result of faulty design, materials, and/or workmanship; provided, when required by Contractor, that such part or parts replaced be returned to Contractor, at Contractor's cost, to the place instructed by Contractor. Subject to Section 12.3, Contractor shall (i) be liable for and pay Owner for any and all property damages to the Facility incurred by Owner directly arising out of or relating to any Defects; and (ii) in any event, Contractor shall provide a service engineer to begin Corrective Work at the Facility as soon as reasonably possible after receipt by Contractor of Owner's notice. Owner shall immediately take appropriate steps to prevent any Defect from becoming more serious and to enable Contractor to rectify the aforesaid Defect. Any warranty claims or requests with respect to Contractor's warranty must be made in writing (inclusive of facsimile, e-mail or through Contractor's electronic portal) without delay during the Primary Warranty Period or, if applicable, Extended Warranty Period. Replaced parts shall become Contractor's property. Contractor shall bear all costs of repairing or replacing the defective parts originally supplied by Contractor, as well as the costs occasioned by the transport of the defective parts and of the repaired or replacement parts between the Facility and the place of repair or replacement as instructed by Contractor. Owner shall provide the Contractor with full

and free access to the Facility to perform its warranty obligations under this Agreement, so long as such access does not unreasonably interfere with the operation of the Facility and subject to any reasonable security or safety requirements of Owner. If Owner fails to provide the Contractor with such access after reasonable notice from the Contractor, then the Contractor shall have no obligation to perform warranty obligations hereunder. Any change to Equipment and Materials that would alter the Technical Specifications may be made only with prior written approval of Owner. All costs incidental to Contractor's performance of its warranty obligations and Corrective Work, including the removal, replacement and reinstallation of Equipment and materials necessary to gain access to any Defect in the Work and retesting of repaired or replaced Work (if appropriate in accordance with industry standards) shall be borne by Contractor. Any Taxes for importation into St. Thomas, U.S. Virgin Islands of items required to meet Contractor's warranty obligations shall be borne by Contractor, if not otherwise exempt.

**13.2.2.** If, after fourteen (14) days' notification of a warranty defect (or, in the case of a warranty defect which jeopardizes the performance of the Facility, three (3) business days after such notification), Contractor has not commenced a response to the correction of the breach and thereafter diligently pursued a correction, then Owner, by written notice to Contractor, may correct or cause to be corrected such breach in accordance with this Agreement, and Contractor shall be liable for all reasonable costs, charges and expenses incurred by Owner in connection with such repair or replacement and arising from or relating to such Defect and shall forthwith pay to Owner an amount equal to such costs, charges and expenses upon receipt of invoices certified by Owner. Owner's action in correcting Defects in accordance with this Section shall not void Contractor's warranty obligations so long as the correction is performed in accordance with Contractor's directions and instructions, or, in the absence of such directions and instructions, in accordance with Prudent Industry Practices. Subject to Section 13.4, if during any consecutive six (6) months during the Primary Warranty Period any Work is repeatedly Defective in the same manner on three (3) or more occasions and materially adversely affects commercial operation of the Facility, the Contractor shall negotiate with Owner in good faith for an extension of the Extended Warranty Period for such defective Work. The foregoing shall not apply to the extent such reoccurring Defect is a result of Owner's negligence, willful misconduct or failure to use authorized parts. The remedies set forth in this Section 13.2 and the other remedies of Owner set forth in this Agreement are the sole and exclusive remedies of Owner for any breach of the warranty set forth in Section 13.1.

**13.3. Warranty Period.**

**13.3.1 For the Plant.** The warranty set forth in this Article shall apply with regards to the Plant or an individual Engine, as applicable, for a period commencing on Substantial Completion or Commercial Operation of the Plant or an individual



Engine, as applicable, whichever occurs first, and ending twelve (12) months thereafter (the "*Plant Primary Warranty Period*"). With regard to the common systems shared by the Engines, the Plant Primary Warranty Period for the common systems will commence once the first engine reaches Substantial Completion or Commercial Operation. The warranty period with respect to parts which have been repaired or replaced during the Primary Warranty Period shall be twelve (12) months from the date of repair or replacement or until the expiration of the Primary Warranty Period, whichever occurs later (the "*Plant Extended Warranty Period*"); provided, however, that in no event shall the Extended Warranty Period extend beyond twenty-four (24) months after the Plant Primary Warranty Period began. The Plant Extended Warranty Period applies only to parts or components of the Work which are repaired or replaced during the Plant Primary Warranty Period and not to the remaining parts or components or other items of Equipment.

**13.3.2 For the BESS.** The Warranty set forth in this Article shall apply with regards to the BESS as follows:

- a. Battery Modules: 3 years from Substantial Completion or Commercial Operation of the BESS;
- b. Battery Inverter: 5 years from Substantial Completion or Commercial Operation of the BESS; and
- c) Balance of BESS: 1 year from Substantial Completion or Commercial Operation of the BESS.

**13.4. Exclusions from Warranty.** Contractor's warranty does not cover any Defect due to or connected with: (a) materials or components or design provided by Owner or on behalf of Owner (except for Contractor); (b) negligence of Owner, its employees or agents or other third parties (other than Subcontractors); (c) use of spare parts other than those supplied by or on behalf of Contractor; (d) improper installation or alterations by Owner; or (e) use by Owner of parts, accessories or attachments which are not sold, supported or expressly approved in writing by Contractor. In particular, Contractor's warranty does not cover any Defects that are caused by or connected with normal wear and tear, the use of unsuitable material or consumables or fuel not in accordance with the Agreement, fluctuations in the grid, maintenance, service or operation of the Facility or any part thereof which, in each case, are not in conformity with Contractor's or any Subcontractor's manuals, instructions or technical specifications or which is otherwise not in accordance with Good Engineering and Construction Practices.

**13.5. Subcontractor Warranties.** Contractor shall, without additional cost to Owner, obtain warranties from Subcontractors that meet or exceed the requirements of this Agreement; provided, however, Contractor shall not in any way be relieved of its responsibilities and liability to Owner under this Agreement, regardless of whether such Subcontractor warranties meet the requirements of this Agreement, as Contractor shall be fully responsible and liable to Owner for its warranty and Corrective Work obligations and liability under this Agreement for all Work. All such warranties of Subcontractors shall be deemed to

run to the benefit of Owner and Contractor. Contractor shall be responsible for enforcing the warranties of all Subcontractors through the relevant Primary Warranty Period or, if applicable, the relevant Extended Warranty Period, unless Owner requests that any such warranties be assigned to it at an earlier date. Any Subcontractor warranties that are still in existence at the end of the relevant Primary Warranty Period or Extended Warranty Period, as the case may be, shall be assigned by Contractor on such date to Owner. All such warranties, with duly executed instruments assigning the warranties to Owner, shall be delivered to Owner upon expiration of the Primary Warranty Period or the Extended Warranty Period, as the case may be. Contractor shall provide reasonable assistance to Owner in connection with the enforcement of Owner of any Subcontractor warranty. Contractor agrees that: (i) Contractor's warranty, as provided under this Article 13 shall apply to all Work, regardless of the provisions of any Subcontractor warranty, and any such Subcontractor warranty shall be in addition to, and not a limitation of, such Contractor warranty; (ii) Contractor is jointly and severally liable with each Subcontractor with respect to all Subcontractor warranties during the Primary Warranty Period or the Extended Warranty Period, as the case may be (but shall have no liability with respect to warranties assigned by Subcontractors to Owner that extend beyond the Primary Warranty Period or Extended Warranty Period); and (iii) service of notice on Contractor that there has been a breach of a Subcontractor warranty shall be sufficient to invoke the terms of this Agreement relating to Corrective Work. This Section 13.5 shall not in any way be construed to limit Contractor's liability under this Agreement for the entire Work or its obligation to enforce Subcontractor warranties.

**13.6. Non-Defect Claims.** Should Owner make a warranty claim under the warranty provided by this Agreement, and it is determined that there exists no Defect covered by such warranty, Owner shall reimburse Contractor the actual and documented reasonable costs and expenses of Contractor for any work performed, including all costs for conducting the investigation of the alleged Defect.

**13.7. Contractor's Right to Test the Facility After Substantial Completion.** The Parties agree and acknowledge that due to the technology enhancements made to the Facility, certain development activities and modifications to the Facility may become necessary. As such, the Parties agree that Contractor has the opportunity to perform limited tests to the Facility, at Contractor's cost, for a one-year period after Substantial Completion of the Plant or BESS, as applicable, other than the tests set forth in Section 10.2(b) above, in order to attempt to achieve greater efficiency for the Facility, subject to Owner's consent, which may be withheld for any reason or for no reason, and subject to the following conditions:

- 13.8.1 Contractor shall provide Owner with a written Notice of at least ten (10) days prior to the date Contractor intends to conduct the tests;
- 13.8.2 Contractor shall not commence any test unless it has first obtained a written approval from Owner regarding the terms and conditions of the test, which approval Owner may withhold at its sole discretion for any reason or for no reason;
- 13.8.3 Contractor shall use reasonable efforts to schedule the tests taking into consideration the operation schedule of the Facility, to ensure minimal

downtime and disruption, subject in all cases to Owner's consent, which may be withheld for any reason or for no reason;

13.8.4 Without in any way derogating from the provisions of Section 20.1, Contractor shall reimburse Owner for all reasonable direct costs that Owner incurs as a direct consequence of Contractor's performing the tests (including, without limitation, compensation for Owner's personnel), provided, however, that the Parties shall agree on the amount of such reasonable direct costs prior to the performance of any tests, and that Owner submits written documentation to Contractor to support the reasonable direct costs.

**13.8. Limited Warranty. THE WARRANTIES SET FORTH IN THIS ARTICLE ARE THE ONLY WARRANTIES BY CONTRACTOR APPLICABLE TO THE FACILITY AND WORK AND ARE EXPRESSLY IN LIEU OF ANY OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR ANY OTHER WARRANTY EXPRESSED OR IMPLIED AGAINST DEFECTS, LATENT OR OTHERWISE. CONTRACTOR NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY OTHER WARRANTY OBLIGATION IN CONNECTION WITH THE WORK OR THE FACILITY OR ANY PART THEREOF. NOTWITHSTANDING ANYTHING TO THE CONTRARY, THIS SECTION 13.10 SHALL IN NO WAY LIMIT CONTRACTOR'S OBLIGATIONS TO COMPLY WITH ARTICLE 10, TO COMPLY WITH, AND TO CAUSE THE FACILITY TO COMPLY WITH, ALL THE PERFORMANCE GUARANTEES, TO CAUSE THE FACILITY TO ACHIEVE SUBSTANTIAL COMPLETION AND FINAL COMPLETION AND TO PERFORM ITS OTHER OBLIGATIONS UNDER THIS AGREEMENT.**

**13.9. Samples.** The Contractor shall have the right at any time during the Primary Warranty Period and the Extended Warranty Period to ask for or take samples of used fuel(s), used lube oils, used cooling water or any used chemicals. Furthermore, the Contractor shall have the right to on-line access to all data in the WOIS/WISE (Wärtsilä Operating Interface System) via remote monitoring as well as free access at any time to the log books of the Facility.

**13.10. Minor Items.** Minor items found to be defective during the Primary or the Extended Warranty Period for the Plant or the Warranty period for the BESS which Owner determines can easily be replaced or installed by Owner's personnel following instructions sent by the Contractor, including but not limited to sensors, shall be sent to the Facility Site by the Contractor but installed by Owner at Owner's cost.

#### **14. TITLE AND RISK OF LOSS.**

**14.1. Equipment and Work.** Title to drawings, specifications and like materials will remain with Contractor except with respect to Imported Materials as set forth in Section 7.2. Title to Work and Equipment provided by Contractor or Subcontractors hereunder will pass

to Owner as and to the extent payment therefor is made by Owner in accordance with this Agreement.

**14.2. Risk of Loss.** Contractor shall have care, custody and control of, and shall bear the risk of loss with respect to, the Facility and all Equipment in connection with the Work until Substantial Completion of the Plant or the BESS as applicable. Upon Substantial Completion or Commercial Operation of the Plant or BESS, as applicable, whichever occurs first, Owner shall have care, custody, and control of, and shall bear the risk of loss of the Plant and/or BESS and all Equipment.

**14.3. Contractor's Drawings, Etc. for Use by Owner.**

**14.3.1. Rights in Drawings, Etc.** Subject to the other provisions of this Agreement, Contractor shall deliver to Owner certain drawings, technical data, manuals, test results, inspection results and descriptions of the Work and/or Equipment ("**Documentation**"). Title to drawings, specifications and like materials will remain with Contractor. All intellectual property rights in the Documentation furnished or to be furnished by Contractor to Owner pursuant to this Agreement shall remain Contractor's property. All rights to intellectual property developed, utilized, or modified in the performance of the Work shall remain the property of the Contractor and/or its Subcontractors.

**14.3.2. Licenses.** Contractor further shall grant and hereby grants to Owner (and shall procure for Owner from Subcontractors or other parties) an irrevocable, perpetual, non-exclusive and royalty-free license under all patents and other intellectual property and proprietary rights to the extent necessary for the operation, maintenance or repair (but only to the extent such operation, maintenance or repair is of the type ordinarily performed by owners of facilities similar to the Facility) of the Facility or any component thereof designed, specified or constructed under this Agreement.

**14.3.3. Reuse of Documents for Other Facilities.** All Documentation prepared by Contractor or its Subcontractors pursuant to this Agreement are instruments of service in respect to the Facility. This Documentation is not intended or represented to be suitable for reuse by Owner or others on extensions of the Facility or on any other project. Any reuse without prior written verification by Contractor or its Subcontractors will be at Owner's sole risk and without liability or legal exposure to Contractor or its Subcontractors. Owner shall defend, indemnify and hold harmless Contractor and its Subcontractors against all claims, losses, damages, injuries, and expenses, including attorneys' fees, arising out of or resulting from such reuse. Any illustrations, catalogues, drawings and dimensions which are either provided by Contractor or are otherwise acquired by Owner and which relate to the Equipment or Work are for information purposes only and are not to be relied upon by Owner as containing any representations, warranties or indemnities.

**14.3.4. Equipment Technical Data.** Notwithstanding anything to the contrary, Contractor and its affiliates shall have the right to collect data from sensors, instruments, monitors, data collectors, industrial control or SCADA devices located at the Owner's sites or on the equipment delivered ("Data") and use such Data, including but not limited, to support and develop its products, solutions and services. The Data will be collected remotely through a WOIS data push. Data may be transferred within Contractor and its affiliates and to third parties who act for or on its behalf for processing the data. Owner shall own all Data collected, Contractor and its affiliates shall own any enrichment, report or derivative work developed or derived from such data. The rights granted hereunder shall survive any termination or expiration of the Agreement. Notwithstanding anything to the contrary herein, Contractor shall not have the right to share any Data with, or disclose any Data to, any third party without Owner's prior written consent. Contractor shall indemnify Owner for any and all Losses resulting from any viruses or malware introduced into Owner's systems or cyber security breaches of Owner's systems resulting from the collection of such Data.

**15. FORCE MAJEURE.** For purposes of this Agreement, the term "*Event of Force Majeure*" shall mean any cause or occurrence affecting the ability of a Party to perform its obligations under this Agreement, which cause or occurrence is beyond the reasonable control of the Party affected and not due to an act or omission of the Party affected and which could not have been reasonably foreseen or avoided by the exercise of reasonable diligence, including acts of God or the public enemy; expropriation or confiscation of facilities; trade or economic sanction; sabotage, acts of war (declared or undeclared); blockade; embargo; insurrection; hostilities; civil unrest; riots; military or guerilla action; terrorist activity or threats of terrorist activities which, under the circumstances, would be considered a precursor to actual terrorist activity; banditry; abnormally adverse weather conditions not reasonably anticipated by the Parties (normal bad weather prevailing at any site at which the work is being performed, however, shall not be included); adverse weather conditions on the high seas; tsunamis; earthquakes; unforeseen subsoil conditions; fires; floods; explosion; accidents; riots; strikes, work stoppages, boycotts, walkouts or other labor disturbances; failures in common carrier services or utility services; or any causes, whether or not of the same class or kind as those specifically named above. Without limiting the generality of the foregoing, any delay in the issuance of any Governmental Approval shall be deemed an Event of Force Majeure, provided, however, that such delay is not attributable (i) to Owner's negligence or willful misconduct, in which case such delay will be deemed to constitute an Owner Caused Delay, or (ii) to Contractor's negligence or willful misconduct, in which case such delay will not give rise to any extension of the Substantial Completion Deadline.

The Parties expressly agree that COVID-19 shall be deemed a Force Majeure event under this Agreement (whether foreseen or unforeseen at the time of this Agreement). Further, and accordingly, any existing arrangements that are, at the time of this Agreement, already affected by COVID-19 shall not be within the control of a Party. In accordance with this Agreement, the Contractor shall keep the Owner informed of the implications of COVID-19 on the Contractor's performance under this Agreement.

**15.1. Failure to Perform Due to an Event of Force Majeure.** Neither Party shall be deemed in breach of this Agreement because of any failure or delay in complying with its obligations under or pursuant to this Agreement (except Owner's obligations to make payment) to the extent such failure or delay is due to one or more Events of Force Majeure or their effects or by any combination thereof, and the periods allowed for the performance by the Parties of such obligations shall be extended for so long as such events or effects continue. The Parties agree to bear their respective costs, including Direct Costs, incurred as a result of an Event of Force Majeure, and Contractor shall not be entitled to an adjustment to the Contract Price, or to a Change Order, to the extent Contractor incurs additional costs and expenses derived from a Force Majeure Event. Notwithstanding the foregoing, either Party may terminate this Agreement if Force Majeure delays a Party's performance for a period greater than six (6) months (in the aggregate).

A Party affected by an Event of Force Majeure shall comply with the following:

**15.1.1.** the affected Party shall give the other Party written notice estimating the event's expected duration and probable impact on the performance of such Party's obligations hereunder, and such affected Party shall continue to furnish timely regular reports with respect thereto during the continuation of the event;

**15.1.2.** the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the event;

**15.1.3.** the affected Party shall exercise all reasonable efforts to mitigate or limit damages to the other Party, promptly taking appropriate and sufficient corrective action; and

**15.1.4.** the affected Party shall use all reasonable efforts to continue to perform its obligations hereunder.

## **16. EVENTS OF DEFAULT; TERMINATION.**

**16.1. Contractor Events of Default.** Contractor shall be in default hereunder upon the occurrence of any one of the following events, which shall be events of default (each an "**Event of Contractor Default**") if not cured within fourteen (14) days following delivery to Contractor of a notice of such event from Owner, or, if capable of being cured but not within such fourteen (14) day period, if Contractor has not commenced the cure within such period and does not thereafter diligently pursue such cure, provided that each of the events described in Sections 16.1(a) and 16.1(c) below shall be an Event of Contractor Default upon its occurrence:

**16.1.1. Unauthorized Assignment or change of control.** Contractor shall have assigned or transferred this Agreement or any right or interest herein, or Contractor shall have undergone a direct or indirect change in ownership in excess of 50%, or a direct or indirect change in control, except, in either case, as expressly permitted by this Agreement or agreed to by Owner;



**16.1.2. Material Default.** Contractor shall have materially defaulted in its obligations hereunder. **Bankruptcy.** Any proceeding shall have been instituted against Contractor seeking to adjudicate Contractor as bankrupt or insolvent; provided that such proceeding shall not have been dismissed within one hundred twenty (120) days of such filing and the conciliator in such proceeding has determined he will not oppose the due performance of this Agreement.

**16.1.4. Liquidated Damages.** Contractor shall have incurred liability for Liquidated Damages in an amount equal to the Maximum Liquidated Damages Amount.

**16.2. Owner's Remedies Against Contractor.**

**16.2.1.** Without limiting Owner's rights to Liquidated Damages under this Agreement, if an Event of Contractor Default shall have occurred and be continuing, Owner shall have the right to terminate this Agreement by delivery of a notice of termination to Contractor, in addition to any rights and remedies that may be available at law or in equity, including without limitation the right to recover any and all damages, losses, costs and expenses, including without limitation reasonable attorney's fees ("**Losses**") incurred by Owner resulting from such Contractor Default. If Owner elects to terminate this Agreement pursuant to this Section, Contractor shall not be entitled to retain or receive any amounts paid or payable hereunder except for an amount equal to Contractor's actual reasonable unrecovered costs of any Equipment and Work of which Owner has taken possession or received, less any damages Owner has incurred as result of such Event of Contractor Default. Additionally, upon any such termination, Contractor shall assign to Owner (to the extent assignable) all purchase orders, vendor contracts and other subcontracts entered into by Contractor in connection with its performance hereunder which are designated by Owner.

**16.3. Events of Default by Owner.** Owner shall be in default hereunder upon the occurrence of any one of the following events, which shall be events of default (each an "**Event of Owner Default**") if not cured within thirty (30) days following delivery to Owner of a notice of such event or, if capable of being cured but not in such thirty (30) day period, if Owner has not commenced the cure within such period and does not thereafter diligently pursue such cure, provided that the events described in Sections 16.3.1 and 16.3.4 below shall be an Event of Owner Default upon its occurrence:

**16.3.1. Unauthorized Assignment.** Owner shall have assigned or transferred this Agreement or any right or interest herein except as expressly permitted by this Agreement or as agreed to by Contractor;

**16.3.2. Payment Default.** Failure of any amount payable to Contractor to be paid when due in accordance with this Agreement (other than the Mobilization Payments, which are addressed in Section 8.1);

provided that any amount disputed by Owner shall not be considered due until determined to be payable in accordance with the dispute resolution process of this Agreement;

**16.3.3. Material Default.** Owner shall have materially defaulted in its material obligations under this Agreement;

**16.3.4. Bankruptcy.** Any proceeding shall have been instituted against Owner seeking to adjudicate Owner as bankrupt or insolvent, provided such proceeding shall not have been dismissed within one hundred twenty (120) days of such filing and the judge in such proceeding has determined he will not oppose the due performance of this Agreement.

**16.3.5. FUNDING.** In the event HUD/VIHFA defunds the Project and Owner cannot demonstrate to the satisfaction of Contractor that they have secured alternate funding within thirty (30) days after the defunding by HUD/VIHFA.

**16.3.6. Amended Subrecipient Agreement.** Owner fails to provide the Amended Subrecipient Agreement required under Section 4.1.16.

**16.4. Contractor Remedies.** Notwithstanding this Agreement's dispute resolution process, if an Event of Owner Default shall have occurred and be continuing, Contractor shall have the right to terminate this Agreement by delivery of a notice of termination to Owner, in addition to any rights and remedies that may be available at law or in equity including without limitation the right to recover all Losses incurred by Contractor resulting from such Owner Default. If Contractor elects to terminate this Agreement pursuant to this Section, Owner shall pay to Contractor, within thirty (30) days after receipt of Contractor's invoice therefor, an amount calculated as follows:

**16.4.1.** The actual Direct Cost to Contractor of items of Equipment and Work already provided to Owner (excluding items that have been paid for already) and an allowance for profit at the rate of fifteen percent (15%) on the Direct Costs to Contractor of items of Equipment and Work provided by Contractor (provided, however, that all of Contractors' overhead and associated expenses relating to the Work are deemed to be included in such fifteen percent (15%) figure;

**16.4.2.** Reasonable and documented expenses actually incurred by Contractor in settling Contractor's terminated orders and subcontracts hereunder; and

**16.4.3.** Reasonable and documented expenses of demobilization, equipment storage, transportation, and handling including reasonable overhead.

## 17. CONTRACTOR REPRESENTATIONS AND WARRANTIES.

Contractor represents and warrants to Owner that:

**17.1. Organization and qualification.** It is a corporation duly organized and validly existing under the laws of Maryland. It has all necessary power and authority to (1) carry on its business as presently conducted and holds all franchises, licenses and permits required therefore, (2) own or hold its properties, and (3) to enter into and perform its obligations under this Agreement and to carry out the transactions contemplated herein.

**17.2. Authorization, Approvals, no Defaults.** The execution, delivery and performance of this Agreement by Contractor (1) has been duly authorized by all requisite company action and is in accordance with its articles of incorporation and by-laws; (2) to the best of Contractor's knowledge will not conflict with any provisions of applicable law; and (3) will not conflict with, result in the breach of, constitute a default under any agreement to which it is a party.

**17.3. Enforceability.** This Agreement constitutes the legal, valid and binding obligation of Contractor enforceable in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, or similar laws affecting creditors' rights generally.

**17.4. Legal proceedings.** There is no action, suit or proceeding, at law or in equity, or official investigation by or before any governmental authority, arbitral tribunal or any other body pending or, to the knowledge of Contractor threatened, against or affecting Contractor or any of its properties, rights or assets, which could affect the validity or enforceability of this Agreement, the ability of Contractor to fulfill its commitments hereunder in any material respect, or that could reasonably be expected to result in a material adverse effect on the business or financial condition of Contractor or the Contractor's ability to perform its obligations under this Agreement. Contractor has no knowledge of any violation or default with respect to, or the existence of, any order, writ, injunction or any decree of any court or any governmental department, commission, board, agency or instrumentality or any arbitration panel which may result in any such nonperformance of its obligations under this Agreement or material adverse effect on its ability to perform such obligations.

**17.5. Necessary Rights.** Contractor owns or will obtain the legal right to use all patents, rights to patents, trademarks, copyrights and licenses necessary for the performance by Contractor of this Agreement.

**17.6. Qualification.** Contractor possesses the know-how, full experience, proper qualification and wherewithal to construct the Facility and to perform and comply with its obligations under this Agreement.

**17.7. No Existing Breach or Default.** Contractor is not currently in breach of, in default under, or in violation of, and the execution and delivery of this Agreement and the performance of its obligations hereunder will not constitute or result in any breach of, default under or violation of, any applicable statute, law, ordinance, decree, rule, or regulation of any Governmental Unit, or the provisions of Contractor's articles of incorporation or by-laws, or any franchise or license, or any provision of any indenture or any evidence of indebtedness or

security therefor, lease, contract, license or other agreement by which it is bound, except for such breaches, defaults or violations as will not, either individually or in the aggregate, result in a material adverse effect on the ability of Contractor to perform its obligations hereunder.

**17.8. Patents, Licenses, Franchises.** Contractor owns or possesses all the patents, trademarks, service marks, trade names, copyrights, licenses, franchises, permits and rights with respect to the foregoing necessary to perform the Work, enable Owner to utilize the Facility and to carry on its business as presently conducted and presently planned to be conducted without conflict with the rights of others.

**17.9. Compliance with Laws.** Contractor has complied with all applicable Laws such that it has not been subject to any fines, penalties, injunctive relief or criminal liabilities which in the aggregate have materially affected or may materially affect its business operations or financial condition or its ability to perform the Work.

**17.10. The Agreement.** Owner has relied upon Contractor's expertise in developing and providing the information and design materials for use in the Project. Contractor hereby warrants and represents that such information, when final, will be accurate, adequate and complete to engineer, procure and construct the Project for the Contract Price, by the Substantial Completion Deadline, and in accordance with all requirements of this Agreement, including applicable Laws, Applicable Codes and Standards, the warranties set forth herein, the Minimum Performance Criteria, and the Performance Guarantees. Accordingly, Contractor (i) hereby agrees that it shall have no right to claim or seek an increase in the Contract Price or an adjustment to the Project Schedule with respect to any incomplete, inaccurate or inadequate information or requirements that may be contained or referenced in the Technical Specifications, and (ii) hereby waives and releases Owner from and against such claims.

**17.11. Applicable Laws and Applicable Codes and Standards.** Contractor warrants that it can perform the Work at the Contract Price and by the Substantial Completion Deadline in accordance with applicable Law and Applicable Codes and Standards. Contractor shall perform the Work in accordance with applicable Laws and Applicable Codes and Standards. Contractor shall promptly notify Owner of any Changes in Law.

**18. OWNER REPRESENTATIONS AND WARRANTIES.** Owner represents and warrants to Contractor that:

**18.1. Organization and qualification.** It is an autonomous governmental instrumentality duly organized and validly existing under the laws of the United States Virgin Islands. It has all necessary power and authority to carry on its business as presently conducted, to own or hold its properties, and to enter into and perform its obligations under this Agreement.

**18.2. Authorization, approvals, no defaults.** The execution, delivery and performance of this Agreement by Owner (1) has been duly authorized by all requisite company action; (2) to the best of Owner's knowledge will not conflict with any provisions of applicable law; and (3) will not conflict with, result in the breach of, or constitute a default under any

agreement to which it is a party or by which it or any of its properties or assets is bound or affected.

**18.3. Enforceability.** This Agreement constitutes the legal, valid and binding obligation of Owner enforceable in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, or similar laws affecting creditors' rights generally.

**18.4. Legal proceedings.** There is no action, suit or proceeding, at law or in equity, or official investigation by or before any governmental authority, arbitral tribunal or any other body pending or, to the knowledge of Owner threatened, against or affecting Owner or any of its properties, rights or assets, which could reasonably be expected to result in a material adverse effect on Owner's ability to perform its obligations under this Agreement.

## **19. APPLICABLE LAW AND DISPUTE RESOLUTION.**

**19.1. Governing Law.** The Agreement shall be governed by, and interpreted under, the substantive and procedural laws of the State of New York, without regard to the conflicts of law rules thereof (other than Sections 5-1401 and 5-1402 of the General Obligations Law of the State of New York.).

**19.2. Jurisdiction.** All claims, disputes or controversy arising between the Parties from or in connection with this Agreement ("*Dispute(s)*") shall be submitted to the U.S. Federal Courts in the U.S. Virgin Islands, and each Party irrevocably and unconditionally submits to the exclusive jurisdiction of such Courts and waives any defense of *forum non conveniens*.

**19.3. Confidentiality.** Except to the extent necessary for proceedings relating to enforcement of this agreement to arbitrate, the award, or other, related rights of the Parties, the fact of the arbitration proceeding itself, all evidence, pleadings, or other documents exchanged or used in the arbitration and the arbitrators' award shall be maintained in confidence by the Parties to the fullest extent permitted by applicable law. However, a violation of this covenant shall not affect the enforceability of this agreement to arbitrate or of the Tribunal's award.

**19.4. Severability.** The provisions of this Agreement to arbitrate are independent of the remaining provisions of the agreement and the Parties intend that they shall continue in effect even though one or more provisions of the Agreement shall be determined to be null or void. This agreement to arbitrate shall also survive the termination or expiration of this Agreement.

## **20. INDEMNIFICATION.**

### **20.1. General Indemnity.**

**20.1.1.** Contractor, on behalf of itself, its Subcontractors, affiliates, representatives, agents, successors and assigns, and their respective officers, directors, managers and employees, agrees to defend, indemnify and hold harmless Owner and Owner's affiliates, representatives and agents, and their

respective directors, officers, managers and employees ("*Owner Indemnitees*") against:

20.1.1.1. any and all liability and/or Losses arising from or related to personal injury to, illness or death of, any person and/or damage to or destruction of property (including the Work and the Facility) in any way directly or indirectly arising out of or relating to the Work or Contractor's obligations hereunder, to the extent that such injury or damage is caused by the negligence (whether characterized as sole, joint, concurrent, contributing or comparative negligence) or willful misconduct of any Contractor Indemnitee or any Subcontractor or any representatives, employees, officers or directors of any Subcontractor;

20.1.1.2. any and all liability and/or Losses to or claims of third parties (together with all reasonable legal and investigative costs relating thereto) for physical injury to or death of any person(s) and for loss or damage to any tangible property in any way directly or indirectly arising out of or relating to the Work or Contractor's obligations hereunder, to the extent that such injury or damage is caused by the negligence (whether characterized as sole, joint, concurrent, contributing or comparative negligence) or willful misconduct of any Contractor Indemnitee or any Subcontractor or any representatives, employees, officers or directors of any Subcontractor; and

20.1.1.3. any and all liability and/or Losses with respect to (A) failure of any Contractor Indemnitee or any Subcontractor or any representatives, employees officers or directors of any Subcontractor to comply with Applicable Laws or Applicable Codes and Standards; (B) payments of Taxes relating to Contractor's income or other Taxes required to be paid by Contractor under the Agreement; (C) non-payment of amounts due as a result of furnishing materials or services to Contractor or any Subcontractor which are payable by Contractor or any Subcontractor in connection with the Work, or (D) any claims, liens, securities interest, encumbrances or rights in rem of any kind filed or asserted against or attached up all or any portion of the Facility, the Facility Site or any interest therein by any Subcontractor or any other person or entity acting through or under Contractor or any Subcontractor, or otherwise arising out of or in connection with this Agreement or performance by Contractor or Subcontractor of the Work.

20.1.2. Owner, on behalf of itself, its affiliates, representatives, agents, directors, officers, successors and assigns and their respective officers, directors, managers, and employees, agrees to defend, indemnify and hold harmless Contractor and Contractor's Subcontractors, affiliates, representatives and agents, and their respective directors, officers, managers and employees ("*Contractor Indemnitees*") against any and all liability and/or Losses to or claims of third parties (together with all reasonable legal

and investigative costs relating thereto) for physical injury to or death of any person(s) and for loss or damage to any tangible property in any way directly or indirectly arising out of or relating to the Owner's obligations hereunder, to the extent that such injury or damage to property results from the negligence (whether characterized as sole, joint, concurrent, contributing or comparative negligence) or willful misconduct of Owner or its agents.

**20.2. Intellectual Property Indemnification.** Contractor agrees to indemnify, defend and hold Owner harmless from and against any and all claims whatsoever arising from or in any manner related to an infringement of patents or the improper use of other proprietary rights which may occur in connection with Contractor's or any Subcontractor's performance of the work pursuant to this Agreement, unless such infringement or improper use is at the direction of Owner. Contractor shall have sole authority for the control of the defense of any and all such claims and any suits brought thereon, and Owner shall render such assistance as Contractor may reasonably require in connection therewith. Should any such claim materially impair completion of the Facility or continued operations of the Facility by Owner then Contractor shall, at its own expense, timely procure for Owner the right to continue the Facility work so as not to materially impair the schedule for completion of the Facility and/or the right to continue operation of the Facility.

**20.3. Environmental Indemnification.**

**20.3.1.** Owner agrees to indemnify and hold the Contractor Indemnitees harmless against and in respect of any and all damages, claims, losses, liabilities and expenses (including without limitation reasonable legal, accounting, consulting, remediation, engineering, investigatory, response, remediation and other expenses) (collectively, "*Environmental Losses*") which are imposed upon, incurred by, or asserted against any Contractor Indemnitee by any party or parties (including without limitation a Governmental Unit) arising out of, in connection with, or relating to: (i) Hazardous Materials at, in, on, under, or migrating and/or emanating to or from the Facility Site, other than any Hazardous Material brought to the Facility Site by Contractor or any Subcontractor or (ii) a violation of Environmental Law by Owner.

**20.3.2.** Contractor agrees to indemnify and hold Owner Indemnitees harmless against and in respect of any and all Environmental Losses which are imposed upon, incurred by, or asserted against any Owner Indemnitee by any party or parties (including without limitation a Governmental Unit) arising out of, in connection with, or relating to: (i) Hazardous Materials brought onto the Facility Site by Contractor or any Subcontractor; or (ii) a violation of Environmental Law by Contractor or any Subcontractor.

**20.4. Actions by Employees.** Neither Party nor its directors, officers, employees, agents, affiliates or representatives, nor any independent contractor engaged by it in connection with the performance of this Agreement, shall be deemed an employee of the other Party. Neither Party shall bring any claim against the other Party or its directors, officers, affiliates,

agents, representatives, employees or independent contractor with respect to any liability for compensation under any State or Federal Worker's Compensation Act (or similar laws or programs in the applicable jurisdictions), including, but not limited to, Worker's Compensation and/or employer's liability or similar claims of employees.

**20.5. Notice and Defense.** If any party entitled to indemnification hereunder (the "**Indemnified Party**") intends to seek indemnification under this Article from the other Party (the "**Indemnifying Party**") with respect to any action or claim, the Indemnified Party shall give the Indemnifying Party notice of such claim or action upon the receipt of actual knowledge or information by the Indemnified Party of any possible claim or of the commencement of such claim or action; provided, however, that the indemnity obligations of the Indemnifying Party shall not be affected unless and to the extent such failure to give notice prejudices the Indemnifying Party. The Indemnifying Party shall have the right to assume the defense of any such claim or action with counsel designated by the Indemnifying Party and reasonably satisfactory to the Indemnified Party; provided, however, that if the defendants in any such action include both the Indemnified Party and the Indemnifying Party, and the Indemnified Party shall have reasonably concluded that there may be legal defenses available to it which are different from or additional to those available to the Indemnifying Party, the Indemnified Party shall have the right to select separate counsel to assert such legal defenses and to otherwise participate, at its own expense.

## 21. INSURANCE.

**21.1. Insurance Carried by Contractor.** The Contractor shall procure, or caused to be procured, at no expense to Owner and maintain or cause to be maintained in full force and effect from the Starting Date to the date of Final Completion with responsible insurance carriers insurance as set forth in Appendix 22 (Contractor and Owner Furnished Insurance).

**21.2. Insurance Carried by Owner.** The Owner shall procure, or caused to be procured, at no expense to Contractor, and maintain or cause to be maintained in full force and effect from the Starting Date to the date of Final Completion with responsible insurance carriers insurance as set forth in Appendix 22 (Contractor and Owner Insurance Requirements).

**21.3. Workers' Compensation.** Contractor and/or its subcontractors shall, at their respective sole cost and expense, maintain Statutory Workers' Compensation Insurance for any and all persons employed directly or indirectly by Contractor and/or its subcontractors during the performance of work in the U.S. Virgin Islands.

**21.4.**

## 22. CONFIDENTIAL TREATMENT OF PROPRIETARY INFORMATION.

**22.1. Confidential Information.** Any written information concerning the Parties hereto which is disclosed to the other Party incident to the performance of Work pursuant to this Agreement and which is expressly marked confidential or proprietary is disclosed in confidence, and the transferee shall not publish or otherwise disclose such information to third



parties without the prior written approval of the transferor; provided, however, that nothing herein shall limit either Party's right to disclose any information provided by the other Party hereunder which:

**22.1.1.** becomes knowledge available in the public domain without fault or knowledge of the disclosing Party prior to such disclosure;

**22.1.2.** is received by either Party from a third party without restriction or breach of any duty of confidentiality and without breach of this Agreement; or

**22.1.3.** is required by either Party to be disclosed by Law.

The Parties shall require their respective Subcontractors or vendors performing any work related to the Facility also to comply with the requirements of this Section 22.1. Appendix 24 also contains provisions relating to confidentiality. In the event of a conflict between this Section 22.1 and the confidentiality provisions of Appendix 24 the latter shall govern.

**22.2. Communications Regarding the Work or the Facility.** Owner and Contractor agree that it is in their mutual interest to limit dissemination of information to the press and the public regarding the Work or the Facility and this Agreement. Each Party intending to issue or publish a statement, press release, advertisement or tombstone in connection with the Work, the Facility or this Agreement shall provide a draft thereof to the other Party for review and prior written approval, which approval shall not be unreasonably withheld.

## **23. TRAINING.**

**23.1. Training Program.** Attached hereto as Appendix 23 is a written program for the training of Owner's personnel at Contractor's training facility in Turku Finland or Ft. Lauderdale, Florida, USA and at the Facility Site (the "**Operator Training Program**"), all in accordance with the scope set forth in Appendix 1A, Appendix 1B, Appendix 2A and Appendix 2B. Contractor's sole undertaking shall be to train the number of persons in accordance with the Operator Training Program.

**23.2. Responsibility for Operating and Maintenance Personnel.** Owner shall be solely responsible for the hiring of the operating and maintenance personnel of the Facility and for supervision of the operating and maintenance personnel of the Facility. Subject to the provisions of this Agreement, Contractor will supervise operating and maintenance personnel until Substantial Completion.

## **24. MISCELLANEOUS PROVISIONS.**

**24.1.** This Agreement represents the entire agreement between the Parties hereto relating to the subject matter hereof and may be amended or varied only in writing by duly authorized representatives of the Parties. The Parties expressly waive all provisions contained

in any past agreement or correspondence which negate, limit, extend or conflict with the provisions herein.

**24.2.** The terms of this Agreement shall be binding upon both Parties and their respective successors and permitted assigns. Neither Party shall be entitled to transfer or assign their rights and liabilities provided for herein to any third person without a written approval from the other Party.

**24.3.** This Agreement shall become binding in its entirety as of the Effective Date.

**24.4.** The provisions of this Agreement are intended for the sole benefit of Owner and Contractor, and there are no third-party beneficiaries.

**24.5.** The invalidity or unenforceability of any portion or provision of this Agreement shall not affect the validity or enforceability of any other portion or provision. Any invalid or unenforceable portion or provision shall be deemed severed from this Agreement, and the balance of the Agreement shall be construed and enforced as if the Agreement did not contain such invalid or unenforceable portion or provision. Notwithstanding the provisions of the preceding sentence, should any term or provision of this Agreement be found invalid by any Governmental Unit having jurisdiction thereof, the Parties shall immediately renegotiate in good faith such term or provision of the Agreement to eliminate such invalidity.

**24.6.** This Agreement is entirely different and separate from that certain Agreement between the parties dated March 15, 2017, For the Engineering, Procurement, and Construction of a 21 MW Power Facility Located in St. Thomas (SC-46-17) (the "Prior EPC Agreement"), and, accordingly, the Contractor shall have no right to suspend Work under this Agreement, to terminate this Agreement, or to take any action or fail to take any action pursuant to this Agreement as a result of any breach by Owner of the Prior EPC Agreement.

## **25. LIENS AND CLAIMS**

**25.1. Creation of liens and claims.** The Contractor shall not directly or indirectly create, incur, assume or suffer to be created by it or any Subcontractors, employees, laborers, material men or other suppliers of goods or services any claim, lien, charge or encumbrance on the Facility Site, the Facility or any part thereof or interest therein, and the Contractor shall promptly (i) pay or discharge, and discharge of record, or post a bond against, any such claim, lien or encumbrance for labor, materials, supplies or other charges for which the Contractor is responsible under this Agreement and which, if unpaid, might be or become a lien upon the Facility Site or the Facility or any component thereof and (ii) indemnify and protect Owner from and against all such claims, liens, charges or encumbrances, which indemnity shall survive the termination of this Agreement. The Contractor shall promptly notify Owner of the assertion of any lien or encumbrance against the Facility Site, the Facility, or any part thereof.

**25.2. Non-waiver of rights.** Nothing in this Section 25 shall be construed as a limitation on or waiver by the Contractor of any of its rights to encumber the Facility Site or the Facility as security for Work performed by the Contractor or for any payments owed to it hereunder; provided that the Contractor may only exercise such right after providing Owner

with thirty (30) days prior written notice of its intent to do so and, with respect to payments to the Contractor hereunder, such payment shall not have been made or a bond or other reasonably acceptable provision to secure such payment shall not have been provided to Contractor within such thirty (30) day period.

## 26. ANTI-CORRUPTION POLICY

26.1. The Parties represent and warrant that they and their directors, employees as well as consented assignees, sub-contractors and alike, if any, are familiar with and in connection with the supply and all related actions fully comply with the provisions and spirit of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions and the Commentaries thereon ("*OECD Convention*") and the Rules of Conduct to Combat Extortion and Bribery of the International Chamber of Commerce ("*ICC Rules*") and any applicable law implementing such provisions, also in case Owner is registered or performs its obligations related to the project outside the countries that are parties to the OECD Convention or ICC Rules, and the fact that it is the corporate policy of the Contractor to be in full compliance, and also require full compliance from its partners, subcontractors and other contracting parties with the letter and spirit of the OECD Convention, ICC Rules and any applicable laws, including but not limited to local laws against anti-bribery.

26.2. The Parties represent and warrant that they and their directors, employees as well as permitted assignees and subcontractors shall not, directly or indirectly, in connection with the Project (i) offer or give a bribe or demand for such a bribe (ii) kick back any portion of a contract payment to owners, directors and/or employees or employees of the other contracting parties or any third party or (iii) utilize other techniques, such as subcontracts, purchase orders or consulting agreements to channel payments or other benefits to government officials, to directors or employees of the Parties or other contracting parties, their relatives or business associates, with the intention to influence or induce the referred owner or director or employee to use his or her influence to assist the Parties or their Supplier in obtaining or retaining business or securing any improper advantage. The Parties acknowledge that such activities may constitute a criminal violation of local laws and regulations punishable by substantial fines and/or imprisonment.

26.3. The Parties represent and warrant that they and their directors, employees as well as permitted assignees, and subcontractors, in connection with the Project, shall not pay or agree to pay, directly or indirectly, any funds or anything of value to any public official or owner or their directors or employees or employee of a company related to the Project for the purpose of influencing their acts or decisions.

26.4. The Parties represent and warrant that no part of its compensation is passed on directly or indirectly by the Parties or by their director or employee as a bribe or in any manner whatsoever and to whomever in contravention of the letter or spirit of the Rules of Conduct to Combat Extortion and Bribery of the International Chamber of Commerce.

26.5. If the a Party or their director and/or employee directly or indirectly offers, pays, promises, gives or authorizes payment of any money or anything of value to any government, public or political party official or a director or an employee of a party involved

in the project for the purpose of influencing the official or director or employee act or decision of such official or director or employee in the course of carrying out this Contract, or is in breach of any of its representations and warranties in this Article 26, the other Party shall be entitled to terminate this Agreement through a simple notice with an immediate effect. Termination in accordance with this Article 26 carries the same consequences as termination pursuant to Article 16.

**27. GENERAL CONTRACT REQUIREMENTS.** Contractor agrees to abide by the terms and conditions of Owner's General Contract Requirements, a copy of which is set forth on Appendix 24.

**28. HUD REQUIREMENTS.** The Parties agree to abide by the HUD General Provisions set forth in Appendix 21.

**29. NOTICES.** Any and all notices pursuant to this Agreement shall be in the English language and can be validly given by either registered mail, courier, telegram, facsimile or telex, email to the addresses provided below. Facsimile and email notices to be confirmed by courier. Alterations to any address must be conveyed to the other Party in writing in order to become effective.

**Owner**

If to Owner: US Virgin Island Water and Power Authority  
9702 Estate Thomas  
St. Thomas, USVI 00801  
Att: Lawrence Kupfer, Executive Director  
Phone: +1 (340) 774-3552, ext. 2024  
Fax: +1 (340) 715 8005  
Email: lawrence.kupfer@viwapa.vi

With a copy to: Venable LLP  
1270 Avenue of the Americas  
New York, NY 10020  
Att: Mark S. Vecchio, Esq.  
Phone: +1 (212) 808-5667  
Fax: +1 (212) 307-5598  
Email: [mvecchio@venable.com](mailto:mvecchio@venable.com)

**Contractor**

If to Contractor: Wärtsilä North America, Inc.  
11710 N. Gessner Rd. Suite A  
Houston, TX  
Attention: Pablo Lambea, Regional Legal Counsel  
Phone: +1 (281) 233 6227

Fax: +1 (281) 233 6233  
Email: pablo.lambea@wartsila.com

With a copy to:

Wärtsilä North America, Inc.  
11710 N. Gessner Rd. Suite A  
Houston, TX  
Attention: Anna Jarowicz, General Manager Project  
Management  
Phone: +  
Fax: +(281) 233 6233

Email: anna.jarowicz@wartsila.com

Notices shall be effective when received by the recipient;

*[The next page is the signature page.]*

A handwritten signature in black ink, appearing to be the initials 'AJ' or similar, located in the bottom left corner of the page.

IN WITNESS WHEREOF, the Parties hereto, Owner and Contractor, have caused their duly authorized representatives to execute this Agreement.

On Behalf of Owner

  
Signature

Lawrence J. Kupfer  
Name (in full)

Executive Director / CEO  
Title

6/30/2020  
Date

On Behalf of the Contractor

  
Signature

Edmund Phillips  
Name (in full)

Business Development Manager  
Title

6/30/2020  
Date