



**MERCED IRRIGATION DISTRICT
CONTRACT DOCUMENTS
MID-IFB-2018-12**

**PARTIAL PROCUREMENT
AND CONSTRUCTION AGREEMENT**

BETWEEN

THE MERCED IRRIGATION DISTRICT

AND

CONTRACTOR

MERCED IRRIGATION DISTRICT
744 W. 20th Street
Merced, California 95340

List of Appendices

- Appendix A : Site
- Appendix B : Approved Project Schedule
- Appendix C : Scope of Work
- Appendix D : Payment Schedule
- Appendix E : Insurance Requirements
- Appendix F : [blank: Lien Waivers Not Required.]
- Appendix G : Form of Performance Bond
- Appendix H : Form of Payment Bond
- Appendix I : Form of Parent Guarantee

SAMPLE

PARTIAL PROCUREMENT AND CONSTRUCTION AGREEMENT

THIS PARTIAL PROCUREMENT AND CONSTRUCTION AGREEMENT (this “**Agreement**”) is entered into as of the 4th day of **January, 2019** (the “**Effective Date**”), by and between the Merced Irrigation District, an irrigation district formed under the Irrigation District Act (“**Owner**”) and **Contractor**, a **corporation** organized under the laws of the **State of California** (“**Contractor**”). Owner and Contractor are sometimes individually referred to herein as a “**Party**” and collectively as the “**Parties.**”

W I T N E S S E T H:

WHEREAS, Owner desires to purchase from Contractor certain partial procurement, construction and related services for the Project, as defined herein; and

WHEREAS, Contractor is willing to sell such partial procurement, construction and related services for the Project upon the terms and subject to the conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows:

Article 1
Definitions and Interpretation

1.1 Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

“**Affected Party**” has the meaning set forth in Section 10.1.

“**Affiliate**” shall mean, with respect to any Party or entity, any other entity which (a) such first Party or entity directly or indirectly, in whole or in part, owns, is owned by or is in common ownership with, and (b) such first Party or entity directly or indirectly controls, is controlled by or is under common control with.

“**Agreement**” means this Partial Procurement and Construction Agreement, including the Terms and Conditions, Appendices A through I, and all written amendments hereto and thereto.

“**Applicable Legal Requirements**” means all laws, statutes, regulations, ordinances, judgments, Permits, approvals, orders or other similar legal requirements of any governmental authority or other body having jurisdiction over Owner, Contractor, the Project, the Site, the performance of the Work or the operation of the Project or any component thereof, as may be in effect from time to time and as may be amended during the Term.

“**Application for Milestone Payment**” has the meaning set forth in Appendix D.

“**Approved Project Schedule**” means that certain project schedule for the completion of the Work as set forth in Appendix B.

“**Business Day**” means any calendar day, except Saturdays, Sundays and national holidays.

“**Change**” has the meaning set forth in Section 9.1.

“**Change Order**” has the meaning set forth in Section 9.1.

“**Change Order Request**” has the meaning set forth in Section 9.2.1.

“**Commissioning Test**” and “**Commissioning Tests**” has the meaning set forth in Section 7.1.

“**Commissioning Testing Completion Notice**” has the meaning set forth in Section 7.3.

“**Completed Commissioning Test**” has the meaning set forth in Section 7.3.

“**Confidential Information**” has the meaning set forth in Section 17.1.

“**Construction Price**” has the meaning set forth in Appendix D.

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

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

“**Contractor Event of Default**” has the meaning set forth in Section 12.2.

“**Contractor Parent Company Guarantee**” has the meaning set forth in Section 13.5.

“**Contractor’s Taxes**” has the meaning set forth in Section 2.2.6.

“**Direct Costs**” means only the actual costs that are directly incurred by Contractor (not to exceed the competitive market rates in the locality of the Work except with prior written consent of the Owner) as a result of the Change or the event giving rise to the Change Order (or, in the context of Owner’s payment of the Termination Payment under Section 12.1.1, in connection with Contractor’s performing Work as described therein) for the following items: (i) payroll wages paid (or avoided) for labor in the direct employ of Contractor the Site; (ii) cost of materials and permanent equipment; (iii) payments properly made by Contractor to Subcontractors; (iv) rental charges of necessary machinery and equipment (but excluding hand tools) used at the Site; (v) permit fees; and (vi) compensation of engineers or other design professionals employed directly by Contractor; (vi) reasonable costs of mobilization and/or demobilization. Notwithstanding the foregoing, “**Direct Costs**” shall not include (A) salaries or other compensation (including costs of contributions, assessments, fringe benefits or taxes based on salaries or compensation) of Contractor’s Personnel at Contractor’s principal office and branch offices (except as provided in the previous sentence); (B) expenses of Contractor’s principal and branch offices; (C) Contractor’s profit, overhead or general expenses of any kind; (D) any replacement, repair or other costs or liabilities arising from any loss of or damage to any equipment, tools or other property owned or used by Contractor or its Subcontractors; (E) costs to correct or reperform any components of such Work as a result of the acts or omissions of Contractor or its Personnel; (F) any fines or penalties assessed against Contractor or its Personnel in connection with such Work; or (G) any costs or expenses other than those specifically set forth above as “Direct Costs.”

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

“**Drawings**” means the drawings, models, specifications, plans, packages, reports, performance curves and data, instruction books, catalogs and other documents and information as required to be provided to Owner by Contractor pursuant to and in accordance with the Scope of Work.

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

“**Engineering Price**” has the meaning set forth in Appendix D.

“**Final Completion**” has the meaning set forth in Section 6.4.1.

“**Force Majeure**” has the meaning set forth in Section 10.1.

“**Guaranteed Substantial Completion Date**” has the meaning set forth in Section 6.1.4.1.

“**Hazardous Substance**” means any and all chemicals, constituents, contaminants, pollutants, materials (including but not limited to petroleum or petroleum products), and wastes and any other carcinogenic, corrosive, ignitable, radioactive, reactive, toxic or otherwise hazardous substances, mixtures (whether solids, liquids, gases), daughter or degradation products or any similar substances now or at any time subject to regulation, control, Remediation or otherwise addressed under Applicable Legal Requirements or considered to be hazardous or otherwise harmful to human health or the environment under Applicable Legal Requirements.

“**Late Substantial Completion Payments**” has the meaning set forth in Section 6.1.4.2.

“**Milestone Payment**” has the meaning set forth in Appendix D.

“**Milestones**” has the meaning set forth in Appendix D.

“**Notice of Final Completion**” has the meaning set forth in Section 6.4.2.

“**Notice of Substantial Completion**” has the meaning set forth in Section 6.1.2.

“**Notice to Proceed**” has the meaning set forth in Section 2.1.

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

“**Owner Indemnitees**” has the meaning set forth in Section 11.1.

“**Owner’s Engineer**” means such independent engineer as may be selected by Owner from time to time as its independent engineer for the Project and the successors and assigns of such independent engineer.

“**Owner’s Taxes**” shall have the meaning set forth in Section 3.4.

“**Parties**” means Owner and Contractor; “**Party**” means Owner or Contractor, as the case may be.

“**Parts Warranty**” has the meaning set forth in Section 8.1.1.

“**Payment Bond**” has the meaning set forth in Section 13.1.

“**Performance Bond**” has the meaning set forth in Section 13.1.

“**Permits**” means all waivers, franchises, variances, permits, authorizations, licenses or orders of or from any governmental authority having jurisdiction over Owner or Contractor and their respective obligations under this Agreement or Project or any component thereof, the Site, the performance of the Work, or the operation of the Project or any component thereof, as may be in effect from time to time.

“**Person**” means any individual, corporation, partnership, Limited Liability Company, association, joint stock company, trust, unincorporated organization, joint venture or other entity with legal constitution under applicable laws, or any government or political subdivision or instrumentality or agency thereof.

“**Personnel**” means, with respect to a Party or entity, such Party’s or entity’s employees, agents, personnel, representatives, invitees, subcontractors, vendors and any other third party independent contractors with whom such Party or entity has contracted, and its agents’, personnels’, representatives’, invitees’, subcontractors’, vendors’ or third party independent contractors’ respective employees, agents, personnel, representatives, invitees, subcontractors, vendors or third party independent contractors.

“**Physical Items**” has the meaning set forth in Section 8.1.1.

“**Procurement Price**” has the meaning set forth in Appendix D.

“**Project**” means, collectively, the partial procurement, assembly, construction, installation, testing and completion of the new Pioneer Bank 3, 12.47 kV bays addition and associated work in connection therewith, all as further described in Appendix C.

“**Project Design Book**” means the compilation of documents, drawings and information which reflects the Project design, which Contractor will maintain and update, and which Owner will review and approve.

“**Project Safety Manual**” has the meaning set forth in Section 2.2.13.1.

“**Project Security Plan**” has the meaning set forth in Section 2.2.14.

“**Prudent Industry Practices**” means the practices, methods, materials, supplies and equipment, as changed from time to time, that are commonly used in the United States electric utility industry to design, construct and operate electric transmission substations or any practices, methods and acts, which in the exercise of reasonable judgment in light of the facts known at the time, could have been expected to accomplish the desired result in manner consistent with norms of reliability, safety and expedition.

“**Punch-List**” has the meaning set forth in Section 6.2.

“**Punch-List Withholding Amount**” has the meaning set forth in Section 5.2.4.

“**Release**” shall mean spilling, leaking, pumping, pouring, emitting, discharging, injecting, escaping, leaching, dumping, exacerbation, aggravation, abandonment or disposing into or migration within the environment.

“**Remediation**” shall mean the investigation, removal, remediation and cleanup of, and other corrective action for, Hazardous Substances and/or damage to the environment caused by Hazardous Substances.

“**Retention**” has the meaning set forth in Section 5.2.3.

“**Scope of Work**” means the scope of work set forth in Appendix C.

“**Services Warranty**” has the meaning set forth in Section 8.1.2.

“**Site**” means that certain parcel of land on which the Substation is located, and upon which Contractor shall construct the Project, as further described in Appendix A.

“**Subcontract**” means any contract between Contractor and a Subcontractor with respect to performing any part of the Work or providing any equipment or materials in connection with the Work.

“**Subcontractor**” means each and every vendor, supplier, materialmen, subcontractor or contractor of any tier, including such parties’ Personnel, performing any part of the Work or providing any equipment or materials in connection with the Work, directly or indirectly for or to Contractor.

“**Substantial Completion**” has the meaning set forth in Section 6.1.1.

“**Substation**” means the substation owned by Owner and which is known as the “Pioneer Substation”, located at 13000 Olive Avenue, Livingston, CA 95334.

“**Term**” means the period of time commencing upon the Effective Date and ending upon the last day of the Warranty Period.

“**Termination Payment**” has the meaning set forth in Section 12.1.1.

“**Terms and Conditions**” means Articles 1 through 18 hereof.

“**Warranties**” has the meaning set forth in Section 8.1.2.

“**Warranty Period**” has the meaning set forth in Section 8.2.

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

1.2 Standards of Interpretation.

1.2.1 This Agreement shall not be construed more strongly against either Party, regardless of which Party is responsible for its preparation.

1.2.2 As used in this Agreement, the words “including” or “includes” or “include” shall mean “including without limitation, “includes without limitation,” and “include without limitation.”

1.2.3 Common nouns and pronouns shall be deemed to refer to the masculine, feminine, neuter, singular, and plural, as the identity of the person or persons, firm or corporation may in the context require.

Article 2 Contractor’s Work and Other Obligations

2.1 Commencement of the Work. When Owner has determined it desirable for Contractor to commence performance of the Work, Owner will deliver to Contractor a written notice thereof (the “**Notice to Proceed**”). Contractor will commence performance of the Work upon its receipt of the Notice to Proceed.

2.2 Work to be performed. Except as otherwise expressly set forth in Article 3 as being the responsibility of Owner, Contractor shall, in accordance with the Terms and Conditions, perform or cause to be performed all necessary work and services required in connection with the design, engineering, permitting, procurement, construction, assembly, installation, testing and completion of the Project (all of the foregoing, collectively, the “**Work**”) including such work as is further described in, and subject to the requirements in and provisions of, the Scope of Work. Without limiting the foregoing, as part of the Work, Contractor hereby undertakes the following covenants and agrees to provide the following services:

2.2.1 Engineering/Design Services; Drawings.

(This section “Not Applicable” for original Scope of Work. However, the contents of this section shall apply should an engineering-specific change order be requested by Owner)

2.2.1.1 Engineering/Design. Owner will provide all engineering and design services necessary for the Work that meet or exceed the requirements set forth in the Scope of Work. Contractor will cooperate with the engineering efforts of Owner and Owner’s Engineer; *provided, however*, that Owner ultimately bears all responsibility for the engineering and designing the Project so as to meet the requirements of this Agreement. As with respect to any preliminary designs, drawings, technical specifications, design bases, or other engineering or design documents or work or information provided to Contractor by Owner or Owner’s Engineer in advance of the Effective Date, including any of the same that have in any way been incorporated into the Scope of Work, Contractor agrees that: (a) the same were and are for informational and conceptual purposes only, and (b) Owner takes full responsibility for the designing and engineering the Project consistent with this Agreement. All engineering work requiring certification shall be certified by professional engineers licensed and properly qualified to perform such engineering services.

2.2.1.2 Drawings. Subject to Section 18.3, as further described in the Scope of Work, Contractor will prepare and submit, by the date specified in the Approved Project Schedule, for written approval by Owner, the Drawings. Following Owner’s written approval of the Drawings, Contractor will proceed with the remainder of the Work based upon the Scope of Work and the Drawings.

2.2.2 Preparation of Site. As part of the Work, Contractor will arrange and pay for disposal of sewage and wastes as necessary to enable Contractor to perform the Work. Contractor shall provide for

the procurement of or disposal of all soil, gravel and similar materials as required for the performance of or otherwise in connection with the Work. Contractor will provide adequate treatment of and protection against water runoff resulting from Contractor's and its Subcontractor's work. Contractor will provide for the collection, treatment and disposal of groundwater resulting from Contractor's and its Subcontractor's work.

2.2.3 Procurement of Materials, Equipment, Supplies. Contractor will procure in Contractor's name, pay for, receive, transport to the Site and store as an independent contractor and not as agent for Owner, all materials, equipment and supplies, and all manufacturing and related services (whether on or off the Site) for construction of and incorporation into the Project which are required for completion of the Work in accordance with this Agreement and are not explicitly specified as being furnished by Owner pursuant to Article 3.

2.2.4 Inspection, Component Testing and Expediting. This Section is intended to address components testing only; Section 2.2.11 and Article 7 address the Commissioning Tests.

2.2.4.1 Testing Responsibilities. Contractor will perform all inspection, component testing, expediting, and quality, surveillance, and traffic services as necessary for the performance of the Work. Contractor's responsibilities under this Section 2.2.4 shall include inspecting and testing such materials and equipment as are required in, and in accordance with, the Scope of Work.

2.2.4.2 Owner's Right to be Present. Contractor will notify Owner of any testing to or inspections of any components of the Work: (a) fourteen (14) days in advance of such testing or inspection, for any testing or inspection outside the Site; and (b) forty-eight (48) hours in advance of such testing or inspection, for any testing or inspection at the Site. Owner and Owner's Engineer shall each have the option of being present at all such tests and inspections and shall be entitled to make recommendations to Contractor or any Subcontractor for the purpose of remedying deficiencies identified. No such inspection or observance shall be deemed to constitute a waiver of any of Contractor's obligations under this Agreement or be construed as an approval or acceptance of the Work.

2.2.5 Labor and Personnel.

2.2.5.1 Contractor's Personnel. As part of the Work, Contractor shall provide and be solely responsible for all labor and personnel required in connection with the Work, including: (a) professional engineers licensed to perform engineering services in the State of California and in the State in which their work is performed (if required); and (b) a Project Manager, who shall be authorized to administer, but not modify or amend, this Agreement on behalf of Contractor and agree upon procedures and provide such information as is necessary for coordinating the efforts of the Parties. If at any time during the performance of the Work, any of Contractor's or its Subcontractors' Personnel becomes, for any reason, unacceptable to Owner, then, upon notice from Owner, Contractor will replace such unacceptable individual with an individual acceptable to Owner. Any costs associated with the removal and replacement of any such Personnel, whether at Owner's request or otherwise, will be borne by Contractor.

2.2.5.2 Prevailing Wage. Contractor shall pay all workers employed by it not less than the general prevailing rate of per diem wages for work of a similar character in the locality in

which the Work is to be performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in Chapter 1 (commencing with Section 1720) Part 7, Division 2 of the California Labor Code. Should the prevailing wage rate be increased, decreased, or eliminated a corresponding adjustment shall be made to the Contract Price which shall reflect the effect of such change in or elimination of the prevailing wage rate. Contractor shall cause its Subcontractors to abide by the foregoing, to the extent that they are bound by such code.

2.2.5.3 Payroll Records. Contractor and its Subcontractors shall keep accurate payroll records, showing the name, address, social security number, work classification and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker or other employee employed by either of them in connection with the Work. The payroll records shall be certified and shall be available for inspection by Owner or its designee at all reasonable times.

2.2.5.4 Nondiscrimination. During the performance of the Work, Contractor and its Subcontractors shall not deny the benefits of this Agreement to any person on the basis of religion, color, ethnic group identification, sex, age, physical or mental disability, nor shall they discriminate unlawfully against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, age or sex. Contractor shall ensure that the evaluation and treatment of employees and applicants for employment are free of such discrimination. Contractor shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code Section 12900 et seq.), the regulations promulgated thereunder (Cal. Admin. Code, Tit. 2, Sections 7285.0 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Gov. Code Sections 11135-11139.5), and the regulations or standards adopted by the awarding state agency to implement such article.

2.2.6 Contractor's Taxes. Except as otherwise provided in Section 3.4, as part of the Work, Contractor shall administer and pay all sales, use, gross receipts, income, value-added, and withholding duties and taxes, import and export duties, and any other similar taxes and/or contributions (including penalties and interest related to such taxes): (a) imposed upon the sale, purchase, transportation or use of materials, supplies, equipment to be incorporated in the Project or provided by Contractor or any Subcontractor in connection with the Work; (b) imposed upon services or labor provided by Contractor or any Subcontractor in connection with the Work; (c) otherwise imposed on or in connection with the Work and/or (d) imposed upon or measured by Contractor's receipts hereunder or by wages earned by employees of Contractor or any Subcontractor ("**Contractor's Taxes**"). To the extent Owner is obligated under Applicable Legal Requirements to pay any of Contractor's Taxes, Contractor shall: (i) furnish to Owner all information and reports required to be furnished to the appropriate taxing authorities in connection with all such Contractor's Taxes; and (ii) reimburse Owner for the full amount of such Contractor's Taxes paid by Owner.

2.2.7 Permitting. Except as provided in Section 3.2, as part of the Work, Contractor shall, at its expense, obtain, pay for and maintain in effect, all Permits required under Applicable Legal Requirements to be obtained in connection with the Work. Contractor shall further provide Owner with such cooperation as is required by Owner in order to obtain, maintain, and comply with all Permits that are the responsibility of Owner.

2.2.8 Storage and Related Matters. Contractor shall comply with any and all receipt, storage and maintenance provisions specified in the Scope of Work. During the construction of the Project, Contractor shall warehouse or otherwise provide appropriate storage, in accordance with manufacturers' recommendations, for all materials, supplies and equipment to be incorporated into the Project, to be utilized as spare parts and/or required for permanent and temporary construction.

2.2.9 Utilities, Fuels, Chemicals and Consumables; Spare Parts and Specialty Tools.

2.2.9.1 Utilities. As further described in the Scope of Work, Contractor will be responsible for providing, at its expense, the temporary facilities and utilities necessary for the performance of the Work, including temporary office trailers or buildings, workshops, restrooms and warehouses, and all temporary sources of electricity and water (demineralized, potable or otherwise).

2.2.9.2 Consumables. As part of the Work, Contractor will arrange and pay for all temporary supplies of consumables, and for the disposal thereof, in sufficient quantities to enable Contractor to perform the Work.

2.2.9.3 Spare Parts. As part of the Work, Contractor will provide Owner with all spare parts that are supplied by the vendors of any equipment comprising the Project. If Contractor uses any such spare parts in order to perform the Work, Contractor will promptly replace such parts with identical parts. Contractor will coordinate with Owner concerning the delivery and storage of spare parts.

2.2.9.4 Maintenance Tools. As part of the Work, Contractor will provide all maintenance tools that are supplied by the vendors of any equipment comprising the Project. As a condition precedent to the achievement of Substantial Completion, Contractor shall deliver to Owner all such maintenance tools.

2.2.10 Initial Operation. The Work shall include management responsibility and the provision of all labor and personnel for the calibration of controls and equipment, and initial operation of the Project through Substantial Completion. Contractor will also provide and be responsible for all labor and personnel for any repairs, adjustments or other non-operational Work required in connection with such start-up and initial operation. Contractor will provide Owner with at least sixty (60) days' prior written notice of the anticipated date on which the Project will be ready for energization.

2.2.11 Commissioning Testing. The Work shall include management responsibility and the provision of all labor and personnel required for the performance, and re-performance, as necessary, of all tests, including the Commissioning Test(s) in accordance with the provisions of Article 7 in order to demonstrate that the Project is in compliance with the Scope of Work. Owner will be permitted to have its own designees on the Site to observe and verify all such testing. Owner will cause staff to be made available to Contractor to use in performing such testing services, but such staff will be directed solely by Contractor, and Contractor will remain responsible for the actions or omissions of such personnel.

2.2.12 Clean-Up and Waste Disposal.

2.2.12.1 During Work's Progress. During the performance of the Work, Contractor shall keep the Site and the surrounding area clean and free from accumulations of waste materials, rubbish and other debris resulting from the Work, and shall remove all such rubbish, waste

materials and debris from the Site and any adjacent area. In the event Contractor should fail or refuse to clean or clear the premises as required above, Owner may at its discretion do such cleaning or clearing and charge Contractor with the full cost of performing such work.

2.2.12.2 Prior to Final Completion. Prior to Final Completion, Contractor will completely clean the Site and will remove all waste materials, rubbish, Contractor's tools, construction equipment, machinery, surplus materials and other debris from the Substation and the Site and any adjacent area. If Contractor has failed to fulfill its obligations under this Section within thirty (30) days after Substantial Completion, then Owner, after having given prior notice to Contractor, may itself clean the Substation and the Site. All costs and expenses related to such actions of Owner will be for the account of Contractor, and Contractor will reimburse such amounts to Owner.

2.2.13 Safety Precautions.

2.2.13.1 Project Safety Manual. Contractor shall have a comprehensive safety program that governs all of Contractor's activities at the Site in connection with its performance of the Work. The safety program shall be reflected in writing in the form of a written project safety manual (the "**Project Safety Manual**") that shall be submitted to Owner within ten (10) Business Days after the date Notice to Proceed is issued. Contractor's Project Safety Manual shall, at a minimum, meet or exceed the specifications set forth in Attachment D to the Scope of Work. Contractor shall initiate, maintain and supervise all reasonable safety precautions and programs in connection with the performance of the Work in accordance with the Project Safety Manual and Applicable Legal Requirements. If Contractor fails to take sufficient precautions for the safety of the public or the protection of the Project or of structures or property on or adjacent to the Site, creating, in the reasonable opinion of Owner, an emergency requiring immediate action, then Owner, after having given reasonable prior notice to Contractor, may cause such sufficient precautions to be taken or provide such protection. The costs of taking or providing any such precautions or protection by Owner shall be for the account of Contractor.

2.2.13.2 Substation Training. Contractor shall cause all of its and its Subcontractors' Personnel who are performing Work at the Site to complete the Owner-provided substation safety training program. Contractor shall not allow any of its or its Subcontractor's Personnel to enter the Site if they have not successfully completed such training. If any of Contractor's or its Subcontractors' Personnel enter the Site without having completed such training, Contractor shall immediately remove such Personnel from the Site.

2.2.14 Security.

Contractor shall be responsible for the security of that portion of the Site comprising the Project at all times prior to Substantial Completion. Within ten (10) days after the date Notice to Proceed is issued, Contractor will provide Owner with an initial draft of the project security plan (the "**Project Security Plan**") that Contractor intends to implement during the performance of the Work. Contractor's security plan shall meet or exceed the standard of care for such plans as established in the Scope of Work. If Owner, in its reasonable opinion, believes that the security plan is insufficient, it shall notify Contractor of such deficiencies in writing and Contractor shall immediately correct such deficiencies in the security plan and implement the corrections into the

performance of the Work. Contractor will implement, maintain and at all times cause Contractor's Personnel to comply with the Project Security Plan.

2.2.15 Hazardous Substances.

2.2.15.1 Preventative Measures; Notice Requirements. Contractor will take all measures necessary to prevent the Release of any Hazardous Substances by Contractor or its subcontractors at the Site or adjacent areas in violation of Applicable Legal Requirements. Contractor will immediately notify Owner of: (a) any Releases of Hazardous Substances that occur in connection with the performance of the Work; (b) any and all material violations and any and all investigations, actions, claims, suits, notices of violation, fines, penalties, orders, and other proceedings related to material violations or alleged material violations of Applicable Legal Requirements which are asserted against Contractor or any of Contractor's Personnel in connection with the Work or their activities on or in connection with the Site; (c) Contractor's discovery of any Hazardous Substances at the Site or adjacent areas; and (d) all material developments with respect to Section 2.2.15.1(a), 2.2.15.1(b), and/or 2.2.15.1(c).

2.2.15.2 Contractor Releases; Removal Obligations. Contractor will be responsible for removing from the Site and areas adjacent thereto, and for properly disposing of, in a manner acceptable to Owner and in compliance with this Agreement, and all Applicable Legal Requirements, all Hazardous Substances generated, Released or accumulated by Contractor or its subcontractors in the course of performing the Work.

2.2.15.3 Pre-Existing Hazardous Substances. In the event Contractor encounters on the Site material reasonably believed to be a Hazardous Substance that existed prior to the date of the Agreement, then Contractor will immediately cease performance of any Work in the area affected and report the condition to Owner in writing. Contractor will not thereafter resume performance of the Work in the affected area except with the prior written permission of Owner.

2.2.16 Protection of Property, Materials and Equipment. Contractor will protect and preserve all public and private property on, adjacent to or near the Site and shall exercise suitable precautions necessary to prevent damage thereto as a result of Work activities. If any of Contractor's Personnel directly or indirectly cause any damage to any such property, then Contractor will immediately, at its own expense, repair, rebuild or otherwise restore the same or otherwise make whole such damage in a manner required by applicable law. If Contractor fails to commence the repair of such damage as set forth above, and/or fails to diligently pursue such repair, then Owner, after ten (10) days prior written notice to Contractor, provided Contractor has not commenced such repair during such ten (10) day period, may elect to repair such damages and to deduct from payments due or to become due to Contractor amounts paid or incurred by Owner in correcting such damage.

2.2.17 Royalties and License Fees. Contractor shall pay all royalties and license fees, if any, for materials, methods, processes and systems purchased by Contractor for incorporation into the Project. Contractor shall not incorporate into the Project any materials, methods, processes or systems which involve the use of any intellectual property or proprietary rights which Owner or Contractor does not have the right to use or which may result in infringement claims or suits against Owner or Contractor. Contractor shall timely notify Owner in writing of any claims which Contractor may receive alleging infringement of patents or other proprietary rights that may affect Contractor's performance of the Work.

2.2.18 Project Design Book and As-Built Drawings. Contractor shall maintain the Project Design Book and shall update and revise the Project Design Book based upon equipment selection and final design of the Project. As a condition to Final Completion, Contractor shall provide five (5) hard copies of the “as built” Project Design Book to Owner, as well as two (2) electronic copies of the same in original format.

2.2.19 Other Work. As part of the Work (and except as otherwise stated in the Scope of Work, Article 3 or Article 7 as being the responsibility of Owner) Contractor shall provide any other services or items not specifically described in this Agreement if: (a) it reasonably may be inferred in accordance with standards employed by leading contractors in the electric transmission industry that the providing of such additional work or item was contemplated as part of this Agreement; or (b) the providing of such additional work or item is necessary to make the Project operable and capable of performing as specified in this Agreement.

2.3 Approved Project Schedule. Contractor will perform the Work in accordance with the Approved Project Schedule. Contractor will update Owner as to actual progress of the Work as and when requested by Owner, and shall hold progress meetings for Owner and its invitees upon reasonable notice.

2.4 Standards of Performance. Contractor shall be solely responsible for all construction means, methods, techniques, sequences, procedures and safety and security programs in connection with the performance of the Work. Contractor shall perform the Work: (a) in a professional, prudent, first-class and workmanlike manner, free from defects, errors and omissions, and with the highest degree of skill and care that is utilized by nationally-recognized firms and professionals in the same field under the same or similar circumstances; (b) only with materials and equipment that are new and of utility-grade quality; and (c) strictly in accordance with (i) the plans and specifications and accompanying data set forth in the Scope of Work, (ii) all Applicable Legal Requirements, (iii) Prudent Industry Practices, and (iv) all engineering, environmental, construction, safety, and electrical codes and standards as specified under or listed in the Scope of Work as such codes and standards exist on the date of Substantial Completion.

2.5 Transfer of Title/Risk of Loss.

2.5.1 Contractor-Supplied Items. Title to all materials, supplies, equipment and machinery used in connection with the Work and which become a permanent part of the Project, and title to all spare parts provided by Contractor to Owner under Section 2.2.9.3, shall vest in Owner upon the earliest of: (a) the occurrence of any event by which title passes from Contractor’s Subcontractors providing such materials, supplies, equipment, machinery or parts to Contractor; or (b) payment therefor by Owner; or (c) delivery of the same to the Site.

2.5.2 Risk of Loss.

(a) Losses to the Project. Contractor will at all times until Substantial Completion bear the risk of loss, destruction or damage (including deterioration in quality) to any property comprising or to comprise the Project or part thereof. In the event of such a loss, destruction or damage as occurs prior to Substantial Completion, Contractor shall promptly, at its own expense, remedy any such loss, destruction or damage. After Substantial Completion, Contractor will bear the risk of loss, destruction or damage to the Project or any part thereof that arises from the negligence or willful misconduct of Contractor and/or Contractor’s Personnel.

(b) Losses to Other Owner Property. As with respect to any property of Owner not comprising the Project, Contractor will at all times bear the risk of loss, destruction or damage thereto that arises from the negligence or willful misconduct of Contractor and/or Contractor's Personnel.

2.5.3 Risk of Loss to Contractor Property. Contractor shall be responsible for the care, custody, and control of, and shall at all times bear the complete risk of loss, destruction, or damage (including deterioration in quality) of, the materials, supplies, equipment and machinery to which it has title.

2.5.4 Title to Drawings, Reports, Documents and Information. Title to all Drawings and to all reports and other information prepared or acquired by Contractor in connection with the Work and which Contractor is required to provide Owner pursuant to this Agreement shall vest in Owner upon Owner's receipt of such reports, Drawings and other information.

2.6 Inspection of the Site; Subsurface Conditions. Contractor has inspected the Site and agrees that the Site is satisfactory for performance of the Work for the Contract Price. Except as provided in Section 9.3.1, Contractor expressly assumes the risk of any schedule delays or extra costs related to or resulting from any concealed, unusual or difficult natural subsurface conditions encountered in the performance of the Work on the Site, including conditions relating to soils, water and/or rock, regardless of whether such conditions were unknown or unanticipated as of the date of the execution of this Agreement, or whether such conditions are at variance with the conditions indicated by this Agreement, or whether such conditions are unusual or differ materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement.

2.7 Nature of the Work. Contractor shall be responsible for having taken and shall take all steps necessary to fully understand the nature of the Work, the general local conditions which can affect the Work and the cost thereof. Except as provided in Section 9.3, Contractor expressly assumes the risk of any schedule delays or extra costs related to or resulting from any failure by Contractor to acquaint itself fully with conditions which may affect the Work, including, but not limited to, conditions relating to transportation, handling, storage of materials, import/export issues, taxes, insurance, availability of labor, water, roads, weather, topographic conditions, applicable provisions of law, and the character and availability of equipment and facilities needed preliminary to and during the prosecution of the Work. Subject to Article 10, in no event will any of the foregoing conditions relating to the nature of the Work relieve Contractor of its responsibilities under this Agreement.

2.8 Subcontractors.

2.8.1 Acceptable Subcontractors. Contractor shall not subcontract all or any portion of the Work without the prior written approval of Owner, which such approval may be withheld in Owner's sole discretion. Assuming Owner has approved a Subcontractor, and subject to Section 2.8.3, Contractor shall provide to Owner such information concerning such Subcontractors and its Subcontract, as Owner may request.

2.8.2 Responsibility for Subcontractors. Contractor shall be solely responsible to Owner for the acts and omissions of, and whenever this Agreement refers to the negligence, fault or omission of Contractor it shall include, the negligence, fault or omission of, Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with

Contractor. Contractor shall not be relieved of obligations to perform the Work in accordance with this Agreement by tests, inspections or approvals required or performed by persons other than Contractor.

2.8.3 Purchase Orders and Subcontracts. Owner shall have the right to review any forms of subcontract (to include purchase orders) to be used by Contractor hereunder; *provided, however*, that Owner's review of such forms shall not give rise to any liability on the part of Owner with respect to such forms and shall not relieve Contractor of any of its obligations thereunder. All Subcontracts must be terminable for convenience, and any related termination fees thereunder must be commercially reasonable in light of the value of the services or materials provided thereunder. As a condition to Final Completion, Contractor will provide Owner with copies of all Subcontracts, purchase orders, material requisitions and other agreements with Subcontractors relating to the Work.

2.8.4 Subcontractor Warranties. Contractor will procure, from all Subcontractors providing materials or equipment comprising the Project or services in connection with the Project, product and service warranties at a minimum equal to the Warranties in Article 8 with respect to such materials, equipment and/or services, which shall endure for a minimum period of at least one (1) year after Final Completion. At the end of the Warranty Period, Contractor will assign to Owner its rights under any and all such Subcontractor warranties that continue past the end of the Warranty Period. Contractor will ensure that Contractor's Personnel do not, take any action which could release, void, impair or waive any Subcontractor warranties.

2.8.5 Subcontractor Insurance. Contractor shall require all Subcontractors to obtain, maintain and keep in force throughout the time during which they are engaged by Contractor such insurance coverages as are commensurate with those as are required of Contractor in Section 2.9.

2.9 Insurance. Contractor will obtain and maintain in full force and effect during the term of this Agreement (or for such longer term as may be required under Appendix E) insurance in accordance with, and meeting the requirements set forth in, Appendix E.

Article 3 **Owner Obligations**

3.1 Real Estate Rights and Access to Site. Owner will secure and maintain at its own expense all rights in or to real estate as in connection with the ownership of and access to the Substation on the Site for the performance of the Work. Owner will furnish to Contractor reasonable access to the Site as necessary for Contractor to perform the Work and in accordance with the Approved Project Schedule.

3.2 Permits. Owner will secure and maintain at its own expense all Permits which are required to own and operate that portion of the Substation comprising the Project. Contractor will cooperate with Owner in connection with Owner's efforts to obtain, maintain and comply with such Permits.

3.3 Owner's Liability Insurance. Owner will obtain and maintain the insurance coverages as described in Appendix E.

3.4 Owner's Taxes. Owner shall administer and pay all sales, use, gross receipts, income, value-added and withholding taxes and duties, and any other similar taxes and/or contributions (including penalties and interest related to such taxes), imposed: (a) that constitute property taxes assessed on the Site; (b) that are measured by Owner's use of the Project; and (c) upon services or labor provided by

Owner (other than services or labor provided by Contractor or any Subcontractor of Contractor) in connection with the Project (collectively “**Owner’s Taxes**”). To the extent Contractor is legally obligated to pay any of Owner’s Taxes, Owner shall: (i) furnish to Contractor all information and reports required to be furnished to the appropriate taxing authorities in connection with all such Owner’s Taxes; and (ii) reimburse Contractor for the full amount of such Owner’s Taxes paid by Contractor.

3.5 Power. If station service is available, Owner will provide and pay for a supply of power as necessary to energize the Project for all initial operation and testing activities. Otherwise, Contractor must procure a suitable generator to supply such power.

3.6 Other Owner Obligations. Owner shall take such other actions and perform such other obligations as are required of Owner in the Scope of Work, if any.

3.7 Training. Owner shall, at a time mutually agreed with Contractor, conduct a substation safety training program for all of Contractor’s and its Subcontractors’ Personnel. For the avoidance of doubt, by offering such training program to Contractor’s and its Subcontractors’ Personnel, Owner assumes no liability for the actions or omissions of such Personnel, nor shall such Personnel be considered employees of Owner or under Owner’s control. Nothing herein shall in any way limit or relieve Contractor from any of its obligations or liabilities under Section 2.2.13.1.

Article 4

Owner’s Right To Inspect, Stop and Re-Perform Work

4.1 Inspection and Re-Performance. Owner and its designees will have the right to have access to and inspect the Work, wherever located and at any stage of completion. Owner may reject any Work that does not comply with this Agreement. If Owner’s inspection reveals any such non-compliance or any other defects in any portion of Work, then Contractor will, promptly upon its receipt of notice from Owner, correct all such defective Work. If Contractor fails to initiate correction of the defective Work within five (5) calendar days of its having received notice thereof from Owner, Owner may, without prejudice to any other remedy Owner may have, correct such defective Work. Owner’s correction of such defective Work will not relieve Contractor of its obligations under this Agreement. All costs and expenses related to such actions of Owner will be for the account of Contractor, and Contractor will promptly reimburse such amounts to Owner, or Owner may set such costs off as against any amount due from Owner to Contractor under this Agreement.

4.2 Right to Stop Work for Cause. If Contractor fails to correct defective Work or fails to diligently carry out the Work in accordance with the requirements of this Agreement or if Contractor’s actions otherwise fail to conform to the requirements of this Agreement, then Owner may order Contractor to stop performance of the portion of the Work affected thereby, until the cause of such order has been eliminated. In addition, Owner may order Contractor to stop performance if the activities of Contractor or its Personnel reasonably appear to Owner to cause or threaten to cause danger to life or damage to Owner’s property. The cost or schedule impacts experienced by Contractor as a result of orders issued by Owner hereunder will be borne by Contractor.

4.3 Right to Suspend Work for Convenience. Owner may at any time suspend (and later reinstate) the Work without terminating this Agreement. Upon receipt of such order, Contractor will immediately suspend its performance of the Work. During any such suspension, Contractor will (a) protect and secure the Work and all materials and equipment, (b) place no further subcontracts or purchase orders for

materials, services, work or facilities with respect to those parts of the Work suspended except to the extent expressly requested by the Owner; and (c) use all reasonable endeavors to suspend on the most favorable terms available to the Contractor all purchase orders, subcontracts and rental agreements to the extent affected by such suspension and otherwise minimize the additional costs associated with such suspension. If, after the issuance of the Notice to Proceed, Owner suspends the Work pursuant to this Section, then Contractor will be entitled to a Change Order as described in Section 9.3.1.

Article 5 Price and Payment

5.1 Contract Price. As full consideration to Contractor for the complete performance of the Work and Contractor's other covenants in this Agreement, Owner will, subject to Section 5.2, pay Contractor (**Written Amount**) dollars (**\$XXX,XXX.00**) (the "**Contract Price**"). The Contract Price may be adjusted only pursuant to a Change Order issued by Owner in accordance with the provisions of Article 9. Subject to the terms and conditions of Section 5.2, the Contract Price shall be paid by Owner to Contractor, in accordance with the invoicing procedures set forth in Appendix D. All invoices submitted to Owner shall be emailed/sent to the following addresses:

Email electronic copy to:

jjoyner@mercedid.org

With a hardcopy mailed to:

Merced Irrigation District
Attn: Jeff Joyner, Project Coordinator
744 W 20th Street
Merced, CA 95340

5.2 Conditions of Payments; Withholdings, Set-Offs, Retention.

5.2.1 [blank.]

5.2.2 Withholding to Protect Owner from Loss. Notwithstanding anything in this Article 5 to the contrary, Owner may, without prejudice to any other rights Owner may have, withhold all or any portion of any payment to such extent as may be necessary in Owner's reasonable opinion to protect Owner from loss due to: (a) defective or incomplete work by Contractor or any of its Subcontractors; (b) claims filed by third parties arising out of Contractor's performance of the Work; (c) failure of Contractor to make payments to Subcontractors; (d) reasonable evidence that Substantial Completion will not occur by the Guaranteed Substantial Completion Date; (e) damage to Owner caused in whole or part by any Contractor or any of its Personnel; (f) liens filed against either the Project, the Site or any other property of Owner in connection with the performance of the Work; (g) stop notices, wage orders or other withholdings required by Applicable Legal Requirements, in connection with the Work; (h) failure by Contractor to maintain the insurance required by this Agreement; or (i) Contractor's failure to fulfill any of its other obligations under this Agreement. When Contractor has remedied the cause for withholding any payment and has furnished evidence of such remedy that is satisfactory to Owner, Owner will make

the payment so withheld to Contractor within thirty (30) calendar days following Owner's receipt of such evidence.

5.2.3 Retention. Owner will retain ten percent (10%) of each Milestone Payment (the "**Retention**"). Owner may deposit the Retention into an escrow account in accordance with Public Contract Code 22300. Subject to Section 5.2.4, the Retention shall be released to Contractor within thirty (30) days after the Notice of Final Completion has been recorded with the appropriate county agency.

5.2.4 Withholding to Ensure Completion of the Punch-List. Upon creation of the Punch-List in accordance with Section 6.2, Owner may withhold from any payment due to Contractor an amount equal to 150% of the total projected cost of completing the Punch-List items (such amount, the "**Punch-List Withholding Amount**"). This amount will be reasonably determined by Owner and will be released to Contractor as set forth in Appendix D.

5.2.5 Set Off. Owner may set off any sums payable by Contractor to Owner under or in connection with this Agreement (including without limitation payments due under Sections 2.2.12, 2.2.13, 2.2.16, 4.1 and 6.1.4.2) against any payments due to Contractor under the Agreement.

5.3 Payment or Use Not Acceptance. No Milestone Payment or other payment to Contractor or any use of the Project by Owner shall constitute an acceptance of any of the Work furnished by Contractor or shall relieve Contractor of any of its obligations or liabilities with respect thereto.

Article 6 Completion of the Work

6.1 Substantial Completion.

6.1.1 Criteria for Substantial Completion. "**Substantial Completion**" shall be achieved when each of the following conditions has been met:

6.1.1.1 Contractor has completed construction and installation of the Project as described in the Scope of Work;

6.1.1.2 Contractor has concluded, and Owner has accepted, all of the Completed Commissioning Tests in accordance with Section 7.3;

6.1.1.3 Contractor has provided Owner with all spare parts and maintenance tools that are required to be provided pursuant to Section 2.2.9.3 and 2.2.9.4, respectively;

6.1.1.4 [blank; lien waivers not required];

6.1.1.5 Owner and Contractor have agreed upon the final Punch-List, as described in Section 6.2;

6.1.1.6 Contractor has completed performance of all other Work on the Project, except for any remaining items set forth in the approved Punch-List; and

6.1.1.7 Owner has delivered in writing a certificate that Contractor has met the requirements set forth in Sections 6.1.1.1 through 6.1.1.6.

6.1.2 Notice and Report of Substantial Completion. When Contractor believes that it has achieved the requirements set forth in Sections 6.1.1.1 through 6.1.1.6, Contractor shall deliver a written notice of such determination (“**Notice of Substantial Completion**”) to Owner. The Notice of Substantial Completion shall contain a report in form acceptable to Owner and with sufficient detail to enable Owner to determine whether Contractor has achieved such requirements.

6.1.3 Achievement of Substantial Completion. Within ten (10) days of receipt of the Notice of Substantial Completion, Owner will inspect that portion of the Substation comprising the Project and either: (a) deliver to Contractor a written certification stating that it has achieved the criteria set forth in Sections 6.1.1.1 through 6.1.1.6; or (b) notify Contractor in writing that such criteria have not been achieved, stating the reasons therefor. If Owner certifies that such requirements have been met, the date on which the last of the criteria set forth in Sections 6.1.1.1 through 6.1.1.6 was met shall be considered, for purposes of this Agreement, the date Substantial Completion has been achieved. If Owner notifies Contractor that such requirements have not been met, Contractor will promptly undertake such action or work as necessary to achieve such requirements and shall then issue another Notice of Substantial Completion to Owner stating that Contractor believes that such requirements have been achieved. Such procedure shall be repeated until Substantial Completion is achieved.

6.1.4 Guaranteed Substantial Completion.

6.1.4.1 Guaranteed Substantial Completion Date. So long as the date Notice to Proceed is issued is on or before **January 4, 2019**, Contractor guarantees that Substantial Completion (Testing and Commissioning of new T4) shall be achieved on or before **May 1, 2019** (the “**Guaranteed Substantial Completion Date**”).

6.1.4.2 Late Substantial Completion Payments (for Liquidated Damages). If Substantial Completion does not occur on or before the Guaranteed Substantial Completion Date, Contractor hereby agrees to pay to Owner an amount (the “**Late Substantial Completion Payments**”) equal to **FIVE THOUSAND U.S. Dollars (\$5,000.00)** per calendar day for each calendar day after the Guaranteed Substantial Completion Date that Substantial Completion is not achieved. In no event shall Contractor’s liability for Late Substantial Completion Payments exceed an amount equal to twenty percent (20%) of the Contract Price.

6.1.4.3 Amounts Reasonable. The Parties hereby acknowledge and agree that the terms, conditions and amounts fixed as liquidated damages pursuant to Section 6.1.4.2 for the Late Substantial Completion Payments are reasonable, considering the loss of revenues and the actual costs that Owner will incur if Substantial Completion is not achieved by the Guaranteed Substantial Completion Date. The amounts of these liquidated damages are agreed upon and fixed hereunder by the Parties because of the difficulty of ascertaining the exact amount of losses and/or costs that will be actually incurred by Owner in such event, and the Parties hereby agree that such amounts are a reasonable estimate of Owner’s probable loss (and are not a penalty) and that such amounts shall be applicable regardless of the amount of such lost revenues and increased costs actually incurred by Owner. The receipt of any such liquidated damages shall not affect Owner’s rights to terminate this Agreement pursuant to Article 12.

6.1.4.4 Payment of Late Substantial Completion Payments. Contractor shall pay the Late Substantial Completion Payments required under Section 6.1.4.2 to Owner on a weekly basis on the last Business Day of each week during the period after the Guaranteed Substantial Completion Date through the achievement of Substantial Completion. Any amounts due under Section 6.1.4.2 may, at Owner's option, be deducted from any unpaid amounts owed by Owner to Contractor.

6.2 Creation of Punch-List. No later than thirty (30) days prior to the then-scheduled date of Substantial Completion, Contractor will prepare and deliver to Owner a written list setting forth all of the items of Work that remain to be performed to complete the Work; provided, that, unless Owner otherwise consents in writing, such items of Work on such list shall only be items that are (a) minor in nature, and (b) not related to the reliable operation of the Project, and (c) not related to the safety of the Project, and (d) not relate to the compliance of the Project with any Applicable Legal Requirements. Such list shall also state the proposed time limits within which Contractor will complete each of such remaining Work items. Upon its receipt of such list, Owner will review the same and notify Contractor of any proposed revisions thereto. Owner and Contractor will then meet and consult in good faith to agree upon the definitive, final list (including the approved time limits within which Contractor will perform such remaining Work items) (such final list, as agreed to by Owner the "**Punch-List**"). Once the final Punch-List is agreed upon, Contractor will immediately begin the items thereon; *provided*, that if Contractor has not commenced such Work within five (5) days, or has not completed such Work within the approved time limits set forth in the final Punch-List, then Owner may have such items completed at Contractor's expense.

6.3 Transfer of Responsibility to Owner. Upon Substantial Completion pursuant to Section 6.1.3, Owner shall thereafter be solely responsible for the operation and maintenance of the Project. Following Substantial Completion and prior to Final Completion, Contractor shall have reasonable access to the Site and the reasonable cooperation of Owner so as to complete any Punch-List items. The achievement of Substantial Completion and/or Owner's use or operation of the Project at any time shall not be deemed or construed to imply Owner's acceptance of any Work that is not in compliance with this Agreement.

6.4 Final Completion.

6.4.1 Criteria for Final Completion. "**Final Completion**" shall be achieved when each of the following conditions has been met:

6.4.1.1 Substantial Completion has been achieved;

6.4.1.2 Contractor has completed all Punch-List items in accordance with this Agreement;

6.4.1.3 Contractor has completed any work required under Article 8 with respect to any claims under the Warranties about which Contractor has been given notice prior to the completion of the last Punch-List item;

6.4.1.4 Contractor has provided five (5) copies of the "as-built" Project Design Book to Owner, as required under Section 2.2.18;

6.4.1.5 [blank; lien waivers not required];

6.4.1.6 Contractor has delivered to Owner copies of all Subcontracts as required under Section 2.8.3

6.4.1.7 Owner has delivered to Contractor a written certification that all the requirements of Sections 6.4.1.1 through 6.4.1.6 have been satisfied.

6.4.2 Notice and Report of Final Completion. When Contractor believes that it has achieved the requirements set forth in Sections 6.4.1.1 through 6.4.1.6, Contractor shall deliver a written notice of such determination (“**Notice of Final Completion**”) to Owner. The Notice of Final Completion shall contain a report in a form acceptable to Owner and with sufficient detail to enable Owner to determine the achievement by Contractor of all Work and other work to be performed under this Agreement, including the Punch-List items, and such other information that Owner may require to determine whether Final Completion has been achieved.

6.4.3 Achievement of Final Completion. Owner will within thirty (30) days following Owner’s receipt of the Notice of Final Completion, either: (a) deliver a written certification stating that the requirements under Sections 6.4.1.1 through 6.4.1.6 have been achieved; or (b) notify Contractor in writing that such requirements have not been achieved, stating the reasons therefor. In the event Owner certifies that such requirements have been met, the date of such certification from Owner will be deemed the date Final Completion has been achieved. In the event Owner notifies Contractor that such requirements have not been met, Contractor shall promptly take such action as necessary to achieve such requirements, and shall then issue to Owner another Notice of Final Completion. Such procedure shall be repeated until Final Completion is achieved.

Article 7 Commissioning Testing

7.1 Commissioning Tests. When Contractor has completed the construction of the Project and believes that the Project is ready for testing, subject to Section 7.2, Contractor shall perform, and re-perform if necessary, all testing described in and/or required by the Scope of Work and as otherwise necessary to demonstrate that the Project meets or exceeds the specifications and criteria set forth therein and that the results of the tests performed on each component of the Project are considered “acceptable” in accordance with the Scope of Work (the “**Commissioning Tests**” and each, a “**Commissioning Test**”). All Commissioning Tests are to be conducted in accordance with the requirements of the Scope of Work. Prior to the performance of the Commissioning Tests, Contractor shall be required to obtain Owner’s written consent to a testing protocol for the Commissioning Tests, and such consent shall not be unreasonably withheld.

7.2 Notice to Owner. Contractor shall give Owner at least seven (7) days written notice in advance of the date on which Contractor intends to commence the initial set of Commissioning Tests. Thereafter, Contractor shall give Owner at least three (3) days notice of all subsequent Commissioning Tests unless a shorter notice period is agreed to in advance and in writing by Owner.

7.3 Completed Commissioning Tests. After Contractor has successfully performed a Commissioning Test demonstrating that a part or component of the Project that has been tested has achieved acceptable results as set forth in the Scope of Work, Contractor may notify Owner in writing (such notice, the “**Commissioning Testing Completion Notice**”) that it elects to nominate that Commissioning Test as a “**Completed Commissioning Test.**” The Commissioning Testing Completion Notice will be

accompanied by a written report of the results of the nominated Commissioning Test. As soon as practicable but in any event within fifteen (15) days after Owner's receipt of the Commissioning Testing Completion Notice, Owner will give written notice to Contractor either accepting or rejecting the Commissioning Test for the part or component submitted by Contractor. In the event that Owner rejects or fails to accept any Commissioning Test, Contractor will undertake such action or work reasonably necessary to cause the failed part or component to achieve a successful Commissioning Test and shall then notify Owner that it wishes to re-nominate that particular Commissioning Test for Owner's approval. Such procedure shall be repeated until Owner accepts all of the Commissioning Tests submitted by Contractor. Failure of Owner to notify Contractor that it accepts or rejects a nominated Commissioning Test within the fifteen (15) day period following Owner's receipt of a Commissioning Testing Completion Notice shall not be deemed to constitute a certification that such nominated Commissioning Test has been accepted as a Completed Commissioning Test.

Article 8 Contractor's Warranties

8.1 Warranties.

8.1.1 Parts Warranty. Contractor warrants that, for the duration of the Warranty Period, all contractor-provided parts, materials, equipment, machinery and other physical items comprising the Project (collectively, "**Physical Items**") will be: (a) new and of utility-grade quality; (b) free from defects in design, workmanship and materials; and (c) strictly in accordance with (i) this Agreement, the Drawings and the plans and specifications and accompanying data set forth in the Scope of Work, (ii) all Applicable Legal Requirements as in effect on the date of Substantial Completion, (iii) all applicable engineering, environmental, construction, safety, and electrical codes and standards as required under or listed in the Scope of Work, as such codes and standards exist on the date of Substantial Completion, and (iv) all Prudent Industry Practices as exist on the date of Substantial Completion (collectively, the "**Parts Warranty**").

8.1.2 Services Warranty. Contractor further warrants that, for the duration of the Warranty Period, all services provided by Contractor or any of its Personnel in connection with the Work will be: (a) performed in a professional, prudent and workmanlike manner that is free from defects, errors and omissions and with the highest degree of skill and care that is utilized by nationally-recognized professionals in the same field under the same or similar circumstances; and (b) strictly in accordance with (i) this Agreement, the Drawings and the plans and specifications and accompanying data set forth in the Scope of Work, (ii) all Applicable Legal Requirements as in effect on the date of Substantial Completion, (iii) all applicable engineering, environmental, construction, safety, and electrical codes and standards as required under or listed in the Scope of Work as such codes and standards exist on the date of Substantial Completion, and (iv) all Prudent Industry Practices as the same exist on the date of Substantial Completion (the "**Services Warranty**"; collectively with the Parts Warranty, the "**Warranties**").

8.2 Warranty Period. Subject to Section 8.4, the Warranties will, with respect to each Physical Item and service provided, remain in full force and effect for a period beginning on the date on which such Physical Item and or service is provided to Owner and ending one (1) year after Final Completion (such period, the "**Warranty Period**"). The Parties acknowledge that the Warranties are given by Contractor to Owner in addition to any Subcontractor warranties that Contractor assigns to Owner pursuant to Section

2.8.4, and that the expiration of the Warranty Period is only applicable to the Warranties and will have no effect on any assigned Subcontractor warranties that may be of longer duration.

8.3 Repair of Defects. If Owner discovers that the Work or any part thereof fails to meet either of the Warranties, Owner will notify Contractor of such failure. Upon receipt of such notice, Contractor will promptly: (a) cure such failure to Owner's reasonable satisfaction and in accordance with Prudent Industry Practices and Applicable Legal Requirements; and (b) perform such tests as Owner may require to demonstrate the cure of such failure. Contractor will bear any and all costs and expenses associated with curing any warranted Work, including all costs of accessing any item that must be repaired or replaced under the Warranties.

8.4 Warranty Period Extension. Any Work re-performed and any part of the Project that is reworked, repaired or replaced in satisfaction of Contractor's obligations in connection with the Warranties will be re-warranted by Contractor pursuant to the same Warranty set forth in Section 8.1, and Contractor will have the same obligations in relation thereto as set forth in Section 8.3, for one (1) year from the date such re-performance, rework, repair or replacement is completed.

8.5 Warranty of Title. Contractor warrants and guarantees that, as of the date of Substantial Completion, title to all services, materials, supplies and equipment provided to Owner by Contractor under this Agreement shall pass to Owner free and clear of all claims, liens, security interests and other encumbrances, and that such services, materials, supplies and equipment shall not be acquired by Contractor subject to any agreement under which a security interest or other lien or encumbrance is retained by any Person.

Article 9 Changes

9.1 Changes. Without invalidating this Agreement, either Party may request changes within the scope of this Agreement(a "**Change**") and, if accepted by the other Party, the Approved Project Schedule and/or the Contract Price may be adjusted by mutual agreement of the Parties documented in a written "**Change Order**" prior to implementation of the Change. Changes may only be authorized by Change Orders issued in accordance with this Article 9. Change Orders will constitute the exclusive remedy to Contractor for any Changes.

9.2 Procedure for Changes.

9.2.1 Changes Initiated by Contractor. If Contractor becomes aware of any circumstances which Contractor has reason to believe may necessitate a Change, Contractor will issue to Owner (a "**Change Order Request**"). All Change Order Requests shall include documentation sufficient to enable Owner to determine: (a) the factors necessitating the possibility of a Change; (b) the impact which the Change is likely to have on the Contract Price; (c) the impact which the Change is likely to have on the Approved Project Schedule; and (d) such other information which Owner may request in connection with such Change. If Contractor fails to notify Owner of a circumstance necessitating a Change within forty-eight (48) hours after Contractor knew or should have known about such circumstance, then notwithstanding anything in this Article 9 to the contrary, Contractor will be deemed to have waived any right to receive a Change Order based upon such circumstance. Owner may, but except as provided in Section 9.3 below, shall not be obligated to, issue a Change Order pursuant to a Change Order Request. Unless otherwise stated by Owner in writing, any work outside the Work described in this Agreement

performed by Contractor prior to its having received a Change Order from Owner will be considered unauthorized work and will be at Contractor's sole risk and expense.

9.2.2 Changes Initiated by Owner. If Owner wishes to request a Change, Owner shall notify Contractor in writing. Within three (3) days after receipt of such notice (unless otherwise extended by mutual agreement), Contractor shall notify Owner in writing of the feasibility of the requested Change, and shall submit to Owner a draft Change Order setting forth the estimated effect(s), if any, that such Change would have on the Contract Price and/or the Approved Project Schedule. Based upon such information, Owner may, but shall not be obligated to, issue a Change Order making a Change based upon such notice from Contractor.

9.3 Required Change Orders.

9.3.1 Circumstances Requiring Change Orders. Provided that Contractor has used all reasonable efforts to avoid and mitigate any potential delays to the Approved Project Schedule and/or increased Direct Costs resulting from such events, Contractor will, subject in all events to Sections 9.4 and 9.5, be entitled to receive Change Orders as described below in the following circumstances:

(a) if and to the extent that an event of Force Majeure directly causes Contractor to suffer a delay in its performance of the Work, then Owner will issue a Change Order extending the Approved Project Schedule;

(b) if, after the date Notice to Proceed is issued, Owner suspends the Work pursuant to the provisions of Section 4.3 (excluding any suspension resulting by reason of any act or omission of Contractor or its Personnel), then Owner will issue a Change Order extending the Approved Project Schedule and/or increasing the Contract Price, as applicable;

(c) if and to the extent that Owner's failure to perform any of its obligations (other than any failure that results from Contractor's breach or default), then Owner will issue a Change Order extending the Approved Project Schedule and/or increasing the Contract Price as applicable; and

(d) if Contractor encounters Hazardous Substances on the Site that existed prior to the date of this Agreement and Contractor ceases performance of any Work in the area affected and/or, as allowed under Section 2.2.15.3, Owner instructs Contractor to take actions in connection with such Hazardous Substance in order to allow continued performance of the Work, then Owner will issue a Change Order extending the Approved Project Schedule and/or increasing the Contract Price, as applicable.

9.3.2 Exclusive Remedies. Any Change Order issued pursuant to Section 9.3.1 shall be Contractor's sole and exclusive remedy for any increased costs and/or delays resulting from the events or circumstances described therein, and Contractor will not be entitled to any additional relief, payment, damages or other compensation in connection with any such events or circumstances.

9.4 Changes Involving Schedule Extensions. Notwithstanding anything in Section 9.3 to the contrary, with respect to any Change Order required to be issued to extend the Approved Project Schedule as a result of an event described in Section 9.3.1, such Change Order will, on a retrospective basis, only extend the Approved Project Schedule by the number of calendar days, at a maximum, equal to the number of calendar days of delay in the critical path progress of the Work demonstrated by Contractor as

being required solely as a result of such event or circumstance, despite Contractor's use of all reasonable efforts to mitigate and avoid any such delay. In no event will Contractor be entitled to any change in the Approved Project Schedule to the extent the event or circumstance giving rise to such change is due to the fault, actions or omissions of Contractor or its Personnel.

9.5 Changes to the Contract Price. With respect to any Change Order required to be issued to increase the Contract Price as a result of an event described in Section 9.3.1, such Change Order will, on a retrospective basis, only increase the Contract Price by an amount equal to the Direct Costs reasonably incurred by Contractor solely as a result of such event or circumstance. In no event will Contractor be entitled to any change in the Contract Price to the extent the event or circumstance giving rise to such change is due to the fault, actions or omissions of Contractor or its Personnel.

9.6 Continued Performance Pending Resolution of Disputes. Notwithstanding and pending resolution of any dispute with respect to a Change, Contractor must proceed, upon written notice from Owner, with the performance of any Change Order issued by Owner.

9.7 Documentation. All claims by Contractor for adjustments to the Contract Price and/or the Approved Project Schedule as a result of Changes under this Article 9 shall be supported by such documentation as Owner may require to verify, to its satisfaction, the accuracy thereof.

Article 10 Force Majeure

10.1 Force Majeure Event. As used in this Agreement, an event of "**Force Majeure**" shall mean any event that: (a) prevents the affected Party (the "**Affected Party**") from performing its obligations under this Agreement or complying with any conditions required by the other Party under this Agreement; and (b) is unforeseeable and is beyond the reasonable control of and not the result of the fault or negligence of the Affected Party or such Affected Party's Personnel (or their Affiliates); and (c) could not have been prevented by the Affected Party's or its Personnel's (or their Affiliates) exercise of reasonable diligence. For purposes of clause (b) above but without intending to limit the scope of the clause, the following events shall be considered to be beyond the reasonable control of an Affected Party or its Personnel: war, civil insurrection, flash floods, governmental actions or omissions, hurricanes, tornadoes, typhoons, lightning strikes, epidemics, earthquakes, quarantines, embargoes, riots, and sabotage. Notwithstanding anything in this Section to the contrary, in no instance will the following be considered events beyond Contractor's or its Personnel's reasonable control or constitute a Force Majeure event: (i) strikes or labor disturbances involving the employees of Contractor or any of its Subcontractors or caused by any violation by Contractor or its Subcontractors of any labor agreements; (ii) price fluctuations with respect to labor or materials, supplies or components of equipment related to items to be supplied by Contractor under this Agreement; (iii) mere economic hardship (including as suffered by the Affected Party or its Personnel or any of their Affiliates), or (iv) normal climatic conditions (based upon a one hundred year period) at the Site.

10.2 Burden of Proof. The burden of proof as to whether a Force Majeure event has occurred shall be upon the Party claiming a Force Majeure event.

10.3 Excused Performance. If the Affected Party is rendered wholly or partly unable to perform its obligations under this Agreement because of a Force Majeure event, such Affected Party will be excused from such non-performance to the extent caused by the Force Majeure event, provided that:

- (a) the Affected Party, within twenty-four (24) hours after knowing of the occurrence of the Force Majeure event, gives the other Party written notice describing the particulars of the occurrence;
- (b) the Affected Party must continue perform its obligations under this Agreement to the extent possible, and the Affected Party must use all reasonable efforts to overcome, mitigate and remedy the damages, delays and effects of the Force Majeure and its inability to perform its obligations under this Agreement as a result thereof; and
- (c) when the Affected Party is able to resume performance of its obligations hereunder, that Party shall give the other Party written notice to that effect and shall promptly resume such performance.

Article 11 **Indemnification**

11.1 **Indemnity.** To the fullest extent permitted by law, Contractor hereby assumes liability for, and will indemnify, defend and hold harmless Owner and its respective members, partners, affiliates, employees, representatives and agents (collectively, the “**Owner Indemnitees**”) from and against all liability (including any strict liability), claims, suits, actions, costs (including attorneys’ fees), expenses, losses, fines, penalties, assessments, or judgments that may be imposed on, incurred by or asserted against any Owner Indemnitee and in any way relating to or arising out of:

- (a) any bodily injury, death or damage to property caused by any act or omission (including strict liability) or willful misconduct of Contractor or any Affiliate or their Personnel, relating to or arising out of the performance of the Work or any curative action under any warranty related to the Work;
- (b) claims by any Government Authority for any Contractor’s Taxes;
- (c) the Release of any Hazardous Substances on or from the Site or any areas adjacent thereto that results from the actions or omissions of Contractor or any of its Personnel;
- (d) the violation by Contractor or any of its Personnel of any, or the failure of the Work to comply with or be capable of operating in compliance with, Applicable Legal Requirements;
- (e) any claim or allegation that any equipment, materials or information provided by Contractor or any of its Personnel in connection with its performance of the Work constitutes an infringement of any patent, trade secret, trademark, copyright or other proprietary rights of any third party or constitutes the unauthorized disclosure of such third party’s confidential information;
- (f) any liens, claims of lien or similar encumbrances arising in connection with the Work;
- (g) any claims with respect to employer’s liability or worker’s compensation filed by any employee of Contractor or any of its Personnel;
- (h) Contractor’s breach of any Subcontracts; and
- (i) any failure of Contractor to comply with its obligations hereunder.

11.2 Notice and Legal Defense. Promptly after receipt by an Owner Indemnitee of any claim or notice of the commencement of any action as to which any indemnity provided for in Article 11 may apply, the Owner Indemnitee will notify Contractor in writing of such fact. Upon Contractor's receipt of such notice, Contractor shall assume on behalf of the Owner Indemnitee the defense thereof with counsel reasonably satisfactory to the Owner Indemnitee; *provided*, that if the defendants in any such action include both Contractor and the Owner Indemnitee, and if the Owner Indemnitee shall have reasonably concluded that there may be legal defenses available to it which are different from, additional to or inconsistent with those available to Contractor, then the Owner Indemnitee shall have the right to select separate counsel to participate in the defense of such action on its own behalf and at Contractor's expense.

11.3 Failure to Defend Action. If Contractor fails to assume the defense of any such claim as described in Section 11.2, promptly after the receipt by Contractor of notification thereof, then the Owner Indemnitee against which the claim is instituted or commenced may, at Contractor's expense, contest, or (with the prior written consent of Contractor, not to be unreasonably withheld) settle, such claim. All costs and expenses incurred by Owner or the Owner Indemnitee in connection with any such contest, settlement or payment may be deducted from any amounts due to Contractor under this Agreement, with all such costs in excess of the amount deducted to be reimbursed by Contractor to Owner or the Owner Indemnitee promptly following, but not later than fifteen (15) days following, Owner's or Owner Indemnitee's demand therefor.

11.4 Survival. The provisions of this Article 11 will survive any termination of this Agreement.

Article 12 Termination and Suspension Rights

12.1 Owner Termination for Convenience. Owner shall have the right, in its sole discretion, to terminate this Agreement for its sole convenience (without necessity of reason to Contractor), at any time by giving written notice thereof to Contractor.

12.1.1 Termination Payment. In the event of termination by Owner under this Section 12.1, then, subject to Section 5.2.2 and 12.1.3, Owner shall pay to Contractor a cancellation fee consisting of Contractor's actual Direct Costs incurred in performing the Work (without profit, overhead or mark-up) in accordance with this Agreement through the date set forth in the written termination notice, minus all amounts paid to Contractor by Owner through the date of the written termination notice (the "**Termination Payment**") *provided, however*, that in no event shall the sum of the Termination Payment and all amounts paid to Contractor by Owner through the date of the written termination notice exceed the Contract Price. Payment of the Termination Payment shall be the sole and exclusive liability of Owner, and the sole and exclusive remedy of Contractor, with respect to termination of this Agreement pursuant to Section 12.1.

12.1.2 Condition Precedent. The following shall be conditions precedent to Owner's obligation to pay Contractor the Termination Payment: (a) Contractor's executing and delivering all such documents and taking all such steps, including the assignment of Contractor's contractual rights, as Owner may require for the purpose of fully vesting in Owner all rights, title and interests of Contractor in and to all Subcontracts, purchase orders, warranties, guarantees and other agreements pertaining to the Work; and (b) Contractor's promptly delivering to Owner any other information reasonably requested by Owner.

12.1.3 Verification of the Termination Payment. Contractor shall, within sixty (60) days of any termination of this Agreement pursuant to Section 12.1, submit to Owner all invoices and other documentation as is sufficient to enable Owner to verify the amount of Contractor's Direct Costs in the performance of the Work in accordance with this Agreement so that Owner may determine the amount of the Termination Payment. Owner shall pay Contractor the Termination Payment within thirty (30) days of Owner's receipt of the documentation required under this Section 12.1.3.

12.2 Owner Termination Upon Contractor Event of Default. If a Contractor Event of Default occurs, then Owner may, without prejudice to any other right or remedy Owner may have under this Agreement or at law or equity, at any time terminate this Agreement, such termination becoming effective upon Contractor's receipt of written notice thereof from Owner. For purposes hereof, a "**Contractor Event of Default**" will occur if:

12.2.1 Contractor is adjudged a bankrupt or insolvent, makes a general assignment for the benefit of its creditors, has a trustee or receiver appointed for its property, files a petition to take advantage of any debtor's act under any Applicable Legal Requirements or is the involuntary subject of any petition or action under any debtor's act under any Applicable Legal Requirements;

12.2.2 Contractor fails or refuses to perform any material obligation under the Agreement;

12.2.3 Contractor fails to remove any lien filed against the Project, the Site or any other property of Owner by any of its Subcontractors; or

12.2.4 Substantial Completion is delayed by more than sixty (60) calendar days past the Guaranteed Substantial Completion Date.

12.3 Actions Upon Termination. Upon receipt of written notice from Owner of termination of this Agreement pursuant to either Section 12.1 or Section 12.2, Contractor will: (a) cease operations as directed by Owner in the notice; (b) take all actions necessary, or that Owner may direct, for the protection and preservation of the Project and all equipment related thereto (in whatever stage of completion); (c) enter into no further subcontracts and purchase orders; and (d) at Owner's instruction, assign its rights under all Subcontracts to Owner or Owner's designee.

12.4 Consequences of Termination. Upon any termination pursuant to this Article 12, in addition to any other rights or remedies that Owner may have under law or equity, Owner may at its option elect to: (a) assume responsibility for and take title to and possession of the Project and any or all work, materials or equipment remaining at the Site and any and all other materials or equipment located outside the Site for which payment in full or in part has been made by Owner; and (b) succeed automatically, without the necessity of any further action by Contractor, to the interests of Contractor in any or all contracts and Subcontracts entered into by Contractor with respect to the Work, and shall be required to compensate such Subcontractors only for compensation becoming due and payable to such parties under the terms of their Subcontracts with Contractor from and after the date Owner elects to succeed to the interests of Contractor in such Subcontracts. In the event of any termination pursuant to Section 12.2, Owner may, at its option, finish the Work and other work by whatever method Owner may deem expedient and, to the extent the costs of completing the Work exceed those amounts that would have been payable to Contractor hereunder to complete the Work except for Contractor's default, Contractor shall pay the difference to Owner promptly upon demand.

Agreement, as the same may be amended, supplemented or otherwise changed in accordance with the provisions of this Agreement.

Article 14 **Representations and Warranties**

14.1 Representations and Warranties of Contractor. Contractor hereby represents and warrants to Owner as follows:

14.1.1 Due Organization of Contractor. Contractor is a **California corporation** duly organized, validly existing and in good standing under the laws of the **State of California** and has all requisite power and authority to own and operate its business and properties and to carry on its business as such business is now being conducted and is duly qualified to do business in the State of California and in any other jurisdiction in which the transaction of its business makes such qualification necessary.

14.1.2 Due Authorization of Contractor; Binding Obligation. Contractor has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder, and the execution, delivery and performance of this Agreement by Contractor have been duly authorized by all necessary corporate action on the part of Contractor; this Agreement has been duly executed and delivered by Contractor and is the valid and binding obligation of Contractor enforceable in accordance with its terms.

14.1.3 Non-Contravention. The execution, delivery and performance of this Agreement by Contractor and the consummation of the transactions contemplated hereby do not and will not contravene the certificate of incorporation or by-laws of Contractor and do not and will not conflict with or result in a breach of or default under any indenture, mortgage, lease, agreement, instrument, judgment, decree, order or ruling to which Contractor is a party or by which it or any of its properties is bound or affected.

14.1.4 Regulatory Approvals. All governmental or other authorizations, approvals, orders or consents required in connection with the execution, delivery and performance of this Agreement by Contractor have been obtained or will be obtained in due course.

14.2 Representation and Warranties of Owner. Owner hereby represents and warrants to Contractor as follows:

14.2.1 Due Organization of Owner. Owner is an irrigation district duly organized and validly existing and in good standing under Division 11 of the California Water Code, Sections 20500 et seq., and has all requisite power and authority to own and operate its business and properties and to carry on its business as such business is now being conducted and is duly qualified to do business in California.

14.2.2 Due Authorization of Owner; Binding Obligation. Owner has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder and the execution, delivery and performance of this Agreement by Owner have been duly authorized by all necessary corporate actions on the part of Owner; this Agreement has been duly executed and delivered by Owner and is the valid and binding obligation of Owner enforceable in accordance with its terms.

14.2.3 Non-Contravention. The execution, delivery and performance of this Agreement by

Owner and the consummation of the transactions contemplated hereby do not and will not contravene the articles of incorporation of Owner and do not and will not conflict with or result in a breach of or default under any indenture, mortgage, lease, agreement, instrument, judgment, decree, order or ruling to which Owner is a party or by which it or any of its properties is bound or affected.

Article 15 Limitation of Liability

15.1 Limitation of Aggregate Liability of Contractor. To the fullest extent permitted by law, and except for liability arising out of the gross negligence, fraud or willful misconduct of Contractor or its Personnel, the total cumulative liability of Contractor to Owner under this Agreement for all claims, losses, damages, and expenses, whether based in contract, tort (including negligence), strict liability, or otherwise, shall be limited to an amount equal to one hundred percent (100%) of the Contract Price. The foregoing limitation is not intended to limit Contractor's liability to Owner or the Owner Indemnitees arising out of any claims of any third parties for which Contractor has an indemnification obligation under this Agreement, and the amount of any such claims shall not be counted towards such limit of liability. Liquidated damages paid by Contractor under this Agreement shall count towards this limitation of liability.

15.2 No Consequential Damages. Notwithstanding anything to the contrary in this Agreement, and except for liability arising out of the fraud or intentional misconduct of a Party, in no event shall either Party be liable to the other Party, in connection with or arising out of such Party's rights or obligations under this Agreement, for loss of anticipated profits or revenue or any other indirect or consequential damages which are not reasonably foreseeable. The foregoing limitation is not intended to limit Contractor's liability to MID or the indemnitees of MID arising out of any claims for which Contractor has an indemnification obligation under this Agreement. In addition, the Parties agree that any liquidated damages payable by Contractor as required under this Agreement shall not be considered "special, incidental, indirect or consequential" damages under this Section.

Article 16 Dispute Resolution

16.1 Applicability of Resolution Procedures. Except for matters requiring immediate injunctive relief, all claims, disputes or other matters in question between the Parties arising out of or relating in any way to this Agreement ("**Disputes**") will be resolved pursuant to this Article 16.

16.2 Management Discussions. The Parties agree to make a diligent, good-faith attempt to resolve all Disputes. If the Parties are unable to resolve a Dispute arising under this Agreement within twenty (20) calendar days after notice from one Party to the other, such Dispute will be submitted promptly to the senior executive officers of the Parties, who will meet, in person or by telephone, not later than ten (10) calendar days after the date such Dispute was submitted to them. In the event that the officers cannot resolve the Dispute within five (5) Business Days after the matter is submitted to them, then the Parties may pursue such rights and remedies as may be available under applicable law.

16.3 Obligations Continue. Notwithstanding the existence of any Dispute hereunder, the Parties will continue to perform their respective obligations under this Agreement unless the Parties otherwise mutually agree in writing.

16.4 Injunctive or Equitable Relief. Notwithstanding anything in this Agreement to the contrary, nothing in this Agreement is intended to, nor shall it, prevent the Parties from seeking injunctive or equitable relief at any time as may be available under law or in equity.

16.5 Survival. The provisions of this Article 16 will survive the termination of this Agreement.

Article 17 Non-Disclosure and Non-Use Covenants

17.1 Confidential Information. The “**Confidential Information**” of a Party means valuable, non-public, competitively sensitive data and information relating to such Party or such Party's business that is either disclosed to the receiving Party in writing and marked “Confidential” or, if provided in another form, is confirmed in writing (including e-mail) within fifteen (15) calendar days therefrom and is identified in such writing by the disclosing Party as being confidential; provided, that regardless of any marking as “confidential,” information shall not be treated as Confidential Information if such information: (a) has been or becomes generally available to the public other than as a result of a disclosure by the receiving Party in violation of this Article; (b) was already known by the receiving Party on a non-confidential basis prior to its disclosure hereunder; (c) has been or becomes available to the receiving Party on a non-confidential basis when the source of such availability is entitled, to the best of the receiving Party's knowledge, to make such disclosure to the receiving Party; or (d) is or was developed by or for the receiving Party independently of and without reference to information disclosed to the receiving Party hereunder.

17.2 Non-Disclosure of Confidential Information. Each Party agrees that, except as provided in this Section 17.2, it will not, without the express prior written consent of the other Party, disclose to any other person or entity the Confidential Information of the other Party. A receiving Party may disclose the disclosing Party's Confidential Information to those of the receiving Party's affiliates, associates, vendors, subcontractors, employees, agents, advisors and consultants, but only to the extent that such personnel reasonably need to know such information in connection with such Party's performance of its obligations under this Agreement (or, in Owner's case, as necessary in connection with the operation or maintenance of its facility). The receiving Party will be responsible for any disclosures by such parties that are in violation of the restrictions set forth in Section 17.2. Further, either Party may disclose such information as must be disclosed pursuant to requirements of law or valid legal process; provided that the Party making such disclosure shall promptly notify the disclosing Party in advance of any such disclosure and reasonably cooperate (at the disclosing Party's expense) in attempt to maintain the confidentiality of the Confidential Information.

17.3 Term of Non-Disclosure Covenant. Notwithstanding any expiration or earlier termination of this Agreement, a receiving Party's obligations under this Article with respect to any Confidential Information will survive for a period of one (1) year after the date of the original disclosure of such Confidential Information to the receiving Party.

Article 18
Miscellaneous

18.1 Governing Documents. The following documents and provisions, listed in descending order of priority, and any amendments thereto, comprise this Agreement:

- (a) The terms and conditions of this Agreement;
- (b) Appendix D;
- (c) Appendix E;
- (d) Appendix C;
- (e) Appendix B;
- (f) Appendix A;
- (g) Appendix G;
- (h) Appendix H;
- (i) Appendix I;

In the event of a conflict or inconsistency among the various documents listed above, such conflict or inconsistency shall be resolved by reference to that document having the higher priority as determined by the order in which the documents are listed above.

18.2 Assignment/Delegation.

18.2.1 Assignment/Delegation by Contractor. It is expressly understood and agreed that this Agreement is personal to Owner, and that Contractor will have no right, power or authority to assign or delegate its rights or obligations under this Agreement or any portion thereof, either voluntarily or involuntarily, or by operation of law.

18.2.2 Assignment/Delegation by Owner. Owner reserves the right, without the prior consent of Contractor, to assign all or any of its rights and/or to delegate all or any of its obligations under this Agreement to any Affiliate of Owner. Owner will give Contractor written notice of such assignment and/or delegation. If Owner so requests, then Contractor will, without delay or conditions, execute a written release that confirms Owner's release from such obligations. Owner may assign any or all of its rights and/or delegate any or all of its obligations under this Agreement to any third party; *provided*, that Owner must first seek and receive Contractor's consent to such assignment and delegation (not be unreasonably withheld, conditioned or delayed).

18.2.3 Successors and Assigns. Subject to Sections 18.2.1 and 18.2.2, the provisions of this Agreement will extend to the benefit of and will be binding upon the successors and permitted assigns of the Parties.

18.2.4 Unauthorized Assignments. Any attempted assignment, delegation or transfer of a Party's rights and/or obligations under this Agreement that is not in accordance with this Section 18.2 shall be null and void.

18.3 Reviews, Inspections, Approvals by Owner. Any review, inspection, approval or related actions of Owner or Owner's Engineer shall not in any way be, or be deemed to be, either: (a) an approval of any of the Work or agreement that such Work is in compliance with this Agreement, which is, and shall remain, the responsibility of Contractor; or (b) a waiver of Contractor's obligations to perform the Work

in accordance with this Agreement. Notwithstanding any provision of this Agreement, Owner shall not be deemed to have assumed the responsibilities of Contractor as a result of any Owner (or its representatives') review, inspection approval or related actions in connection with the Work. No action or inaction by Owner or its representatives with respect to the design or construction of the Work shall relieve Contractor of its duties and responsibilities under this Agreement.

18.4 Governing Law; Choice of Forum. This Agreement shall be interpreted in accordance with the substantive and procedural laws of the State of California. All actions or proceedings arising in connection with this Agreement shall be tried and litigated exclusively in State court located in the County of Merced, State of California and Federal court located in the County of Fresno, State of California. The aforementioned choice of venue is mandatory, thereby precluding the possibility of litigation between the Parties with respect to or arising out of this Agreement in any jurisdiction other than that specified in this Section 18.4. Each Party hereby waives any right it may have to assert the doctrine of forum non conveniens or a similar doctrine or to object to venue with respect to any proceeding brought in accordance with this paragraph, and stipulates that the State and Federal courts located in the Counties of Merced and Fresno, respectively, California, shall have in personam jurisdiction and venue over each of them for the purpose of litigating any dispute or proceeding arising out of or related to this Agreement. Each Party hereby authorizes service of process sufficient for personal jurisdiction in any action against it at the address and in the manner for the giving of notice as set forth in this Agreement.

18.5 Time is of the Essence. Time is of the essence for Contractor's performance of the Work.

18.6 Severability. If any provision of this Agreement shall be held void, voidable, invalid or inoperative, no other provision of this Agreement shall be affected as a result thereof, and, accordingly, the remaining provisions of this Agreement shall remain in full force and effect as though such void, voidable, invalid or inoperative provision had not been contained herein

18.7 Notices. All notices permitted or required to be given under this Agreement shall be in writing and shall be deemed duly given: (a) when sent by telefacsimile transmission, directed to the other Party; *provided*, that the sender has received electronic or voice confirmation of the recipient's receipt of such transmission; (b) upon receipt when sent by overnight or international courier service, addressed to the recipient Party; or (c) when received by the recipient, if delivered by personal delivery to a Party. All notices must be in English or accompanied with an English translation. "Electronic mail" shall not be considered a "writing" for purposes hereof. All notices shall be delivered or sent to the Parties at their respective address(es) or number(s) shown below or to such other address(es) or number(s) as a Party may designate by prior written notice given in accordance with this provision to the other Party:

If to Owner:

Email electronic copy to:

jjoyner@mercedid.org

Mail hardcopy to:

Merced Irrigation District
Attn: Jeff Joyner, Project Coordinator

744 W 20th Street
Merced, CA 95340

If to Contractor:

Email electronic copy to:

Mail hardcopy to:

Attn: _____

18.8 Article and Section Headings. The Article and Section headings herein have been inserted for convenience of reference only and shall not in any manner affect the construction, meaning or effect of anything herein contained nor govern the rights and liabilities of the Parties. References to “Articles” and “Sections” in these Terms and Conditions shall mean the Articles and Sections of these Terms and Conditions unless otherwise expressly noted.

18.9 No Waiver of Rights. Except as may be specifically agreed in writing, the failure of Owner or Contractor to insist in any one or more instances upon the strict performance of any one or more of the provisions of this Agreement or to exercise any right herein contained or provided by law or equity shall not be construed as, or constitute in any way, a waiver, modification or relinquishment of the performance of such provision or right(s), or of the right to subsequently demand strict performance or exercise of such right(s), and all such rights shall continue unchanged and remain in full force and effect. “Electronic mail” shall not be considered a “writing” for purposes hereof.

18.10 Entire Agreement. This Agreement contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes any and all prior and contemporaneous written and oral agreements, proposals, negotiations, understandings and representations pertaining to the subject matter hereof.

18.11 Amendments. No amendments or modifications of this Agreement shall be valid unless evidenced in writing and signed by a duly authorized representative of the Party against which enforcement is sought. “Electronic mail” shall not be considered a “writing” for purposes hereof.

18.12 No Third Party Rights. This Agreement and all rights hereunder are intended for the sole benefit of the Parties and, to the extent expressly provided, for the benefit of the Owner Indemnitees, and shall not imply or create any rights on the part of, or obligations to, any other Person.

18.13 Owner’s Obligations Non-recourse. The Parties acknowledge that Owner has entered into this Agreement entirely on its own behalf, and in no manner on behalf of its affiliates and that Contractor will not have any recourse against any of Owner’s affiliates, members, joint venturers, officers, directors or employees for any reason.

18.14 Relationship of the Parties. Nothing in this Agreement shall be deemed to constitute either Party a partner, agent or legal representative of the other Party, or to create any fiduciary relationship between the Parties. Contractor is and shall remain an independent contractor in the performance of this Agreement, maintaining complete control of its Personnel, workers, Subcontractors and operations required for performance of the Work.

18.15 Counterparts; Facsimile Signatures. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Any signature page of any such counterpart, or any electronic or facsimile thereof, may be attached or appended to any other counterpart to complete a fully executed counterpart of this Agreement, and any telecopy, .pdf-format or other facsimile transmission of any signature of a Party shall be deemed an original and shall bind such Party.

[Remainder of the page intentionally blank]

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have caused this Agreement to be executed by their duly authorized officers as of the date indicated below and to be effective as of the day and year first above written.

“Owner”

“Contractor”

MERCED IRRIGATION DISTRICT

CONTRACTOR, INC.

_____ signature

_____ signature

Juan Sandoval
_____ print name

_____ print name

Interim Deputy General Manager,
Energy Resources
_____ Title

_____ Title

APPENDIX A

SITE

[This section has been intentionally left blank.]

APPENDIX B

APPROVED PROJECT SCHEDULE

Project to be completed on or before May 1, 2019.

APPENDIX C

SCOPE OF WORK

The Scope of Work shall consist of the Owner's complete Invitation For Bid package for IFB 2018-12, including all addenda and related documentation and the Contractor's official response to said MID IFB 2018-12. To the extent a conflict exists between Owner's IFB documents and Contractor's official response to said IFB, the Owner's IFB documents shall control.

APPENDIX D

PAYMENT SCHEDULE

1. Milestone Payments. Set forth below is a list of Work activity milestones for Work that Contractor will successively meet in the course of performing the Work (the “**Milestones**”), and an accompanying list of corresponding payment amounts to which Contractor will be entitled upon its achievement of each Milestone. On the tenth (10th) day of each month after the Notice to Proceed, Contractor will provide to Owner an “**Application for Milestone Payment,**” that (a) describes all Milestones achieved by Contractor during the prior month, (b) provides Owner with such information as Owner may require to verify such achievement, and (c) is accompanied by the required submittals described in Section 5.2.1 of the Terms and Conditions. Upon its receipt of such Application for Milestone Payment, and once Owner has verified that Contractor has indeed achieved such Milestone and has provided the required submittals, then, subject to Section 5.2 of the Terms and Conditions, Owner will, within thirty (30) calendar days of the date on which the Application for Milestone Payment for such Milestone was received by Owner, pay Contractor an amount equal to the amount set forth below that corresponds to each achieved Milestone (each such payment, a “**Milestone Payment**”). MID shall subtract and withhold 10% from of each of the milestone payments per Section 5.2.3. MID shall also release the retained amount subject to Sections 5.2.4 and 5.2.3. Progress billing by percentage of milestone completion is acceptable.

For purposes of the payment of Milestones as described herein, the Contract Price is subdivided into the following Milestone categories:

<u>Milestones</u>	<u>Payment Amount</u>
MOBILIZATION	\$XX,XXX.00
SITE PREPARATION	\$XX,XXX.00
FOUNDATIONS	\$XX,XXX.00
GROUNDING	\$X,XXX.00
SUBSTRUCTURE	\$XX,XXX.00
STEEL AND BUSSING	\$XX,XXX.00
EQUIPMENT	\$XX,XXX.00
CONTROL PANEL AND WIRING	\$XX,XXX.00
TESTING AND COMMISSIONING	\$XX,XXX.00
OTHER (wire way, cable tray, station service)	\$XX,XXX.00
Total Contract Price	\$XXX,XXX.00

2. Return of Application. Any Application for Milestone Payment that is disputed or determined to be improper, or for defective, suspended, or terminated Work, may be returned to Contractor, along with documentation describing the reason(s) why the payment request is not proper.

3. Waiver of Claims at Final Payment. Acceptance of the last Milestone Payment by Contractor shall constitute a waiver of affirmative claims by Contractor, except those previously made in writing and identified as unsettled at the time of such payment, which are expressly reserved by Contractor from operation of its release of claims pursuant to the California Public Contract Code Section 7100 et al or other Applicable Legal Requirements.

SAMPLE

APPENDIX E**INSURANCE REQUIREMENTS****1. General Insurance Requirements**

1.1 Acceptable Insurers. All insurance required herein to be purchased and maintained by Contractor shall be obtained from an insurance carrier or carriers duly authorized to do business in the state where the Project is located and to issue insurance policies for the limits and coverage so required. Such carrier or carriers must be rated “A” or better by the A. M. Best Key Rating Guide.

1.2 Insurance Certificates/Notice of Cancellation. Prior to commencement of the Work, Contractor shall furnish Owner with certificates showing the type, amount, class of operations covered, effective dates and dates of expiration of each insurance policy. All of the policies of insurance so required to be purchased and maintained shall contain a provision or endorsement that the coverage afforded will not be canceled, reduced in coverage, or renewal refused without at least thirty (30) days’ prior written notice to Owner by certified mail. In the context of such notification, the wording “will endeavor” and “but failure to mail such notice shall impose no obligation or liability of any kind upon the Company, its agents or representatives,” or provisions with similar meanings, will be deleted from all policies and Certificates of Insurance.

1.3 Additional Insureds/Waiver of Subrogation. The Commercial General Liability Insurance, the Builders All Risk Insurance and any umbrella insurance policies required or obtained herein shall name Owner and its Affiliates, and their respective officers, directors, agents and employees, any owner of the Site or any portion thereof (to the extent Owner is not), each as “additional insureds” under such policies. Such additional insured endorsements shall provide primary coverage not limited to the sole negligence of Contractor. All policies of insurance maintained by Contractor hereunder shall waive any right of subrogation against Owner and its Affiliates, and their respective officers, directors, agents and employees.

1.4 Insurance Limits. The limits for each policy of insurance required hereunder shall not be less than the amounts described herein, unless a greater amount is required by Applicable Legal Requirements.

1.5 Restriction on Start of Site Work. Contractor shall not perform any Work nor allow any Subcontractor, supplier, or other organization to perform Work unless Contractor has in full force and effect all required insurance. Unless a longer duration is stated herein, all policies required hereunder must be maintained by Contractor in full force and effect for the duration of the Term.

1.6 Contractor’s Property. As per Section 2.5.3 of the Terms and conditions, Contractor shall be responsible for and shall bear the risk of loss and damage to any property of Contractor, wherever located, and any insurance provided for such property shall be at Contractor’s expense. All deductibles with respect to Contractor’s insurance shall be for the account of Contractor.

1.7 Primary Coverage. The coverage provided by all policies of insurance required herein shall be primary over and pay without contribution from any other coverage procured or maintained by Owner.

1.8 Deductibles, Liability. For coverages required to be carried by Contractor in this Appendix E, Contractor shall bear all costs of all deductibles and shall remain solely and fully liable for the full amount of any claim or item not compensated by insurance, including settlement made with the prior written approval of Owner.

1.9 No Violation of Policies. Contractor shall not violate or knowingly permit any violation of any conditions or terms of the policies of insurance described in this Appendix E.

1.10 Failure to Maintain and Cancellation. In the event Contractor neglects, refuses or fails to provide or maintain any of the insurance required under this Agreement, or if such insurance is cancelled for any reason, Owner shall have the right, but not the obligation, to procure or maintain the same. In the event Owner does procure or maintain such insurance, Owner shall have, in addition to any and all other available remedies, the right to recover from Contractor all of the costs associated with procuring or maintaining such insurance.

1.11 No Waiver. The foregoing provisions requiring Contractor to carry insurance shall not be construed in any manner as waiving, restricting or limiting the liability of Contractor as to any obligations imposed under this Agreement, whether or not same are, or may be, covered by insurance.

1.12 No Claims. Contractor hereby represents and warrants to Owner that, as of the date of execution of this Agreement, Contractor is not aware of any claims or potential claims that have been made, filed or threatened against any of the insurance, or for damages covered by any of the insurance, required to be held by Contractor under this Appendix E.

2. Workers' Compensation and Employer's Liability

2.1 Scope. Contractor shall provide at its expense Workers' Compensation Insurance to protect Contractor against all claims under applicable state workers' compensation laws. Contractor shall also be protected by Employer's Liability Insurance against claims for injury, disease or death of employees which, for any reason, may not fall within the provisions of such workers' compensation law.

2.2 Subcontractors. Contractor shall require each Subcontractor similarly to provide Workers' Compensation Insurance and Employer's Liability Insurance for all of the Subcontractor's employees to be engaged in the Work unless such employees are covered by the protection afforded by Contractor's Workers' Compensation Insurance.

2.3 Coverage Limits. The Worker's Compensation Insurance shall be in no less than the amounts as required by the relevant worker's compensation law. Coverage limits for Employer Liability Insurance shall be as follows:

Bodily Injury by Accident -	\$1,000,000 each accident
Bodily Injury by Disease -	\$1,000,000 each employee
Bodily Injury by Disease -	\$1,000,000 policy limit

2.4 Navigable Waters. If the Work involves work in, over or alongside any navigable waters, Contractor shall provide workers' compensation coverage, which shall include coverage under the U.S. Longshoremen and Harbor Workers Compensation Act, The Jones Act, Maritime Employer's

Liability and any other coverage required under Federal or State laws pertaining to workers in, over or alongside navigable waters.

3. Commercial General Liability Insurance

3.1 Scope. Contractor shall provide, at its expense, Commercial General Liability Insurance in the amount provided below, covering all claims arising out of or in connection with injuries to persons or damage to third-party property due to any act or omission of Contractor or its agents, employees or Subcontractors. Any aggregate limits shall apply separately and exclusively to the Project. The policy shall include protection against claims insured by usual personal injury liability coverage, including a “protective liability” endorsement to insure the contractual liability assumed by Contractor under the indemnification provisions in this Agreement. To the extent that Work performed by Contractor or under its direction may require blasting, explosive conditions, or underground operations, the comprehensive general liability coverage shall contain no exclusion relative to blasting, explosion, collapse of buildings, or damage to underground structures. The Commercial General Liability Insurance policy will include completed operations coverage, which shall endure during the Term and for two years after Final Completion.

3.2 Coverage Limits. The coverage amounts of such Commercial General Liability Insurance in no less than as follows:

Combined Single Limits of Liability:	
General Annual Aggregate Limit (other than Products/Completed Operations)	\$10,000,000
Products/Completed Operations	
Aggregate Limit	\$10,000,000
Personal Injury Limit	\$10,000,000
Each Occurrence	\$10,000,000

4. Comprehensive Automobile Liability

4.1 Scope. Contractor shall provide at its expense Automobile Liability Insurance, on an occurrence basis, covering all claims of bodily injury and property damage arising from the operation on or off the Site of all motor vehicles licensed for highway use, whether they are owned, un-owned, or hired.

4.2 Subcontractors. Contractor shall require each Subcontractor similarly to provide Automobile Liability Insurance for all of the Subcontractor’s employees unless Subcontractor is included within the coverage of Contractor’s Automobile Liability Insurance.

4.3 Coverage Limits. The amount of such Automobile Liability Insurance shall be no less than ten million dollars (\$10,000,000) per occurrence (no aggregate limit).

5. Umbrella Liability Insurance

Notwithstanding anything herein to the contrary, the insurance coverages to be provided by Contractor under Section 3 and Section 4 hereof may be satisfied through any combination of primary and umbrella policies.

6. Builder's All Risk Insurance

6.1 Scope. Contractor shall provide at its own expense Builder's All Risk Insurance. The insurance shall insure Contractor and Owner against all risks of damage to buildings, structures, and materials that are part of the Work or the Project. The Builder's All Risk policy shall insure against all risks, including without limitation risks of:

- (a) any direct physical loss or damage to (i) the Project or any portion thereof from any cause, including without limitation flood, earthquake or tidal wave and (ii) all other Owner property that arises from or is related to the negligence or willful misconduct of Contractor and/or Contractor's Personnel;
- (b) any mechanical breakdown, electrical injury or other accident that occurs during any performance testing or other testing or operation of any component of the Project;
- (c) any expense or loss caused by any delay to the completion of the Project (i.e., delayed start-up).

6.2 Coverage Limits. The amount of such Builder's All Risk Insurance shall not be less than the insurable value of the Work at completion. Such insurance shall provide for losses to be payable to each insured, as their interests may appear. Contractor shall be responsible for the full costs of any deductible under the Builder's All Risk Insurance in all events. The foregoing shall in no way affect Contractor's obligation to bear all costs and expenses for any breach of the Warranty as described in the Terms and Conditions.

APPENDIX F

[This section has been intentionally left blank.]

APPENDIX F-1

[This section has been intentionally left blank.]

SAMPLE

APPENDIX F-2

[This section has been intentionally left blank.]

SAMPLE

APPENDIX G
FORM OF PERFORMANCE BOND

(attached)

PERFORMANCE BOND

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

CONTRACTOR (Name and Address):

SURETY (Name and Principal Place of Business):

OWNER (Name and Address):

CONSTRUCTION CONTRACT

Date:

Amount:

Description (Name and Location):

BOND

Date (Not earlier than Construction Contract Date):

Amount:

CONTRACTOR AS PRINCIPAL

Company:

(Corporate Seal)

SURETY

Company:

(Corporate Seal)

Signature: _____

Name and Title:

Signature: _____

Name and Title:

(Any additional signatures appear on page 3)

(FOR INFORMATION ONLY - Name, Address and Telephone)

AGENT or BROKER:

OWNER'S REPRESENTATIVE (Architect, Engineer or other party):

-

- 1 The Contractor and the Surety, jointly and severally, bind themselves, their executors, administrators, successors and permitted assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.
- 2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except to participate in conferences as provided in Subparagraph 3.1.
- 3 If there is no Owner Default, the Surety's obligation under this Bond shall arise after:
 - 3.1 The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, at any time to declare a Contractor Default nor shall such agreement in any way waive or modify Owner's rights and remedies under the Construction Contract; and
 - 3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the Construction Contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1; and
 - 3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the Construction Contract, if Surety proceeds as described in Paragraphs 4.1, 4.2 or 4.3.
- 4 When the Owner has satisfied the conditions of Paragraph 3, the Surety shall promptly and at the Surety's expense take one of the following actions:
 - 4.1 Arrange for the Contractor, with consent of the Owner, to perform and complete the Construction Contract; or
 - 4.2 Undertake with the consent of the Owner to perform and complete the Construction Contract itself, through its agents or through independent contractors; or
 - 4.3 With the consent of the Owner, obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and the contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Paragraph 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or
 - 4.4 If Owner withholds its consent for Surety to take any of the actions set forth in Paragraphs 4.1, 4.2 or 4.3 above, then Surety will with reasonable promptness under the circumstances:
 - 4.4.1 After investigation, determine the amount for which may be liable to the Owner and, as soon as practicable after the amount is determined, tender payment therefor to the Owner; or
 - 4.4.2 Deny liability in whole or in part and notify the Owner citing reasons therefore, in which event Owner may pursue all rights at law or in equity.
- 5 If the Surety does not proceed as provided in Paragraph 4 with reasonable promptness, the Surety shall be deemed to be in default on this Bond fifteen days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the surety proceeds as provided in Subparagraph 4.4, and the Owner refuses the payment tendered or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.
- 6 After the Owner has terminated the Contractor's right to complete the Construction Contract, and if the Surety elects to act under Subparagraph 4.1, 4.2, or 4.3 above, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. But, to the limit of the amount of this Bond, but subject to commitment by the Owner of the Balance of the Contract Price to mitigation of costs and damages on the Construction Contract, the Surety is obligated without duplication for:
 - 6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
 - 6.2 Additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Paragraph 4; and
 - 6.3 Liquidated damages, or if not liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.
- 7 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No

right of action shall accrue on this Bond to any person or entity other than the Owner or its respective executors, administrators or successors.

8 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations. Other than as specifically provided in this Bond, Surety waives all rights of presentment, demand, protest or other notice of any kind.

9 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located. Each of the Parties hereby accepts and consents to, generally and unconditionally, the jurisdiction of the aforesaid courts and appellate courts from any appeal thereof. Any proceeding, legal or equitable, under this Bond shall be instituted within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable. This Bond shall be governed and construed by and in accordance with the same law that governs the Construction Contract (pursuant to its governing law clause), excluding any laws that would dictate the application of the laws of another state.

10 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the signature page.

11 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

12 DEFINITIONS: The following terms shall have the meanings as set forth below (i.e., not as set forth in the Construction Contract):

12.1 Balance of the Contract Price: The total amount payable by the Owner to the Contractor under the Construction Contract, after all proper adjustments have been made as allowed under the Construction Contract, including claims for damages to which the Contractor is entitled thereunder, reduced by all payments made to or on behalf of the Contractor under the Construction Contract.

12.2 Construction Contract: The agreement between the Owner and the Contractor identified on the signature page, including any and all present or future amendments, supplement and change orders thereto.

12.3 Contractor Default: Failure of the Contractor, which has neither been remedied nor waived in writing, to perform or otherwise to comply with the terms of the Construction Contract.

12.4 Owner Default: Failure of the Owner, which has neither been remedied nor waived, to pay the Contractor as required by the Construction Contract.

12.5 Project: The works being constructed by Contractor under the Construction Contract.

13. Neither Surety nor Contractor may assign or delegate any of its respective rights or obligations under this Bond to any third party without the prior written consent of Owner.

(Space is provided below for additional signatures of added parties, other than those appearing on the cover page.)

CONTRACTOR AS PRINCIPAL
Company: _____ (Corporate Seal)

SURETY
Company: _____ (Corporate Seal)

Signature: _____
Name and Title:
Address:

Signature: _____
Name and Title:
Address:

SAMPLE

APPENDIX H
FORM OF PAYMENT BOND

(attached)

LABOR AND MATERIAL PAYMENT BOND

We, the undersigned principal and surety, acknowledge ourselves jointly and severally bound to the MERCED IRRIGATION DISTRICT (“MID”) in the sum of _____ Dollars (\$ _____). The condition of said obligation is such, that if said principal or his subcontractors, under that certain Partial Procurement and Construction Agreement between MID and said principal, shall fail to pay any of the persons named in Section 3181 of the Civil Code of the State of California, or amounts due under the Unemployment Insurance Code with respect to work or labor performed by any such person, or amounts required to be deducted, withheld, and paid over to the Franchise Tax Board from the wages of employees of the principal and his subcontractors pursuant to Section 18806 of the Revenue and Taxation Code, with respect to such work and labor, and surety will pay for the same, in an amount not exceeding the sum set forth above, and also, in case suit is brought upon this bond, a reasonable attorneys’ fee, to be fixed by the court. This bond shall inure to the benefit of any and all persons named in said Section 3181 so as to give a right of action to such persons or their assigns in any suit brought upon this bond.

Dated _____, 20__.

(PRINCIPAL) _____

(SEAL)

By _____ PRES.

and _____ SECY.

(SURETY) _____

(SEAL)

By _____

State of California \ss
County of Merced /

On this _____ day of _____, 20__ , before me, a Notary Public in and for said County and State, personally appeared _____

_____, each known to me to be the duly authorized Attorney in Fact of the above named surety, and acknowledged to me that he subscribed the name of said surety thereto and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said County the day of the year in this certificate first above written.

Notary Public in and for said County and State

APPENDIX I

FORM OF PARENT COMPANY GUARANTEE

This Guarantee is issued to and for the benefit of THE MERCED IRRIGATION DISTRICT, an irrigation district organized under the laws of the State of California (“**Owner**”) by [*Parent of Contractor*], a [_____] organized under the laws of [_____] (“**Guarantor**”).

WITNESSETH:

WHEREAS, Owner plans to purchase from Contractor certain partial procurement, and construction and related services for the development of the [*description of facility here*] in [*location*] (the “**Project**”);

WHEREAS, Owner intends to enter into a Partial Procurement and Construction Agreement (the “**PPC Agreement**”) with [*contractor entity name here*] (“**Contractor**”), whereby Contractor will provide certain services, materials and equipment for the Project;

WHEREAS, as a condition to Owner’s entering into the PPC Agreement, Guarantor must guaranty the obligations of Contractor under the PPC Agreement in accordance with the terms set forth herein;

NOW, THEREFORE, in consideration of the foregoing premises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Guarantor hereby agree as follows:

1. Guarantee. Guarantor absolutely, unconditionally and irrevocably guarantees to Owner that:

(a) if for any reason Contractor shall fail to make proper and punctual payment to Owner of any amounts from time to time due and payable by Contractor under the PPC Agreement, Guarantor will pay to Owner such amount not paid by Contractor. Guarantor will make such payment within seven (7) days of its having received written notice of such failure by Contractor from and demand by Owner, and such payment shall also include any such additional amounts as may be necessary to ensure that, after such withholdings or deductions as the Guarantor may be required by law to make on account of taxes of any nature, the amount received by Owner from Guarantor will be the same amount as would have been received had such amount been duly paid by Contractor in accordance with the terms of the PPC Agreement.

(b) if for any reason Contractor shall fail to perform or cause to be performed any duty, obligation, warranty, guarantee or responsibility imposed upon Contractor under the PPC Agreement, Guarantor will, upon receipt of written notice of such failure and demand by Owner, perform or cause to be performed such duty, obligation, warranty, guarantee or responsibility in accordance with the PPC Agreement.

2. Unconditional Obligation. This is a guarantee of payment and performance and not of collection. The liability of Guarantor under this Guaranty is direct, irrevocable and not conditional or contingent upon the pursuit of any remedies against Contractor or any other person or entity, nor upon any other recourse available to Owner, its successors, endorsees, transferees, or assigns. Guarantor waives any

and all rights it may now or in the future have under law or in equity to require either that an action be brought against Contractor or any other person or entity as a condition to proceeding against Guarantor, or to require that action be first taken against any security given by Contractor or Guarantor or to any balance of any deposit account or credit on the books of Owner in favor of Contractor or any other person or entity before proceeding against Guarantor under this Guaranty.

3. Absolute Obligation. The obligations of Guarantor under this Guaranty are absolute and without regard to the genuineness, validity, legality or enforceability of any of the PPC Agreement or of any terms thereof, or lack of power or authority of Contractor to enter into any of the PPC Agreement or any substitution, taking, release or exchange of any other guaranty of or any security for Contractor's performance under the PPC Agreement or any other circumstances which might otherwise constitute a legal or equitable discharge of a surety or guarantor. The obligations of Guarantor under this Guaranty shall not be affected, reduced, modified or impaired upon the happening of any of the following events:

- (a) the failure to give notice to Guarantor of the occurrence of a default under the terms and provisions of the PPC Agreement;
- (b) the change, modification or amendment of any obligation, duty, guarantee, warranty, responsibility, covenant or agreement (including without limitation Change Orders) set forth in any of the PPC Agreement;
- (c) any failure, omission, delay by or inability on the part of Owner to assert or exercise any right, power or remedy conferred upon Owner under the PPC Agreement or this Guaranty;
- (d) the voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of any of Contractor's assets, the receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization of, or similar proceedings affecting Contractor or Guarantor or any of the assets of Contractor or Guarantor;
- (e) the merger or consolidation of Contractor into or with any corporation or other entity, or Contractor's loss of its separate corporate identity or its ceasing to be an affiliate of Guarantor;
- (f) any action by Owner under the PPC Agreement granting indulgence or extension of time for payment to Contractor or any other surety; or
- (g) the assignment of any right, title or interest of Owner in the PPC Agreement to any other person or entity.

4. Reserved.

5. Waiver of Notice. Guarantor hereby waives notice of (a) Owner's acceptance and reliance on this Guaranty; (b) default or demand in the case of default, provided such notice or demand has been given to or made upon Contractor; and (c) any indulgences, extensions or consents granted to Contractor or any other surety. Guarantor waives promptness, diligence, presentment, demand of payment or enforcement and any other notice with respect to any of the guaranteed obligations and this Guaranty.

6. Bankruptcy and Subrogation Rights. In the event of any bankruptcy by Contractor, the Guarantor hereby agrees that it will not exercise any right of subrogation, contribution, indemnification, reimbursement or similar rights against Contractor with respect to this Guaranty, whether such rights arise under an express or implied contract or by operation of law, it being the intention of the Guarantor and Owner that the Guarantor shall not be deemed to be a “creditor” (as defined in Section 101 of the U.S. Bankruptcy Code) of Contractor by reason of the existence of this Guaranty in the event that Contractor becomes a debtor in any proceeding under the U.S. Bankruptcy Code. In addition, the Guarantor will not exercise any rights which it may acquire by way of subrogation under this Guaranty by any payment made hereunder or otherwise, until all of the liabilities and obligations of Contractor to Owner under the PPC Agreement shall have indefeasibly been paid in full. If any amount shall be paid to the Guarantor on account of such subrogation rights at any time when all such liabilities and obligations shall not have been indefeasibly paid in full, such amounts shall be held in trust for the benefit of the Owner and shall forthwith be paid to Owner and applied to such liabilities and obligations, whether matured or unmatured.

7. Term. This Guaranty shall remain in full force and effect until Final Completion under the PPC Agreement.

8. Assignment. This Guaranty shall inure to the benefit of Owner, its successors and assigns and shall be binding upon Guarantor and its successors and permitted assigns. Owner may at any time assign this Guaranty to any person or entity to whom Owner assigns the PPC Agreement in accordance with the terms thereof, including a collateral assignment of Owner’s right, title and interest in and to this Guaranty in connection with obtaining financing for the Project. Guarantor may not assign this Guaranty without the prior written consent of Owner.

9. Representations and Warranties. Guarantor hereby represents, warrants and covenants that:

(a) entering into this Guaranty and performance hereunder (i) is not an event of default or otherwise contrary to any obligation by which Guarantor may be bound, and (ii) will not result in the creation or imposition of any lien upon any property of Guarantor;

(b) Guarantor is a corporation duly incorporated, validly existing and in good standing under the laws of [] and is duly qualified and in good standing in each jurisdiction where the failure to so qualify and be in good standing would materially and adversely affect its ability to perform its obligations under this Guaranty, and Guarantor will maintain its existence and remain in good standing under such laws;

(c) the execution and delivery by Guarantor of this Guaranty, and the performance by Guarantor of its obligations hereunder (i) are within Guarantor’s corporate powers, (ii) have been duly authorized by all necessary action, (corporate or otherwise), (iii) do not contravene any law or regulation applicable to or binding on Guarantor or any of its properties, and (iv) do not require the consent or approval of any person or entity which has not already been obtained;

(d) no litigation, investigation or proceedings of or before any arbitrator or governmental authority is pending or, to Guarantor’s knowledge, threatened by or against Guarantor or its subsidiaries or against any of such parties’ properties or revenues which, if adversely determined, would be reasonably likely to have a material adverse effect on the business, operations, property or financial condition of the Guarantor or any of its subsidiaries; and

(e) this Guaranty constitutes the legal, valid and binding obligation of Guarantor enforceable against Guarantor in accordance with its terms.

10. No Set-Offs. No set-off, counterclaim, reduction or diminution of any obligation, or any defense of any kind or nature which Guarantor has or may have against Owner or any of its members, affiliates, officers, employees, agents or representatives shall be available to Guarantor against Owner in connection with any obligation of Guarantor to Owner under this Guaranty.

11. Severability. The invalidity or unenforceability of any provision of this Guaranty shall not affect the validity or enforceability of the remaining provisions of this Guaranty, which shall be enforced to the greatest extent permitted by law.

12. Non-Exclusive Remedies. No remedy herein conferred upon or reserved to Owner hereunder is intended to be exclusive of any other available remedy, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Guaranty, the PPC Agreement or hereafter existing at law or in equity or by statute. No single or partial exercise by Owner or its successors or assigns of any right or remedy shall preclude any further exercise thereof.

13. Waivers. No delay or omission to exercise any right or power of Owner shall impair any such right or power or shall be construed to be a waiver thereof. No waiver of any right of Owner under this Guaranty shall be effective unless made pursuant to an instrument in writing duly executed by Owner.

14. Notices. All notices permitted or required to be given under this Agreement shall be in writing and shall be deemed duly given when sent by telefacsimile transmission, by overnight courier, by personal delivery or on the seventh (7th) day following the date on which such notice is deposited in the mail, postage prepaid, certified, return receipt requested. All notices shall be delivered or sent to the parties at their respective address(es) or number(s) shown below or to such other address(es) or number(s) as a party may designate by prior written notice given in accordance with this provision to the other party:

If to Owner:

If to Guarantor:

15. Amendment. No amendment of this Guaranty shall be effective unless made pursuant to an instrument in writing duly executed by both Owner and Guarantor.

16. Interest. Interest shall accrue on all sums not paid by Guarantor when required hereunder at a rate equal to the highest rate of interest allowed under applicable law.

17. Governing Law; Consent to Jurisdiction. This Guaranty shall in all respects be governed by and construed in accordance with the laws of the State of California, without giving effect to any choice of law rules thereof which may direct the application of the laws of another jurisdiction.

18. Waiver of Jury Trial. TO THE FULLEST EXTENT ALLOWED UNDER APPLICABLE LAW, GUARANTOR WAIVES ANY RIGHT IT MAY HAVE TO A JURY TRIAL IN CONNECTION WITH ANY ACTION, SUIT OR PROCEEDING ARISING OUT OF OR RELATED IN ANY WAY TO THIS GUARANTY.

19. Costs of Enforcement. Guarantor shall pay and indemnify Owner for all costs, expenses, and damages actually incurred (including, without limitation, attorneys' fees and other legal expenses) in connection with any action or appeal to enforce the obligations of Guarantor under this Guaranty.

IN WITNESS WHEREOF, Guarantor has executed this Guaranty as of the date first written above.

“Guarantor”

[_____] (Contractor)

By: _____

Name: _____

Title: _____

Date: _____

Acknowledged and accepted by:

“Owner”

THE MERCED IRRIGATION DISTRICT

By: _____

Name: _____

Title: _____

Date: _____