

**DESIGN, BUILD,  
OPERATE AND FINANCE  
AGREEMENT**

among the

**MATANUSKA-SUSITNA BOROUGH (MSB)**

**and**

[PARTY TBD]

[MONTH TBD] \_\_\_\_\_, 2019

Some terms are labeled  
“TBD” because more  
information about the type  
of facility is needed to  
determine them, and will be  
negotiated by the parties.

The Borough also reserves  
the right to propose any  
additional or alternate terms  
to meet its needs.

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## **DESIGN, BUILD, OPERATE AND FINANCE AGREEMENT**

THIS DESIGN, BUILD, OPERATE AND FINANCE AGREEMENT (this "Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_ among the MATANUSKA-SUSITNA BOROUGH, a municipal corporation organized and existing under the laws of the State of Alaska ("MSB"), and [PARTY].

### **RECITALS**

The MSB issued a Request for Proposal NAME TBD (the "RFP") to solicit proposals from firms experienced in the business of financing, designing, constructing, operating, and maintaining the facilities at issue in order to evaluate firms with the experience necessary or desirable to design, build, finance and operate the new Facility.

The RFP was distributed in accordance with the requirements of MSB procurement regulations.

Proposals submitted in response to the RFP were received and, after evaluation, the MSB selected the proposal from Company as the proposal most favorable to the MSB. Company's TBD response to the RFP and the supplemental information provided on TBD is hereinafter referred to as "Company's Response to RFP". A true and correct copy of the RFP and the Company's Response to RFP is attached hereto as Appendix \_\_\_\_\_ and incorporated herein by this reference.

During the MSB's negotiations with Company, Company was informed and agreed not to participate in any unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration. Company further agreed to comply with the provisions of the Code and any regulations related thereto.

The MSB desires to retain Company, and Company desires to be retained by the MSB, to (1) finance the construction of the Facility, (2) to design, build and construct the Facility, and upon completion of construction of the Facility, (3) to operate and maintain the Facility for a period of at least 20 years in accordance with the terms of this Agreement.

The MSB desires to lease Tract TBD LEGAL, Plat No TBD PLAT NO (the "Property") to Company, and Company desires to lease the Property from the MSB upon which to construct and operate the Facility hereinafter defined, pursuant to the terms and conditions of a ground lease attached hereto as Appendix \_\_\_\_\_ (the "Ground Lease").

The MSB, as the Operator of the adjacent Borough Central Landfill, will allow the Company to/ or will purchase [language depends on terms TBD] \_\_\_\_\_ services exclusively from the Company per the terms, conditions and duration of this Agreement, subject to appropriation of operational funding.

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, and the recitals that are incorporated herein by this reference, the parties hereto, intending to be legally bound, hereby agree as follows:

## **ARTICLE I DEFINITIONS**

### **1.1 Definitions**

**Acceptable Influent** means TBD [influent received by the Facility meeting the applicable parameters set forth in Appendix No.\_\_\_\_\_, Performance Specifications.]

**Acceptable Operator** means the Company, subject to Company's right to change as set forth in Section 20.4.

**ADEC** means the State of Alaska Department of Environmental Conservation.

**Agreement** means this "Design, Build, Operate and Finance Agreement," including its amendments, attachments, exhibits, appendices and any other document or documents that are incorporated by reference.

**Applicable Law** means any applicable law, regulation, ordinance, rule, order or determination of any federal, state, borough or municipal authority.

**Casualty** has the meaning set forth in Section 15.1.

**Change in Law** means any of the occurrences set forth in Section 12.5 of this Agreement, which may occur after this agreement is signed.

**Change Order** is a written agreement prepared by Company or MSB after the execution of this Agreement that is executed by Company and MSB, requiring a change in the Work and the amount of the adjustment, if any, in the Compensation, and the extent of the adjustment, if any, in the Contract Time; provided, that such changes and/or adjustments must allow for the Facility to be operated in compliance with Applicable Law and this Agreement.

**Code** means Alaska Statutes or MSB Code Sections, unless the context indicates otherwise.

**Commencement of Operations Date** means the date on which the Company is ready, willing and able to commence to operate the Facility and provide service to the Borough Central Landfill.

**Company** means [TBD].

**Company's Contractors** means TBD, subject to the Company's right to change as set forth in Section 20.4.

**Company's Designers** means TBD, subject to the Company's right to change as set forth in Section 20.4

**Compensation** means the money due Company for the Work and the O&M Services as specified in Article IX.

**Construction Documents** means a set of drawings and plans necessary for the construction of the Facility that are consistent with, and a logical evolution of, the Conceptual Design Documents dated TBD which are attached as Appendix \_\_\_\_\_ and for which the required permits for the Work will be issued. The term "Construction Documents" includes drawings and plans contained in or proposed pursuant to Change Orders and Work Change Directives, as applicable.

**Contingent Assignment of Contracts and Subcontracts** means the contingent assignment to the MSB of (a) all Contracts between the Company and any entities acting as General Contractors under contract with the Company, including TBD and (b) all Subcontracts between any entities acting as General Contractors under contract with the Company and each of their Subcontractors, for purposes of assigning and transferring the contractual rights, duties and obligations under those Contracts and Subcontracts to - the MSB in the event of a termination of the DBOF Agreement. In the case of a contingent assignment, the assignment may include a portion of the Contracts and Subcontracts.

**Contract Representative** means the person authorized by the Project Committee or the Company, as applicable, to represent it in connection with this Agreement. The Project Committee's Contract Representative is Rustin Krafft, the MSB Purchasing Officer; the Company's Contract Representative shall initially be TBD. Either party may change its Contract Representative by written notice to the other party.

**Contract Time** means the duration of the performance of the Work either as a part of the total work thereof or the total time from Notice-to-Proceed to the Final Completion Date. Contract Time will be as identified in the MSB-approved Project Schedule.

**Contract Year** means the one year period commencing TBD and ending the following TBD in each year during the term of this Agreement, except the first year which shall commence on the Effective Date and end the next December 31, and the last year, which shall commence on January 1 and end on the anniversary of the Commencement of Operations Date immediately following said January 1.

**CPM** means Critical Path Method.

**Design/Build Buyout Fee** Not used.

**Differing Site Conditions** means concealed or latent physical conditions or subsurface conditions at the Property that differ from the conditions indicated in the RFP.

**Effective Date** means the date this agreement is signed by all parties.

**Engineer of Record** is the engineer retained by the Company to prepare and oversee the preparation of the Construction Documents and to provide engineering services for the

Facility. The Engineer of Record is TBD, a Member of the Company.

**Event of Default** has the meaning set forth in Article 13.

**Existing Improvements** means all improvements to the Waste Facility constructed as of the date of termination under Section 13.2.

**Facility** means all the buildings, structures, equipment, piping, wells, and related or required appurtenances that are to be designed and constructed by as set forth in this Agreement, including all improvements in the Waste Facility.

**Final Completion Date** means the date on which all requirements for the design and construction of the Facility identified under this Agreement are fully satisfied, including all start-up and commissioning activities, and all of the items in Section 5.16 have been completed.

**Float** means the number of days by which an activity on the Project Schedule may be delayed from its earliest start date without necessarily extending the Substantial Completion Date or Final Completion Date.

**Force Majeure** means any act, event or condition excusing performance of this Agreement as set forth in Section 12.4.

**Good Industry Practices** means those methods, techniques, standards and practices which at the time they are employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good and prudent practices in the construction, operation or maintenance, as the case may be, for the TBD industry in Alaska and are consistent with the same degree of skill and care ordinarily exercised by members of the respective trade or profession.

**Ground Lease** means the lease by and between the MSB, as landlord, and Company, as tenant, of the Property a true and correct copy of which is attached hereto as Appendix \_\_\_\_\_.

**Hazardous Materials** means any substance, material, or waste which is or becomes regulated by any Applicable Laws.

**MSB** means the Matanuska Susitna Borough, Alaska.

**Non-Routine Services** has the meaning given in Section 7.4 of this Agreement.

**Notice to Proceed (NTP)** means the authorization by the MSB for the Company to proceed with the Work or some portion of the Work.

**O&M Component of the Service Fees** TBD, if any.

**O&M Scope of Work** means the scope of work for operating and maintaining the Facility as contained in the Company's Response to RFP, Operations and Maintenance Plan.

**O&M Services** means all operation and maintenance services described in the O&M Scope of Work to be provided by Company in accordance with this Agreement.

**O&M Services Termination Fee** means the amount described as the Termination Fee based on the applicable date of termination of this Agreement by MSB under Section 4.2.

**Operations Manager** has the meaning given in Section 2.2.1 of this Agreement.

**Other Expenses** means the expenses for Non-Routine Services performed by Company pursuant to this Agreement.

**Person** means any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership trust, unincorporated organization, the State of Alaska, or any political subdivision of the State of Alaska, including, but not limited to, the MSB.

**Post-Termination Period** has the meaning set forth in Section 13.5.3 of this Agreement.

**Pre-Permit Approval** has the meaning set forth in Section 5.1.2 of this Agreement.

**Prevailing Wage Law** means Alaska prevailing wage statutes and regulations.

**Project Committee** shall mean the committee established pursuant to Section 5.18.

**Project Schedule** means the CPM schedule that is prepared by Company and approved by the MSB for the Work pursuant to this Agreement which must reflect that Commencement of Operations Date must occur by TBD, barring any delay caused by MSB or Force Majeure event or an amendment to this contract which changes the date. The Initial Project Schedule is attached hereto as Appendix \_\_\_\_\_.

**Property** has the meaning set forth in the Recitals, namely: TBD LEGAL DESCRIPTION, Palmer Recording District.

**Request for Proposals (RFP)** means the documents issued by the MSB for soliciting proposals for the Work and the O&M Services, entitled "TBD" including supplemental addenda, documentation and attachments.

**Response to Request for Proposals** means the "Company's Response to RFP" dated TBD which includes the supplemental information provided on TBD.

**Scheduled Construction Commencement Date** means the date in the Project Schedule for commencement of the Work.

**Service Fees** if any, TBD.

**Standard Services** means those O&M Services that are to be routinely provided by Company under this Agreement as specified in Article VII.

**Start Up Testing** means the usual and customary testing of any equipment, system or component to be performed following Substantial Completion for the purposes of demonstrating that the Facility: (i) performs properly in accordance with the Construction Documents approved by the MSB as provided herein; and (ii) from TBD Company shall commence the Start Up Testing following five (5) days notification to the MSB and the MSB shall be entitled to observe the Start Up Testing. Successful completion of the Start Up Testing may lead to a Certificate to Operate from the ADEC.

**Substantial Completion or Substantially Complete** means the date when all of the following events have been accomplished and verified by the MSB's Contract Representative: (i) the Facility has been substantially completed in accordance with the Construction Documents; (ii) the ADEC has issued a Certificate to Operate; (iii) a letter requesting Substantial Completion has been received from Company that includes a detailed punch list of outstanding items that in the aggregate cost less than One Hundred Thousand Dollars (\$100,000) to complete that, if not completed, would not delay the commencement of operations; and (iv) the Engineer of Record of the Company has issued a Certificate of Substantial Completion.

**Term** means the period of time designated in Article III during which Company shall provide the various services contemplated by this Agreement.

**Termination Fee** means, TBD.

**Tract** means the portion of the Property designated as Tract in Appendix \_\_\_\_\_. If the Property is subdivided as provided in Section 6.1, after final approval and recordation of the plat the term "Tract" shall refer to the parcel as described in the final plat.

**Waste Facility** means the waste facility to be designed and constructed by Company on Tract \_\_\_\_\_ pursuant to the terms of Section 2.1.5, including all buildings, structures, equipment, piping, wells, and related or required appurtenances that are to be designed and constructed by as set forth in this Agreement, including improvements performed under Change Orders and Work Change Directives, if any.

**Work** means the design, architectural, engineering, permitting, utility extensions and hook-ups, construction, start-up testing and start up, operations expenses until the Commencement of Operations Date, and any and all other services required for the construction of the Facility in accordance with the Construction Documents. All Work will be performed by the Company or the Company's Contractors and Company's Designers.

**ARTICLE II**  
**SCOPE OF SERVICES/OBLIGATIONS**

**2.1. Design/Build/Operate/Finance Services for New Facility**

**2.1.1. Company's Obligations**

The MSB hereby retains Company to completely finance the Facility, to design and construct the Facility, and to operate and maintain the Facility during the Term of this Agreement. Company hereby agrees to cause the Company's Contractors and Company's Designers to perform the Work on the terms and conditions set forth in this Agreement including designing and building the Facility. The MSB acknowledges and agrees that the Company's Contractors and Company's Designers will actually perform the Work and any other improvements required here under. The Company warrants that the Company's Designers at all times shall hold current and valid Alaska Professional Registrations for the design services performed under this Agreement and that the Company's Contractors at all times shall hold a valid Alaska contractor's license, and the Company is solely responsible to the MSB for any failure by the Company's Contractors and Designers to perform the Work in accordance with this Agreement. All design services and construction Work and the O&M Services shall be performed in good faith, with prompt professional and commercial due diligence, and in accordance with Good Industry Practices. The Facility to be constructed is generally described in Appendix \_\_\_\_\_ Conceptual Design Documents.

**2.2. General Management**

Subject to the terms and conditions hereof, the Company is responsible for the design, construction, operation and maintenance, and any and all services required by this Agreement, wholly and severally, complete or incomplete which includes all labor, materials, equipment and services provided or to be provided under this Agreement with respect to the Work, the O&M Services or otherwise including, without limitation, the following:

**2.2.1. Personnel**

Company shall, or shall cause the Company's Contractor or Acceptable Operator (as applicable) to, assign to the construction, and the operation and maintenance, of the Facility such executive and administrative personnel, on a full or part-time basis, as reasonably appropriate, as may be required to provide proper supervision and management of the construction, and operation and maintenance. of the Facility, but in no event shall staffing be less than required by Applicable Law or the "Minimum Staffing Plan" as stated in Company's Response to RFP, Section TBD Company shall provide the MSB with written designation of a qualified Operations Manager and other designated staff specifically required by the

operations permit and as defined under Applicable Law. Company shall not replace its Operations Manager or other required staff without providing a replacement that meets the standards described above. Company shall notify MSB of the identity of and contact information for Company's Operations Manager prior to the Commencement of Operations Date. No separate charge shall be made to the MSB for any payroll benefits or other expense attributable to personnel. Company shall supervise the work of, and hire and discharge, on-site employees of the Facility, using reasonable care in hiring and discharging such employees. Such employees shall include all employees reasonably necessary for the operation and maintenance of the Facility. Unless otherwise required in writing by the MSB, all employees involved in the operation and maintenance of the Facility shall be the sole employees of the Company or the Company's Contractor or Acceptable Operator (as applicable). The MSB shall have no right to interfere with, supervise or otherwise direct such personnel, but may request the Company to discharge or remove from the Facility such personnel the MSB deems reasonably unsatisfactory. The Company shall (or shall cause the Company's Contractor or Acceptable Operator) to execute and file when due all forms, reports and returns which are required by law for the employment of such personnel.

#### 2.2.2. Maintenance and Repairs

Company shall perform, or cause to be performed, such ordinary maintenance and repairs to the Facility as shall be required: (a) by Good Industry Practices to maintain the Facility; and (b) by any Applicable Law. In connection with such maintenance, but subject to the remainder of this Section, Company must purchase such supplies and enter into such service contracts as are necessary and appropriate therefore and Company shall also cause to be provided, or contract to have provided, gas, electricity, telephone, rubbish hauling, cleaning, repairs, maintenance and similar services, to the extent such services are necessary for the proper maintenance of the Facility.

#### 2.2.3. Notice of Violation of Applicable Laws

Upon obtaining knowledge thereof, Company shall promptly notify the MSB in writing of any violation of any Applicable Law and shall advise the MSB as to any potential violation of any new Applicable Law, and, in either case, Company shall advise the MSB of the steps it will take to cure such violation of future violation.

### 2.3. O&M Services

Company covenants and agrees to operate and maintain the Facility in accordance with the terms, covenants, obligations and conditions set forth in this Agreement (including, without limitation, the performance standards described in Company's Response to RFP, Operations and Maintenance Plan as modified in Appendix \_\_\_\_).

### **ARTICLE III TERM**

The Term shall commence on the Effective Date and shall continue in effect (unless this Agreement is terminated earlier as permitted in this Agreement) until twenty (20) years from the Commencement of Operations Date, unless the MSB pays the applicable Fee terminating this Agreement under Section 4.2; provided, Following the initial 20 year Term, this agreement is subject to two, five (5) year extensions upon mutual agreement of the parties unless terminated by the MSB with a one hundred eighty (180) day written notice.

### **ARTICLE IV MSB TERMINATION OPTION**

**4.1. Not Used.**

**4.2. Termination at Option of MSB; Payment of Termination Fee**

Following the payment of the \_\_\_TBD\_\_\_ Fee and any Service Fee earned, the MSB may terminate the balance of this Agreement in its sole and absolute discretion at any time, upon one hundred eighty (180) days prior written notice. Upon payment of the \_\_\_TBD Fee and any Service Fee, the Company's rights and obligations under the Ground Lease, including any interest in the Tract that Company may acquire in the future, shall terminate, and Company shall comply with the applicable Sections, including but not limited to, 13.4 of this Agreement.

**4.3 Not Used.**

### **ARTICLE V WORK**

**5.1. General**

Company shall complete the Work in accordance with the terms and conditions of this Agreement including, without limitation, the Project Schedule. Company shall perform the Work in accordance with Applicable Laws and shall provide all notices applicable to the Work as required by Applicable Laws.

5.1.1. Company shall provide design services, permitting, labor, materials and equipment required to undertake, complete, start up and test the Facility. Notwithstanding any contracts or subcontracts into which Company may enter, Company is and shall continue to be responsible to the MSB under this Agreement for all matters related to the Facility, and the failure of any engineer, contractor or subcontractor retained by Company shall not relieve Company of any of its obligations under this Agreement. Company shall promptly inform the

MSB, in reasonable detail, of any default or anticipated default by the project architect, engineer or any subcontractors or other consultants under their respective contracts with Company, or by Company under any such agreement, as to which Company has any knowledge or information.

Company shall prepare and submit to the MSB for review and approval the Design Development Documents at (35% and 65%) and the Construction Documents at (95% and 100%); together the Design Documents. At Company's discretion, the Design Documents may be in sequential packages such that the Work may be initiated in specific areas while design in other areas is ongoing. The Design Documents shall be developed in accordance with the Project Schedule. The MSB's review of the Design Documents shall in no way relieve Company of any responsibility for such design and construction hereunder. The MSB shall complete its review of the Design Development and the Construction Documents submitted for review no later than twenty one (21) business days following receipt of the Design Development and the Construction Documents, respectively. The MSB shall notify Company of any concerns, problems or noncompliance of the Design Development or Construction Documents within that time. The scope of the MSB's review shall be to insure that the Design Documents and the Construction Documents are consistent with, and a logical evolution of, the Work contemplated by the Company's response to the MSB's RFP and whether they incorporate the requirements of Good Industry Practices.

- 5.1.2. If the MSB does not respond to the submission of the Design Development or Construction Documents within the twenty one (21) business day period specified in Section 5.1.2, the Design Development or Construction Documents shall be deemed approved by MSB. Approval by the MSB does not alter the fundamental requirements of this contract, the performance standards or the RFP.
- 5.1.3. To facilitate orderly progression of the Facility Design the MSB may require periodic design coordination meetings. These meetings will be sponsored by the Company. Minutes with action items will be prepared and distributed for review by the Company.
- 5.1.4. Upon approval of the Construction Documents, or any portion of the Construction Documents and issuance of a Notice to Proceed from the MSB, Company may proceed with mobilization and construction related to the portion of the Work identified in the approved Construction Documents subject to compliance with the requirements of other Regulatory agencies.
- 5.1.5. The MSB may engage qualified representatives to assist it in the review of the Work as the MSB determines is in its best interest. Said representatives may inspect all Work and the Facility at any time during or after construction prior to the Final Completion Date and the MSB and the Company shall cooperate in

scheduling inspections so that they do not interfere with or delay the Work. Except as otherwise expressly provided in Section 11.5 of this Agreement, Company, on behalf of the MSB, is responsible for obtaining all permits necessary for the Work and the O&M Services. The Company is responsible for the payment of all fees charged by the applicable permitting authority for such permits.

- 5.1.6. Company shall submit monthly progress reports no later than the tenth (10th) day of each month to the MSB detailing the progress of the Work, including whether the Work is proceeding according to the Project Schedule, discrepancies, conflicts, or ambiguities existing in the documents provided by the MSB that require resolution; health and safety issues existing in connection with the Work; and other items requiring resolution so as not to impact Company's ability to complete the Work in accordance with the Project Schedule. Company shall promptly notify the MSB of potential changes in the Project Schedule.
- 5.1.7. Company shall conduct periodic progress meetings with the MSB Contract Representative as described in Section 5.7.2 below. The MSB, or its duly appointed representatives, may inspect and monitor the Work and review any documents relating to the Work all for the purpose of reviewing Company's progress in the performance of its obligations regarding the Work. Notwithstanding the MSB's or its representative's attendance, inspection, monitoring, or review, or its failure to do so, Company is not relieved of any of its obligations, responsibilities, or liabilities under this Agreement. Company is at all times fully responsible and liable to carry out and fulfill all of its obligations and duties under this Agreement. Therefore, Company has authority over all design and construction activities associated with the Work. MSB acceptance of the Facility shall occur only as provided below after final inspection and MSB approval and issuance of a Certificate to Operate by ADEC.
- 5.1.8. Company shall operate and maintain the Facility in compliance with the terms and conditions set forth herein.

Notwithstanding any provision to the contrary, the MSB is not required to make payments or incur costs in excess of the Service Fees listed in Section 9.1, any Change Orders or amendments thereto executed by all parties any adjustments to the Service Fees

- 5.1.9. Company shall promptly reimburse the MSB for any penalties or fines paid to any permit agency that result from Company's conduct, including but not limited to active or passive negligence, willful misconduct or breach of this Agreement, including Company's failure to meet the Scheduled Construction Commencement Date, the Substantial Completion date, or the Final Completion Date, as described on the Project Schedule. The MSB shall provide Company

notice of the assessment of any such fine or penalty, and Company is entitled to contest at its own expense in the MSB's name, the imposition of any such fine or penalty, provided Company indemnifies, defends (with counsel reasonably acceptable to MSB) and holds the MSB harmless from, and reimburses MSB for, any costs associated with such action, including without limitation, attorneys' fees.

5.1.10. Prior to the commencement of construction, Company will deliver to the MSB 100% payment and 100% performance bonds for all work done by Company's Contractors on the project. Each performance bond and each payment bond shall name the Company and MSB as Co-Obligees under the bond. The bonds shall be in form and substance, and from surety/insurance companies, reasonably acceptable to the MSB with respect both to each surety company's individual rating and to the specific terms of each bond. All of the premiums with respect to the bonds shall be paid by Company and shall not be Other Expenses. The MSB hereby acknowledges and agrees that the respective bonds are issued solely with respect to the performance and payment of the General Construction Segments of the Work.

5.1.11. The Work shall comply with the Quality Control/Quality Assurance, Risk Management and Loss Prevention Program attached as stated in the Company's Response to RFP.

5.1.12. Not Used.

5.1.13. Not Used.

5.1.14. Not Used.

5.1.15. Not Used.

## **5.2. Construction Requirements**

Company shall complete the Work in accordance with Good Industry Practices, Applicable Law and the requirements set forth in this Agreement including, without limitation, completion of the Work by the Final Completion Date identified in the Project Schedule. Company shall remedy any services which fail to conform to this standard and shall be responsible for the cost therefore, and shall promptly correct any Work which fails to meet the standards of Good Industry Practices and Company shall not be entitled to additional Service Fees therefore.

## **5.3. Project Schedule**

Company planning, scheduling and execution of the Work will be presented to the MSB by submission of the Project Schedule.

- 5.3.1. The Project Schedule will include established technical standards for CPM using a computerized precedence diagram method.
- 5.3.2. Company is responsible for coordinating its own schedules, including subcontractors and suppliers, as well as construction-related activities of others.
- 5.3.3. Company will provide the MSB with three (3) copies of an updated Project Schedule no later than 30 days after the effective date. This updated Project Schedule will reflect the entire Work for the Facility. The Project Schedule shall be based on the Initial Project Schedule attached hereto as Appendix \_\_\_\_\_.
- 5.3.4. The MSB will review and approve or comment upon the updated Project Schedule as submitted by Company within ten (10) days after the MSB's receipt of the updated Project Schedule. If the MSB disapproves the updated Project Schedule, the MSB shall notify Company in writing and the notice shall include the reasons for disapproval. Once the updated Project Schedule is approved by the MSB, it shall become the new Project Schedule for the Work, and is the basis for: (a) the monitoring of Company's progress against milestones and Contract Time, (b) the evaluation and reconciliation of extensions in the Final Completion Date, if and when an extension is approved by the MSB; and (c) the assessment of liquidated damages.
- 5.3.5. In the event the MSB determines in good faith that the performance of the Work, or any portion thereof, has not progressed or reached the level of completion required by the Project Schedule that could result in a delay of Substantial Completion or the Final Completion Date due to causes within the control of Company, the MSB shall notify Company and the Company shall promptly meet with the MSB to discuss the MSB's concerns. If there is agreement between Company and the MSB that the Work is not proceeding in accordance with the Project Schedule, or after such discussion no agreement is reached and the MSB reasonably believes that the Work is not proceeding in accordance with the Project Schedule, the MSB has the right to order Company to take corrective measures necessary to expedite the progress of the Work, including, without limitation: (i) working additional shifts or overtime, (ii) supplying additional manpower, equipment, and facilities, and (iii) submitting a recovery schedule for re-sequencing performance of the Work or other similar measures. Such measures shall continue until the progress of the Work complies with the Project Schedule. The Company is not entitled to an adjustment in compensation in connection with the measures required by the MSB under or pursuant to this Section. The MSB may exercise the rights furnished the MSB under or pursuant to this section as frequently as the MSB deems necessary to ensure that Company's performance of the Work will comply with the deadlines set forth in the Project Schedule. If Company fails to implement or commence the measures described herein within ten (10) days after MSB's written demand then MSB

may, without prejudice to other remedies, take corrective action at the expense of Company and deduct the costs from payments due Company under this Agreement and, to the extent the costs exceed payments due, Company shall reimburse MSB for such costs within ten (10) days after written demand.

**5.4. Liquidated Damages**

Septage Only Facility

In the event that Company fails to timely construct the Facility, Company shall pay to the MSB, immediately upon written demand, Liquidated Damages in the amount of \_\_\$500 per calendar day for each day that passes from \_\_\_\_TBD.

Other Waste Facility

In the event that Company fails to timely construct the Facility, Company shall pay to the MSB, immediately upon written demand, Liquidated Damages in the amount of \_\_TBD per calendar day for each day that passes from \_\_\_\_TBD.

**5.5. Use of Float**

Company shall be able to utilize the total Float.

**5.6. Project Schedule Criteria**

The Project Schedule shall be based on the Initial Project Schedule attached as Appendix \_\_\_\_\_. The Project Schedule will show the breakdown of work into activities and relationships only to the extent required to effectively manage the Work. The Project Schedule will show the division of the Work into activities and specify the progression from the date of this Agreement to Final Completion Date. The Project Schedule shall include appropriate time allowances and constraints for submittals, items of interface with work performed by others, and construction, start-up and performance tests, but in no event shall the Project Schedule be updated to move the date of Substantial Completion to a date after the scheduled Commencement of Operations Date, (other than pursuant to a Change Order or Force Majeure pursuant to the terms of this Agreement).

5.6.1. The Project Schedule will be in a precedence diagram and/or bar chart format, will be plotted on a time-scaled calendar, and shall expressly identify the Contract Time, milestones, the critical path(s), and all relevant activities. Activities will be shown on their early dates, with their total Float noted beside them. Connections between activities will identify both predecessor and successor work.

5.6.2. The Project Schedule will include procurement-related activities, which lead to the delivery of permanent materials to the Property. Procurement activities may include, without limitation, preparation of shop drawings, review/acceptance of shop drawings, materials fabrication and materials delivery, as appropriate.

- 5.6.3. The Project Schedule will identify those requisite duties and responsibilities of the MSB and others, including, without limitation, applicable regulatory and review agencies. The Project Schedule will incorporate appropriate activities and sequences based on the information given in the RFP as well as information provided by regulatory and reviewing agencies with respect to the Facility.

**5.7. Schedule Updates**

- 5.7.1. Company shall provide the MSB with a monthly update (as part of each monthly progress report) to the Project Schedule no later than the tenth (10th) day of each month. The Project Schedule shall include forecast and actual data. The forecast data shall show Company's intended plan for the remainder of the Work. The actual data shall record when and how work was performed. The Project Schedule update shall be in precedence diagram and/or bar chart format with appropriate logic ties between bars. Each update to the Project Schedule prepared by Company shall include the current status of each activity, the remaining duration of each activity, the actual start and finish date for each activity in progress or completed, and the estimated start of activities, re-sequencing of work, or proposed changes in logic or duration for activities in the future. In no event, however, shall the Project Schedule be updated to move the Commencement of Operations Date (other than pursuant to a Change Order or Force Majeure pursuant to the terms of this Agreement).
- 5.7.2. Progress meetings between the MSB and Company shall be held monthly during the design phase of the work and bi-weekly upon the commencement of construction. The meetings shall include review of current month actual schedule data against field and submittal records, evaluate actual physical progress, review of the Project Schedule status, identification of problem areas, discussion of critical issues, determination of causes for delay and formulation of recommendations for corrective action. The Company shall take minutes, document action items and distribute minutes for review.

**5.8. Not Used.**

**5.9. Project Schedule Revisions**

Project Schedule revisions will accurately represent all changes and adjustments in the sequencing and timing of work remaining. The Project Schedule revisions will incorporate all changes that have been agreed upon by the parties through any executed Change Order or amendment to the Agreement. Each Project Schedule revision will be assigned a revision number, starting with 'Rev. I' to the Project Schedule.

**5.10. Design Services**

Company will provide through licensed design professionals employed by Company or the Company's Contractors, or procured from qualified, independent licensed consultants, the

necessary design services, including architectural, engineering and other design professional services, for the preparation of the Construction Documents consistent with Applicable Laws and Good Industry Practices.

**5.11. Construction Services**

Unless otherwise specifically agreed to in writing by the parties, Company shall provide and is fully responsible for the necessary supervision, labor, inspection, testing, start-up, material, equipment, machinery, temporary power for construction and other temporary facilities to complete construction of the Work. Company shall at all times exercise complete and exclusive control over the means, methods, sequences and techniques of construction.

- 5.11.1. Company shall employ only subcontractors who are licensed and qualified to perform the Work consistent with Applicable Law. Company shall have sole discretion as to the use of the subcontractors and suppliers used to accomplish the Work.
- 5.11.2. Company assumes all responsibility to MSB for the proper performance of the Work of subcontractors and any acts and omissions in connection with such performance. Nothing in the Agreement is intended or deemed to create any legal or contractual relationship between the MSB and any subcontractor under the direct or indirect control, supervision, or direction of Company.
- 5.11.3. During the Term, the MSB may perform other work on the adjacent property with separate contractors under the MSB's control. Company will coordinate the Work with those of such separate contractors so that the Work and the work of the separate contractors can be completed in an orderly and coordinated manner without unreasonable disruption. The MSB will take full responsibility for all other contractors employed by the MSB that may perform other work on the Property as provided for in Section 11.6. The Company will take full responsibility for all other contractors employed by the Company that may perform Work on the adjacent property.
- 5.11.4. Company shall keep the Property reasonably free from debris, trash, and construction wastes to permit Company to perform its construction services efficiently, safely and without interfering with the use of adjacent land areas. Upon Substantial Completion of the Work, or a divisible portion of the Work, Company shall promptly remove all debris, trash, construction wastes, materials, equipment, machinery and tools arising from the Work or applicable portions thereof to permit proper operation and maintenance of the Facility in a reasonably aesthetic manner.

## **5.12. Safety**

Company recognizes the importance of performing the Work in a safe manner so as to prevent damage, injury or loss to all individuals at the Property, whether working or visiting, the Work, including materials and equipment incorporated into the Work or stored on the Property, off the Property, or adjacent thereto.

5.12.1. Company shall comply with the planning and safety measures as stated in Company's Response to RFP, Technical Approach section.

5.12.2. Company assumes responsibility for implementing and monitoring all safety programs related to the performance of the Work. Company shall, prior to commencing construction, designate a safety representative with the necessary qualifications and experience to supervise the implementation and monitoring of all safety programs related to the Work. Unless otherwise required by the Agreement, Company's safety representative shall be an individual assigned to the Facility who may have responsibilities for the Work in addition to safety. The safety representative or the safety representative's designee shall make routine daily inspections of the Property and shall hold weekly safety meetings with Company's construction personnel, subcontractors and others as applicable. Company and its subcontractors shall comply with all Applicable Law relating to safety, as well as any reasonable MSB-specified safety requirements, provided that such MSB-specified requirements do not violate any Applicable Laws. Company shall immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to the MSB and, to the extent mandated by legal requirements, to all governmental and/or regulatory authorities having jurisdiction over safety related matters involving the Work. Company responsibility for safety under this Section is not intended in any way to relieve subcontractors, employees and agents of any contractual or legal obligations or responsibility. Company covenants to cause all subcontractors employees and agents to comply with Applicable Law. These obligations and responsibilities include, but are not limited to compliance with all legal requirements, including those related to health and safety matters, and taking all necessary measures to implement and monitor all safety programs to guard against injury, losses, damages or accidents resulting from their performance of the Work.

## **5.13. Respect for Private Property**

The Facility will be built in the core area of the MSB.. Most adjacent land is privately owned. The Company and its employees shall respect the property rights of the adjacent property owners. The Company agrees to provide orientation sessions regarding appropriate behavior and respect for private property.

#### **5.14. Hazardous Materials and Differing Site Conditions**

Company hereby acknowledges that it has been given reasonable access to the Property for the purpose of inspecting the condition of the Property, including subsurface conditions, soils conditions, and the presence of Hazardous Materials. The MSB has had a Phase I Environmental assessment conducted on the Property and shall only bear the risk of differing conditions related to Hazardous Material existing on the property in the lease area prior to and as of the date of this Agreement. If the Company utilizes property outside of the lease area the Company bears all of the risk associated with differing site conditions related to Hazardous Materials.

- 5.14.1. Upon encountering any Hazardous Materials on the Property, Company will stop the Work immediately in the affected area and notify the MSB in writing.
- 5.14.2. The Company will be obligated to resume the Work at the affected area of the Property only after MSB's and Company's consultants have confirmed that such Hazardous Materials have been removed or remediated by the MSB and all necessary approvals have been obtained from all applicable governmental entities having jurisdiction over the Property.
- 5.14.3. Company shall indemnify, defend and hold harmless MSB and MSB's officers, directors, employees and agents from and against all claims, losses, damages, liabilities and expenses, including attorneys' fees and expenses, arising out of or resulting from (i) the presence or release of Hazardous Materials on, in or under the Property that were introduced to the Property by Company; (ii) the transportation, storage, use or disposal of any such Hazardous Materials by Company or its employees, agents, contractors or subcontractors; and (iii) all Hazardous Materials on the Property that are not the expressly made responsibility of the MSB under this Section 5.14.

#### **5.15. Facility Start-Up and Performance Testing**

- 5.15.1. Following Substantial Completion of the Facility, Company shall promptly begin to perform the Start Up Testing required to obtain a Certificate to Operate from the ADEC, if any, or a similar regulatory equivalent.
- 5.15.2. Upon successful completion of the Start Up Testing and issuance of a Certificate to Operate by ADEC, or similar regulatory equivalent, and completion of the other requirements to Final Completion of the Facility set forth in Section 5.16, the MSB shall within ten (10) days thereafter issue notification of final acceptance or rejection of the Facility. Any final acceptance of the Facility shall not be deemed to waive the MSB's rights regarding claims for insurance, corporate guarantee, indemnification, warranties and guarantees, or recovery for damages resulting from the Work which fails to satisfy the requirements of this Agreement.
- 5.15.3. Any rejection of the final completion of the Facility shall describe the reasons

for the rejection. Company shall diligently correct the matters requiring correction and then diligently conduct any required additional Start Up Testing necessary for the ADEC Certificate to Operate and acceptance by the **MSB**. This process shall be repeated until MSB issues notification of final acceptance of the Facility, however, subject to applicable Change Order adjustments in Contract Time or Force Majeure delays, nothing in this Section shall extend the Substantial Completion Date or Final Completion Date for performance by Company.

#### **5.16. Requirements of Final Completion**

Final completion shall not be deemed to have occurred until:

- (i) A certificate of occupancy has been issued for the Facility;
- (ii) Any certificates or permits required to construct or operate the Facility have been issued;
- (iii) All Work, including items on any punch lists prepared by the Engineer of Record or the MSB as a result of final inspections has been completed in accordance with the Construction Documents and Applicable Law, and MSB has received an unqualified written certification to that effect from Company;
- (iv) MSB has issued its final acceptance under Section 5.15.2 or 5.15.3 of this Agreement;
- (v) Company has delivered to MSB, at no cost to MSB, 1 .PDF and 1 AutoCAD Copy of a complete set of "as-built" drawings, which shows all deviations from the Construction Documents;
- (vi) Company has delivered to MSB, at no cost to MSB, copies of final, unconditional mechanics, materialman's and design professional lien waivers from all contractors, suppliers and design professionals involved. However, if Company has difficulties obtaining such lien waivers, there is no filed lien and Company certifies payment has been made, final completion will not be delayed as a result thereof.
- (vii) Company has delivered to MSB, at no cost to MSB, a report, reasonably satisfactory in form and content to MSB, demonstrating that the \_\_\_\_\_ produced by the Facility from the \_\_\_\_\_ TBD delivered to the Facility complies with all Applicable Law.
- (viii) Company has delivered to MSB, at no cost to MSB, a report, reasonably satisfactory in form and content to MSB, demonstrating that the \_\_\_\_\_ delivered to the meets the \_\_\_\_\_ TBD quality standards in the performance specifications and Applicable Law.
- (ix) Company has obtained necessary Certificates to Operate from the ADEC.

**5.17. Cost of the Work**

The cost of the Work shall not exceed a Guaranteed Maximum Price stipulated in Section 9.2. Subject to the guaranteed maximum price, the Company shall provide, upon request by the MSB, a report summarizing the project costs on a monthly basis. The Company shall keep all cost documentation, including design contracts, construction contracts, and supplier contracts with documentation of payments made against each. Company self-performed work shall be documented with payroll records, equipment, material, miscellaneous invoices, and industry standard documentation of payments.

**5.18 Project Committee**

The MSB and Company agree that all of the MSB's rights under this Agreement to supervise and make decisions regarding the Work, including, but not limited to, all decisions regarding project schedules, , and resolution of all disputes with the Company regarding the Work, shall be assigned to and become the responsibility of a Project Committee. The Project Committee shall consist of (1) the MSB's \_\_\_\_\_, and (4) the MSB's \_\_\_\_\_, or their designees. The Project Committee shall meet on a regular basis according to a schedule set at the first meeting of the Project Committee. The MSB's project manager shall also attend Project Committee Meetings. Any member of the Project Committee may call a special meeting of the Project Committee upon not less than 72 hours notice in writing to the Project Committee members or their designees. Said notice shall be deemed given upon the time of delivery of a facsimile transmission or hand delivery of written notice. Any decision by the Project Committee shall be by majority vote of the members who are participating in the meeting. They may participate in person or telephonically in the meeting. A quorum shall be the presence or telephonic participation of three members of the Project Committee. Company agrees that, in performing the Work, it shall take direction from the Project Committee as provided in this Section.

**ARTICLE VI**

**GROUND LEASE, EASEMENTS, AND PROPERTY SUBDIVISION**

**6.1 Ground Lease**

Subject to the approval of the MSB Assembly, the MSB agrees to lease the Property to Company, and Company agrees to lease the Property from the MSB, pursuant to the terms and conditions of the Ground Lease attached hereto as Appendix \_\_\_\_.

**6.2 Subdivision of the Property**

If Borough code requires the property to be subdivided, promptly upon execution of this Agreement, the MSB shall undertake to subdivide the Property into Tracts as depicted in the attached Appendix \_\_\_\_\_.

**6.3 Not Used**

**6.4 Modification to Ground Lease**

If final approval is received and a plat is recorded subdividing the Property into two parcels (if subdivision is required by the platting code) substantially similar to those depicted in Appendix \_\_\_\_\_, Assembly approval is received, and the MSB and the Company shall execute a modification to the Ground Lease, terminating the Ground Lease with respect to \_\_\_\_\_ and providing for a corresponding reduction or adjustment in rent, based upon the square footage in the new Tract \_\_\_\_\_ as a percentage of the total square footage of the Property. Upon modification of the Ground Lease, the Service Fee payable pursuant to Appendix \_\_\_\_\_ shall be reduced to reflect reduction in rent.

**6.5 Not Used.**

**ARTICLE VII  
OPERATION & MAINTENANCE OF FACILITY**

**7.1. General**

The Facility shall be operated and maintained by Company during the Term following the Commencement of Operations Date as prescribed in the O&M Scope of Work set forth in Company's Response to RFP, and in accordance with: (i) Good Industry Standards; (ii) Applicable Law; (iii) the Minimum Staffing set forth in Company's Response to RFP and this Agreement; (iv) the Quality Control, Quality Assurance, Risk Management and Loss Prevention Program set forth in the Company's Response to RFP; and (v) the Planning and Safety Measures set forth in Company's Response to RFP. In addition, no later than sixty (60) days before Substantial Completion, the Company shall develop written policies and procedures that will define the reporting, notification, and general operational interface requirements for the operation and maintenance of the Facility by Company, which policies and procedures shall be incorporated into the O&M manual for the Facility, and Company shall comply with such O&M manual for the Facility.

**7.2. Expenses**

Except for Non-Routine Services (defined in Section 7.4 below), Company will assume responsibility (at its cost) for activities required or recommended by the O&M Scope of Work, the equipment manufacturer, or Company to operate the Facility and to maximize the service life of the equipment and vehicles, including, but not limited to, the expense of Company personnel, fuels, chemicals, and supplies. Additionally, Company shall make all necessary repairs required to correct any deficiency in the original equipment which prevents the Facility from consistently meeting the requirements of this Agreement, and Company shall provide laboratory services as required to properly operate the Facility as required by the Alaska Department of Environmental Conservation and to perform any testing or provide any reports as required by Applicable Law.

**7.3. Not Used**

**7.4. Not Used**

**7.5. Contract Representative**

Company shall direct all material communications to the MSB Contract Representative.

**7.6. Service Problems; Call Outs**

Company shall ensure that personnel shall be available during normal business hours to promptly respond to service problems and call outs. Company shall ensure that personnel will be available twenty-four (24) hours a day, seven (7) days a week by telephone to respond to any emergency calls from the MSB.

**7.7. Reports and Records**

Company will prepare and sign all reports required pursuant to Applicable Law and will maintain other records reasonably deemed useful to monitor and control the operation of the Facility and to insure that the Facility operates pursuant to and in accordance with this Agreement, Applicable Law and Good Industry Practices.

**7.8. Proprietary Rights**

All Facility records, data, software, and information, including, but not limited to, operation reports, and laboratory data, shall be owned by Company, but shall be assigned and delivered to MSB upon the expiration or any earlier termination of this Agreement, together with all operating procedure guidelines, preventive maintenance and safety programs, and plant evaluation reports.

**7.9. Engineering and Technical Services**

At no extra charge, Company shall provide such engineering and technical services required to identify, evaluate, and prepare preliminary recommendations necessary to ensure the proper operation and maintenance of the Facility in accordance with Good Industry Practices.

**7.10 Emergency Preparedness**

Prior to the Commencement of Operations Date, Company shall prepare and revise as necessary an emergency preparedness plan, satisfactory to the MSB, for coordination with the MSB and other governmental agencies. The emergency preparedness plan shall be approved in the MSB's sole, but reasonable, discretion. Company shall comply with such Plan for the remainder of the Term.

**ARTICLE VIII  
PERFORMANCE STANDARDS**

**8.1. Design and Performance Standards**

Company represents and warrants that the Facility will meet the performance criteria set forth in the Performance Standards outlined in the RFP and Appendix \_\_\_\_\_, except that such representation and warranty is void with respect to any defects or deficiencies that result from or are caused by, directly or indirectly, the delivery to the Facility of \_\_\_\_\_ that is not \_\_\_\_\_. All design professional services performed to execute the Work shall conform to Good Industry Practices.

**8.2. Not Used.**

**8.3. Not Used.**

**8.4. Defects; Payment for Repairs or Replacements**

Company shall make any and all repairs or replacements resulting from defects in design, materials or workmanship other than any such defects that are the result of or are caused by, directly or indirectly, the delivery to the Facility of TBD, or that are discovered prior to the payment of any Section 4.2 Fee (if applicable).

Company shall make the repairs and replacements required promptly, and promptly upon any receipt of written notification from the MSB that a repair is necessitated because of the safety of the public or the safety of Borough employees. If Company fails to make repairs and replacements dictated by the safety of the public or Borough employees, the MSB may (but is not required to) repair or replace the defective element of the Facility and Company shall reimburse MSB for the cost thereof, (together with an administrative fee of ten percent (10%) of the cost of the repairs or replacement work) within ten (10) days after written demand.

**ARTICLE IX  
COMPENSATION**

**9.1. Compensation for Services**

Beginning upon the Commencement of Operations Date and continuing through the expiration or earlier termination of this Agreement, the MSB agrees to purchase/OR PAY for TBD from Company. The MSB agrees to pay Company for TBD services provided to in the amount of the Service Fees set forth in Appendix \_\_\_TBD\_\_\_, as may from time to time be adjusted as set forth in Section 9.3 below. The MSB's obligation to purchase TBD services shall be subject to appropriation by the Borough Assembly, as provided in Section 10.1.16.

**9.2. Guaranteed Maximum Price for the Work**

9.2.1 The Company agrees that the sum of \$\_\_\_\_\_TBD\_\_\_\_\_, which is set forth in Appendix \_\_\_\_\_, page \_\_\_\_\_, as the Construction Cost, shall be the Company's guaranteed maximum price for the performance of the Work. Within the guaranteed maximum price the estimated budget for each segment of the Work is as follows:

9.2.1.1 The Company will establish a guaranteed maximum price for each segment of the Work at 100% design. The sum of the guaranteed maximum prices for all Work segments shall be no more than \$\_\_\_TBD\_\_\_\_\_. The variance between the guaranteed maximum price and the segment budget above shall not exceed five percent (5%).

The parties acknowledge this provision is to assist the MSB in determining adequate insurance, credit requirements, etc. The provision is not intended to entitle the Company to any payment based on the value of the work. Furthermore, the parties understand that any amount due at Termination or expiration is governed by other provisions.

**9.3. Audit Books and Records**

9.3.1 Not Used.

9.3.2 The Company shall prepare and maintain proper, accurate and complete books and records regarding the Work and all other transactions related to the design, permitting, construction, shakedown and testing of the Facility, and the operation and maintenance of the Facility, including all books of account, bills, vouchers, invoices, personnel rate sheets, cost estimates and bid computations and analyses, subcontracts, purchase orders, time books, daily job diaries and reports, correspondence, and any other documents showing all acts and transactions in connection with or relating to or arising by reason of the Work, this Agreement, any subcontract or the operation and maintenance of the Facility. All financial records of the Company shall be maintained in accordance with generally accepted accounting principles and auditing standards for governmental institutions. The Company shall make available to the MSB for examination and copying such books and records (except for the Company's financial ledgers and statement). The Company shall keep and maintain all such books and records separate and distinct from other records and accounts, and shall maintain such books and records for at least seven (7) years after the close of the period of operation to which they relate, for books and records related to the maintenance and operation of the Facility, or such longer period during which any legal proceeding with respect to Work or the maintenance and operation of the Facility may be pending.

**9.4. Not Used**

**9.5. Capital Reserve Account**

The Company shall be solely responsible for repairs or replacements resulting from failures caused by latent defects in design or construction that are discovered with written notice to Company prior to the payment of any Section 4.2 Fee (if applicable).

The Company agrees to establish a Capital Reserve Account for payment of all the costs of repairs or replacements, if occurring after the one year Construction Warranty Period, and if not the result of a catastrophic event covered by Company's insurance or the result of latent design or construction defects that are discovered with written notice to Company prior to the payment of any Section 4.2 Fee (if applicable). Funds in the Capital Reserve Account shall not be used for any other purpose than normal repairs or replacement. Amounts in the Capital Reserve Account shall be determined by Company Except as otherwise herein specifically provided, the Capital Reserve Account purchases shall be limited to building or equipment components or items that have a unit value of \$1000 or more and an expected useful life of 5 years or more.

**9.6. Not Used.**

**9.7. Payment of Late Charges**

Company shall provide invoices to the MSB by the fifth (5<sup>th</sup>) day of each month for the monthly installments of any Service Fees and such Other Expenses as are incurred for the previous month. Payment shall be made by the MSB within thirty (30) days of receiving a bill. In the event that any portion of the Company invoice is disputed by the MSB, the MSB shall pay the undisputed portion of the invoice. If any payment required to be made by either party hereunder is not paid when due, such payments shall bear interest thereon from the date such payment was due to the date of receipt of payment by the party owed. Late payments shall bear interest at the rate equal to Wells Fargo Prime Rate.

**9.8. Change Orders**

If liquidated damages are applicable per Section 5.4, the Company shall be entitled to request additional time to perform (and the MSB shall be required to grant) Change Orders with respect to:

- (i) MSB caused delays, including delays in acquiring government permits and approvals which occur through no fault of Company;
- (ii) Change in Law;
- (iii) Force Majeure Events; and
- (iv) Not used.

The Company shall be entitled to receive an appropriate adjustment in the Contract Time (not any adjustment in Fees) following any of the events described in clauses 9.8 (i)-(iii) that delay

compliance with the Project Schedule, and the Project Schedule shall be revised accordingly; provided, however, that the Company shall exercise commercially reasonable best efforts to minimize any delay (including any re-sequencing of the Work) and shall otherwise mitigate the effects of any such events (provided that the Company shall not be required to incur material additional costs in effecting such re-sequencing). Disputes with respect to the issuance of a Change Order for an adjustment to the contract time shall be settled by the dispute resolution process under Article XIV (if any); provided, however except in the case of a legitimate dispute regarding any of the causes of delay specified in Paragraph 9.8(i), Company shall not be obligated to perform any of the work subject to such dispute unless and until the parties have executed a Change Order.

**9.9. Not Used.**

**9.10. Not Used.**

**9.11. Emergencies**

In any emergency affecting the safety of persons and/or property, Company shall act, in its reasonable discretion, to prevent threatened damage, injury or loss to persons or property.

**9.12 Not Used.**

## **ARTICLE X REPRESENTATIONS AND WARRANTIES**

**10.1. MSB Representations, Warranties, and Covenants**

The MSB hereby represents warrants and covenants to Company as follows:

10.1.1 The MSB is a municipal corporation duly created and existing pursuant to the laws of the State of Alaska. The MSB has the full legal right, power and authority to enter into this Agreement and to perform its duties and obligations hereunder. This Agreement has been duly authorized, executed and delivered by the MSB and constitutes a legal, valid and binding obligation of the MSB, enforceable against it in accordance with its terms, and the authorization, execution, delivery and performance of this Agreement by the MSB does not violate any law, judgment, order, ruling or regulation applicable to the MSB and does not constitute a breach of or default under any agreement or instrument by which the MSB is bound.

10.1.2 Not Used.

10.1.3 Not Used.

10.1.4 To the MSB's current actual knowledge, no material action, suit, proceeding or official investigation has been threatened, publicly announced or commenced against the MSB by any Federal, state or local governmental authority or agency,

or in any Federal, state or local court, that seeks to challenge the MSB's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement or enjoin, assess civil or criminal penalties against, assess civil damage against or obtain any judgment, order or consent decree binding the MSB on account of this Agreement or any actions contemplated to be taken by the MSB under this Agreement, except as set forth in this Agreement.

- 10.1.5 The MSB is the rightful owner of the Property.
- 10.1.6 The obligation of the MSB to pay the Service Fees or make other payments pursuant to this Agreement is subject to appropriation by the MSB Assembly. In the event the Assembly fails to appropriate sufficient funds to pay any of the MSB's obligations under this Agreement, MSB will notify the Company at the beginning of the period for which funds have not been appropriated, terminate this Agreement, and thereupon be released of all of its obligations hereunder, including but not limited to its obligations to make all further payments thereafter due under this Agreement.
- 10.1.7 The MSB pledges to include in its budget all Service Fees and any additional payments required by this Agreement in accordance with applicable law. The MSB pledges to use its best efforts to obtain appropriations by the MSB Assembly in amounts sufficient to pay all amounts required by this Agreement.

## **10.2. Company Representations, Warranties, and Covenants**

Company represents, warrants and covenants to the MSB as follows:

- 10.2.1 Company is a \_\_\_\_\_ company duly organized and validly existing in good standing in the State of Alaska and is qualified and authorized to do business in the State of Alaska.
- 10.2.2 Company has full power and authority to enter into this Agreement and to perform its duties and obligations hereunder. This Agreement has been duly authorized, executed and delivered by Company, and the authorization, execution, delivery and performance of this Agreement by Company shall not violate any law, judgment, order, ruling or regulation applicable to Company and constitutes a legal, valid and binding obligation of Company, enforceable against it in accordance with its terms, and does not constitute a breach of or default under any agreement or instrument by which Company is bound.
- 10.2.3 The Company's Contractors and the Company's Designers have or hold all licenses necessary to perform the Work.
- 10.2.4 To the best of Company's current actual knowledge, no action, suit, proceeding or official investigation has been threatened, publicly announced or commenced against Company by any Federal, state or local governmental authority or agency,

or in any Federal, state or local court that seeks to enjoin, assess civil or criminal penalties against, assess civil damage against or obtain any judgment, order or consent decree binding Company on account of this Agreement or any actions contemplated to be taken by Company hereunder.

10.2.5 During the MSB's negotiations with the Company, Company was informed and agreed not to participate in any unlawful activity including, but not limited to, rebates, kickbacks, or other unlawful consideration.

**10.3 Not Used.**

**10.4 Not Used.**

## **ARTICLE XI RESPONSIBILITIES**

### **11.1. Duty to Cooperate**

The Company and the MSB shall, throughout the performance of the Work and the O&M Services, cooperate with each other and perform their respective responsibilities, obligations and services in a timely manner to facilitate the timely and efficient performance of the Work and the O&M Services.

### **11.2. Reviews and Approvals**

Each party shall provide timely reviews and approvals of all submissions so as to permit reaching the deadlines set forth in the Project Schedule.

### **11.3. Existing Site Conditions Reports**

Company acknowledges that MSB has provided to Company the reports regarding the condition of the Property that or that the Company has conducted due diligence on the Property.

**11.4. Not Used.**

### **11.5. Government Approvals and Permits**

MSB shall provide reasonable assistance to Company in obtaining permit approvals and licenses, which are Company's responsibility; however, the MSB shall not be obligated to incur any third party cost or expense with regard to the same. Company shall not apply for changes to any permits or governmental approvals issued to or binding on MSB, or discuss any such change with any governmental authority other than MSB related to permits or governmental approvals issued to or binding on MSB, without the prior written consent of MSB.

**11.6. MSB's Separate Contractors**

MSB is responsible for all work performed on the Property by separate contractors under MSB's control. MSB shall contractually require its separate contractors to cooperate with, and coordinate their activities so as not to interfere with Company in order to enable timely completion of the Work.

**ARTICLE XII**

**INSURANCE AND INDEMNIFICATION AND LETTER OF CREDIT**

**12.1. Company Insurance & Builders Risk Insurance**

**INSURANCE PROVISIONS ARE TO BE DETERMINED AFTER BID BASED ON THE TYPE OF PROJECT**

**12.2. Indemnity**

12.2.1 Company shall indemnify, defend, protect and hold harmless the MSB, and its elected and appointed officials, officers, attorneys, employees, and agents from and against any and all claims (including workers' compensation and wage claims), demands, suits, actions, liabilities, losses, damages, penalties, judgments, and costs and expenses, including without limitation the costs and expenses of litigation, of or by anyone that in any way is caused by, arise out of, or is occasioned by the Company's performance of the Work, or that resulted from any negligent act, error or omission of the Company's employees, consultants, contractors, or agents, during performance of their work under the Agreement, except to the extent such matters arise from the independent negligent, act, error or omission of MSB or any Person claiming indemnification under this Subparagraph.

12.2.2 Subject to appropriation for the specific purpose by the Borough Assembly, the MSB shall indemnify, defend, protect and hold harmless Company, and its officers, attorneys, members, managers, employees and agents from and against any and all claims (including workers' compensation and wage claims), demands, suits, actions, liabilities, losses, damages, penalties, judgments, and costs and expenses, including without limitation the costs and expenses of litigation, of or by anyone that in any way is caused by, arises out of, or is occasioned by (a) the negligent act, error or omission of the MSB, or any of its employees, consultants, contractors, or agents, and (b) loss of possession of the Property due to a failure by MSB to maintain legal possession (such as a successful appeal of an Order for Possession), except to the extent such matters arise from the independent act, error or omission of the Company or any Person claiming indemnification under this Subparagraph.

12.2.3 In the event of a claim for indemnification, the person claiming indemnification shall immediately notify the other party of the claim and the indemnifying party shall have the right to assume the defense against the claim, with counsel

reasonably satisfactory to it, and the right to approve the settlement of the claim.

12.2.4 This Article shall survive the expiration of the Agreement at the end of its Term or its earlier termination.

### **12.3. Limitation on Extent of Damages**

Any damages that arise out of the performance of this Agreement shall be limited to the actual, direct loss to the other party and damages shall not include lost profits, loss of business opportunity, consequential or so-called "special damages" or indirect damages, good will or reputation. Nothing in this Section shall limit or reduce any liability of Company to pay any liquidated damages for delay under Section 5.4 (which are MSB's sole remedy for delay). Nor shall this Section limit or reduce any liability MSB to pay Company the agreed to fees in the event of termination. In the absence of willful misconduct, it is the intent of the parties hereto that punitive damages shall not be sought or awarded.

### **12.4. Force Majeure**

12.4.1 Force Majeure means any act, event or condition beyond the reasonable control of the party relying thereon, but not including a Change in Law, failure to make any undisputed payment obligation hereunder or the result of negligent or willful action or lack of reasonable action of the party seeking to claim this protection. Force Majeure does not include a change in economic or market conditions or a change in the financial condition of a party to this Agreement. Subject to the foregoing and the other terms of this Section, Force Majeure events include, without limitation, any of the following:

- (i) severe weather (except reasonably anticipated weather conditions, even if severe, which are normal for the geographic area), landslide, lightning, earthquake, hurricane, flood, acts of a public enemy, war, blockade, riot, civil disturbance, terrorism, or similar occurrence;
- (ii) labor strikes and similar events beyond the reasonable control of the party claiming the delay;
- (iii) any failure of any appropriate governmental body or private utility having operational jurisdiction or authority respecting the Facility to provide and maintain utilities respecting the Facility which are required for the performance of the Agreement and which could not have been reasonably foreseen, or was caused, by the party claiming delay;
- (iv) any failure of title to the Facility or any placement or enforcement of any encumbrance (other than permitted encumbrances) on the Facility or on any improvements thereon that is not created or caused by the party claiming

the Force Majeure delay and does not result from an obligation of such party;

- (v) the preemption, confiscation, diversion, destruction, or other interference in possession or performance of materials or services by, or on behalf of, or with authority of a governmental body (other than, in the case of a claim of Force Majeure by the MSB, the MSB) in connection with a declared or asserted public emergency or any condemnation or other taking by eminent domain or similar action of any portion of the Facility;
- (vi) the presence at the Facility of (i) subsurface structures, materials or conditions having historical, geological, archaeological, religious or similar significance; (ii) any habitat of an endangered or protected species; or (iii) functioning subsurface structures used by utilities on, underneath, near or adjacent to the Facility;
- (vii) the presence of hazardous waste or hazardous substances upon or beneath the Facility or, hereafter, the release or migration of hazardous waste or hazardous substances on, to or from the Facility not currently known to Company;

12.4.2 With respect to any delay in issuing permits listed above, the Company must, as a condition to claiming Force Majeure, have: (i) made reasonable efforts to discuss its proposed submittals in detail with the permit issuer prior to applying for the permit; (ii) taken all reasonable actions to diligently prosecute its application for the issuance or renewal of such permit; and (iii) promptly notified the MSB Purchasing Officer in writing of any material problems or disputes that might reasonably be expected to result in a Force Majeure delay in issuing the applicable permit. The MSB shall promptly create and maintain a committee comprised of the MSB Purchasing Officer and the MSB employee reviewing submittals for the applicable permit (if issued by the MSB) to evaluate notices of potential delay by the Company, and the MSB shall designate in writing one employee that shall have the review authority for each MSB permit described above.

12.4.3 Notwithstanding anything to the contrary in this Section, an event shall not constitute a "Force Majeure" event under this Agreement with respect to the Company's obligations under this Agreement unless Company shall use its commercially reasonable best efforts to: (i) reasonably anticipate foreseeable force majeure events and take appropriate prevention actions before such a force majeure event occurs; (ii) address the effects of any force majeure event as it is occurring; and (iii) after a force majeure event has occurred, address the effects of such event to prevent or minimize delay to the extent reasonably practicable.

12.4.4 In the event of a Force Majeure event, the performance of the party seeking protection shall be excused (other than any payment obligation) if such party is

unable to perform, provided such event was not caused solely or in substantial part by an act or omission of such party or its contractor(s) and only to the extent the effects of the Force Majeure could not have been prevented or avoided by reasonable effort of such party.

- 12.4.5 The party seeking protection for Force Majeure shall provide prompt notice to the other party at the beginning and end of such a Force Majeure event. At the conclusion of any such event, the obligations of the party seeking protection shall resume in full force and effect. The party seeking protection shall use reasonable efforts to eliminate its cause, mitigate its effects, and resume performance under this Agreement as expeditiously as possible. If applicable, the parties shall execute an appropriate Change Order to adjust the Contract Time, or any Buyout or Service Fee (if applicable) if necessary to reflect the effects of any such Force Majeure event.

## **12.5. Changes in Law**

- 12.5.1 A Change in Law means any of the following that occur after the Effective Date of this agreement that could not have been reasonably anticipated by Company;
- 12.5.1.1 the enactment, adoption, promulgation, modification, repeal, or change of any Federal, State, or local law (excluding Federal or State income tax law), ordinance, code, rule, or regulation which is enforceable in a Court of competent jurisdiction;
  - 12.5.1.2 a final order, decree, or judgment of any Federal, State, or local court, administrative agency or governmental officer or body, if such order, decree, or judgment is not also the result of negligent or willful action or failure to act of the party relying thereon, provided that the contesting in good faith of any such order, decree, or judgment shall not constitute or be construed as a willful or negligent action of such party;
  - 12.5.1.3 the suspension, termination, interruption, denial, failure to issue, or failure of renewal of any permit, license, consent, authorization, or approval essential to the operation of the Facility, if such act or event is not also the result of negligent or willful action or failure to act of the party relying thereon, provided that the contesting in good faith of any such order shall not be construed as a negligent or willful action of such party;
  - 12.5.1.4 the imposition of any material conditions on the issuance or renewal of any permit, license, or approval the compliance with which causes an increase in the cost of the Work or the operation costs of the Facility beyond the most stringent requirements applicable to the Facility in effect on the Effective Date; or

12.5.2 For each Change in Law, Company or MSB may notify the other party of such Change in Law and then promptly, but no later than thirty (30) days after becoming aware of such change, the Company shall prepare a report describing the reason for believing a Change in Law has occurred and all actions and changes proposed by it to address the Change in Law, including an assessment of alternatives, and any related increases/decreases in operations, maintenance, capital and other costs.

The Company shall have the sole right to determine whether any improvements to or alterations of the Facility shall be performed in connection with any Change in Law provided, that (i) any such determination not to comply with any Change in Law by the Company will not be valid to the extent it could subject MSB to any criminal sanctions or any other liability.

Any obligation for the MSB to pay increase in Service Fees, or other Fee, resulting from actions or changes to address the Change in Law must be negotiated and agreed to by the parties prior implementing such.

Should the MSB determine in its review and approval of Company's report referenced in Section 12.5.2 that the MSB desires to finance any portion of any capital improvements to the Facility or operations that are required as a result of such Change in Law, the MSB reserves the right to do so in the MSB's sole and absolute discretion and the parties shall promptly execute an agreement to reflect such desires.

**12.6. Letter of Credit**  
Terms TBD

**ARTICLE XIII  
TERMINATION; DEFAULT AND REMEDIES**

**13.1. Termination for Cause by the MSB**

Upon the occurrence of an "Event of Default" by Company, as defined below, the MSB shall have the right to terminate this Agreement in whole or in part or pursue a cause of action for actual damages, or both. Damages for delay shall in no event exceed the liquidated damages limit provided for under Section 5.4. Each of the following shall constitute an Event of Default by company if it is not cured in accordance with the applicable cure provisions set forth below:

13.1.1 The failure of Company to perform or observe any of its covenants, agreements, obligations or duties under this Agreement that cannot be cured by the payment of money;

13.1.2 The failure by Company to make any uncontested payment required under this Agreement (or the failure by Company to make any contested payment to the extent the liability of the Company for such payment and amount of such

payment have been determined);

- 13.1.3 The material inaccuracy of any representation or warranty made by Company which inaccuracy has had or could reasonably be expected to have a material adverse effect on the MSB or on the Company's ability to perform its material obligations under this Agreement; or
- 13.1.4 The commencement of any bankruptcy, insolvency, liquidation or similar proceeding by or against Company, which materially and adversely affects Company's ability to perform its duties or obligations under this Agreement; the consent by Company to the appointment of, or taking possession by a receiver, liquidator, trustee in bankruptcy or custodian of Company or any substantial part of the assets of Company; any assignment of all or substantially all of the assets of Company for the benefit of creditors (except to secure Bonds or other financing); or the failure by Company to pay debts as they come due, unless Company is disputing the debt or the amount thereof.
- 13.1.5 Upon the occurrence of any event described in Section 13.1.1, 13.1.2 or 13.1.3 above known to MSB, the MSB shall provide written notice of the event to Company. Company shall have sixty (60) days after such written notice is given to cure an event described in 13.1.1 or 13.1.3 and ten (10) days to cure an event described in 13.1.2; provided, however, that if the cure of an event described in 13.1.1 or 13.1.3 cannot reasonably be completed within the sixty (60) days, an Event of Default under 13.1.1 or 13.1.3 shall not occur if within said sixty (60) days Company shall have commenced to cure and shall thereafter diligently prosecute the cure to completion. Upon the occurrence of an Event of Default by Company based on an event described in Section 13.1.1 or 13.1.2 or 13.1.3, and failure to cure within the time provided above, the MSB may, terminate or suspend the Agreement in whole by providing written notice thereof to Company. Upon the happening of any event described in Section 13.1.4, this Agreement may be terminated immediately by MSB without prior notice or opportunity to cure.

### **13.2. Termination for Default; No Compensation for Improvements**

- 13.2.1 Except as otherwise provided in this Section 13.2, should this Agreement be terminated by MSB following an uncured Event of Default by Company, the Ground Lease shall terminate and the Existing Improvements shall be removed by Company from the Tract within one hundred eighty (180) days (or such shorter period as may be reasonably practicable) from the notice of termination.
- 13.2.2 The MSB may, at its sole option, allow Company to leave some or all of the Existing Improvements upon termination. If it so elects, such Improvements shall become the property of MSB upon termination and MSB shall have no obligation to compensate Company for the same.
- 13.2.3 If the Existing Improvements are not timely removed or expressly allowed by

MSB to stay, they shall be deemed abandoned by Company. If the MSB decides to remove or destroy the abandoned property, the Company shall be liable for all costs and expenses incurred by MSB to remove or destroy abandoned property not allowed to be left on the Leased Premises, and for the removal of trash or other debris left thereon.

- 13.2.4 Nothing in this Section waives the MSB's claim for other damages that may arise from a termination by MSB following an Event of Default by Company
- 13.2.5 Improvements previously acquired by MSB in accordance with this Agreement are not subject to this Section.
- 13.2.6 This Section shall survive termination of this Agreement by MSB following an Event of Default by Company.

### **13.3. Termination for Cause by Company: Payment Due Company**

Upon the occurrence of an "Event of Default" by the MSB, as defined below, Company shall have the right to terminate this Agreement. Each of the following shall constitute an Event of Default by the MSB if not cured in accordance with the applicable cure provisions set forth below:

- 13.3.1 The failure of the MSB to perform or observe any of its covenants, agreements, obligations or duties under this Agreement;
- 13.3.2 The failure by the MSB to make any payment required under this Agreement;
- 13.3.3 The material inaccuracy of any representation or warranty made by the MSB which inaccuracy has had or could reasonably be expected to have a material adverse effect on Company, this Agreement or its enforceability or on the MSB's ability to perform its material obligations hereunder;
- 13.3.4 The commencement of any bankruptcy, insolvency, liquidation or similar proceeding against the MSB, the consent by the MSB to the appointment of or taking possession by a receiver, liquidator, assignee, trustee or custodian of the MSB or any substantial part of its assets, of any assignment for the benefit of creditors (except to secure Bonds or other financing), or the failure by the MSB to pay its debts as they come due (unless the debt is disputed or the amount of such debt is disputed); provided that in the case of commencement of an involuntary petition or proceeding or entry of a judgment or judicial order that includes or seeks to cause any of the above events, such petition, proceeding, judgment or order shall remain undischarged or undismissed for one hundred and twenty (120) days; and provided further that the appointment of a financial control or oversight board by the State shall not, in and of itself; constitute any such event. The rights and remedies identified herein shall not limit the ability of Company to seek any other rights and remedies provided by law, including Company's ability to seek relief from any automatic stays under the United States Bankruptcy Code or the right of Company to stop work under any

applicable provisions of the Agreement.

- 13.3.5 Upon the happening of any event described in Sections 13.3.1 through 13.3.3 above, Company may send written notice to the MSB setting forth in detail the alleged failure or deficiency of the MSB. The MSB shall have forty-five (45) days (other than for an event described in Section 13.3.2, in which case the MSB will have ten (10) days) after receipt of such written notice from Company to cure such failure or deficiency. If the failure or deficiency is described in Section 13.3.1 or 13.3.3 and is subject to cure, but such cure cannot reasonably be completed within forty-five (45) days, an Event of Default under Section 13.3.1 or 13.3.3 (as the case may be) shall not occur if within the forty-five (45) days the MSB shall have commenced to cure and shall thereafter diligently pursue such cure to completion.
- 13.3.6 In the event that the MSB does not cure such failure or deficiency within an applicable cure period (or any extension as provided above), Company may send an additional written notice which describes the default and also includes the following notice in bolded and underlined capitalized letters:
- 13.3.7 **IN THE EVENT MSB DOES NOT CURE THE DEFAULT DESCRIBED BELOW WITHIN FIFTEEN (15) DAYS AFTER RECEIPT OF THIS NOTICE. COMPANY SHALL HAVE THE RIGHT TO TERMINATE THIS "DESIGN, BUILD, OPERATE AND FINANCE AGREEMENT" BETWEEN COMPANY AND MSB.**
- 13.3.8 If MSB does not cure the default within fifteen (15) days' after receipt of such additional notice, then Company may by written notice to MSB and terminate the Agreement in whole or in part, or suspend performance thereof until the cure is completed.
- 13.3.9 Upon the happening of an event described in Section 13.3.4, this Agreement may be terminated immediately by Company without prior notice or opportunity to cure.
- 13.3.10 If Company should elect to terminate this Agreement for uncured default by the MSB, the Company shall be entitled to all of its rights and remedies (subject to Section 12.3), including without limitation, payment by the defaulting party of the Section 4.2 Fee and any Service Fees herein due prior to the date of termination.
- 13.3.11 **COMPANY HEREBY ACKNOWLEDGES, STIPULATES AND AGREES THAT IN THE EVENT OF A DEFAULT BY MSB AFTER THE COMMENCEMENT OF OPERATIONS DATE, IT WOULD BE IMPRACTICAL TO CALCULATE OR ASCERTAIN WITH CERTAINTY THE EXTENT AND AMOUNT OF DAMAGES TO COMPANY AND THAT THE SUM SPECIFIED HEREIN THAT THE MSB IS TO PAY COMPANY**

UPON TERMINATION OF THIS AGREEMENT BY COMPANY FOR AN UNCURED DEFAULT BY MSB IS REASONABLE UNDER THE CIRCUMSTANCE.

MSB's Initials: \_\_\_\_\_ Company's Initials : \_\_\_\_\_

**13.4. Continuity in the Event of Termination or Expiration**

**Termination**

In the event of termination of this Agreement for whatever cause and regardless of fault, Company shall at the MSB's option, provide for continuity of the O&M Services for the Facility, as applicable, over a one hundred and eighty (180)-day period, or such lesser time as MSB may specify, for transition of such O&M Services back to the MSB, to another contractor designated by the MSB, or for the services to be phased out. Company shall be paid by MSB for such services consistent with the payment structure set forth in this Agreement.

13.4.1 Upon termination of this Agreement before the expiration of the Term and payment of the Section 4.2 Termination fee provided for herein, and if the MSB agrees to allow the Company to leave some or all of the Existing Improvements upon termination Company shall execute such documents and instruments as are reasonably requested by MSB to transfer to the MSB the Facility. The Facility shall be transferred to the MSB in the condition found, less fair wear and tear, in good operating order, maintained in accordance with Good Industry Practices, with operating and maintenance records, and with a level of parts inventory consistent with the O&M Scope of Work without cost to the MSB.

13.4.2 The MSB shall have the right to make offers to hire any and all of the on-site employees of Company in the event of termination of this Agreement. Company shall not be entitled to any claim for compensation or damages on account of employment of Company's employees upon or after termination of this Agreement.

13.4.3 Not used.

**Expiration**

13.4.4 In the event of expiration of this Agreement the Ground Lease shall terminate and the Existing Improvements shall be removed by Company from the Tract within one hundred eighty (180) days (or such shorter period as may be reasonably practicable). The MSB may, at its sole option, allow Company to leave some or all of the Existing Improvements. If it so elects, such Improvements shall become the property of MSB and MSB shall have no obligation to compensate Company for the same.

- 13.4.5 If the Existing Improvements are not timely removed or expressly allowed by MSB to stay, they shall be deemed abandoned by Company. If the MSB decides to remove or destroy the abandoned property, the Company shall be liable for all costs and expenses incurred by MSB to remove or destroy abandoned property not allowed to be left on the Leased Premises, and for the removal of trash or other debris left thereon.
- 13.4.6 Company shall at the MSB's option, provide for continuity of the O&M Services for the Facility, as applicable, over a one hundred and eighty (180)-day period, or such lesser time as MSB may specify, for transition of such O&M Services to the MSB or to another contractor designated by the MSB. Company shall be paid by MSB for such services consistent with the payment structure set forth in this Agreement.
- 13.4.7 Before the expiration of the Term and payment of the fees provided for herein, Company shall execute such documents and instruments as are reasonably requested by MSB to transfer to the MSB the Facility. The Facility shall be transferred to the MSB in the condition found, less fair wear and tear, in good operating order, maintained in accordance with Good Industry Practices, with operating and maintenance records, and with a level of parts inventory consistent with the O&M Scope of Work without cost to the MSB.
- 13.4.8 The MSB shall have the right to make offers to hire any and all of the on-site employees of Company in the event of termination of this Agreement. Company shall not be entitled to any claim for compensation or damages on account of employment of Company's employees upon or after termination of this Agreement.

### **13.5. Expiration of Term of Agreement**

- 13.5.1 Upon expiration of this Agreement, each party shall promptly pay to the other as soon as is determinable, all amounts necessary to rectify any overpayments made by such other party pursuant to the terms and conditions of this Agreement.
- 13.5.2 Within ten (10) days after the expiration or earlier termination of this Agreement, Company shall deliver to the MSB, the originals, to the extent in the possession of Company, and copies (as hereinafter described), of the following ("Books and Records"): (i) all books and records prepared and /or maintained by Company during the Term in connection with the O&M Services; (ii) all permits, plans, purchase and sale agreements, licenses, warranties, contracts, security documents and loan documents pertaining to the Facility and in possession of Company, excluding only those related to TBD (iii) all insurance policies, bills of sale or other documents evidencing title or rights of the MSB. Furthermore, all original documents delivered by Company to the MSB pursuant to this Section shall be made available to Company as may be

reasonably necessary in connection with any actual or threatened litigation which relates to the Facility and, and (iv) any other records or documents pertaining to the Project and in the possession of Company which are required or reasonably appropriate for the ownership, development, construction, sale and management of the Project (provided, however, that if any of the items referred to in this Section shall pertain to the Project as well as to other properties or projects not owned by the MSB, then Company shall not need to deliver the original thereof if it delivers certified copies of such items). In addition to the foregoing, Company shall, immediately upon the termination of this Agreement, identify all contracts relating to the O&M Services and assign to the MSB or its designee such existing contracts, if any relating to the O&M Services as the MSB shall reasonably direct.

13.5.3 Within ninety (90) days after the expiration of the Term of this Agreement, Company shall be obligated to deliver to the MSB a final accounting, which shall specifically identify any and all expenses which have been incurred in connection with the Facility as of the date thereof but which have yet to be paid: provided, however, that if such expiration or termination date shall be a date other than the last day of a calendar month, the final accounting shall be prepared as of the last day of the month in which such expiration or termination occurs.

13.5.4 Transfer of Title. Upon the expiration of the Term of this Agreement and the MSB's express agreement to allow Existing Improvements to remain, title to the Facility shall transfer to the Borough. Company shall cooperate with the MSB and execute all documents the MSB may reasonably request to effectuate the transfer, including, but not limited to, documents transferring any real property interests owned by Company that are a part of the Facility. Title to the Facility and Tract TBD, shall be free of all liens and encumbrances except those to which the Property is subject as of the date of this Agreement, and easements against Tract TBD to which the MSB has consented in writing, or were acquired by eminent domain.

13.5.5 During the period following expiration, Company shall assist the MSB and any other party or person designated by the MSB in any manner which the MSB shall reasonably require to become familiar with the Facility, its operation, and all matters relating thereto. Such assistance shall be at no additional cost or expense to Company.

**13.6 Not Used.**

**13.7 Survival of Certain Provisions upon Termination**

All representations and warranties of the parties contained in Article X hereof and the rights and obligations of the parties pursuant to Articles **VIII, XIII, XIV, XIX** and **XX** in their entirety along with Sections 12.3, 12.4, and 16.3 shall survive the expiration

or earlier termination of this Agreement.

## **ARTICLE XIV**

### **Contract Adjustments and Disputes**

#### **14.1 Requests for Contract Adjustments and Relief**

- 14.1.1 If either Company or MSB believes that it is entitled to relief against the other for any event arising out of or related to the Work, such party shall provide written notice to the other party of the basis for its claim for relief. Such notice shall be in accordance with any specific notice requirements contained in applicable sections of this Agreement. In the absence of any specific notice requirement, written notice shall be given within a reasonable time, not to exceed twenty-one (21) days, after the occurrence giving rise to the claim for relief or after the claiming party reasonably should have recognized the event or condition giving rise to the request, whichever is later. Such notice shall include sufficient information to advise the other party of the circumstances giving rise to the relief requested and the basis of such request.
- 14.1.2 The parties are fully committed to working with each other throughout the performance of the Work and agree to communicate regularly with each other at all times so as to avoid or minimize disputes or disagreements. If disputes or disagreements do arise, Company and MSB each commit to resolving such disputes or disagreements in an amicable, professional and expeditious manner so as to avoid unnecessary losses, delays and disruptions to the Work.
- 14.1.3 Company and MSB will first attempt to resolve disputes or disagreements at the field level through discussions between Company's Representative and MSB Representative. Upon receipt of a written notice of claim the MSB Representative will provide a written response within 14 days.
- 14.1.4 If a dispute or disagreement cannot be resolved through Company's Representative and MSB's Representative within 30 days from receipt of written notice, Company's Contract Representative and MSB's Contract Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than thirty (30) days after such a request is made, to attempt to resolve such dispute or disagreement. Prior to any meetings between the Contract Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute or disagreement.
- 14.1.5 If after meeting the Contract Representatives determine that the dispute or disagreement cannot be resolved on terms satisfactory to both parties, the parties shall submit the dispute or disagreement to the MSB's Purchasing Officer.

#### **14.2 Not Used.**

### **14.3 Disputes**

14.3.1 Not used.

14.3.2 Not used.

14.3.3 If a claim is not resolved by the above process, the claimant shall have recourse to the Superior Court of Alaska. pending final decision of any dispute hereunder, the Company shall proceed diligently with the performance of this Agreement.

14.3.4 The jurisdiction and venue for any court action arising as a result of this Agreement shall be the Superior Court of Alaska in Palmer, Alaska.

### **14.4 Duty to Continue Performance**

14.4.1 Unless provided to the contrary in this Agreement, Company shall continue to perform the Work and MSB shall continue to satisfy its payment obligations to Company, pending the final resolution of any dispute or disagreement between Company and MSB.

### **14.5 Consequential Damages**

14.5.1 NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY (EXCEPT AS SET FORTH IN SECTION 14.5.2 BELOW), NEITHER COMPANY NOR THE MSB SHALL BE LIABLE TO THE OTHER FOR ANY CONSEQUENTIAL LOSSES OR DAMAGES, WHETHER ARISING IN THIS AGREEMENT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO LOSSES OF USE, PROFITS, BUSINESS, REPUTATION OR FINANCING.

14.5.2 The consequential damages limitation set forth in Section 14.5.1 above is not intended to affect the payment of liquidated damages (if any), set forth in Article 5 of the Agreement, which both parties recognize has been established, in part, to reimburse MSB for some damages that might otherwise be deemed to be consequential.

## **ARTICLE XV DAMAGE AND DESTRUCTION**

### **15.1. Repair of Damage by Company**

Company agrees to notify the MSB in writing promptly of any damage to the Facility resulting from fire, earthquake, or any other identifiable event of a sudden, unexpected, or unusual nature ("Casualty"). If the Facility is damaged by a Casualty, Company shall restore the Facility to substantially the same condition as existed before the Casualty, except to the extent modifications to the Facility are required by Applicable Law. Such

restoration shall commence as soon as practicable following the Casualty. If the MSB requests that Company make modifications to the Facility in connection with the rebuilding, Company may condition its consent to those modifications on confirmation that the modifications shall not increase the time or the cost needed to restore the Facility to full operating condition.

**15.2. Repair Period Notice**

Company shall, within thirty (30) days after the date of the Casualty, provide written notice to the MSB indicating the anticipated commencement date and period for repairing the Facility ("Repair Period Notice"). The Repair Period Notice shall be accompanied by a certified statement executed by the contractor retained by Company to complete the repairs. If Company has not retained a contractor, if requested by MSB, a licensed contractor not affiliated with Company and approved by the MSB, shall certify Company's opinion about the anticipated period for repairing the Facility.

**15.3. MSB's Option to Terminate**

If the Repair Period Notice provided by Company indicates that the anticipated period for repairing the Facility exceeds two-hundred and seventy (270) days, or the Casualty is not covered by the insurance required under this Agreement, the MSB may elect to (i) terminate this Agreement by providing written notice to Company within thirty (30) days after receiving the Repair Period Notice, or (ii) negotiate with Company in order to otherwise repair the Casualty. Upon any termination pursuant to this Section 15.3, the MSB shall pay to Company the Termination Fee (if any) and Service Fees to the date of termination) less any insurance proceeds recoverable or held by Company (and which shall remain with the Company in the event of payment of the Termination Fee).

**15.4. Uninsured Costs**

The Company shall be responsible for the uninsured portion of any costs of repairs.

**ARTICLE XVI  
ASSIGNMENT AND DELEGATION**

**16.1. Assignment of Rights or Interests**

No party hereto shall transfer, assign or hypothecate its rights under or interest in this Agreement without the written consent of the other.

**16.2. Legal and Contractual Relationships**

This Agreement shall not create any contractual relationship or liability between any of Company's contractors, employees or agents and MSB.

**16.3. Contingent Assignment of Contracts and Subcontracts**

- 16.3.1 There shall be a provision in each of the Subcontract Agreements between the Company's General Contractors and their Subcontractors of any tier providing that all such Subcontracts shall be automatically assigned to the General Contractors in the event of a Subcontractor termination or default, with all rights, interests and obligations under such Subcontracts automatically transferring to the appropriate General Contractor.
- 16.3.2 All Contracts between the Company and any entities acting as General Contractors under contract with the Company, including TBD CONTRACTORS , and all Subcontracts between any entities acting as General Contractors under contract with the Company and each of their Subcontractors, shall be assigned to MSB for purposes of assigning and transferring the contractual rights, duties and obligations under those Contracts and Subcontracts to MSB in the event of Termination and permission is provided for the Facility to remain.
- 16.3.3 Such assignment is subject to the prior rights of the surety, if any, obligated under any bond relating to an assigned Contract or Subcontract and to the prior rights of any Bond Trustee.
- 16.3.4 Upon such assignment, MSB may further assign an assigned Contract or Subcontract to a successor Contractor or other entity. If MSB assigns a Contract or Subcontract to another Contractor or other entity, MSB shall remain responsible for the successor Contractor's obligations under the Contract or Subcontract, except to the extent such responsibility is transferred to and accepted by the successor Contractor through an indemnity agreement, surety bond, or other valid and enforceable means.

**16.4. Liens**

Company shall not permit any lien or encumbrance to be placed by General Contractors, subcontractors or suppliers on its leasehold interest under the Ground Lease, the Facility, or upon supplies or equipment ordered for incorporation into the Work, or on any property owned by MSB. If any such liens or encumbrances are encountered, Company shall at its sole cost and expense promptly remove them, and failing to remove them, Company will provide a bond in the amount of one hundred fifty percent (150%) of the lien.

**ARTICLE XVII  
CONTRACT ADMINISTRATION**

**17.1. Agreement Documents**

This Agreement, the Appendices attached hereto and all documents and instruments referenced herein shall permit the parties to complete the Work within the Contract Time

for the compensation specified. The contract documents are intended to be complementary and interpreted in harmony so as to avoid conflict, and interpreted in a manner consistent with construction and design industry standards. In the event of any inconsistency, conflict or ambiguity between or among this Agreement, the Appendices and other documents referenced in this Agreement, the instruments are prioritized as follows:

- 17.1.1 All written modifications, amendments and Change Orders to this Agreement issued in accordance with the terms of this Agreement.
- 17.1.2 This Agreement.
- 17.1.3 The Appendices attached hereto.
- 17.1.4 The DBOF RFP.
- 17.1.5 Company's Response to RFP and any amendments to the Company's Response to RFP.
- 17.1.6 Any other documents described or referred to in this Agreement.

## **17.2 Notices**

Whenever this Agreement requires that notice be provided to another party, such notice shall be in writing and addressed as set forth below. Notices will be deemed to have been validly given:

- (i) upon receipt if hand delivered or sent by overnight courier service, or
- (ii) four (4) days after being sent by registered or certified mail, postage prepaid; provided, that any notice shall not be effective as to a party unless addressed to that party's addressees for notices. Either party may change the persons or address(es) for notice by a written notice to the other party given pursuant to this Section.

### **To the MSB:**

Matanuska-Susitna Borough  
Borough Purchasing Officer  
350 East Dahlia Avenue  
Palmer, Alaska 99645

### **With a copy to:**

Borough Attorney  
350 East Dahlia Avenue  
Palmer, AK 99645

**To the Company:**

TBD

With a copy to:

TBD

With a copy to:

TBD

**ARTICLE XVIII  
NOT USED**

**ARTICLE XIX  
FINANCING**

**19.1. Construction Financing**

Company shall finance construction of the Facility utilizing a loan upon terms and from a commercial bank or lender reasonably acceptable to MSB, or other means acceptable to the MSB.

**19.2. Not Used.**

**19.3. Collateral Assignment**

The Company shall have the right to pledge and assign, its contract, leasehold and other interests herein through security documents as needed to secure any financing obtained to pay any portion of the Work; provided, however, that no asset belonging to the MSB may be used as collateral for Company's financing.

**19.4. MSB's Obligation to Participate in Financing**

The Company is the entity responsible for financing. At the request of the Company, MSB may, at its sole discretion, agree to work cooperatively with the Company to fulfill Company's obligation to provide financing under this Agreement. Nothing herein obligates MSB to issue any bonds or otherwise work to fulfill the Company's obligation to provide financing.

**ARTICLE XX  
MISCELLANEOUS PROVISIONS**

**20.1. Compliance with Law**

Company agrees to comply with all Applicable Laws including, without limitation, the following:

20.1.1 Federal Clean Water Act.

20.1.2 The Prevailing Wage Laws.

With respect to complying with the Prevailing Wage Laws, Company acknowledges and agrees that the Facility constitutes a public work of the MSB for which prevailing wages must be paid, and Company covenants that it will pay prevailing wages for the construction of the Facility and will provide MSB with a payment bond in an amount sufficient to pay all prevailing wages that are payable.

**20.2. Application of Taxes & Assessments**

Any taxes or assessments against the Property described in the Ground Lease, the Facility or other improvements will be part of the Service Fees.

**20.3. Relationship between Parties**

The relationship of Company to the MSB is that of independent contractor and not one of employment. None of the employees or agents of Company or the Company's Contractors or Designers shall be considered employees of the MSB. For the purposes of all federal, state and local laws and regulations, Company and the Company's Contractors and Designers shall exercise primary management and operational decision making authority.

**20.4. Change in Control of Company; Change in Acceptable Operator; Change in Company's Contractors or Company's Designers**

In no event shall the control of the Company be changed prior to the Final Completion Date. The parties agree that the Acceptable Operator may be changed from the Company to any other entity approved by the MSB (such approval not to be unreasonably withheld, conditioned or delayed). The parties agree that the Company's Contractors or Company's Designers may be changed to any other entity approved by the MSB (such approval not to be unreasonably withheld, conditioned or delayed) with whom the Company has entered into any contract to perform the Work who is properly licensed to do the Work and whose name and address shall have been delivered to the MSB.

**20.5. Governing Law. Jurisdiction. Venue**

This Agreement shall be construed, interpreted and applied in accordance with the laws of the State of Alaska. Any claims or disputes arising under this Agreement shall be brought in the Superior Court for the Third Judicial District, State of Alaska, at Palmer, Alaska.

**20.6. Waiver**

The failure on the part of any party to enforce any provision of this Agreement shall not be construed as a waiver of its right to enforce such provision in the future. A waiver of any term of this Agreement on the part of any party in one case shall not be construed as a waiver in any other case and shall not affect any other term of this Agreement. No payment of any sum by MSB to Company or acceptance of any sum by MSB shall constitute a waiver of any default by any party or of any provision of this Agreement.

**20.7. Ownership of Documents**

As between the MSB and the Company, the Preliminary Design Documents and the Construction Documents shall at all times remain the sole property of Company until the expiration or earlier termination of this Agreement. Company shall promptly after the date of this Agreement obtain necessary consents to such assignment of such documents to the MSB. All information acquired from the MSB, or from others at the expense of the MSB, in the performance of this Agreement shall be and remain the property of the MSB. This includes but is not limited to all records, data, files, computer records, work sheets, deliverable products (complete and incomplete) and all other types of information or writings, whether electronic, digital, graphic matter or other medium upon which intelligence or information may be recorded or retrieved prepared or acquired by Company in the performance of this Agreement. This excludes documents identifying the salary and benefits of specific employees of Company as well as other proprietary information related to the business operations of Company. Company shall have a right to retain a copy of all documents it produces under this Agreement. The Company shall retain the rights to such designs, drawings and specifications to use as it sees fit on other projects without liability to the MSB.

**20.8. Title to Facility**

Until the earlier of expiration of the Facility or earlier termination of the Term where permission is granted for the Facility to remain on the property, title to the Facility shall be and remain exclusively in Company.

**20.9. Dispute Assistance**

Except for claims and/or litigation in which MSB's and the Company's interests are, or have the potential to become, adverse, MSB and the Company shall render assistance to each other in claims and/or litigation in connection with or arising out of this Agreement, including without limitation, any claims and/or litigation involving Company or its employees, agents, consultants or contractors; and any claims and/or litigation brought by or against the MSB and any third parties, by providing appropriate information, analyses, and expert witnesses as necessary to prosecute or defend their own and each other's interests in such claims and/or litigation. Each party shall be solely responsible for the expenses related to the compensation of attorneys, consultants or expert witnesses

retained by that party. However, the parties may agree to share such costs to the extent services provided by such professionals benefit both parties. This provision shall not limit in any manner MSB's or the Company's obligations under the indemnification provisions of this Agreement.

**20.10. Successors and Assigns**

The Company and the MSB respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to the covenants, agreement and obligations contained in this Agreement.

**20.11. Third Party Beneficiaries**

This Agreement shall not create any rights or benefits to parties other than MSB and Company.

**20.12. Counterparts**

This Agreement may be executed in counterparts.

**20.13. Entire Agreement, Modifications, Headings and Severability**

The parties acknowledge that this Agreement, the Appendices attached hereto and the documents and agreements referred to herein all of which are hereby incorporated by this reference, constitute the entire Agreement between the parties and supersede all prior representations, warranties, agreements, and understandings oral or written between the parties with respect to its subject matter. Unless stated otherwise in this Agreement, this Agreement may not be modified except in writing signed by all parties. The parties hereto shall cooperate with one another in preparing such modifications or amendments to this Agreement as may be necessary. The headings to this Agreement are for convenience and reference purposes only and shall not constitute a part of the Agreement. If any element of this Agreement is later held to violate the law or a regulation, it shall be deemed void, and all remaining provisions shall continue in force.

**20.14. Time of Essence**

Time is of the essence with respect to each provision hereof in which time is a factor.

**20.15. No Waiver of Governmental Authority**

The consents, approvals and disapprovals given or to be given by MSB under this Agreement are given in the MSB's proprietary capacity as a party to this Agreement. Nothing in this Agreement shall be construed as a waiver of, or limitation upon, the authority, powers or actions of the MSB acting in its governmental capacity except as may be expressly permitted by Applicable Law.

**20.16. Authority of MSB Purchasing Officer**

The MSB Purchasing Officer shall have the authority to execute all documents necessary to implement this Agreement.

**20.17. Signs**

MSB shall have the right to approve all signs in or about the Property or Facility that are visible from outside the Facility.

**20.18. Payment of the Company's Contractors and Designers**

The MSB and the Company each hereby acknowledge and agree that the Work is being performed by the Company's Contractors and Company's Designers and that payment of the Company's Contractors and Company's designers is the sole responsibility of Company. To the extent the Work is paid for from the financing obtained by the Company hereunder. The Company's Contractors and Designers recourse to collect for the cost of design and construction is limited thereto.

**20.19. Not Used.**

**20.20. Not Used.**

**20.21. Not Used.**

**20.22. Interpretation**

MSB and the Company understand, agree and acknowledge that: (a) This Agreement has been freely negotiated and drafted by each of them: and (b) In any controversy dispute or contest over the meaning, interpretation, validity, or enforceability of this Agreement or any of its terms or conditions, there shall be no inference, presumption, or conclusion drawn whatsoever against any Party by virtue of that party having drafted this Agreement or any portion thereof. Nothing contained in this Agreement shall be construed as an obligation by Company or the MSB.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.