

# Design-Build Operate & Maintain Exhibit

**Document No. E-DBOM**

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© Design-Build Institute of America  
Washington, D.C.





## Design-Build Institute of America - Contract Documents

### LICENSE AGREEMENT

**By using the DBIA Contract Documents, you agree to and are bound by the terms of this License Agreement.**

- 1. License.** The Design-Build Institute of America ("DBIA") provides DBIA Contract Documents and licenses their use worldwide. You acknowledge that DBIA Contract Documents are protected by the copyright laws of the United States. You have a limited nonexclusive license to: (a) Use DBIA Contract Documents on any number of machines owned, leased or rented by your company or organization; (b) Use DBIA Contract Documents in printed form for bona fide contract purposes; and (c) Copy DBIA Contract Documents into any machine-readable or printed form for backup or modification purposes in support of your permitted use.
- 2. User Responsibility.** You assume sole responsibility for the selection of specific documents or portions thereof to achieve your intended results, and for the installation, use, and results obtained from the DBIA Contract Documents. You acknowledge that you understand that the text of the DBIA Contract Documents has important legal consequences and that consultation with an attorney is recommended with respect to use or modification of the text. You will not represent that any of the contract documents you generate from DBIA Contract Documents are DBIA documents unless (a) the document text is used without alteration or (b) all additions and changes to, and deletions from, the text are clearly shown.
- 3. Copies.** You may not use, copy, modify, or transfer DBIA Contract Documents, or any copy, modification or merged portion, in whole or in part, except as expressly provided for in this license. Reproduction of DBIA Contract Documents in printed or machine-readable format for resale or educational purposes is expressly prohibited. You will reproduce and include DBIA's copyright notice on any printed or machine-readable copy, modification, or portion merged into another document or program.
- 4. Transfers.** You may not transfer possession of any copy, modification or merged portion of DBIA Contract Documents to another party, except that a party with whom you are contracting may receive and use such transferred material solely for purposes of its contract with you. You may not sublicense, assign, or transfer this license except as expressly provided in this Agreement, and any attempt to do so is void.
- 5. Term.** The license is effective for one year from the date of purchase. DBIA may elect to terminate it earlier, by written notice to you, if you fail to comply with any term or condition of this Agreement.
- 6. Limited Warranty.** DBIA warrants the electronic files or other media by which DBIA Contract Documents are furnished to be free from defects in materials and workmanship under normal use during the Term. There is no other warranty of any kind, expressed or implied, including, but not limited to the implied warranties of merchantability and fitness for a particular purpose. Some states do not allow the exclusion of implied warranties, so the above exclusion may not apply to you. This warranty gives you specific legal rights and you may also have other rights which vary from state to state. DBIA does not warrant that the DBIA Contract Documents will meet your requirements or that the operation of DBIA Contract Documents will be uninterrupted or error free.
- 7. Limitations of Remedies.** DBIA's entire liability and your exclusive remedy shall be: the replacement of any document not meeting DBIA's "Limited Warranty" which is returned to DBIA with a copy of your receipt, or at DBIA's election, your money will be refunded. In no event will DBIA be liable to you for any damages, including any lost profits, lost savings or other incidental or consequential damages arising out of the use or inability to use DBIA Contract Documents even if DBIA has been advised of the possibility of such damages, or for any claim by any other party. Some states do not allow the limitation or exclusion of liability for incidental or consequential damages, so the above limitation or exclusion may not apply to you.
- 8. Acknowledgement.** You acknowledge that you have read this agreement, understand it and agree to be bound by its terms and conditions and that it will be governed by the laws of the District of Columbia. You further agree that it is the complete and exclusive statement of your agreement with DBIA which supersedes any proposal or prior agreement, oral or written, and any other communications between the parties relating to the subject matter of this agreement.

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## CHECKLIST

### For DBIA Design-Build Operate & Maintain Exhibit, E-DBOM (2019 Edition)

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Use this Checklist to ensure that the Agreement is fully completed, and all exhibits are attached.

_____	Page 1	Project name and address
_____	Page 1	Facility identification
_____	Page 1	Design-Builder's name and address
_____	Page 1	Owner's name and address
_____	Page 1	Effective date of the Exhibit
_____	Section 1.7	Check appropriate box to identify the form of agreement between Owner and Design-Builder
_____	Section 2.4	Insert applicable industry or Owner-provided performance standards, or refer to Appendix A
_____	Section 4.1.1	Complete the blank for the number of years for the Operating Plan duration
_____	Section 4.2.1	Complete the blank for the number of years for the Operating Plan duration
_____	Section 4.3.1	Complete the blank for the number of years for the Operating Plan duration
_____	Section 5.8.1	Complete the blank for the maximum number of hours of post completion consultation and for the number of on-site visits post completion
_____	Section 6.2.1	Complete the blank for the aggregate per incident amount for emergency expenditures
_____	Section 7.2.1	Complete the blanks for the Handback Inspection schedule
_____	Section 7.2.7	Complete the blanks for the Handback Letter of Credit renewals or replacements
_____	Section 7.3	Complete the blanks for the amount of liquidated damages (if any) and note the optional provisions that are provided, including inserting an amount if the parties select the option for a maximum amount of liquidated damages payable by Design-Builder
_____	Section 8.1	Check appropriate box for alternative payment structures (8.1.1 and 8.1.2) and fill in the blanks for the payment structure selected
_____	Section 8.2.2	Complete the blank for the Annual Operating Fee
_____	Section 8.3.2	Check the box for alternative flat monthly payments; fill in the blank for percentages
_____	Section 8.4.1	Complete the blank for the percentage applied to the Pre-Tax New Income formula
_____	Section 8.4.3	Complete the blank for the maximum number of injuries as affecting the Incentive Fee
_____	Section 8.4.4	Complete the blank for the maximum Incentive Fee per Project Year, or aggregate
_____	Section 8.5.1	Complete the blanks for the Design-Builder's fee
_____	Section 8.5.2	Complete the blanks for the Capital Improvements Cap and Design-Builder's fee
_____	Section 9.2	Insert Owner's O&M Representative information
_____	Section 9.3	Insert Design-Builder's O&M Representative information
_____	Section 10.1.1	Complete the blanks for the aggregate limitation of liability for all Project Years

_____	Section 11.3	Identify other exhibits to the Agreement
_____	Section 11.4	Insert any other provisions (optional)
_____	Last Page	Owner's and Design-Builder's execution of the Agreement
_____	Appendix B	Par. C, insert here any other maintenance to be included as Scheduled Maintenance
_____	Appendix B	Par. D, insert here any other maintenance to be included as Scheduled Maintenance
_____	Appendix C	Identify any Third-Party Agreements here
_____	Appendix D	Par. D.2, complete the blank for the period of years beyond the end of the O&M Term
_____	Appendix D	Par. D.3.1, complete the blank for the number of months prior to expiration of the O&M Term that the parties will meet to discuss the schedule of Handback Inspections
_____	Appendix D	Par. D.4.1, insert the handback tests specific to the Facility for this Project

## GENERAL INSTRUCTIONS

No.	Subject	Instruction
1.	Standard Forms	Standard form contracts have long served an important function in the United States and international construction markets. The common purpose of these forms is to provide an economical and convenient way for parties to contract for design and construction services. As standard forms gain acceptance and are used with increased frequency, parties are able to enter into contracts with greater certainty as to their rights and responsibilities.
2.	DBIA Standard Form Contract Documents	Since its formation in 1993, the Design-Build Institute of America ("DBIA") has regularly evaluated the needs of Owners, Design-Builders, and other parties to the design-build process in preparation for developing its own contract forms. Consistent with DBIA's mission of promulgating best design-build practices, DBIA believes that the design-build contract should reflect a balanced approach to risk that considers the legitimate interests of all parties to the design-build process. DBIA's Standard Form Contract Documents reflect a modern risk allocation approach, allocating each risk to the party best equipped to manage and minimize that risk, with the goal of promoting best design-build practices.
3.	Use of Non-DBIA Documents	To avoid inconsistencies among documents used for the same project, DBIA's Standard Form Contract Documents should not be used in conjunction with non-DBIA documents unless the non-DBIA documents are appropriately modified on the advice of legal counsel. Moreover, care should also be taken when using different editions of the DBIA Standard Form Documents on the same project to ensure consistency.
4.	Legal Consequences	DBIA Standard Form Contract Documents are legally binding contracts with important legal consequences. Contracting parties are advised and encouraged to seek legal counsel in completing or modifying these Documents.
5.	Reproduction	DBIA hereby grants to purchasers a limited license to reproduce its Documents consistent with the License Agreement accompanying these Documents. At least two original versions of the Exhibit should be signed by the parties. Any other reproduction of DBIA Documents is strictly prohibited.
6.	Modifications	<p>Effective contracting is accomplished when the parties give specific thought to their contracting goals and then tailor the contract to meet the unique needs of the project and the design-build team. For that reason, these Documents may require modification for various purposes including, for example, to comply with local codes and laws, or to add special terms. DBIA's latest revisions to its Documents provide the parties an opportunity to customize their contractual relationship by selecting various optional contract clauses that may better reflect the unique needs and risks associated with the project.</p> <p>Any modifications to these Documents should be initialed by the parties. At no time should a document be re-typed in its entirety. Re-creating the document violates copyright laws and destroys one of the advantages of standard forms-familiarity with the terms.</p>
7.	Execution	It is good practice to execute two original copies of the Exhibit. Only persons authorized to sign for the contracting parties may execute the Exhibit.

## SPECIFIC INSTRUCTIONS

Section	Title	Instruction
General	Purpose of This Agreement	DBIA's Design-Build Operate & Maintain Exhibit ("Exhibit") should be used only when the parties intend for the Design-Builder, in addition to furnishing the design and construction of the Project as set forth in the Design-Build Agreement, to operate and maintain the completed Project for the Term set forth herein (the "O&M Term").
General	Purpose of These Instructions	These Instructions are not part of this Exhibit, but are provided to aid the parties in their understanding of the Exhibit and in completing the Exhibit.
General	Related Documents	This Exhibit shall be used in conjunction with the DBIA Document No. 525, Standard Form of Agreement Between Owner and Design-Builder - Lump Sum (2010 Edition), or DBIA Document No. 530, Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price (2010 Edition), DBIA Document No. 544, Standard Form: Progressive Design-Build Agreement (PDB) (2019 Edition), or DBIA Document No. 545, Standard Form: Progressive Design-Build Agreement for Water & Wastewater Projects (2017 Edition).
General	Date	On Page 1, enter the date when both parties reach a final understanding.
General	Project, Facility and Parties: Owner and Design-Builder	On Page, 1 enter the name and location of the Project and the portion of the Project (the "Facility") to which this Exhibit applies. Also enter the legal name and full address of Owner and Design-Builder, as well as the legal form of each entity, e.g., corporation, partnership, limited partnership, limited liability company, or other.
1.13	Handback Requirements	A critical part of this Exhibit is to identify the terms, conditions, requirements and procedures set out in Article 7 and Appendix D of this Exhibit governing the condition in which Design-Builder is to deliver the Facility upon expiration or earlier termination of the O&M Phases.
1.19	Operating Plan	Explained with more detail in Article 4, the Operating Plan shall describe, in detail reasonably acceptable to Owner, anticipated maintenance and overhaul schedules, planned outages, staffing plans, equipment acquisitions and spare parts and Consumables, inventories (including a breakdown of capital items and expense items), schedules of Subcontractor and Design Consultant services, Facility performance data, data regarding required environmental performance, projected fuel or energy usage, and such other matters as Owner may reasonably require.
1.22	O&M Plan	The O&M Plan is a written document which describes the operations and maintenance of the completed Project including how the operations and maintenance will be addressed over the period of the O&M Term. This shall include the management structure and approach, the proposed period of and approach to operations and maintenance, routine maintenance, and emergency response.
1.25	Performance Criteria	Performance Criteria are essential terms which set out the performance metrics and outcomes established by the Owner and agreed to by the Design-Builder for the four stages of the O&M Services, including: 1. End of Construction, which criteria defines the conditions to which the Project must be designed and constructed for the Design-Builder to achieve final acceptance and qualify for final payment under the Design-Build Agreement and certificate signifying the end of the Design and Construction Phase. 2. Maintenance Phase, which criteria defines the condition to which the Facility must be maintained during the Maintenance Phase, as defined in this Article 1. 3. Operational Phase, which criteria defines the condition to which the Facility must be operated during the Operational Phase, as defined in this Article 1. 4. Handback, which criteria defines the final condition requirements of the Facility at the end of the O&M Term, as defined in Article 7 and Appendix D of this Exhibit.

2.3	Third-Parties	The Owner and Design-Builder should incorporate this Exhibit into their respective contracts with any third parties who will participate during the O&M Phases of the Project including, but not limited to, any Subcontractor or Design Consultant, and their lower tier contracts. Those contracts are identified in Appendix C to this Exhibit.
2.4	Performance Standards	It is important that the parties agree on the performance standards by which the Design-Builder's Services are to be judged. Those are to be identified here or set out in Appendix A, which are incorporated herein by reference.
4.1	Operating Plan	Each year during the term of the Operational Phase and Maintenance Phase, the Design-Builder shall prepare and submit to Owner in writing a proposed operating and maintenance plan for the upcoming Project Year. The Operating Plan shall describe, in detail reasonably acceptable to Owner, anticipated maintenance and overhaul schedules, planned outages, staffing plans, equipment acquisitions and spare parts and Consumables, inventories (including a breakdown of capital items and expense items), schedules of Subcontractor and Design Consultant services, Facility performance data, data regarding required environmental performance, projected fuel or energy usage, and such other matters as Owner may reasonably require.
4.2	O&M Budget	Together with the Operating Plan, the Design-Builder is required to submit to the Owner for its review and approval a proposed budget for operating and maintaining the Facility during the upcoming Project Year and, with respect to Scheduled Maintenance, for the next five (5) Project Years (or the then-remaining portion of the O&M Term, whichever is less) (the "O&M Budget").
4.3	Annual Plan	The Operating Plan and the O&M Budget are sometimes together called the "Annual Plan". When approved pursuant to Section 4.3.2 of the Exhibit, the Annual Plan shall be an "Approved Annual Plan" and shall consist of an "Approved Operating Plan" and an "Approved O&M Budget." An Approved Annual Plan shall constitute authorization for Design-Builder to expend money to operate and maintain the Facility in accordance with such Approved Annual Plan.
5.1	Operational Phase Duties	Section 5.1 sets out the duties the Design-Builder will perform to operate the Facility on behalf of the Owner, as the Owner's agent, for the period of the O&M Term as set out herein and in Appendix A to this Exhibit.
5.2	Maintenance Phase Duties	Section 5.2 sets out the duties the Design-Builder will perform for all Scheduled Maintenance activities necessary to meet the specified standards during the O&M Term and to minimize the occurrence of Defects. The required Scheduled Maintenance activities are set out in Appendix B to this Exhibit.
5.8	Post Completion Services	Section 5.8 sets out the duties the Design-Builder will perform for a period of twelve (12) months after the end of the O&M Term to consult with the Owner on any aspect of the operation, maintenance, and repair of the Facility, at no additional cost to Owner up to an agreed upon maximum number of hours, in the aggregate, and a maximum number of on-site visits to the Project site. Any consultation beyond these limits shall be paid as Additional Services on an hourly rate basis, lump sum, or other method of compensation agreed to by the parties in writing, as well as required travel in connection with any such post-completion services.



6.1	Outages	The Design-Builder is required to coordinate with the Owner and any parties to Third-Party Agreements, if any, identified in Appendix C to this Exhibit as required: (a) when production of the Facility output (e.g. treated wastewater, water, steam or generation of electricity) is to be initiated, interrupted, or curtailed, and (b) by making all reasonable efforts to schedule all outages at the Facility that will reduce the output of the Facility at the most appropriate times for the Owner and any parties to Third-Party Agreements. This Section also addresses unplanned interruptions or curtailments of Facility output.
6.2	Emergencies	If an emergency situation arises during the O&M Term endangering the safety or protection of persons, the Facility, the Project, or property located near the Project, this Section addresses the notifications and Services provided by the Design-Builder to attempt to prevent or mitigate any such threatened damage, injury, or loss (including making payments and incurring expenses on behalf of Owner in the nature of capital or operating expenses or otherwise) deemed by Design-Builder to be reasonably necessary or advisable under the circumstances to prevent, avoid, or mitigate injury, damage, or loss to persons or property. This Section also provides for the parties to agree upon an aggregate amount per incident for which the Design-Builder does not need to seek Owner approval before performing emergency Services.
Article 7	Handback Requirements	This Article, as well as Appendix D, addresses the requirements at the end of the O&M Term, when the Owner assumes responsibility for the operation and maintenance of the Facility, known as the "Handback Requirements" for the Design-Builder. This Article also addresses the schedule for Handback Inspections prior to the expiration of the O&M Term.
7.3	Liquidated Damages	Owner should make a good faith evaluation of the amount that is reasonably necessary to compensate it for delay. Owner should not establish liquidated damages to penalize Design-Builder. This Section permits the Owner and Design-Builder to agree on liquidated damages for late completion of the Handback Requirements, with an option to place a cap (or maximum) on such liquidated damages.
8.1	Monthly Payments	The parties will need to agree on how the Design-Builder will be paid during the O&M Phases for O&M Costs, whether scheduled monthly payments (i.e., one-twelfth of the annual O&M Budget, or variable monthly payments based on itemized applications for actual costs incurred during the month.
8.2	Annual Operating Fee	In addition to the Monthly Payments, the Owner shall pay Design-Builder an Annual Operating Fee in the amount agreed to by the parties, as set out in this Section.
8.3	Reimbursable Expenses	In addition to the payments required by Sections 8.1 and 8.2 above, the Owner shall reimburse Design-Builder for all costs incurred by Design-Builder in performing the O&M Services to the extent the nature and amount of such costs and expenses: (a) are incurred in connection with the performance of any Unscheduled Maintenance, as approved in advance by Owner; or (b) are incurred in connection with an emergency under Section 6.2 hereof (collectively, the "Reimbursable Expenses"). There is an optional Section if the parties elect for flat monthly payments also.
8.4	Annual Incentive Fee	As incentive for Design-Builder to maximize profitability and efficiency of operation of the Facility, the parties should agree on an incentive fee payable to the Design-Builder at the end of each Project Year, based on Owner's Pre-Tax Net Income ("PTNI") from the Facility for such Project Year. The incentive is only paid if the Design-Builder achieves certain metrics set out in Section 8.4.3, and is subject to a cap, or maximum.
Article 9	Representatives of the Parties	<p>Enter the name, title, address and telephone number of Owner's O&amp;M Representative at Section 9.2.</p> <p>Enter the name, title, address and telephone number of Design-Builder's O&amp;M Representative in Section 9.3.</p> <p>If Representatives are identified after execution of the Exhibit, an appropriate amendment should be made to the Exhibit at the time these individuals are designated.</p>

10.1	Limitation of Liability	The parties may choose to limit the liability of the Design-Builder to the Owner for the O&M Services. Section 10.1.2 contains certain “carve outs” to the limitation for such things as: (a) intentional, fraudulent or willful misconduct, or gross negligence of Design-Builder; and (b) any claim by Owner for indemnity and defense related to a claim by a third-party against Owner, where such third-party is not an affiliate, subsidiary, parent or related entity of the Owner.
11.4	Other Provisions	Insert any other provisions here or attach supplemental terms and conditions as a new appendix to the Exhibit.



## DESIGN-BUILD OPERATE & MAINTAIN EXHIBIT

This document has important legal consequences. Consultation with an attorney is recommended with respect to its completion or modification and its relation to the other Contract Documents set forth in DBIA Document No. 525, *Standard Form of Agreement Between Owner and Design-Builder - Lump Sum* (2010 Edition) or DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price* (2010 Edition), DBIA Document No. 544, *Standard Form: Progressive Design-Build Agreement (PDB)*, or DBIA Document No. 545, *Standard Form: Progressive Design-Build Agreement for Water & Wastewater Projects (PDB)*.

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This Exhibit is attached to and made a part of the Design-Build Agreement.

**PROJECT:**

*(Include Project name and location as it appears in the Design-Build Agreement)*

**FACILITY:**

*(Identify that portion, or portions, of the Project to which this Exhibit applies)*

**DESIGN-BUILDER:**

*(Hereinafter "Design-Builder")*

**OWNER:**

*(Hereinafter "Owner")*

**DATE:**

*(Insert the effective date of this Exhibit)*

## ARTICLE 1 DEFINITIONS

**1.1** *Annual Operating Fee* means an annual operating fee, if any, paid to Design-Builder during each year of the O&M Term as set forth in Section 8.2 of this Exhibit.

**1.2** *Annual Plan* shall have the meaning set forth in Section 4.1 of this Exhibit.

**1.3** *Consumables* shall mean collectively all chemicals, lubricants, hand tools, laboratory supplies, and other items (other than water and fuel) used or needing periodic replacement during the normal operation of the Facility.

**1.4** *Defect* means failure of the Facility to meet the Performance Criteria under this Exhibit and any deficiency in design or construction that is covered by a warranty from the Design-Builder to the Owner.

**1.5** *Deliverable* means a document, either in hard copy or electronic form, which describes certain performance reporting, operational outcomes or maintenance aspects of the Project.

**1.6** *Design and Construction Phase* means the services to be performed pursuant to Article 2 of the General Conditions of Contract, which commence on the date set out in the Design-Build Agreement and end upon the issuance of final acceptance and the making of final payment by Owner to Design-Builder for those services.

**1.7** *Design-Build Agreement* means the Agreement identified below between the Design-Builder and Owner for the design and construction of the Project. Definitions in this Exhibit shall be the same as the definitions set forth in DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition). The Design-Build Agreement is based on the following:

**(check one box below)**

☐ DBIA Document No. 525, *Standard Form of Agreement Between Owner and Design-Builder - Lump Sum* (2010 Edition) ("DBIA 525").

☐ DBIA Document No. 530, *Standard Form of Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a Guaranteed Maximum Price ("GMP")* (2010 Edition) ("DBIA 530").

☐ DBIA Document No. 544, *Standard Form: Progressive Design-Build Agreement (PDB)*, (2019 Edition) ("DBIA 544").

☐ DBIA Document No. 545, *Standard Form: Progressive Design-Build Agreement for Water & Wastewater Projects* (2017 Edition) ("DBIA 545").

**1.8** *Facility* means that portion of the Project described on page one of this Exhibit.

**1.9** *Finance Plan* means a written plan, if any, provided by the Owner describing the proposed financing of the Project which identifies the source of funds to design, construct, operate and maintain the Facility including, as appropriate, Design-Builder's equity, commercial debt, loans, Owner-provided funds, and the projected Project revenue stream, if applicable. If User Fees or other revenue streams will be generated by the Facility, then a description of the User Fee structure must be included in the Finance Plan.

**1.10** *Force Majeure Event* means an event as described in Section 1.2.8 of the General Conditions of Contract.

**1.11** *General Conditions of Contract* means the General Conditions of Contract attached to the Design-Build Agreement and is based on the DBIA Document No. 535 *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition).

**1.12** *Handback* means the end of the O&M Term, when the Owner assumes responsibility for the operation and maintenance of the Facility.

**1.13** *Handback Requirements* means the terms, conditions, requirements and procedures set out in Article 7 and Appendix D of this Exhibit governing the condition in which Design-Build is to deliver the Facility upon expiration or earlier termination of the O&M Phases.

**1.14** *Information* means any information, data, drawings, reports, test results, submittals, calculations, or any other information which describes certain performance reporting, operational outcomes or maintenance aspects of the Facility.

**1.15** *Legal Requirements* shall have the meaning set forth in the General Conditions of Contract.

**1.16** *Maintenance* shall have the meaning set forth in Appendix B to this Exhibit, and may refer to both Scheduled Maintenance and Unscheduled Maintenance.

**1.17** *Maintenance Phase* means the period of the Project after Substantial Completion during which the Design-Build is required to maintain the Facility, in whole or in part, ending on the expiration of the O&M Term.

**1.18** *O&M Budget* shall have the meaning set forth in Section 4.2 of this Exhibit.

**1.19** *Operating Plan* shall have the meaning set forth in Section 4.1 of this Exhibit.

**1.20** *Operation Phase* means the period of time after Substantial Completion during which the Design-Build is required to operate the Facility, in whole or in part, ending on the expiration of the O&M Term.

**1.21** *O&M Phases* means the combined Operational Phase and Maintenance Phases, as set forth herein.

**1.22** *O&M Plan* is a written document which describes the operations and maintenance of the completed Project including how the operations and maintenance will be addressed over the period of the O&M Term. This shall include the management structure and approach, the proposed period of and approach to operations and maintenance, routine maintenance, and emergency response.

**1.23** *O&M Services* means those Services performed by the Design-Build during each of the Operational Phases and Maintenance Phases.

**1.24** *O&M Term* means the duration of the combined Operational Phase and Maintenance Phases, during which the Design-Build is responsible to operate and maintain the completed Project and Facility.

**1.25** *Performance Criteria* means those performance metrics and outcomes established by the Owner and agreed to by the Design-Build for the following four stages:

1. End of Construction, which criteria define the conditions to which the Project must be designed and constructed for the Design-Build to achieve final acceptance and qualify for final payment under the Design-Build Agreement and certificate signifying the end of the Design and Construction Phase.

2. Maintenance Phase, which criteria define the condition to which the Facility must be maintained during the Maintenance Phase, as defined in this Article 1.

3. Operational Phase, which criteria define the condition to which the Facility must be operated during the Operational Phase, as defined in this Article 1.

4. Handback, which criteria define the final condition requirements of the Facility at the end of the O&M Term, as defined in Article 7 and Appendix D of this Exhibit.

- 1.26** *Planned Outage* shall mean the cessation of operation of the Facility for Scheduled Maintenance.
- 1.27** *Project* means the entire Project described and set forth on page 1 of this Exhibit, which is the subject of the Design-Build Agreement. The Facility may consist of the entire Project or a portion thereof, as stated on page 1 of this Exhibit.
- 1.28** *Project Year* shall mean any calendar year during the O&M Term, commencing with the first activities of the earlier of the Operational Phase or the Maintenance Phase.
- 1.29** *Scheduled Maintenance* shall have the meaning set forth in Appendix B to this Exhibit.
- 1.30** *Subcontractor* or *Design Consultant* and their lower tier *Sub-Subcontractors* and *Design Sub-Consultants* shall have the meanings set forth in the General Conditions of Contract.
- 1.31** *Subcontract* or *Design Consultant Agreement* shall mean an agreement between the Design-Builder, and a Subcontractor or a Design Consultant to perform a portion of the Work set forth in the Design-Build Agreement.
- 1.32** *Third-Party Agreement* shall refer to written contracts between Owner and third parties identified in Appendix C to this Exhibit.
- 1.33** *Unscheduled Maintenance* shall mean any and all maintenance, repair and replacement requirements of the Facility during a Project Year, other than the Scheduled Maintenance described in Appendix B to this Exhibit.
- 1.34** *User Fee* shall mean payments made by users of the Facility during the O&M Phase, collected by the Owner as a charge for use of the Facility or its function.

## **ARTICLE 2 GENERAL TERMS**

- 2.1** The Owner desires for the Design-Builder, in addition to furnishing the design and construction of the Project set forth in the *Design-Build Agreement*, to operate and maintain the completed Project for the Term set forth herein (hereafter the “O&M Term”). The purpose of this Exhibit is to describe the duties and responsibilities of the Owner and Design-Builder for the Operational and Maintenance Phases of the Project (hereafter the “O&M Phases”).
- 2.2** The Owner and Design-Builder will, in connection with the meeting set forth in Section 2.1.4 of the General Conditions of Contract, determine the following:
- 2.2.1** The scope of operational and maintenance duties for the Project, including but not limited to the roles, duties, overlap, coordination and duration of such as performed by the Design-Builder and by the Owner;
  - 2.2.2** The Information and Deliverables to be submitted by the Design-Builder during the O&M Phases of the Project, including but not limited to the format for the Information and/or Deliverable;
  - 2.2.3** The identities of any Subcontractor or Design Consultant who will participate on behalf of the Design-Builder during the O&M Phases of the Project.
  - 2.2.4** The identities of any of the Owner’s employees, independent contractors or design consultants who will participate on behalf of the Owner during the O&M Phases of the Project; and
  - 2.2.5** Establish submission schedules for Information and Deliverables.

**2.3** Owner and Design-Builder will incorporate this Exhibit into their respective contracts with any third parties who will participate during the O&M Phases of the Project including, but not limited to, any Subcontractor or Design Consultant, and their lower tier contracts.

**2.4** Design-Builder shall perform the Services required under this Exhibit, including those set forth in Appendix A, in a prudent, reasonable, and efficient manner and in accordance with the following standards, which are incorporated herein by reference, and Legal Requirements:

***[insert here any applicable industry or Owner-provided performance standards, or refer to Appendix A]***

**2.5** Design-Builder will operate and maintain the Facility, and equipment in or at the Facility, in accordance with the manufacturers' recommendations and requirements, and per industry standards, so as not to void or limit any manufacturers' warranties on such Facility and equipment.

**2.6** Design-Builder has been retained by Owner as an independent contractor to operate and maintain the Project on behalf of Owner. Neither Design-Builder nor any of its employees, Subcontractors, Design Consultants or agents shall be deemed to have any other status, except that Design-Builder is the agent of Owner to the limited extent that this Exhibit expressly grants Design-Builder the authority to act on behalf of Owner.

**2.7** Although it is Design-Builder's obligation to operate and maintain the Facility, Owner shall have the right throughout the O&M Term, upon reasonable written notice, to inspect Design-Builder's records of operation, permit compliance, past maintenance and scheduled maintenance for the Facility including, but not limited to, those records identified in Section 5.1.4 of this Exhibit. Such records shall be inspected at Design-Builder's office listed on page 1 of this Exhibit, or at such other location agreed to by the parties where such records are maintained. The Owner may request copies of any such documents, which copies shall be made at Owner's expense, whether electronic or paper.

**2.8** Design-Builder shall be solely responsible for the performance of any of its employees, agents, or subcontractors under this Exhibit. Design-Builder shall report to the Owner any and all employees, agents, and contractors performing work in connection with this Facility, and all shall be subject to the approval of the Owner, which approval shall not unreasonably be withheld. The Owner shall not make any federal or state tax withholdings on behalf of Design-Builder.

## **ARTICLE 3 OWNER'S RESPONSIBILITIES**

**3.1** The Owner shall provide, at Owner's sole cost and expense:

- (a) all regulatory and governmental permits, operating licenses (other than those required to be obtained by Design-Builder under this Exhibit or Legal Requirements) and authorizations (including such permits, licenses and authorizations required by additional regulations or changes to regulations);
- (b) drawings and operations manuals for any existing equipment (not supplied or installed by Design-Builder);
- (c) rights of ingress and egress to and from the Project site, the Facility, and all components thereof;
- (d) electricity, fuel and water;
- (e) an initial supply and inventory of operating supplies, Consumables, maintenance tools, and spare parts, with additions to such initial inventory as may be required from time to time (all as recommended by Design-Builder and approved by Owner);

- (f) means of waste disposal (including payment of waste disposal charges, if any);
- (g) insurance as required pursuant to the Design-Build Agreement and Article 5 of the General Conditions of Contract; and
- (h) all other rights, services and materials reasonably required for the operation and maintenance of the Facility in compliance with this Exhibit, excepting only those goods and services specifically identified herein as being provided by Design-Builder.

**3.2** Owner shall provide to Design-Builder any notices received by Owner in connection with Owner's performance of its responsibilities under this Article 3 including, but not limited to, notices from any governmental entity or manufacturer of equipment, or notices of any legal claim or suit by any third party or employee of the Owner participating in either operation or maintenance of the Project and Facility.

**3.3** Owner shall designate in Article 9 of this Exhibit an individual who will act on behalf of Owner with respect to communicating decisions and directions to Design-Builder under this Exhibit. Such individual shall be available to receive such communications and provide appropriate responses at any time. The Owner's Designated Representative shall be permitted reasonable access to the Facility during the O&M Term for the purpose of gaining knowledge of the progress, workmanship and character of the materials used and persons employed in operating and maintaining the Facility. The Owner's Designated Representative shall be responsible for his or her safety at all times when entering the Facility during the O&M Term, and shall comply with any reasonable safety requests of the Design-Builder, including the wearing of personal protective equipment, as required.

**3.4** Site visits and inspections by the Owner's Designated Representative or any consultant retained by Owner shall not relieve the Design-Builder of its obligations under this Exhibit or Legal Requirements.

**3.5** Owner shall provide Design-Builder with all vendor manuals, as-built or record drawings of the Project and Facility, spare parts lists, Project data books and drawings which are in the possession of Owner or of any other separate contractor to Owner who is responsible for construction, installation, repair or maintenance of the Project or a part thereof, and any other documents that define the Project's operating requirements. Design-Builder shall be entitled to rely upon such information in performance of the O&M Services.

**3.6** The Owner shall procure, obtain and maintain during the O&M Term any governmental or agency consents to enable Design-Builder to perform its duties at the Facility. The Owner shall deal directly with all such governmental departments and agencies on all matters that require consultation and discussion about the operation and/or maintenance of the Facility during the O&M Term, such that the Design-Builder is able to perform its obligations. The Design-Builder will provide, at the Owner's request, all reasonable assistance, documentation and support to the Owner for this purpose.

## **ARTICLE 4 ANNUAL PLAN**

### **4.1 Operating Plan.**

**4.1.1** Not later than the first day of November of each calendar year, Design-Builder shall prepare and submit to Owner in writing a proposed operating and maintenance plan for the upcoming Project Year and, with respect to Scheduled Maintenance, for the next  Project Years (or the then-remaining portion of the O&M Term, whichever is less) (the "Operating Plan"). The Operating Plan for the first Project Year shall be submitted to Owner for approval not later than sixty (60) days prior to the scheduled Substantial Completion Date under the Design-Build Agreement.

**4.1.2** The Operating Plan shall describe, in detail reasonably acceptable to Owner, anticipated maintenance and overhaul schedules, planned outages, staffing plans, equipment acquisitions



and spare parts and Consumables, inventories (including a breakdown of capital items and expense items), schedules of Subcontractor and Design Consultant services, Facility performance data, data regarding required environmental performance, projected fuel or energy usage, and such other matters as Owner may reasonably require.

## **4.2 O&M Budget**

**4.2.1** Any actions proposed under the Operating Plan shall be consistent with manuals and procedures prepared or established by Owner, Design-Builder, Owner's separate contractors, or equipment manufacturers, industry standards, and this Exhibit. Together with the Operating Plan, Design-Builder shall submit to Owner for its review and approval a proposed budget for operating and maintaining the Facility during the upcoming Project Year and, with respect to Scheduled Maintenance, for the next [ ] Project Years (or the then-remaining portion of the O&M Term, whichever is less) (the "O&M Budget").

## **4.3 Annual Plan**

**4.3.1** The O&M Budget shall include the estimated cost, based on time and materials and all fees, for all anticipated operation and maintenance services to be provided by Design-Builder during each month of the upcoming Project Year and, with respect to Scheduled Maintenance, for the next [ ] Project Years (or the then-remaining portion of the O&M Term, whichever is less) (the Operating Plan and the O&M Budget are hereinafter sometimes together called the "Annual Plan"). When approved pursuant to Section 4.3.2 below, the Annual Plan shall be an "Approved Annual Plan" and shall consist of an "Approved Operating Plan" and an "Approved O&M Budget."

**4.3.2** Owner shall give its written approval or disapproval of the Annual Plan no later than sixty (60) days after receipt thereof from Design-Builder. In the event Owner does not give its approval or disapproval of the Annual Plan within such sixty (60) day period, the entire Annual Plan shall be deemed approved by Owner. If Owner disapproves all or any portion of the proposed Annual Plan, Owner and Design-Builder shall make all reasonable efforts to agree upon the items and associated costs included in the Annual Plan.

**4.3.3** In the event that Owner and Design-Builder cannot agree on the Annual Plan, those elements of the Annual Plan which are in dispute shall be revised on an interim basis in accordance with the reasonable specifications of Owner, and Owner and Design-Builder agree to continue the O&M Services pursuant to such revised Annual Plan, pending the written final resolution of their disagreement. The Owner-specified O&M Budget or Annual Plan will be deemed an Approved O&M Budget or an Approved Annual Plan until such written resolution. However, in no event shall such revised Annual Plan require Design-Builder to: (a) deviate from its standard practices regarding salary administration, compensation, personnel practices and staffing levels; or (b) perform services that might conflict with Design-Builder's duties under this Exhibit or Legal Requirements.

**4.3.4** An Approved Annual Plan shall constitute authorization for Design-Builder to expend money to operate and maintain the Facility in accordance with such Approved Annual Plan. Design-Builder shall notify Owner as soon as reasonably possible of any significant deviations or discrepancies between the costs and expenses actually incurred by Design-Builder during each Project Year and the costs and expenses projected to be incurred by Design-Builder as set forth in the Approved O&M Budget for such Project Year.

**4.3.5** In the event either party hereto desires to request an adjustment to an Approved Annual Plan at any time during the Project Year, such party shall submit in writing a proposed revised Annual Plan for the other party's consideration, which proposal such other party shall approve or disapprove in writing within thirty (30) days after receipt thereof. If the proposed revised Annual Plan is disapproved in writing within such thirty (30) day period, the disapproving party shall furnish the other party in writing with the reasons for such disapproval and shall immediately begin good faith discussions in an effort to reach a mutually agreeable revised Annual Plan. Until the revised Annual Plan is approved in writing by Owner, Design-Builder shall not, except in an

emergency as described in Article 6 hereof, act outside of the Approved Annual Plan for such Project Year without the prior written consent of Owner. Once approved, Design-Builder's authority with respect to a revised Annual Plan shall be the same as that authorized for the original Approved Annual Plan.

**4.3.6** As stated in Section 5.4 of this Exhibit, the cost of all major equipment teardowns and overhauls and all capital improvements shall be the responsibility of Owner. To the extent reasonably possible, the costs of all anticipated major equipment teardowns and overhauls and anticipated capital improvements shall be incorporated into the Approved Annual Plan and Approved O&M Budget. If such costs have been incorporated into the applicable Approved Annual Plan and Approved O&M Budget, or if Owner has otherwise consented in writing to reimburse Design-Builder for such costs, Design-Builder shall schedule, coordinate, contract and oversee the performance of such activities.

## **ARTICLE 5 DESIGN-BUILDER'S RESPONSIBILITIES**

### **5.1 Operational Phase Duties.**

**5.1.1** Design-Builder will perform duties to operate the Facility on behalf of the Owner, as the Owner's agent, for the period of the O&M Term as set out herein and in Appendix A to this Exhibit.

**5.1.2** Owner shall develop requirements for what information is to be reported, how it is to be reported, and who is to receive any Deliverable required dealing with the operation of the Facility, or any portion thereof.

**5.1.3** The Facility shall meet the standards specified in the Performance Criteria during the Operational Period. Failure to meet the Performance Criteria shall be deemed a Defect. Whenever a Defect is identified, either by the Design-Builder's inspections, by the Owner, or by any third party authorized and acting on the Owner's behalf, the Design-Builder shall act promptly to remedy and repair the Defect, which may include contacting manufacturers, suppliers, vendors and Owner's separate contractors to provide such remedy and repair pursuant to any warranty obligations running to the Design-Builder or to the Owner. Design-Builder shall not, however, initiate any legal action in Owner's name, without Owner's written approval and agreement on allocation of legal costs and attorney's fees. As long as Design-Builder has acted promptly in the case of contacting such entities on Owner's behalf, then the Design-Builder shall not be liable to Owner for any delay or loss caused by such entities' failure to remedy the Defect.

**5.1.4** Design-Builder shall maintain, at a location acceptable to Owner, the Facility operating logs, records, and reports that document the operation and maintenance of the Facility, all in form and substance sufficient to meet Owner's reporting requirements if applicable and identified in the Performance Criteria or in an Appendix to this Exhibit.

**5.1.5** Design-Builder shall maintain current revisions of drawings, specifications, lists, clarifications and other materials related to operation and maintenance of the Facility.

**5.1.6** Design-Builder shall provide Owner reasonably necessary assistance in connection with Owner's compliance with reporting requirements under any Third-Party Agreements, Legal Requirements or any other agreement to which Owner is a party relating to the Project or Facility. Such assistance shall include providing reports, records, logs and other information that Owner may reasonably request as to the Facility or its operation, as stated in Section 2.7 of this Exhibit.

**5.1.7** Design-Builder shall perform all Operational Phase services consistent with the equipment manufacturer's recommendations and requirements, prudent industry practices and the contractual obligations of Owner under any relevant Third-Party Agreements identified in

Appendix C to this Exhibit (e.g. power purchase agreement, steam sales agreement, and any other side letters or other agreements directly relating to the same).

**5.1.8** Design-Builder shall provide adequate quality assurance and maintain the Facility in good overall condition and appearance, for the safe and proper operation of the Facility and all equipment therein.

**5.1.9** Design-Builder shall comply with all Legal Requirements and permits applicable to Design-Builder's Operational Phase services, including, without limitation, obtaining and maintaining, at Design-Builder's expense, all licenses and permits required to qualify Design-Builder to perform the Operation Phase services and to do business in the jurisdiction in which the Facility is located.

## **5.2 Maintenance Phase Duties.**

**5.2.1** The Design-Builder is responsible for all Scheduled Maintenance activities necessary to meet the specified standards during the O&M Term and to minimize the occurrence of Defects. The required Scheduled Maintenance activities are set out in Appendix B to this Exhibit.

**5.2.2** Maintenance shall include, subject to the limitations of an Approved O&M Budget, performing or causing to be performed all services, and making or causing to be made all repairs and replacements, necessary so that at all such times the Facility shall be maintained in good, safe and operating condition, and shall include, without limitation, maintaining a reasonable stock of operating supplies, maintenance tools and spare parts of comparable quality to the initial spare parts provided by Owner; inspecting and repairing or replacing all portions of the Facility that may become defective, worn, damaged or incapable of operation as a result of normal and routine operations; and performing periodic maintenance in accordance with the manufacturers' requirements and recommendations, the Performance Criteria, and industry standards; and the services described in Appendix B to this Exhibit. Maintenance Phase services do not include Unscheduled Maintenance.

**5.2.3** Owner agrees that operating supplies, maintenance tools and spare parts may in part be stored by Design-Builder at a location other than the Facility, so long as: (a) such location and storage is sufficiently convenient to allow the efficient operation and maintenance of the Facility pursuant to this Exhibit; and (b) records are kept as to inventory and location of all such items; and (c) the method of allocating the costs of such materials to the Facility has been approved in advance by Owner.

**5.2.4** In addition to the provisions in Section 6.2 related to emergencies, in the event that the Facility or major equipment suffers a failure (or Design-Builder reasonably believes that such an occurrence is imminent), and Design-Builder has made reasonable, but unsuccessful, efforts to notify and communicate with Owner regarding such occurrence or imminent occurrence in accordance with the terms of this Exhibit, then Design-Builder is authorized to, and shall, take all reasonable and necessary action to prevent or to mitigate such failure and make reasonable efforts to minimize any cost associated with such remedial action. Design-Builder shall continue to attempt to notify and communicate with Owner regarding the occurrence and the remedial action. However, Design-Builder shall not be required to expend for such purposes more than the amount set out in Section 6.2.1 for such remedial action.

**5.2.5** The Design-Builder is responsible for providing all management, supervision, professional and technical services; quality management; and labor, materials, utilities, and equipment for performing all of the duties and obligations to maintain the Facility during the Maintenance Period.

**5.2.6** Design-Builder and Owner understand that new methods, procedures, and products may present opportunities for improvements during the Maintenance Period. Both parties mutually agree to consider the use of such new technologies and methods provided that they are agreed

to by the Design-Builder and the Owner in writing prior to use, with allocation of costs for any betterments which will accrue to the Owner upon completion of the O&M Term.

### **5.3 Correcting Defects.**

**5.3.1** The Design-Builder shall investigate and inspect the underlying cause or origin of any Defect before commencing repair work and shall prepare and submit for the Owner's review a remedial action plan recommending the most appropriate treatment to restore the affected portion of the Facility to its operable condition. The Owner shall communicate its approval or rejection of the Design-Builder's remedial action plan within two (2) business days of receipt or shall be deemed to have made no objection to the same.

**5.3.2** The Design-Builder shall remedy at its expense, unless otherwise stated or agreed to in writing by Owner, any Defect caused by a failure of the Facility to meet Owner's Performance Criteria and which failure is due solely to Design-Builder's negligence or breach of the Design-Build Agreement (including any Defect caused by a Subcontractor or Design Consultant to the Design-Builder). This shall not apply, however, to a Defect that is the sole responsibility of manufacturers, suppliers, vendors and Owner's separate contractors who are obligated to remedy and repair a Defect pursuant to any warranty obligations running to the Owner as stated in Section 5.1.3 of this Exhibit.

### **5.4 Overhaul of Major Equipment and Capital Improvements.**

**5.4.1** The cost of all major equipment teardowns and overhauls and all capital improvements shall be the responsibility of Owner. Design-Builder shall promptly notify Owner in writing of any such teardowns and overhauls of major equipment or capital improvements that Design-Builder believes are necessary or advisable together with a proposed schedule for completing such repairs or improvements. Owner may contract with a separate contractor to perform any such major equipment teardowns and overhauls and all capital improvements, or Owner may permit Design-Builder to submit a proposal to perform the same, in whole or in part, for additional compensation either by separate written agreement or as Additional Services under Article 8 of this Exhibit.

**5.4.2** As stated in Section 4.3.6 of this Exhibit, if such costs have been incorporated into the applicable Approved Annual Plan and Approved O&M Budget, or if Owner has otherwise consented in writing to reimburse Design-Builder for such costs, Design-Builder shall schedule, coordinate, contract and oversee the performance of such activities as Additional Services, under Article 8 of this Exhibit.

**5.4.3** Design-Builder also shall be responsible for monitoring and enforcing contract compliance by the Owner's contractor performing major equipment teardowns and overhauls and capital improvements, including taking such reasonable steps, subject to Section 5.5.1, below, to enforce any warranties granted to Owner by such manufacturer, supplier, or contractor.

### **5.5 Litigation, Permit Lapses.**

**5.5.1** When acting on Owner's behalf to correct a Defect, or to enforce any warranties granted to Owner, the Design-Builder shall not initiate any legal action in Owner's name, without Owner's written approval and agreement on allocation of legal costs and attorney's fees.

**5.5.2** Upon obtaining knowledge thereof, Design-Builder shall promptly notify Owner in writing of: (i) any litigation, claims, disputes or actions, threatened or filed by any third party, concerning the Project, the Facility or the O&M Services; (ii) any refusal or threatened refusal by a public or private agency or authority to grant, renew or extend (or any action pending or threatened that might affect the granting, renewal or extension of) any license, easement, permit, warranty, approval, authorization or consent relating to the Facility or the O&M Services; and (iii) any dispute with any public or private agency or authority relating to the Facility or the O&M Services.

## **5.6 Fines and Penalties.**

**5.6.1** If during the O&M Term any governmental or regulatory authority or agency assesses any fine(s) or penalty(ies) against Design-Builder or Owner arising solely from Design-Builder's failure to operate and maintain the Facility in accordance with the terms of this Exhibit or any Legal Requirements, without Owner's prior written consent, such fines and penalties shall, subject to any limitations of liability agreed to by the Parties in Article 10, be the sole responsibility of Design-Builder and shall not be deemed a Reimbursable Cost. To the fullest extent permitted by law, and subject to Article 10, Design-Builder shall defend and indemnify Owner from any damages, costs, or expense (including reasonable attorney's fees), or any legal or administrative proceedings caused by such failure on the part of the Design-Builder.

## **5.7 Protection of the Environment.**

**5.7.1** Notwithstanding any other provision of this Exhibit, the Design-Builder shall take all reasonable steps to protect the environment in the area of the Facility and to limit damage and nuisance to people and property resulting from pollution, noise and other results of the fulfillment of its obligations under this Exhibit and shall take reasonable steps to ensure that air emissions and surface discharges from the Facility shall not exceed the values prescribed by applicable laws or permits, wherever possible.

## **5.8 Post Completion Services.**

**5.8.1** For a period of twelve (12) months after the end of the O&M Term, the Design-Builder must make available competent and experienced personnel or consultants to consult with the Owner on any aspect of the operation, maintenance and repair of the Facility. Such consultation shall be provided at no additional cost to Owner up to a maximum of [ ] hours, in the aggregate, and [ ] on-site visits to the Project site. Any consultation beyond these limits shall be paid as Additional Services on an hourly rate basis, lump sum or other method of compensation agreed to by the parties in writing. Required travel in connection with any such post-completion services shall be reimbursable by Owner at the direct cost incurred by Design-Builder, with no markup.

# **ARTICLE 6 OUTAGES AND EMERGENCIES**

## **6.1 Outages.**

**6.1.1** Design-Builder shall coordinate with the Owner and any parties to Third-Party Agreements, if any, identified in Appendix C to this Exhibit as required: (a) when production of the Facility output (e.g. treated wastewater, water, steam or generation of electricity) is to be initiated, interrupted or curtailed, and (b) by making all reasonable efforts to schedule all outages at the Facility that will reduce the output of the Facility at the most appropriate times for the Owner and any parties to Third-Party Agreements.

**6.1.2** In the case of unplanned interruptions or curtailments of Facility output, Design-Builder shall give the Owner and authorized representatives of parties to any Third-Party Agreements notice identified in Appendix C to this Exhibit as soon as practical, stating the reason therefor and the probable duration thereof, and containing any other information necessary for the notice to conform to the requirements of the Third-Party Agreement.

## **6.2 Emergencies.**

**6.2.1** If an emergency situation arises during the O&M Term endangering the safety or protection of persons, the Facility, the Project, or property located near the Project, the correction of which falls within the Design-Builder's duties, Design-Builder shall promptly notify Owner when possible and take all necessary action to attempt to prevent or mitigate any such threatened damage, injury or loss (including making payments and incurring expenses on behalf of Owner in the nature of capital or operating expenses or otherwise) deemed by Design-Builder to be

reasonably necessary or advisable under the circumstances to prevent, avoid or mitigate injury, damage or loss to persons or property. Provided, however, that Design-Builder shall not make any such expenditures if the aggregate amount per incident exceeds \$\_\_\_\_\_ unless Owner has approved the same or Design-Builder has been unable to contact Owner notwithstanding its diligent efforts to do so. Design-Builder shall make reasonable efforts to minimize any cost associated with remedial action in case of such an emergency.

**6.2.2** If the above emergency creates an imminent threat to persons or property, the Design-Builder may act before giving written notice to the Owner, but shall promptly give such notice as soon as practicable, but in no event later than the close of business on the following business day. If, as a result of action taken in response to such an emergency, Design-Builder incurs costs or expenses in connection therewith, the Approved Annual Plan shall be revised to properly incorporate and reflect such costs and expenses. However, if the event giving rise to the emergency was caused by Design-Builder's breach of its duties hereunder, costs and expenses incurred in responding to such emergency will not cause revision of the Approved Annual Plan and will not be reimbursed by Owner.

**6.2.3** If an emergency situation arises as described above which creates an imminent threat to persons or property, and the Design-Builder has not performed the remedial work within twenty-four (24) hours after written notice from the Owner, then the Owner may give written notice to Design-Builder and perform the remedial work with other forces at the Design-Builder's expense. Remedial work performed by others will not alter the Design-Builder's obligations under the Design-Build Agreement.

**6.2.4** If the Owner considers that an emergency has arisen in relation to the Facility, the Owner may give written notice to the Design-Builder specifying the nature of the emergency which it has identified. Promptly upon receipt of such Owner notice, the Design-Builder shall, to the extent it is practicable to do so, rectify such emergency. If, however, the Design-Builder considers that the emergency is outside its capacity to rectify as the operator of the Facility, it shall notify the Owner promptly and the Owner shall take such actions as may be necessary to rectify the emergency itself.

## **ARTICLE 7 HANDBACK REQUIREMENTS**

**7.1** At the end of the O&M Term, when the Owner assumes responsibility for the operation and maintenance of the Facility, the Facility shall be free from any Defect other than those due to normal and customary wear and tear and shall comply with any other Handback Requirements set out in Appendix D to this Exhibit.

### **7.2 Handback Inspection.**

**7.2.1** According to the following schedule, prior to the expiration of the O&M Term, upon written notice to Owner, the Design-Builder and Owner will jointly carry out three (3) Handback Inspections to determine what portions of the Facility will need repairs or replacement in order to achieve the Handback Requirements.

1. The initial Handback Inspection shall take place at a time, specified by the Owner following consultation with the Design-Builder, that is at least \_\_\_\_\_ months, but not more than \_\_\_\_\_ months, prior to the end of the O&M Term.
2. The second Handback Inspection shall take place at a time, specified by the Owner following consultation with the Design-Builder, that is at least \_\_\_\_\_ months and not more than \_\_\_\_\_ months prior to the end of the O&M Term.
3. The third Handback Inspection shall take place at a time, specified by the Owner following consultation with the Design-Builder, that is not more than \_\_\_\_\_ months prior to the end of the O&M Term.

**7.2.2** If, during any of the first two of the above Handback Inspections, any portion of the Facility is not in a condition consistent with the Handback Requirements, then the Design-Builder shall provide to the Owner a program and schedule for correcting any portions not meeting the Handback Requirements, plus a cost estimate of the amount to be expended to bring those portions of the Facility into compliance with the Handback Requirements.

**7.2.3** If the third Handback Inspection shows any portion of the Facility that is still not in a condition consistent with the Handback Requirements, then the Owner, at its sole option, may elect to accept the Facility in its non-conforming condition, in whole or in part, instead of requiring its removal and correction and, in that situation, Owner may deduct the cost of remedying or repairing any non-conforming condition from amounts then, or thereafter, due the Design-Builder. Such deduction shall not exceed the fair and reasonable cost to remedy or repair the non-conforming condition.

**7.2.4** The Design-Builder shall have the option and the right, however, to perform such remedial work as necessary to correct the non-conforming condition(s) identified by the Owner or to accept the deduction offered by the Owner. Such election must be made in writing by Design-Builder within seven (7) days of receipt of Owner's proposed cost deduction(s). The right to correct such conditions is subject, however, to liquidated damages as set forth in Section 7.3.

**7.2.5** If Design-Builder elects to perform the remedial work, but fails to deliver a workplan and schedule in accordance with Appendix D of this Exhibit or, having delivered it, fails in any material respect to diligently carry out the workplan in accordance with the schedule, then the Owner may hold back from any amounts thereafter becoming payable to Design-Builder under this Exhibit an aggregate amount (the "Handback Requirements Holdback") that the Owner considers sufficient to achieve the Handback Requirements at the end of the O&M Term, including with respect to the spares inventory, in the event that Design-Builder were to fail to do so.

**7.2.6** The Handback Requirements Holdback shall be released to Design-Builder, without interest, as the work to achieve the Handback Requirements is done by Design-Builder (but not more frequently than monthly). If the Handback Requirements are not achieved by the expiration of the O&M Term, the Owner may release Design-Builder from its obligation to achieve the Handback Requirements and may retain the remaining balance of the Handback Requirements Holdback.

**7.2.7** Design-Builder may at any time call for release of the remaining balance of the Handback Requirements Holdback upon delivering to the Owner an irrevocable, unconditional, on sight letter of credit in the amount of the remaining balance of the Handback Requirements Holdback (the "Handback Letter of Credit"), issued by a bank authorized to do business in the state in which the Facility is located (or issued by such other financial institution approved in advance for the purposes of this Section 7.2.7 by the Owner, who may grant or decline such approval in its absolute discretion). The Owner may present the Handback Letter of Credit for payment if:

- (a) upon expiration of the O&M Term, the Handback Requirements are not met;
- (b) Design-Builder fails to deliver a renewal of the Handback Letter of Credit at least   days before the expiration of the Handback Letter of Credit; or
- (c) any of the long-term credit ratings of the issuer of the letter of credit becomes unstable and Design-Builder fails to deliver a replacement of the Handback Letter of Credit no later than   days after being so requested by the Owner in writing.

As the work to achieve the Handback Requirements is done by Design-Builder (but not more frequently than monthly), the Owner shall permit, on written application by Design-Builder, a corresponding reduction in the amount of the Handback Letter of Credit.

**7.3 Liquidated Damages.** If the Design-Builder elects to perform the work necessary to complete all corrections identified in the Handback Inspections by the end of the O&M Term, then in lieu of accepting the Facility as-is and deducting the cost to repair under Section 7.2.3, above, the Owner may permit the Design-Builder to continue to perform repairs at Design-Builder's expense, but assess liquidated damages for late completion until such repairs are completed to Owner's satisfaction. The parties agree that Owner will suffer damages which are difficult to determine and accurately specify. Design-Builder agrees that if completion of all Handback Requirements is not attained by the end of the O&M Term, Designer-Builder shall pay Owner [REDACTED] Dollars (\$[REDACTED]) as liquidated damages for each day thereafter until completion of all Handback Requirements.

*[The parties may want to consider the following supplemental language within Section 7.3 if they want to assess liquidated damages subject to a maximum amount.]*

☐ Owner and Design-Builder agree that the maximum amount of liquidated damages payable by Design-Builder under this Section 7.3 shall be [REDACTED] Dollars (\$[REDACTED]), regardless of the actual date that all Handback Requirements are completed and accepted.

*[At the parties' option, the following may be used]:*

☐ In addition, the Owner may require the Design-Builder to post a performance bond issued by an approved surety, guaranteeing the proper and timely performance of any Handback Requirements as a condition of continued performance. The bond shall be posted in an amount equal to one hundred and fifty percent (150%) of the Owner's estimated deductions to complete the work, as proposed in Section 7.2.3. Upon final completion by Design-Builder of the Handback Requirements, and written acceptance by Owner, the Owner shall issue a letter of discharge and irrevocable consent to release the surety of the performance bond.

**7.4 Disputes Over Handback Requirements.** Any dispute under this Article 7 as to the condition of the Facility, the cost or schedule for repairs, the value of Owner's offered deductions, the assessment of liquidated damages, or otherwise, shall be resolved pursuant to the provisions of Article 10 of the General Conditions of Contract.

## ARTICLE 8 COMPENSATION

*[Note to User: the dollar amounts, limitations, percentages and multipliers shown in this Article of this Exhibit and elsewhere are as an example only, not a recommendation, and the parties are free to negotiate actual dollar amounts, limitations, percentages and multipliers to be inserted].*

The Owner will pay the Design-Builder during the O&M Term the amounts set out in this Article 8, for Monthly Payments, Annual Operating Fee, Reimbursable Expenses, Annual Incentive Fee (if any), and for Additional Services, as follows:

### 8.1 Monthly Payment.

**8.1.1 Flat Monthly Payments.** A monthly payment equivalent to one-twelfth of the Approved O&M Budget for the Project Year based on the approved annual payment schedule. The Design-Builder will receive the monthly agreed upon payment regardless of the actual quantity of work performed and services provided during that month. The scheduled monthly payment shall be deemed full compensation for all inspection, testing, documentation, reporting, design, maintenance, construction, and reconstruction required to fulfill the O&M Services requirements.

**8.1.2** The scheduled monthly payments will be fixed for the duration of the O&M Term, with the exception of the following potential adjustments:

- .1 Withholding of, or reduced, payment resulting from the Design-Builder's failure to comply with, or delay in complying with, the service level requirements of this Exhibit;



.2 Adjustment to compensate for the effects of inflation or deflation based on changes in the Consumer Price Index, U.S. Department of Labor for all Urban Consumers for the \_\_\_\_\_ region (hereafter the "Consumer Price Index").

***[At the parties' option, the following clauses may be used in lieu of Sections 8.1.1 and 8.1.2]:***

☐ **8.1.1** Variable Monthly Payments. Owner shall pay Design-Builder on a monthly basis, upon submission of itemized applications for payment, substantiated by such documentation as Owner may reasonably require to verify Design-Builder's actual costs, the following costs and expenses incurred by Design-Builder (the "O&M Costs"):

(a) the delivered cost of supplies, Consumables, spare parts, replacement components, rental equipment and all other items Design-Builder is required to provide and does provide for the Facility on behalf of Owner;

(b) the wages and salaries (together, "Direct Pay") and bonuses, for all of Design-Builder's on-site personnel, together with an allowance of \_\_\_\_\_ percent (\_\_\_\_%) of Direct Pay to cover the cost of associated payroll taxes, unemployment and disability insurance, worker's compensation, vacation, holidays, fringe benefits and other statutory compensation (a present breakdown of such costs is included for reference purposes only as Attachment II hereto, although the above \_\_\_\_\_ percent (\_\_\_\_%) allowance will remain fixed), plus an administrative overhead allocation equal to \_\_\_\_\_ percent (\_\_\_\_%) of base salaries;

(c) the costs of any of Design-Builder's non-site specialists or other personnel, calculated at Design-Builder's standard markup (provided such cost shall not exceed, on a prorated basis, \_\_\_\_\_ times the base salary for such personnel);

(d) costs of special training conducted off-site or conducted by Design-Builder's non-site personnel or non-Design-Builder personnel, as approved in advance and in writing by Owner;

(e) relocation and recruitment costs of salaried employees and recruitment costs (but not relocation costs) of non-salaried employees;

(f) travel costs and related expenses, as approved in advance and in writing by Owner;

(g) all costs of insurance and bonds to be carried by Design-Builder pursuant to the Design-Build Agreement;

(h) the costs of suppliers, subcontractors, attorneys, certified public accountants and other third-party advisors to the extent of work performed specifically for the Facility;

(i) upon Owner's request and subject to Owner's prior written approval, the cost of services (other than the O&M Services) at mutually agreed upon prices, terms and conditions; and

(j) the delivered cost of certain materials such as tools, office equipment, furniture and office supplies.

☐ **8.1.2** On or before the fifteenth (15th) day of each month commencing after the initiation of O&M Services, Design-Builder shall deliver to Owner a detailed schedule of expenditures prepared by Design-Builder for the cost of all O&M Services ("O&M Costs") incurred during the preceding month. Upon request, Design-Builder shall make available to Owner all relevant documentation reasonably necessary for Owner to verify the accuracy of such schedule and necessity of such O&M Costs, including copies of all relevant invoices for supplies, spare parts, Consumables and replacement components and labor costs and benefits computations

incurred by Design-Builder for its employees, Subcontractors or other personnel, plus lien waivers. Each invoice for O&M Costs submitted to Owner shall be paid in full by Owner to Design-Builder not later than thirty (30) days after the date Owner received such invoice, unless Owner elects to dispute such invoice. If Owner disputes any amount set forth in any such invoice, Owner shall pay the undisputed portion within said period and Owner and Design-Builder shall attempt in good faith to resolve all disputed items as soon as reasonably practicable.

## **8.2 Annual Operating Fee.**

**8.2.1** In addition to the Monthly Payment, Owner shall pay Design-Builder an Annual Operating Fee in the amount set out below (or a pro rata portion thereof in the case of a Project Year of less than 12 months).

**8.2.2** For the first Project Year and each subsequent Project Year, Owner shall pay to Design-Builder the sum of \$\_\_\_\_\_ per month of the Project Year, an annual fee of \$\_\_\_\_\_ (the "Annual Operating Fee"). Beginning on the first day of the second Project Year and on the first day of each subsequent Project Year thereafter, the Annual Operating Fee (and the corresponding Monthly Payments) shall be adjusted to reflect changes in the Consumer Price Index per Section 8.1.2.

## **8.3 Reimbursable Expenses.**

**8.3.1** In addition to the payments required by Sections 8.1 and 8.2 above, the Owner shall reimburse Design-Builder for all costs incurred by Design-Builder in performing the O&M Services to the extent the nature and amount of such costs and expenses: (a) are incurred in connection with the performance of any Unscheduled Maintenance, as approved in advance by Owner; or (b) are incurred in connection with an emergency under Section 6.2 hereof (collectively, the "Reimbursable Expenses").

***[If the parties elect Flat Monthly Payments under Sections 8.1.1 and 8.1.2, then the following clauses may be used as well]:***

☐ **8.3.2** Design-Builder shall not incur Reimbursable Expenses unless they are incurred in accordance with the applicable Annual Budget, or are permitted by Section 8.3.1, above. If Design-Builder becomes aware that Reimbursable Expenses exceed or will exceed the amount provided in the applicable Annual Budget by \_\_\_\_\_ percent (\_\_\_\_%) or more, Design-Builder shall use all reasonable efforts to notify Owner in writing within ten (10) days and shall not, without Owner's approval to amend the applicable Annual Budget or Owner's authorization for Design-Builder to make such expenditure, perform any further Services that will cause or increase a budget overrun, except as provided in Sections 6.2.1 and 8.3.1 (Unscheduled Maintenance or emergencies). If Owner refuses to authorize expenditures in excess of the Annual Budget, Design-Builder shall be relieved of those duties or obligations of this Exhibit that cannot be performed without the expenditures the Owner refuses to approve.

## **8.4 Annual Incentive Fee.**

**8.4.1** As incentive for Design-Builder to maximize profitability and efficiency of operation of the Facility, Design-Builder shall be entitled to receive at the end of each Project Year an additional fee (the "Incentive Fee") based on Owner's Pre-Tax Net Income ("PTNI") from the Facility for such Project Year. The Incentive Fee shall be calculated in accordance with the following formula:

Incentive Fee = (\_\_\_\_% x PTNI), where PTNI shall be equal to the positive difference (if any) between the amount of the Facility's net pre-tax net income before payment of the Incentive Fee, as determined in accordance with generally accepted accounting principles, and the projected pre-tax net income as set forth in the annual profit plan prepared by Owner for such year.

**8.4.2** As soon as practicable, but in no event later than ninety (90) days after the end of each Project Year, Owner shall deliver to Design-Builder a statement, together with all reasonable, necessary and appropriate supporting documentation, calculating the amount of Incentive Fee due to Design-Builder. Such Incentive Fee, if any, shall be due and payable by Owner to Design-Builder within ten (10) days after receipt of Design-Builder's statement agreeing to such calculation.

**8.4.3** Notwithstanding the foregoing provisions, no Incentive Fee will be paid to Design-Builder for a Project Year if in such Project Year either (or both) of the following events occurs:

1. **Safety Standard:** The number of accidental injuries at the Facility, incurred by Design-Builder's personnel, *[or Owner's personnel under Design-Builder's direction and supervision]* which injuries cause lost work time, require professional medical care, and are not caused by forces or events which are completely beyond Design-Builder's reasonable control and which do not relate to work at the Facility, is greater than:
  - (i)  as to the period beginning with the commencement of the Project Year and ending upon the end of December 31 of that year; or
2. **Environmental Standard:** An environmental or other regulatory fine which: (1) relates to operation of the Facility, and (2) arises by sole reason of Design-Builder's negligent or willful misconduct, is levied against Owner or Design-Builder, after any appeals are exhausted.

**8.4.4** Notwithstanding the foregoing provisions, in no event will any Incentive Fee exceed \$ per Project Year, or \$ in the aggregate during the O&M Term.

## **8.5 Additional Services.**

**8.5.1 Major Equipment Teardowns and Overhauls.** The costs of all major equipment teardowns and overhauls required by normal operations of the Facility (not caused by a Defect in the Facility attributable to the Design-Builder), shall be performed by Design-Builder for additional compensation, not included in Sections 8.1 through 8.4, above. For all such work, the parties shall enter into a Change Order as a supplement to this Exhibit and Owner shall reimburse Design-Builder for such costs either on a Lump Sum basis, or on a Cost-Plus Fee basis, where the Design-Builder's fee shall be  percent (%) of the actual verified cost of the work.

**8.5.2 Capital Improvements.** Any capital improvements made to the Facility by the Owner during the O&M Term shall be made by Owner's separate contractors unless the cost of such improvement is less than \$ per year (the "Capital Improvements Cap"). For all such improvements within the Capital Improvements Cap, the parties shall enter into a Change Order as a supplement to this Exhibit and Owner shall reimburse Design-Builder for such costs either on a Lump Sum basis, or on a Cost-Plus Fee basis, where the Design-Builder's fee shall be  percent (%) of the actual verified cost of the work.

**8.5.2.1** If, however, Owner makes capital improvements in excess of the Capital Improvements Cap, then Design-Builder shall have the right to submit a proposal for such work. If the Owner hires another contractor to perform such capital improvements, then Design-Builder shall for an agreed additional fee, schedule, coordinate and oversee the performance of such activities on the Owner's behalf as Owner's agent and construction manager. The parties shall enter into an appropriate separate written agreement or amendment to the Design-Build Agreement for such construction management services.

**8.6 Taxes.** In addition to any other compensation to be paid to Design-Builder under this Article 8, Owner shall pay and shall indemnify and hold Design-Builder harmless from any taxes (including without limitation any gross receipt taxes), levies, imposts, duties, charges or withholdings of any nature

whatsoever imposed upon the Facility, the real property or leasehold interest upon which the Facility or any part thereof is located, by any federal, state or local government or taxing authority; or upon or with respect to any receipts or earnings arising therefrom (excepting only any taxes, levies, duties, charges or withholdings imposed upon Design-Builder or its employees by virtue of the fees payable to Design-Builder hereunder).

**8.7 Interest.** Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing five (5) days after payment is due at the rate specified in the Design-Build Agreement. If no such rate is specified, then interest shall accrue at the highest applicable statutory rate.

## **ARTICLE 9 REPRESENTATIVES AND NOTICE**

**9.1** Owner and Design-Builder shall each designate a representative (hereafter "Designated O&M Representative") to act on its behalf in overseeing the performance of the services required by this Exhibit during the O&M Phases. Owner and Design-Builder may change their respective Designated O&M Representatives upon seven (7) days' written notice to the other party. Designated O&M Representative shall be the primary means for communication and all other interactions between Owner and Design-Builder that are required during the O&M Phases. Designated O&M Representatives shall have the power and authority to bind their respective principals under this Exhibit. In the event of temporary leave due to normal vacation, sickness, or other cause, the parties shall designate an interim representative in writing who shall have full authority to act on behalf of such party until the Designated O&M Representative returns to full-time duties.

**9.2 Owner's O&M Representative.**

*(Identify individual's name, title, address and telephone numbers, including emergency number)*

**9.3 Design-Builder's O&M Representative.**

*(Identify individual's name, title, address and telephone numbers, including emergency number)*

## **ARTICLE 10 FINANCIAL LIMITATIONS**

**10.1 Limitation of Liability.**

**10.1.1** The total aggregate liability of Design-Builder with respect to this Exhibit and the O&M Services, under any theory of recovery, whether based on contract, in tort (including negligence and strict liability), under warranty, or otherwise, and notwithstanding any other provision of the Design-Build Agreement, shall be limited for any act, error or omission that occurs in any Project Year to the amount of compensation under Article 8 received by the Design-Builder in that Project Year. For any claim that relates to one or more continuous acts, errors or omissions that occur over several Project Years, then the aggregate liability of Design-Builder for the same shall be the total amount received by Design-Builder under this Exhibit for all such Project Years in the aggregate, but in no event more than \_\_\_\_\_ (\$\_\_\_\_\_). Each claim by Owner shall be identified separately and distinctly for each act, error or omission and the Project Year in which it occurred, and not combined solely for the purpose of increasing the aggregate limitation of liability over multiple Project Years.

**10.1.2** The limitation on the aggregate liability of Design-Builder under this Section 10.1.1 shall not apply to: (a) intentional, fraudulent or willful misconduct, nor gross negligence of Design-Builder, nor (b) any claim by Owner for indemnity and defense related to a claim by a third-party against Owner, where such third-party is not an affiliate, subsidiary, parent or related entity of the Owner. The availability of insurance proceeds or lack thereof shall not affect Design-Builder's liability as contemplated in this Section 10.1.1.

## **10.2 Warranty and Disclaimer.**

**10.2.1** Design-Builder makes no guarantees or warranties of any kind in connection with its performance of O&M Services under this Exhibit other than that it shall perform the O&M Services in a good and workmanlike manner in accordance with prevailing industry standards.

**10.2.2 EXCEPT AS STATED IN SECTION 10.2.1, DESIGN-BUILDER EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES OF ANY NATURE WHATSOEVER WHETHER STATUTORY, ORAL, WRITTEN, EXPRESS, OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.** Owner and Design-Builder hereby acknowledge that this Exhibit is not intended to and does not replace or mitigate any of the express warranties provided by Design-Builder under the Design-Build Agreement, which warranties shall survive as relates to the Work performed under that agreement, and not the O&M Services under this Exhibit.

## ARTICLE 11 MISCELLANEOUS

**11.1** This Exhibit shall not modify or alter the Design-Build Agreement, except as expressly set forth in this Exhibit.

**11.2** Disputes arising out of this Exhibit shall be resolved pursuant to Article 10 of the General Conditions of Contract.

**11.3** The following Appendices are attached hereto and incorporated herein by this reference:

Appendix A: SCOPE OF O&M SERVICES  
Appendix B: SCHEDULED MAINTENANCE  
Appendix C: THIRD-PARTY AGREEMENTS  
Appendix D: HANDBACK REQUIREMENTS

**11.4** Other provisions:

*[Either insert additional terms here, or reference supplemental terms as an Appendix]*

**OWNER:**

**DESIGN-BUILDER:**

\_\_\_\_\_  
(Name of Owner)

\_\_\_\_\_  
(Name of Design-Builder)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Title)

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**Caution: You should sign an original DBIA document which has this caution printed in blue. An original assures that changes will not be obscured as may occur when documents are reproduced.**

## APPENDIX A SCOPE OF O&M SERVICES

DESIGN-BUILDER SHALL PERFORM EACH OF THE SERVICES LISTED IN THIS APPENDIX A IN ACCORDANCE WITH THE STANDARDS REQUIRED UNDER THIS EXHIBIT.

*[Note to User: The specific obligations of the Design-Builder will depend on the Facility. The following provisions are illustrative only, and are provided to identify some of the possible areas of O&M Services and show the level of detail that may be appropriate].*

### A.1. Programs and Standards.

In addition to those responsibilities described in the Design-Build Agreement, Design-Builder shall be responsible for the establishment and implementation of the following programs, standards and procedures, which require Owner's written approval and which are included in the O&M Services to be provided by Design-Builder:

- A. A program for establishing specific operating goals for each functional area of the Facility, for managing resources to minimize personnel turnover, and for qualifying personnel, to operate and maintain the Facility (including the basis for qualification of personnel).
- B. A program for communicating and cooperating with Owner, with Third-Parties and governmental agencies.
- C. Facility management standards for conduct of operations, safety, conduct of maintenance, housekeeping, material condition, and records management.
- D. A program for preparing supporting documentation, equipment and meter readings and information necessary to accurately prepare, justify and support monthly invoices in accordance with the terms and conditions of the Owner's Third-Party Agreements.
- E. Developing procedures used to operate the Facility as well as monitoring, evaluating, and proposing revisions to such procedures.
- F. A Facility operations and monitoring program which provides the requirements for:
  - 1. Monitoring of Facility Performance
  - 2. Monthly Facility Performance Calculations and Report
  - 3. Monthly Fuel Consumption Calculations and Report
  - 4. Facility Permitting and Environmental Reporting
  - 5. Shift Routines / Operating Practices
  - 6. Control of Equipment
  - 7. Facility Chemistry Control and Water Treatment
  - 8. Training Programs
  - 9. Design-Builder Qualifications
  - 10. Operating Procedures
  - 11. Status of Major Equipment
- G. A maintenance program which provides the requirements for:
  - 1. Maintenance Planning
  - 2. Maintenance Procedures
  - 3. Preventive Maintenance
  - 4. Predictive Maintenance
  - 5. Maintenance Training
- H. A materials management program which provides the requirements for:
  - 1. Procuring Materials and Tools
  - 2. Inventory Levels and Control
  - 3. Renewal of Inventories

- I. A diagnostic testing program for maintaining the Facility and Project equipment, including both system and component level testing.
- J. A housekeeping / cleanliness program which provides the requirements for:
  - 1. Hazardous Material Control
  - 2. General Facility Cleanliness
  - 3. Equipment Condition Inspections
  - 4. Hazardous Waste Program
- K. A problem assessment program which provides the procedure for determining the cause(s) of operational or equipment failures and preventing future failures through recommended improvements, including justification for such recommendations (i.e., basis of recommendation and economic analysis).
- L. A records management program for maintaining the traceability and documentation of Facility performance.
- M. A Facility safety program which provides the requirements for establishing:
  - 1. Safety Monitoring
  - 2. Accident Prevention Program
  - 3. Accident Reporting
- N. Monthly and yearly reporting systems of Facility performance to Owner.
- O. A security program for maintaining the security of the Facility and surrounding area.

#### **A.2. O&M Services.**

Design-Builder shall be responsible for the following O&M Services to be provided, furnished or performed by Design-Builder:

- A. Review as-built drawings of the Facility for accuracy, after such drawings become available.
- B. Maintain all spare parts, tools, equipment, goods, and other items and materials that are necessary to operate and maintain the Facility in accordance with industry standards and the requirements, if any, of Third-Party Agreements. Design-Builder shall also maintain an inventory listing of spare parts, tools, equipment, goods, and other items and materials provided to Design-Builder by Owner or its contractors, vendors or suppliers.
- C. Inspect and check equipment and systems at the Facility at the start of the O&M Phases and at such regular intervals as are agreed to by Owner and Design-Builder, or are required by: (a) Legal Requirements; or, (b) Third-Party Agreements.
- D. Training and Staffing.
  - 1. Provide all operating and maintenance personnel to be trained, and coordinate training of Owner's personnel by Design-Builder.
  - 2. Establish and maintain a sufficient management staff to oversee, and work force to perform, the O&M Services.
  - 3. Schedule, hire, and supervise employees, subcontractors, vendors and (if applicable) Owner's employees as may be necessary for the performance of services hereunder.
- E. Startup Activities.
  - 1. Establish startup and operating procedures for the Facility.
  - 2. Coordinate startup activities of the Facility with Owner and any third parties, such as steam host, fuel suppliers and any purchasing utilities.



3. Furnish qualified startup personnel and operators during, and participate in, pre-startup, startup, mechanical check-out and testing.
- F. Prepare an operation and maintenance manual for the Facility.
- G. Establish, in conjunction with the Owner, safety rules for the Facility consistent with all Legal Requirements and permits and industry practices.
- H. To the extent not provided by Owner, acquire, on behalf of Owner an initial supply and stock of operating supplies and consumables for the Facility.
- I. To the extent not provided by Owner, acquire, on behalf of Owner an initial stock of maintenance tools, and prepare an initial inventory of spare parts.
- J. Monitor performance tests, and review with Owner the results of such checks and tests.
- K. Third-Party Agreements.
1. Cooperate with the authorized representatives of Owner and any parties to Third-Party Agreements identified in Appendix C to this Exhibit (e.g. steam host, purchasing utilities, fuel suppliers) in the various activities and duties to be performed under the provisions of the applicable Third-Party Agreements, if any.
  2. Respond to requests, if any, from parties to Third-Party Agreements in writing, with a copy to Owner, which relate to the operation or maintenance of the Facility.
- L. Operating and Maintenance Records.
1. Monitor and record all daily operating and maintenance data and information for the Facility that: (a) Owner has identified in writing that it must report to any person or entity; (b) Owner must report to any government agency or other person or entity under Legal Requirements; and, (c) Owner reasonably requests. Design-Build shall furnish such information in writing to the Owner containing such information as Owner may reasonably request on a monthly basis by the fifth (5<sup>th</sup>) day of each month in such format as is required by Owner, or by any Third-Party Agreements.
  2. Maintaining adequate records of emissions data for the Facility, if required by environmental control agencies and Owner's standard practices, and furnishing to the Owner and any governmental agencies any reports and other information required to comply with Legal Requirements, regulations, ordinances, and permits, with any such reports and information maintained by Design-Build being the property of Owner and being transferred to Owner on termination of the O&M Services.
  3. Maintain appropriate records for and preparing, presenting and prosecuting applications for all permits, licenses and approvals (or renewals thereof) required for operation and maintenance of the Facility.
- M. Report to Owner any material failure or reasonably anticipated material failure to operate and maintain the Facility in accordance with any laws, Third-Party Agreements, manufacturers' warranties, or permits applicable to the operation and maintenance of the Facility, any actual or reasonably anticipated disruption in production or operation of the Facility, any actual or reasonably anticipated disputes with any parties to Third-Party Agreements or suppliers to Owner, and any actual or reasonably anticipated labor disorders;
- N. Coordinate on-site actions with regard to and documenting support for any and all warranty and other claims against suppliers of materials and equipment to the Facility, and any claims against any insurance carriers for payment of claims, liabilities or losses in connection with the Facility or its operation covered by such insurance, all as may be from time to time requested by the Owner.
- O. Cooperate with Owner and Owner's designated auditor(s), accountant(s) and lawyer(s) with respect to any audit or review of Facility operating and maintenance practices; provided,

however, that no such auditor will be, in Design-Builder's reasonable discretion, a competitor to Design-Builder.

P. Dispose of waste products from the Facility in compliance with all Legal Requirements, regulations, ordinances, and permits.

Q. Safety.

1. Cause Design-Builder's employees, personnel, agents, visitors, and subcontractors to comply with any safety rules and standards: (a) required by applicable law; (b) implemented pursuant to this Exhibit, if any; (c) as Owner may from time to time promulgate and make known to Design-Builder, including those regarding access to the Site.

2. Maintain adequate records of any accidents occurring at the Facility, including the frequency, cause and severity and corrective action taken with respect thereto.

3. Cooperate with Owner in reporting to any insurers and responsible parties on any accidents that result in personal injury or property damage.

4. Promptly and effectively responding to emergencies pertaining to the Facility or the Project site, subject to Section 6.2 of this Exhibit.

## APPENDIX B SCHEDULED MAINTENANCE

Scheduled Maintenance includes any and all maintenance, repair and replacement requirements of the Facility during a Project Year, which include:

B.1 Those maintenance activities contemplated, either generally or specifically, in the Approved Annual Plan, or any approved revision thereof, for such Project Year; and

B.2 Routine maintenance of the Facility, including but not limited to, prompt repairs of holes, joints, drains; patching; crack sealing and temporary repairs and patching of Defects with appropriate materials and workmanship to operate that portion of the Facility until a permanent repair can be made.

B.3 Minor maintenance, repair and replacement requirements typically performed by operators of similar Facilities as part of their basic maintenance obligations and compensation. It is agreed and understood that maintenance items capable of being performed at a cost of less than \_\_\_\_\_ (\$\_\_\_\_\_) (or at an aggregate cost, including all such items in such Project Year, in an amount that will be agreed upon by the parties in each Approved Annual Plan), do not constitute Unscheduled Maintenance and are to be considered as covered by the Approved Annual Plan.

B.4 Other maintenance:

*[For example, clarify if the Design-Builder is responsible for such things as repairing cracks, leaks, equipment failures, vegetation control, litter removal, sign maintenance, guardrail, pavement markings, traffic signals, winter maintenance, snow and ice removal, emergency response services, maintenance of traffic, etc.]*

## APPENDIX C THIRD-PARTY AGREEMENTS

Owner identifies the following Third-Party Agreements which set out any operation and/or maintenance duties required of Owner, to be fulfilled by Design-Builder (e.g. power purchase agreement, steam sales agreement, and any other side letters or other agreements directly relating to the same).

*[List such Third-Party Agreements here]*

SAMPLE

## APPENDIX D HANDBACK REQUIREMENTS

At the end of the O&M Term, when the Owner assumes responsibility for the operation and maintenance of the Facility, the Facility shall be free from any Defect other than those due to normal and customary wear and tear and shall comply with any other Handback Requirements set out below:

### D.1 GENERAL

This Appendix D sets forth the minimum requirements for handback of the Facility at the end of the O&M Term, including exit plans, procedures, standards and reporting.

### D.2 HANDBACK REQUIREMENTS

At the end of the O&M Term, Design-Builder shall hand back the Facility to the Owner in a condition that meets or exceeds the requirements in Section 7.1 of this Exhibit and the Facility shall:

- Fully comply with the requirements of any applicable governmental authority, Legal Requirements, standards, guidelines, permits and approvals;
- Be in good condition and operating order, excluding normal customary wear and tear, and shall not have any structural faults or Defects; and
- Be in a condition such that the Facility (including, for greater certainty, any existing facilities included in the Facility) shall continue to function in accordance with the Owner's technical requirements, and Design-Builder's design, subject to normal customary wear and tear for a period of [REDACTED] (\_\_\_\_) years beyond the end of the O&M Term with no requirement for capital expenditure provided that the Facility is operated and maintained by the Owner from the expiration of the O&M Term in accordance with good industry practice.

### D.3 HANDBACK INSPECTIONS

**D.3.1** Not less than [REDACTED] months prior to the expiration of the O&M Term, Design-Builder and the Owner will meet to discuss the schedule of Handback Inspections contemplated in Section 7.2 of this Exhibit.

**D.3.2** Following each Handback Inspection under Section 7.2.1, Design-Builder shall within:

- (a) 45 days of the initial Handback Inspection;
- (b) 30 days of the second Handback Inspection; and,
- (c) 15 days of the third Handback Inspection,

prepare and deliver to the Owner a comprehensive workplan and schedule acceptable to the Owner, acting reasonably, designed to verify that the Facility will meet the Handback Requirements upon expiration of the O&M Term, including a valuation of the existing spares inventory and a plan for remedying any shortages. Following delivery and acceptance of such workplan and schedule, Design-Builder shall keep the Owner fully advised of all activity and progress in carrying out the workplan.

### D.4 HANDBACK TEST PROCEDURES

#### D.4.1 General

Design-Builder shall perform and record the handback test procedures in accordance with this Appendix D including:

*[list applicable tests here, specific to the Facility for this Project]*

The Facility will be deemed to have passed the handback tests if the results for every component listed above comply with the Owner's technical requirements and the test standards and criteria identified above, and all components and systems operate successfully throughout the tests without any Unplanned Maintenance or other unplanned operator intervention.

**D.4.2 Monitoring Requirements**  
*[list any monitoring requirements here]*

**D.5 HANDBACK STANDARDS**

The ability of the Facility to meet the Owner's technical requirements shall be demonstrated during handback testing, including demonstration of the following:

- The Facility operates properly with only the normal staffing of employees, with the exception of additional Design-Builder staffing deployed specifically to perform the handback test activities;
- The Facility complies with the requirements of any applicable governmental authority, Legal Requirements, standards, guidelines, permits and approvals at all times;
- The Facility operates properly in automatic control, including automatic shut-down and startup of equipment as intended in Design-Builder's design.

**D.6 HANDBACK REPORT**

The handback report(s) shall be prepared in accordance with this Appendix D, and the handback test procedures set out herein and shall include at a minimum:

- A certification that testing was conducted in accordance with the accepted handback test procedures and standards;
- A certification of the results of the testing with respect to each of the handback test procedures and standards, each of which shall be addressed separately and the basis for the determination presented and this certification of results of the testing shall include a determination of the extent to which the facilities comply with the applicable performance requirements;
- All data measured and recorded during the handback tests including laboratory analyses, instrument calibrations and measurement;
- All calculations used in determining test results;
- Record of equipment outages, failures and preventative maintenance performed during the handback tests; and
- Any other data reasonably requested by the Owner to be included in the handback report.

All certifications shall be signed and sealed by the Design-Builder's Engineer of Record.

**D.7 HANDBACK TEST FAILURE**

Any failure to meet handback test procedures and standards during the handback testing shall require the failed handback test to be repeated. Failure to continuously demonstrate the handback test procedures and standards during the period of the handback tests shall constitute a failure of the handback test. Any failure of a handback test shall require: (i) correction of those components or conditions that resulted in the failure; and (ii) performance of a repeat of the handback test after proper notification is provided to the Owner.

**D.8 FINAL EVALUATION**

Before the end of the O&M Term, Design-Builder shall provide the Owner with a full set of Facility management data including, but not be limited to, the following:

- Up to date Facility inventory;

- Complete set of performance data of the Facility;
- Complete records of repair, renewal and replacement for the Facility;
- Current Facility condition status;
- Current spares inventory status;
- Design-Builder's current Facility predictive and preventive maintenance programs; and
- An updated list of recommended spare parts requirements at the end of the O&M Term.

SAMPLE

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